IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

S ECI 2020 03282

BETWEEN

SEBASTIAN AGNELLO

Plaintiff

-and-

HERITAGE CARE PTY LTD (ACN 106 873 796)

Defendant

FURTHER AMENDED STATEMENT OF CLAIM – PURSUANT TO THE ORDERS OF THE HON JOHN DIXON J MADE ON 16 DECEMBER 2021

Date of Document:	~~14 August 2020~~ ~~12 May 2021~~ 07 February 2022		
Filed on behalf of:	The Plaintiff	Solicitors Code:	112 579
Prepared by:		Telephone:	(03) 9102 6200
Carbone Lawyers		Facsimile:	(03) 9102 6299
302 King Street		Ref:	TC:200443
Melbourne VIC 3000		Email:	tony.carbone@carbonelawyers.com.au

~~PARTIES AND GROUP MEMBERS~~

1. ~~The plaintiff is the son of the deceased, Carmela Agnello ("**the deceased**").~~
2. ~~At all material times the defendant:~~
   a. ~~is and was incorporated in the State of Victoria and is capable of being sued in the State of Victoria pursuant to the provisions of the Corporation Law;~~
   b. ~~is accredited as an approved provider of aged care services pursuant to the provisions of the *Aged Care Quality and Safety Commission Act 2018* (Cth) ("**ACQSCA**");~~
   c. ~~provided aged care services pursuant to the provisions of the *Aged Care Act 1997* (Cth) ("**ACA**");~~
   d. ~~provided residential accommodation and aged care services at its care facility located at 25 Willandra Drive Epping in the State of Victoria ("**Epping Gardens**");~~
3. ~~This proceeding is commenced as a group proceeding pursuant to Part IVA of the *Supreme Court Act 1986* (Vic) by the plaintiff on his own behalf and on behalf of:~~
   a. ~~all persons who at any point from February 2020 sustained mental or nervous shock in connection with a person with whom they had a close proximate relationship and~~

who was or is a resident at Epping Gardens pursuant to a resident agreement for residential care and who was either killed, injured or put in danger by acts or omissions of the defendant;

b. The legal personal representatives of the estates of any deceased persons who came within sub-paragraph (a) herein during the period;

c. all residents at Epping Gardens pursuant to a resident agreement for residential care residents who at any point from February 2020 sustained injury, mental or nervous shock, loss and damage and/or were put in danger by acts or omissions of the defendant;

d. all employees of the defendant who had worked at Epping Gardens who at any point from February 2020 sustained physical injury, mental or nervous shock in connection with their employment at Epping Gardens and/or were put in danger by acts or omissions of the defendant.

4. As at the commencement of this proceeding, there are seven or more persons who have claims against the defendant.

THE DECEASED

5. The deceased was born in Italy on 27 April 1928.

6. On or about 26 September 2018 the deceased, together with the support of the plaintiff and the deceased's immediate family members, entered into an agreement with the defendant entitled Resident Agreement for Residential Care ("**the agreement**").

PARTICULARS

A copy of the agreement is available for inspection at the plaintiff's solicitor's office during normal business hours on reasonable notice.

7. On entering into the agreement, the deceased took up full time residence at Epping Gardens.

8. Whilst a resident at Epping Gardens the deceased was dependent on the defendant for her care needs and the provision of a safe living environment.

9. In the course of her residence at Epping Gardens, the deceased, inter alia:

a. was exposed to COVID-19 positive staff and residents;

b. was exposed to an unsafe residential environment contaminated by Epping Gardens COVID-19 positive residents, staff and unauthorised visitors;

c. was not properly isolated or cared for in accordance with Commonwealth and State Government Care Facility guidelines and directions; and

d. was not provided with any or any adequate personal protective equipment ("**PPE**").

10. On 28 July 2020 the deceased died from contracting COVID-19.

THE DEFENDANT

11. Pursuant to the terms and conditions of the agreement and its accreditation as a provider of aged care services under the ACQSCA, the defendant agreed to provide to the deceased aged care services and accommodation.

12. In requesting the defendant, and the defendant agreeing, to provide accommodation and aged care services under the terms and conditions of the agreement to the deceased, the defendant then entered a fiduciary relationship with the deceased.

PARTICULARS

(i) The relationship between defendant and deceased is a fiduciary relationship.

(ii) By reason of that relationship, the deceased reposed trust and confidence in the defendant in its capacity as the deceased's accommodation and aged care provider.

13. By reason of the relationship referred to in paragraph 12, the defendant was under duties, amongst other duties, to:

a. act in the deceased's best interests;

b. actively work to provide a safe and comfortable environment consistent with the Deceased's care needs;

c. deliver accommodation and aged care services safely, competently, diligently and as well as reasonably practicable;

d. be responsible to the care needs of the deceased;

e. be compliant with all relevant legislation, regulations and professional standard guidelines;

f. disclose in a timely and proper manner all matters relevant the deceased's aged care and accommodation requirements, health, well-being and security to the plaintiff;

g. at all times provide adequate and properly trained staff to care for the deceased's health and well-being;

h. at all times ensure there is available all necessary inventory and equipment to provide for and ensure as reasonably practicable the health and well-being of the deceased;

i. at all times ensure it has in place and when necessary properly implement in a timely way an effective infection control program.

14. Further, or alternatively, the agreement contained a contractual term, requiring the defendant to use its best endeavours to protect the deceased's interests and to exercise reasonable care and skill in carrying out, by all proper means, its obligations and duties to the deceased under the terms and conditions of the agreement and in compliance with all relevant legislation, regulation and professional standard guidelines ("**the Implied Term**").

PARTICULARS

(i) The Implied Term was implied in the agreement.
(ii) The Implied Term was implied in law.

15. Further, or alternatively, the defendant, as an accredited aged care services and residential accommodation provider, it was under a duty of care to exercise a level of skill, care and diligence sufficient to prevent occurrence of the kind which occurred of matters referred to in paragraphs 9, 10 and 18 herein and which were within the scope of the risk of which the defendant was positively required to avoid and prevent from occurring ("**duty of care**").

CLAIM AGAINST THE DEFENDANT

16. In all the circumstances, the matters pleaded in paragraph 9 and 10 herein occurred by reason of the defendant's negligent actions, omissions and conduct.

17. Further, in addition to the matters referred to in paragraph 9 herein, the defendant:

a. was or ought to have been aware that at all relevant times prior to 20 July 2020 a COVID-19 pandemic has been declared in the State of Victoria;

b. was or ought to have been aware the State of Victoria considered it reasonably necessary to issue to the defendant Care Facilities Directions pursuant s.200 (1) (b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic) ("**PHWA**") to protect public health and the health of the deceased;

c. was or ought to have been aware the State of Victoria considered it reasonably necessary to issue to the defendant on 13 April 2020 *Care Facilities Directions (No 2)* pursuant s.200 (1) (b) and (d) of the PHWA ("**CFD2**") to protect public health and the health of the deceased.

BREACHES

18. In breach of its duty of care and and/or in breach of the implied term, the defendant:

a. allowed or permitted staff and residents to:

i. not wear PPE;

ii. move freely within Epping Gardens

when there was a risk of spreading contamination and contracting COVID-19 infection.

b. Permitted "visitors" and "excluded persons" as defined in CFD2 entry to Epping Gardens and thereby exposed the deceased to contracting COVID-19.

PARTICULARS

allowed staff from other aged care facilities entry to Epping Gardens without having self-isolated or an up to date vaccination against influenza;
permitting "excluded persons" entry to Epping Gardens without registration for the purpose of attending a baby shower on 16 July 2020;
permitting "excluded persons" entry to Epping Gardens without registration for the purpose of attending a party on 18 July 2020;
permitting "excluded persons" entry to Epping Gardens without having been tested for COVID-19.

c. failed to act in the deceased's best interests;

d. failed to actively work to provide a safe and comfortable environment consistent with the Deceased's care needs;

e. failed to deliver accommodation and aged care services safely, competently, diligently and as best as reasonably practicable;

f. failed to responsibly and/or adequately care needs of the deceased;

g. failed to be compliant with all relevant legislation, regulations and professional standard guidelines;

h. failed to disclose to the deceased and/or the plaintiff in a timely and proper manner all matters relevant the deceased's aged care and accommodation requirements, health, well-being and security to the plaintiff;

i. failed to at all material times provide adequate and properly trained staff to care for the deceased's health and well-being;

j. failed to at all times ensure there is available all necessary inventory and equipment to provide for and ensure as reasonably practicable the health and well-being of the deceased;

k. failed to at all times ensure it had in place and implemented an effective infection control program;

l. exposing the deceased and/or causing her through the defendant's conduct to contract COVID-19;

m. causing and/or materially contributing to the deceased's death;

n. at all material times exposing or subjecting the deceased to the unnecessary risk of death.

o. at all material times failing to warn the deceased she should use adequate PPE whilst on Epping Gardens premises;

p. falling to advise or properly advise persons the deceased and/or the plaintiff that they should wear PPE;

q. failing to ensure its staff were properly informed of the dangers of COVID-19 and were instructed in safe working practices necessary to protect the deceased from contracting COVID-19;

r. failing in all the circumstances to employ adequate staff levels;

s. failing to instruct staff adequately or at all in relation to:

i. its COVID-19 infection control program; and

ii. the dangers of exposure to COVID-19;

t. failing to have any or any adequate awareness of the dangers of exposing the deceased to COVID-19 in any form;

u. failing to keep abreast of the known literature and information relating to the dangers of COVID-19;

v. failing to heed the warnings given by State and Federal Governments as to the dangers of COVID-19.

w. failing to educate staff in regard to COVID-19;

x. failing to take any reasonable care for the safety and wellbeing of the plaintiff.

y. concealing information from the plaintiff regarding the risks which it exposed the deceased to;

z. improperly concealing from and/or misrepresenting information to the plaintiff, and all relevant Government authorities concerning the severity of risks and dangers of COVID-19 contamination and spread at Epping Gardens.

19. As a result of the defendant's failures referred to in paragraphs 9 and 18 the deceased died after contracting COVID-19.

20. By reason of the defendant's failures referred to in paragraphs 9 and 18, the defendant breached its fiduciary duties to:

a. act in the plaintiff's best interests; and

b. deliver aged care and accommodation services to a standard competently, diligently and to a standard consistent with the deceased's aged care needs.

21. Further, or alternatively, by reason of the defendant's failures referred to in paragraphs 9 and 18, the defendant:

    a. did not use its best endeavours to protect the deceased from contracting COVID-19 and preventing her death as a consequence thereof; and/or

    b. did not exercise reasonable care and skill in carrying out, by all proper means, its obligations and duties required of it as an accredited aged care service and accommodation provider which amounted to a breach of the Implied Term referred to in paragraph 14 above.

22. Further, or alternatively, by reason of the defendant's failures referred to in paragraph 9 and18, the defendant did not in all the circumstances use all reasonable skill, care and diligence in carrying out its obligations and duties to the deceased as an accredited aged care service and accommodation provider, which amounted to:

    a. a breach of the defendant's duty of care referred to in paragraph 15 above; and/or

    b. a breach of the implied term; and/or

    c. a breach of its obligations and duties pursuant to the provisions of the ACQSCA and ACA and the regulations and guidelines made thereunder; and/or

    d. a breach of a direction or requirement under paragraphs 5 and 8 of CFD2 and thereby committed an offence under s.203 of the PHWA.

23. By reason of the matters aforesaid it was reasonably foreseeable to the defendant that the plaintiff, as a person of normal fortitude, would, in all the circumstances suffer a recognizable illness by reason of the defendant's breaches to the deceased referred to above and by reason thereof the plaintiff has suffered injuries, loss and damage.

PARTICULARS

Psychological reaction marked by depression and anxiety.
Nervous shock.

PARTICULARS OF LOSS AND DAMAGE

The plaintiff has incurred medical and like expenses details of which will be provided prior to the trial of this action

PARTICULARS

The plaintiff is aged 59, born in Australia, on 5 February 1961.
The plaintiff is employed as a freight clerk.
The plaintiff's particulars of loss of earnings and loss of earnings capacitty will be provided prior to trial.

24. Further and/or in the alternative, at all times material the defendant knew, that by reason of its conduct, it was putting the deceased at risk of death or serious injury and that nevertheless in wanton and contumelious disregard of the deceased and her health the defendant chose to knowingly continue to provide aged care services and accommodation in breach of Federal and State Government legislation, regulations, guidelines and directions. Further, in all the circumstances the defendant either knew or ought to have known that in doing so there was a reasonable likelihood the deceased would die or suffer serious injury. As a consequence of the above the plaintiff and each of the group members claim punitive damages against the defendant.

COMMON QUESTIONS

25. The questions of law or fact common to the claims of the plaintiff and each of the group members are:

a. Whether or not a duty of care was owed to the plaintiff and the group members and if so the content of that duty.
b. Whether or not the defendant committed the acts and/or engaged in the conduct alleged in the statement of claim.
c. Whether or not the defendant committed the wrongs alleged in the statement of claim.
d. Whether or not the plaintiff's and the group members' similar conditions were causally related to the defendant's claimed breaches.
e. Did the defendant breach its common law duty of care.
f. If the defendant breached its common law duty of care, was such breach a cause of the death of the deceased and any of the losses suffered by the plaintiff.
g. What are the principles for identifying and measuring losses suffered by the plaintiff and group members as a result of the conduct and actions of the defendant as alleged in the statement of claim.

THE PLAINTIFF CLAIMS:

1. Damages.

2. Punitive damages.

3. Interest pursuant to the Penalty Interest Rates Act 1983 as amended.

4. Costs.

5. Such further or other relief or order or direction as the Court thinks fit or just and equitable.

A PARTIES AND GROUP MEMBERS

A.1 Plaintiff

1 Carmela Agnello (**Mrs Agnello**):

(a) was born in Italy on or about 27 April 1928;

(b) moved to Australia in 1958 and became an Australian citizen on 5 September 1979;

(c) on or about 20 September 2018, entered into an agreement with the defendant for the provision of accommodation and residential care services (**Resident Agreement**) at the defendant's aged care facility located at 25 Willandra Drive, Epping, in the State of Victoria (**Epping Gardens**);

Particulars

The Resident Agreement in respect of Mrs Agnello:

(i) is in writing to the effect alleged; and

(iii) was signed by the plaintiff as Mrs Agnello's representative.

(d) at material times from 26 September 2018, was:

(i) a Resident (defined below);

(ii) a 'care recipient' of 'residential care' services provided by the defendant within the meaning of the *Aged Care Act 1997* (Cth) (**Aged Care Act**), including 'hotel services' and 'care and services' within the meaning of the *Quality of Care Principles 2014* (Cth) (**Residential Care Services**); and

(iii) a 'consumer' of 'services' within the meaning of:

(1) Schedule 2 to the *Competition and Consumer Act 2010* (Cth), being the Australian Consumer Law (**ACL**); and

(2) the *Quality of Care Principles 2014* (Cth) (**Quality of Care Principles**);

(e) died on 28 July 2020 as a result of having contracted the novel coronavirus disease 2019 (**COVID-19**).

2 The plaintiff, Sebastian Agnello (**Mr Agnello**):

(a) is the legal personal representative of the estate of Mrs Agnello;

(b) was the child of Mrs Agnello; and

(c) signed the Resident Agreement as Mrs Agnello's representative.

3 This proceeding is commenced as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) by Mr Agnello on his own behalf and on behalf of the Group Members (defined below), being:

(a) the Resident Sub-Group Members (defined below), in his capacity as the legal personal representative of Mrs Agnello's estate;

(b) the Family Sub-Group Members (defined below), in his personal capacity; and

(c) the Representee Sub-Group Members (defined below), in his personal capacity.

A.2 Defendant

4 At all material times, the defendant:

(a) is and was a corporation incorporated according to law;

(b) is and was an 'approved provider' of aged care within the meaning of the *Aged Care Quality and Safety Commission Act 2018* (Cth) and the Aged Care Act; and

(c) supplied the Residential Care Services to the Resident Sub-Group Members in trade or commerce.

A.3 COVID-19 Period

5 On 20 July 2020, the defendant was notified that a Resident and a staff member of Epping Gardens had tested positive to COVID-19.

Particulars

Page 40 of the 'Independent Review of COVID-19 outbreaks at St Basil's Homes for the Aged in Fawkner, Victoria and Heritage Care Epping Gardens in Epping, Victoria' by Professor Lyn Gilbert AO and Adjunct Professor Alan Lilly dated 30 November 2020 (**Independent Review**).

6 Between 20 July 2020 and 9 September 2020, 103 Residents and 86 staff members at Epping Gardens tested positive to COVID-19 (**COVID-19 Outbreak**).

7 Further, 38 Resident Sub-Group Members died as a result of having contracted COVID 19, including Mrs Agnello.

Particulars

Independent Review, pages 6 and 43.

A.4 Group Members

8 The group members to whom this proceeding relates (**Group Members**):

(a) are Residents and Family who suffered loss or damage in the COVID-19 Period as a result of the defendant's conduct as alleged in this Amended Statement of Claim;

(b) are the legal personal representatives of the estates of Residents who suffered loss or damage in the COVID-19 Period as a result of the defendant's conduct as alleged in this Amended Statement of Claim;

(c) are not any of the persons mentioned in s 33E(2) of the *Supreme Court Act 1986* (Vic),

where:

(i) "**Residents**" mean persons who were resident at Epping Gardens at any time in the COVID-19 Period;

(ii) "**Family**" means partners, sons-in-law or daughters-in-law, siblings, children, grandchildren, cousins, nieces or nephews of a Resident;

(iii) "**loss or damage**" means any one or more of:

(1) personal injury or death, whether by contracting COVID-19 or otherwise;

(2) pain and suffering;

(3) mental or nervous shock;

(4) disappointment and distress;

(5) injured feelings;

(6) funeral expenses;

(7) medical and like expenses;

(8) other economic loss consequent on personal injury or death;

(iv) "**COVID-19 Period**" means the period 26 February 2020 to 9 September 2020.

9 As at the date of the commencement of this proceeding, there are seven or more Group Members.

10 The Group Members are each a member of one or more of the following sub-groups:

(a) a sub-group (**Resident Sub-Group Members**), comprising Residents or the legal personal representatives of their estates whose loss or damage was caused by the defendant's:

(i) Breaches of Resident Duty (defined below);

(ii) Breaches of Contract (defined below); and/or

(iii) Breaches of Consumer Guarantees (defined below);

(b) a sub-group (**Family Sub-Group Members**), comprising Family whose loss or damage was caused by the defendant's Breaches of Family Duty (defined below);

(c) a sub-group (**Representee Sub-Group Members**), comprising Residents and Family who:

(i) prior to the COVID-19 Period (defined below), were given a copy of the Resident Handbook (defined below); and

(ii) were given a copy of the 17 April Letter and the 23 April Letter (both defined below) sent by the defendant.

11 At all material times, Resident Sub-Group Members were:

(a) 'care recipients' of Residential Care Services; and

(b) 'consumers' of 'services' within the meaning of:

(i) Schedule 2 to the *Competition and Consumer Act 2010* (Cth), being the ACL;

(ii) the Quality of Care Principles.

12 The claims of the Group Members:

(a) arise out of the same, similar or related circumstances; and

(b) give rise to the common questions of law or fact identified in Section I below.

B STATUTORY AND REGULATORY CONTEXT

13 At all material times, the defendant was required to comply with (*inter alia*):

(a) the Aged Care Act;

(b) the Quality of Care Principles made under s 96-1 of the Aged Care Act, including the Aged Care Quality Standards in Schedule 2;

(c) the *User Rights Principles 2014* (Cth) made under s 96-1 of the Aged Care Act (**User Rights Principles**), including the Charter of Aged Care Rights in Schedule 1 (**Charter**); and

(d) directions made pursuant to s 200(1) of the *Public Health and Wellbeing Act 2008* (Vic) from time to time (**Victorian Directions**).

14 Further, the defendant was aware or ought to have been aware of the content of the following guidelines:

(a) Australian Guidelines for the Prevention and Control of Infection in Healthcare from May 2019 (**Infection Control Guidelines**);

(b) CDNA National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Residential Care Facilities in Australia (**CDNA National Guidelines**) from 13 March 2020; and

(c) guidelines published by the Commonwealth Department of Health (**Department**) regarding Social Distancing Measures (defined below).

B.1 Aged Care Act

15 At all material times, the following provisions of the Aged Care Act applied and were to the effect alleged:

(a) section 54-1(1) provided that the responsibilities of an approved provider in relation to the quality of residential aged care are:

(i) to provide such care and services as are specified in the Quality of Care Principles in respect of aged care of the type in question;

(ii) to maintain an adequate number of appropriately skilled staff to ensure that the care needs of care recipients are met;

(iii) to provide care and services of a quality that is consistent with any rights and responsibilities of care recipients that are specified in the User Rights Principles for the purposes of paragraph 56-1(m), 56-2(k) or 56-3(l);

(iv) to comply with the Aged Care Quality Standards made under section 54-2;

(v) such other responsibilities as are specified in the Quality of Care Principles;

(b) section 56-1 provided that the responsibilities of an approved provider in relation to a care recipient are, *inter alia*:

(i) not to act in a way which is inconsistent with any rights and responsibilities of care recipients that are specified in the User Rights Principles [s 56-1(m)];

(ii) such other responsibilities as are specified in the User Rights Principles [s 56-1(n)];

(c) section 9-1(1), read with s 63-1(1)(c), provided that an approved provider must notify the Aged Care Quality and Safety Commissioner of a change of circumstances that materially affects the approved provider's suitability to be a provider of aged care within 28 days after the change occurs.

B.2 Quality of Care Principles

16 At all material times, the following provisions of the Quality of Care Principles applied and were to the effect alleged:

(a) further to paragraph 15(a)(i) above, s 7 provided that an approved provider of a residential care service must provide the care or service specified in Schedule 1 to any care recipient who needs it, in a way that complies with the Aged Care Quality Standards, including (*inter alia*):

(i) the following hotel services:

(1) cleanliness and tidiness of the entire residential care service, only excluding a care recipient's personal area if the care recipient chooses and is able to maintain this himself or herself [item 1.6 of the table at Schedule 1, Part 1];

(2) meals of adequate variety, quality and quantity for each care recipient, served each day at times generally acceptable to both care recipients and management, and generally consisting of 3 meals per day plus morning tea, afternoon tea and supper [item 1.10(a) of the table at Schedule 1, Part 1];

(3) special dietary requirements, having regard to either medical need or religious or cultural observance [item 1.10(b) of the table at Schedule 1, Part 1];

(4) food, including fruit of adequate variety, quality and quantity, and non-alcoholic beverages, including fruit juice [item 1.10(c) of the table at Schedule 1, Part 1];

(5) at least one responsible person is continuously on call and in reasonable proximity to render emergency assistance [item 1.12 of the table at Schedule 1, Part 1],

(**Hotel Services**);

(ii) the following care and services:

(1) personal assistance, including individual attention, individual supervision, and physical assistance, with the following: bathing, showering, personal hygiene and grooming; maintaining continence or managing incontinence, and using aids and appliances designed to

assist continence management; eating and eating aids, and using eating utensils and eating aids (including actual feeding if necessary); dressing, undressing, and using dressing aids; moving, walking, wheelchair use, and using devices and appliances designed to aid mobility, including the fitting of artificial limbs and other personal mobility aids [item 2.1 in the table at Schedule 1, Part 2];

(2) emotional support to, and supervision of, care recipients [item 2.3 in the table at Schedule 1, Part 2];

(3) treatments and procedures that are carried out according to the instructions of a health professional or a person responsible for assessing a care recipient's personal care needs, including supervision and physical assistance with taking medications, and ordering and reordering medications, subject to requirements of State or Territory law (includes bandages, dressings, swabs and saline) [item 2.4 in the table at Schedule 1, Part 2];

(4) individual attention and support to care recipients with cognitive impairment (for example, dementia and behavioural disorders) [item 2.9 in the table at Schedule 1, Part 2],

(**Care Services**);

(b) section 18 provided, *inter alia*, that the Aged Care Quality Standards applied to residential care, and that the Standards applied equally for the benefit of each care recipient being provided with residential care through an aged care service, irrespective of the care recipient's financial status, applicable fees and charges, amount of subsidy payable, agreements entered into, or any other matter.

B.3 Aged Care Quality Standards

17 At all material times, the following provisions of the Aged Care Quality Standards, at Schedule 2 of the Quality of Care Principles, applied and were to the effect alleged:

(a) Standard 1 required approved providers to demonstrate that (*inter alia*):

(i) each consumer is treated with dignity and respect, with their identity, culture and diversity valued [clause 1(3)(a)];

(ii) information provided to each consumer is current, accurate and timely, and communicated in a way that is clear, easy to understand and enables them to exercise choice [clause 1(3)(e)];

(b) Standard 2 required approved providers to demonstrate that (*inter alia*):

(i) assessment and planning, including consideration of risks to the consumer's health and well-being, informs the delivery of safe and effective care and services [clause 2(3)(a)];

(ii) care and services are reviewed regularly for effectiveness, and when circumstances change or when incidents impact on the needs, goals or preferences of the consumer [clause 2(3)(e)];

(c) Standard 3 required approved providers to demonstrate (*inter alia*):

(i) that each consumer gets safe and effective personal care, clinical care, or both personal care and clinical care, that: is best practice; and is tailored to their needs; and optimises their health and well-being [clause 3(3)(a)];

(ii) effective management of high-impact or high-prevalence risks associated with the care of each consumer [clause 3(3)(b)];

(iii) that deterioration or change of a consumer's mental health, cognitive or physical function, capacity or condition is recognised and responded to in a timely manner [clause 3(3)(d)];

(iv) minimisation of infection-related risks through implementing standard and transmission-based precautions to prevent and control infection [clause 3(3)(g)(i)];

(d) Standard 4 required approved providers to demonstrate (*inter alia*):

(i) that each consumer gets safe and effective services and supports for daily living that meet the consumer's needs, goals and preferences and optimise their independence, health, well-being and quality of life [clause 4(3)(a)];

(ii) information about the consumer's condition, needs and preferences is communicated within the organisation, and with others where responsibility for care is shared [clause 4(3)(d)];

(e) Standard 5 required approved providers to demonstrate (*inter alia*):

(i) the service environment is safe, clean, well maintained and comfortable [clause 5(3)(b)(i)];

(ii) furniture, fittings and equipment are safe, clean, well maintained and suitable for the consumer [clause 5(3)(c)];

(f) Standard 6 required providers to demonstrate that, *inter alia*, appropriate action is taken in response to complaints and an open disclosure process is used when things go wrong [clause 6(3)(c)];

(g) Standard 8 required providers to demonstrate (*inter alia*):

(i) effective organisation wide governance systems relating to the following: information management; continuous improvement; financial governance; workforce governance, including the assignment of clear responsibilities and accountabilities; regulatory compliance; feedback and complaints [clause 8(3)(c)]; and

(ii) effective risk management systems and practices, including but not limited to the following: managing high impact or high prevalence risks associated with the care of consumers; and identifying and responding to abuse and neglect of consumers [clause 8(3)(d)].

B.4 User Rights Principles

18 At all material times, the following provisions of the User Rights Principles applied and were to the effect alleged:

(a) further to paragraph 15(b)(i) above, sections 9 and 9A of the User Rights Principles provided that, for the purposes of paragraph 56-1(m) of the Aged Care Act:

(i) the rights of a care recipient who is being provided with, or is to be provided with, residential care include the rights mentioned in the Charter [section 9];

(ii) an approved provider of residential care must not act in a way which is inconsistent with the legal and consumer rights of a care recipient [section 9A].

B.5 Charter

19 At all material times, the following provisions of the Charter, at Schedule 1 of the User Rights Principles, applied and were to the effect alleged:

(a) clause 2 provided that care recipients who are provided with residential care have the right to (*inter alia*):

(i) safe and high quality care and services;

(ii) be treated with dignity and respect;

(iii) live without abuse and neglect;

(iv) be informed about their care and services in a way they understand; and

(v) be listened to and understood.

B.6 Victorian Directions

20 At material times between 21 March 2020 and 9 September 2020, the Victorian Directions in Annexure A applied and were to the effect alleged.

21 The effect of the Victorian Directions listed in Annexure A was that, at material times between 21 March 2020 and 20 July 2020:

(a) only one person, or two persons together, could visit a resident of a residential aged care facility for up to 2 hours per day if for the purpose of providing care and support to that resident;

(b) notwithstanding subparagraph (a), a person could not visit if the person:

(i) had a temperature higher than 37.5 degrees or symptoms of acute respiratory infection;

(ii) did not have an up to date vaccination against influenza, if such a vaccination was available to the person;

(iii) was under the age of 16 and not providing end of life support to the resident;

(c) notwithstanding subparagraph (a) above, a person could visit a resident for longer than 2 hours if the person was providing end of life support to the resident.

B.7 Infection Control Guidelines

22 In or around May 2019, the Infection Control Guidelines were published publicly and contained provisions to the following effect:

(a) with respect to hand hygiene [3.1.1]:

(i) routine hand hygiene should be performed: before touching a patient; before a procedure; after a procedure or body substance exposure risk; after touching a patient; after touching a patient's surroundings;

(ii) hand hygiene must also be performed before putting on gloves and after the removal of gloves;

(iii) alcohol-based hand rubs that contain between 60% and 80% v/v ethanol or equivalent should be used for all routine hand hygiene practices;

(iv) soap and water should be used for hand hygiene when hands are visibly soiled;

(b) with respect to routine management of the physical environment [3.1.3]:

(i) it is good practice to routinely clean surfaces as follows: clean frequently touched surfaces with detergent solution at least daily, when visibly soiled and after every known contamination; and clean general surfaces and fittings when visibly soiled and immediately after spillage;

(c) with respect to contact precautions [3.2.2]:

(i) it is suggested that contact precautions, in addition to standard precautions, are implemented in the presence of known or suspected infectious agents that are spread by direct or indirect contact with the patient or the patient's environment;

(ii) it is suggested that appropriate hand hygiene be undertaken and personal protective equipment (**PPE**) worn to prevent contact transmission;

(d) with respect to droplet precautions [3.2.3]:

(i) it is suggested that droplet precautions, in addition to standard precautions, are implemented for patients known or suspected to be infected with agents transmitted by respiratory droplets that are generated by a patient when coughing, sneezing or talking;

(ii) it is suggested that a surgical mask should be worn when entering a patient-care environment to prevent droplet transmission;

(iii) it is good practice to place patients who require droplet precautions in a single-patient room;

(e) with respect to airborne precautions [3.2.4]:

(i) it is recommended that airborne precautions, in addition to standard precautions, are implemented in the presence of known or suspected infectious agents that are transmitted person-to-person by the airborne route;

(f) with respect to infection control strategies to contain an outbreak [3.4.2.1]:

(i) it is good practice to consider the use of early bay closures to control known or suspected norovirus outbreaks rather than ward/unit closures;

(ii) rather than closing an entire ward or unit to manage an outbreak of norovirus in a healthcare facility, it may be more efficient to control an outbreak through cohorting symptomatic patients in bays. If taken, this approach needs to be implemented promptly and early (within three days of the first case becoming ill) in combination with adequate infection control strategies.

Particulars

The Infection Control Guidelines were produced by the National Health and Medical Research Council in collaboration with the Australian Commission on Safety and Quality in Healthcare and published on the Australian Commission on Safety and Quality in Healthcare's website.

B.8 CDNA National Guidelines

23 On or about 13 March 2020, the CDNA National Guidelines were published publicly on the Department's website and contained provisions to the following effect:

(a) clause 1.3.1 provided that all residential care facilities (*inter alia*):

(i) should have in-house (or access to) infection control expertise, and outbreak management plans in place;

(ii) are required to: detect and notify outbreaks to state health departments; self-manage outbreaks in accordance with the CDNA National Guidelines, the Infection Control Guidelines and the *Australian Health Sector Emergency Response Plan for Novel Coronavirus* (2020); confirm and declare an outbreak; provide advice on infection control measures and use of PPE; and confirm and declare when an outbreak is over;

(b) with respect to preparation, clause 3.1 provided that facilities (*inter alia*):

(i) should prepare an "outbreak management plan" which includes the prevention strategies outlined in the CDNA National Guidelines [3.1.1];

(ii) must identify a dedicated staff member to plan, co-ordinate and manage logistics in an outbreak setting as well as communicate and liaise with the state/territory health department [3.1.1];

(iii) should inform and support staff to exclude themselves from work when they have any kind of respiratory illness and to notify the facility if they were confirmed to have COVID-19. The principle underlying staff and visitors staying away from the facility if they are unwell should be reinforced by placing signage at all entry points to the facility [3.1.2];

(iv) should have a staff contingency plan in the event of an outbreak where unwell staff members need to be excluded from work for a prolonged period until cleared to return to work. The workforce management plan should be able to cover a 20 to 30% staff absentee rate [3.1.3];

(v) are responsible for ensuring their staff are adequately trained and competent in all aspects of outbreak management prior to an outbreak. Staff should know

the signs and symptoms of COVID-19 in order to identify and respond quickly to a potential outbreak [3.1.4];

(vi) should ensure that they hold adequate stock levels of all consumable materials required during an outbreak, including: PPE (gloves, gowns, masks, eyewear); hand hygiene products (alcohol based hand rub, liquid soap, hand towel); diagnostic materials (swabs); cleaning supplies (detergent and disinfectant products) [3.1.5];

(vii) should have an effective policy in place to obtain additional stock from suppliers as needed. In order to effectively monitor stock levels, facilities should: undertake regular stocktake (counting stock); and use an outbreak kit/ box [3.1.5];

(c) with respect to prevention, clause 3.2 provided that facilities (*inter alia*):

(i) are expected to use risk assessments to ensure the risks of a COVID-19 outbreak are as low as possible, which can involve examining the facility's service environment, equipment, workforce training, systems, processes or practices that affect any aspect of how they deliver personal and clinical care;

(ii) should instruct all staff to self-screen for symptoms of COVID-19. Staff must not come to work if symptomatic and must report their symptoms to the facility. Sick leave policies must enable employees to stay home if they have symptoms of respiratory infection [3.2.1];

(iii) must instruct visitors not to enter the facility if they have symptoms of COVID-19 [3.2.1];

(iv) must monitor residents and employees for fever or acute respiratory symptoms [3.2.1 and 3.2.3];

(v) must restrict residents with fever or acute respiratory symptoms to their room. If they must leave the room for medically necessary procedures, facilities should have them wear a facemask (if tolerated) [3.2.1];

(vi) must implement non-pharmaceutical measures, which include: hand hygiene and cough and sneeze etiquette; use of appropriate PPE; environmental cleaning measures; isolation and cohorting; and social distancing [3.2.1];

(vii) should advise all regular visitors to be vigilant with hygiene measures including social distancing, and to monitor for symptoms of COVID-19, specifically fever and acute respiratory illness. They should be instructed to stay away when unwell, for their own and residents' protection, and to observe any self-quarantine requirements [3.2.2];

(viii) notify any possible COVID-19 illness in residents and employees to the relevant jurisdictional public health authority [3.2.3];

(d) with respect to identifying COVID-19, clause 4 provided that facilities (*inter alia*):

(i) should establish systems to monitor staff and residents for COVID-19 with a high level of vigilance and have a low threshold for investigation [4.1];

(ii) identification of a resident or staff member with acute respiratory illness should be followed by prompt testing for a causative agent and, while confirmation of SARS-CoV-2 infection is pending, immediate and appropriate infection control management of the person with acute respiratory illness may prevent further spread of the disease [4.1];

(e) with respect to COVID-19 case and outbreak management, clause 5 provided that facilities (*inter alia*):

(i) should immediately isolate residents (**cohort**) with suspected or confirmed COVID-19 and minimise interaction with other residents [5.1];

(ii) should immediately exclude from the facility any member of staff who develops symptoms of respiratory illness, and instruct them to remain away whilst a diagnosis is sought [5.2];

(iii) with a suspected or confirmed COVID-19 outbreak, must use standard precautions include performing hand hygiene before and after every episode of resident contact, the use of PPE (including gloves, gown, appropriate mask and eye protection) depending on the anticipated exposure, good respiratory

hygiene/cough etiquette and regular cleaning of the environment and equipment [5.4.2],

Particulars

The CDNA National Guidelines were published on the Department's website on 13 March 2020. Thereafter, they were updated on 30 April 2020 and 14 July 2020. The updated versions, on which the plaintiff will also rely at trial, contain guidelines that were equivalent or no less onerous than the measures set out in Sections B.7 and B.8 above.

(those measures set out in Sections B.7 and B.8 are hereafter defined as **Infection Control Measures**).

B.9 Department of Health Guidelines on social distancing

24 At all material times during the COVID-19 Period, the Department issued guidelines to the effect that all persons should (*inter alia*):

(a) keep 1.5 metres away from others wherever possible;

(b) avoid physical greetings such as handshaking, hugs and kisses;

(c) avoid large gatherings;

(d) stay home if they have any cold or flu symptoms;

(e) wear a surgical mask when they are in the same room as a sick person;

(f) when at work: stop shaking hands to greet others; avoid non-essential meetings and, if needed, hold meetings via video conferencing or phone calls; put off large meetings to a later date; hold essential meetings outside in the open air if possible; eat lunch at their desk or outside rather than in the lunch room; regularly clean and disinfect surfaces that many people touch; open windows or adjust air conditioning for more ventilation; limit food handling and sharing of food in the workplace; and avoid non-essential travel,

(together, **Social Distancing Measures**).

Particulars

The Social Distancing Measures were published to the Department's website and updated from time to time during the COVID-19 Period. Further particulars may be provided after discovery.

C EVENTS SURROUNDING COVID-19 OUTBREAK

C.1 COVID-19 and the Symptoms

25 COVID-19:

(a) is a highly infectious disease caused by the severe acute respiratory syndrome coronavirus 2 virus (SARS-CoV-2);

(b) causes death in some infected persons;

(c) is transmissible primarily through face-to-face contact and contact with surfaces with which an infected person has been in contact, through droplet and airborne transmission; and

(d) is infectious even while an infected person may be asymptomatic.

26 On 21 January 2020, COVID-19 was added as a "listed human disease" to the *Biosecurity (Listed Human Diseases) Determination 2016* (Cth), under s 42(1) of the *Biosecurity Act 2015* (Cth), by promulgation of the *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (Cth).

27 The first case of COVID-19 in Australia was detected in Victoria on 25 January 2020.

28 On 29 January 2020, COVID-19 was added to the list of notifiable conditions in Schedules 3 and 4 of the *Public Health and Wellbeing Regulations 2019* (Vic), under ss 232 and 238 of the *Public Health and Wellbeing Act 2008* (Vic), by promulgation of the *Public Health and Wellbeing Amendment (Coronavirus) Regulations 2020* (Vic).

29 On 30 January 2020, COVID-19 was declared by the World Health Organisation to be a 'Public Health Emergency of International Concern'.

30 On or about 16 March 2020, the Department published an information sheet entitled 'Coronavirus (COVID-19) – Identifying the symptoms', which provided that (*inter alia*):

(a) fever and cough were common symptoms of COVID-19;

(b) sore throat, shortness of breath, fatigue, aches and pains, headaches and diarrhea were sometimes symptoms of COVID-19.

31 On or about 2 April 2020, the Department published an information sheet entitled 'Coronavirus (COVID-19): Outbreak Management' in relation to residential care facilities, which provided that (*inter alia*):

(a) an outbreak of COVID-19 in a residential care facility is likely to be worse than an outbreak of influenza. In the outbreak in the aged care facility in Washington state USA, two thirds of residents (80/120) were infected. Of these, 32 per cent died;

(b) it is possible that residents will not be able to be transferred to a hospital. For this reason, it is important to have advanced care plans in place ahead of outbreaks;

(c) the most common signs and symptoms of COVID-19 include fever (although fever may be absent in the elderly) and dry cough;

(d) other symptoms can include, shortness of breath, coughing up thick mucus or phlegm and fatigue;

(e) older people may also have symptoms of increased confusion, worsening chronic conditions of the lungs and loss of appetite;

(f) less common symptoms include: sore throat; headache; myalgia/arthralgia (generalised muscle or joint pain); chills; nausea or vomiting; nasal congestion; diarrhoea; haemoptysis (coughing up blood); conjunctival congestion (red, swollen and watery eyes),

(the symptoms set out in paragraphs 30 and 31 above are hereafter defined as **Symptoms**).

C.2 The 26 February Notification

32 On 26 February 2020, the Chief Medical Officer of the Commonwealth, Professor Brendan Murphy, notified aged care providers, including the defendant, that their existing obligations with respect to infection prevention and control applied to COVID-19 (**26 February Notification**).

Particulars

The 26 February Notification is in writing to the effect alleged and is contained in a letter to aged care providers, including the defendant, dated 26 February 2020.

The existing obligations referred to are summarised in Sections B.1, B.2, B.3, B.4, B.5 and B.7 above.

33 The 26 February Notification stated, *inter alia*, that:

(a) "COVID-19 (formerly known as novel coronavirus) presents a challenge for all involved in providing care to vulnerable people, including the residential aged care sector. The COVID-19 situation is evolving, and as we move toward the 2020 influenza season, I note that there is a need for collaboration between the Commonwealth, the aged care sector, state and territory public health authorities, and the healthcare sector as part of our COVID-19 planning and preparedness activity";

(b) "…I would like to reiterate the importance of infection control and being prepared for health emergencies. Aged care homes often have frequent visitors and carers coming and going, and close physical contact between staff, residents and their families. Elderly residents are more at risk of infections generally, and are particularly vulnerable to serious illness if they do become infected";

(c) "In this context, and within the context of the Aged Care Quality Standards, your implementation of standard and transmission-based precautions to prevent and control infections is an important action. Indeed, aged care homes are expected to assess the risk of, and take steps to prevent, detect and control, the spread of infections. Infection management practices, such as isolating infectious individuals and applying standard precautions to prevent transmission, minimise the risk of infection spreading";

(d) "Homes should implement effective infection prevention and control programs that are in line with national guidelines. The [Infection Control Guidelines] set out the requirements for best practice infection control. Infection prevention and control programs will vary between aged care homes, depending on the nature of the care and services provided, the context and the risk";

(e) "As well as implementing an infection control program, there should be established protocols in place at aged care homes to manage any health emergencies that arise, including service-wide infection outbreaks or broader community epidemics. *While the number of cases of COVID-19 is currently small in Australia, it is possible that this situation could change and services need to plan and be prepared for this*" (emphasis added); and

(f) "Further information on the public health management of COVID-19 is available in the [CDNA National Guidelines]".

C.3 Further advice and Dorothy Henderson Lodge Outbreak

34 On or about 2 March 2020, Aged Care Quality and Safety Commissioner Janet Anderson (**Commissioner Anderson**) wrote to all aged care providers, including the defendant, to provide "updated advice regarding COVID-19", stating that:

(a) "While the number of cases of COVID-19 is currently small in Australia, it is possible that this situation could change at any time, and providers of all services need to give a high priority to planning and being prepared for this scenario; and

(b) "All aged care service providers should pay close attention to requirements under the Aged Care Quality Standards … at this critical time and be vigilant in maintaining the highest possible standards for minimisation of infection-related risks. Providers are urged to undertake a self-assessment against the Quality Standards taking into account the requirements under Standard 3 and Standard 8 and ensure that your services have in place arrangements for:

- assessment and management of risk associated with infectious outbreaks if infection is suspected or identified
- ensuring adequate care of the infected individual
- protection measures for consumers staff and for residential aged care services, visitors to the service
- notification advice to consumers, families, carers and relevant authorities".

Particulars

The document is in writing to the effect alleged and is contained in a letter to aged care providers, including the defendant, from Commissioner Anderson dated 2 March 2020.

35 On or about 3 March 2020, aged care facility 'Dorothy Henderson Lodge' in northern Sydney, New South Wales, detected its first case of COVID-19; by 11 April 2020, 17 residents and five staff had contracted COVID-19 and six residents had died (**Dorothy Henderson Lodge Outbreak**).

36 On or about 17 March 2020, the Australian Health Protection Principal Committee published recommendations to residential aged care facilities, which stated that:

(a) "While all respiratory viruses can cause outbreaks and significant morbidity and mortality, COVID-19 is acknowledged as a significant health risk particularly for the elderly and individuals with co-morbidities or low immunity";

(b) "[Aged care facilities] must ensure that they are prepared to manage outbreaks of COVID-19";

(c) "[Facilities] should implement the following measures for restricting visits and visitors to reduce the risk of transmission to residents, including:

(i) Limiting visits to a short duration;

(ii) Limiting visits to a maximum of two visitors at one time per day. These may be immediate social supports (family members, close friends) or professional service or advocacy;

(iii) Visits should be conducted in a resident's room, outdoors, or in a specific [designated] area … rather than communal areas where the risk of transmission to residents is greater;

(iv) No large group visits or gatherings, including social activities or entertainment, should be permitted at this time";

(d) "Active screening for symptoms of COVID-19 in residents being admitted or re-admitted from other health facilities and community settings should be conducted"; and

(e) "Staff should be made aware of early signs and symptoms of COVID-19. Any staff with fever OR symptoms of acute respiratory infection (e.g. cough, sore throat, runny nose, shortness of breath) should be excluded from the workplace and tested for COVID-19 … Sick leave policies must enable employees to stay home, if they have symptoms of respiratory infection".

Particulars

The recommendations were published on the Department's website on 17 March 2020.

C.4 The defendant's purported 'lock-down'

37 On or about 21 March 2020:

(a) 229 cases of COVID-19 were confirmed in the State of Victoria;

(b) the *Aged Care Facilities Directions* were issued under s 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic), which had the effect of prohibiting people from visiting residential aged care facilities (with limited exceptions) from 6.00pm on 21 March 2020.

Particulars

The *Aged Care Facilities Directions* were issued on 21 March 2020, and published in Victoria Government Gazette No. S 142 on 22 March 2020.

38 On or about 22 March 2020, the defendant notified Residents, Family and friends that, as of midnight on Sunday 22 March 2020, access to Epping Gardens would be limited to essential services and contractors, and Family and friends would be denied access to Epping Gardens until further notice unless an exemption was granted where Residents had been deemed as requiring end of life care (**22 March Letter**).

Particulars

The notification is in writing to the effect stated and is contained in a letter attached to an email from the defendant dated 22 March 2020.

39 The 22 March Letter provided (*inter alia*):

(a) that the defendant was "exceeding the Department of Health's COVID-19 Guidelines relating to visits and [had] implemented all their other recommendations";

(b) in response to the question "Why is an aged care home the best place for my loved one to be?", that the defendant had "on-site registered nurses and care staff, infection control practices and regularly attending health professionals including GPs" and also had "equipment and medical supplies on-site to reduce the possibility of infection".

C.5 Continued advice and Newmarch House Outbreak

40 On or about 26 March 2020, the Department published an information sheet entitled 'Coronavirus disease (COVID-19): Environmental cleaning and disinfection principles for health and residential care facilities', which provided that (*inter alia*):

(a) coronaviruses can survive on surfaces for many hours but are readily inactivated by cleaning and disinfection;

(b) cleaning staff should wear impermeable disposable gloves and a surgical mask plus eye protection or a face shield while cleaning;

(c) if there is visible contamination with respiratory secretions or other body fluid, the cleaners should wear a full length disposable gown in addition to the surgical mask, eye protection and gloves;

(d) in communal areas such as staff dining rooms, cafes, retail outlets, staff meeting rooms and patient transport vehicles, the risk of transmission of COVID-19 can be minimised through a good standard of general hygiene, including: promoting cough etiquette and respiratory hygiene; routine cleaning of frequently touched hard surfaces with detergent/disinfectant solution/wipe; providing adequate alcohol-based hand rub for staff and consumers to use; and training staff on use of alcohol-based hand rub;

(e) in non-patient areas and well residents' rooms and communal areas in aged care facilities, routine cleaning should be performed of frequently touched surfaces with detergent/disinfectant solution/wipe at least daily or when visibly dirty;

(f) in patient areas, staff should clean and disinfect frequently touched surfaces with detergent and disinfectant wipe/solution between each episode of patient care (according to normal infection prevention and control practice), and take care to

clean/disinfect surfaces in areas that patients have directly been in contact with or have been exposed to respiratory droplets;

(g) in rooms of aged care residents who are ill, staff should clean and disinfect frequently touched surfaces with detergent and disinfectant wipe/solution at least daily; clean and disinfect equipment after each use; clean and disinfect surfaces that have been in direct contact with or exposed to respiratory droplets.

Particulars

The information sheet is in writing to the effect alleged and was published on the Department's website on 26 March 2020.

41 Between 11 April and 15 June 2020, aged care facility 'Newmarch House' in western Sydney, New South Wales, experienced an outbreak of COVID-19 in which 37 residents and 34 staff members tested positive for COVID-19, and 19 residents died (**Newmarch House Outbreak**).

C.6 Staff Cuts and Staff Movement

42 On 29 May 2020, Kellie Anderson, Human Resources Manager of the defendant, told staff members that Epping Gardens had had significant challenges due to COVID-19 and, as a result, the defendant had no other option but to review the roster based on occupancy and resident acuity.

Particulars

Email from Kellie Anderson dated 29 May 2020 timed at 2:25pm.

43 The meeting to discuss the roster changes pleaded in the preceding paragraph was scheduled on 1 June 2020 from 10.00am (**1 June Meeting**).

Particulars

Email from Kellie Anderson dated 29 May 2020 timed at 2:31pm.

44 At the 1 June Meeting, staff members were told by management that:

(a) Epping Gardens had been losing profits;

(b) as a result, management had decided to cut the number of staff at Epping Gardens;

(c) staff were no longer to work in specific zones or wards but instead were to work across both the upstairs and downstairs regions of Epping Gardens; and

(d) if a staff member could not work due to illness or any other reason, management would not replace their shift,

(**Staff Cuts**).

45 After the 1 June Meeting, pursuant to the Staff Cuts:

(a) the defendant terminated the employment of between one-third and half of the nurses at Epping Gardens, reduced the working hours of personal care assistants (**PCAs**), and terminated the employment of a number of casual staff; and

(b) total staff levels were reduced from approximately 110 staff members to 50 staff members,

(**Pre-Existing Staff Shortage**).

Particulars

Further particulars may be provided after discovery.

46 As a result, at material times from approximately 1 June 2020:

(a) only one registered nurse was responsible for over 80 residents across two wards;

(b) PCAs were required to work throughout the facility, including in the Transition Care Program ward (**TCP Ward**), in which both residents from Epping Gardens and patients from Northern Hospital Epping (**Northern Hospital**) resided;

(c) there was no system in place to monitor which staff worked in which wards,

(**Staff Movement**).

Particulars

Further particulars may be provided after discovery.

C.7 Conditions preceding COVID-19 Outbreak

47 At all material times between 22 March 2020 and 13 July 2020:

(a) staff did not wear masks unless they were in the TCP Ward or from time to time if they were caring for a Resident who was ill, in circumstances where:

(i) the Director of Nursing directed that staff members be given only one mask per shift;

(ii) the Director of Nursing locked remaining masks in her office, which could only be accessed with permission;

(iii) the Director of Nursing discouraged staff from using masks, telling some staff that wearing masks was not necessary and telling others that wearing masks would scare the Residents by making them think that the staff were sick;

(b) Family and other visitors were not told or encouraged to wear masks.

48 At all material times between 22 March 2020 and 20 July 2020:

(a) with respect to visits by Family and other visitors:

(i) Family were frequently given permission by management to visit Residents, not only for 'end of life' or other exceptional reasons;

Particulars

Permission was frequently granted by the defendant's then General Manager, Alister Cooray, and Director of Nursing, Monica Elston. Further particulars may be provided after discovery.

(ii) Family were often asked by management to attend Epping Gardens to care for or feed, their Resident because there were insufficient staff members to care for or feed them;

Particulars

By way of example, this request was made to Family members of Salvatore Tropea, Zisis Ioanou, Danica Stefanovska and Concetta Mineo. Further particulars may be provided after discovery.

(iii) visitors were entering Epping Gardens daily;

(iv) the defendant had no practice of monitoring visitors or reporting visitors who stayed at Epping Gardens for longer than the period prescribed by the Victorian Directions;

Particulars

Further particulars may be provided after discovery.

(b) with respect to screening of entrants to Epping Gardens:

(i) in the days following 22 March 2020, the Director of Nursing, General Manager or receptionist would take the temperature of any person who entered Epping Gardens;

(ii) thereafter, staff were required to take their own temperatures on arrival at Epping Gardens, but no member of staff or management was assigned to monitor if they had done so;

(iii) hand sanitisers at the entrance of Epping Gardens were frequently empty;

(c) with respect to staff generally:

(i) no face-to-face training on managing a COVID-19 outbreak was provided to Epping Gardens' staff;

(ii) staff were not discouraged from entering Epping Gardens if they were not rostered on;

(d) with respect to social distancing:

(i) the Social Distancing Measures were not being observed;

(ii) the Director of Nursing directed staff to feed Residents together in communal dining areas due to the Pre-Existing Staff Shortage;

(iii) toilets were still being shared between visitors, staff members and residents;

(e) Residents were not being regularly or systematically tested for COVID-19;

(f) Families complained to the defendant's Chief Executive Officer, General Manager and Director of Nursing about the matters set out in paragraphs 47 to 49, alternatively some of them, but the complaints were not addressed.

Particulars

By way of example, complaints were made to management by Connie and Rose Tropea (Family of Salvatore Tropea), Luisa Cavarra (Family

of Antonio Croce), and Susan Cashman (Family of Margaret Shallcross).

49 At all material times between at least 1 June 2020 and 20 July 2020:

(a) with respect to the TCP Ward:

(i) new patients from Northern Hospital arrived in the TCP Ward approximately every two days;

(ii) Epping Gardens staff continued to be directed to work in both the TCP Ward and in the remainder of the Epping Gardens facility during the same shift;

(iii) staff from Epping Gardens and staff from Northern Hospital shared the Epping Gardens' kitchen;

(b) there were insufficient supplies of PPE for staff members to use;

(c) with respect to cleanliness:

(i) Residents were not sufficiently bathed and were often left in soiled clothing, with the result that in some cases Family members were required to bathe their Resident;

(ii) Residents' rooms, including the bed linen, chairs and carpet, were often visibly soiled;

(iii) Residents' ensuites, including toilet and basin, were often visibly soiled;

(iv) Residents' rooms would often smell of urine and faecal matter; and

(v) there would be ants and other insects in Residents' rooms;

Particulars

By way of example, the matters pleaded in subparagraph (c) above were observed by the Families of Danica Stefanovska, Sam Scicluna, Salvatore Tropea, Antonio Croce and Zisis Ioanou.

(d) with respect to Care Services:

(i) Residents were not sufficiently hydrated;

Particulars

By way of example, the Families of Danica Stefanovska and Zisis Ioanou were each told by hospital doctors that their Residents were dehydrated.

(ii) Residents were not sufficiently fed or given the correct meals;

Particulars

By way of example:

(i) upon being admitted to Northern Hospital, Zisis Ioanou's Family were told that he had lost a significant amount of weight;

(ii) Sam Scicluna was often given cordial, biscuits, ice cream and sugary desserts even though he was known by the defendant to be diabetic;

(iii) on a number of occasions, Salvatore Tropea was given solid foods instead of the pureed meal in his care plan, causing complications with his dsyphagia/ aspiration.

(iii) the defendant did not provide sufficient fresh fruit to Residents;

(iv) Residents were often not given the correct medication or any medication at all;

Particulars

By way of example, the Families of Zisis Ioanou, Danica Stefanovska and Salvatore Tropea each observed their Resident not being given correct medication, or their required medication at all, on a number of occasions.

(v) minor wounds were often left untreated;

Particulars

By way of example:

(i) Sam Scicluna's ingrown toenail developed into septicaemia; and

(ii) Antonio Croce's gangrene infection spread, necessitating the amputation of his toes.

(vi) Residents often could not find, or attract the attention of, a PCA or nurse to receive assistance; and

(vii) Residents' buzzers and sensors would often not work or would be left unplugged, leading to delays in receiving assistance.

50 On 3 July 2020, it was reported that:

(a) two healthcare workers at Northern Hospital had tested positive to COVID-19;

(b) 66 new cases were detected the previous day, making it the 17th consecutive day of double-digit case growth in Victoria, with a continuing number of new cases associated with transmission in households and families.

Particulars

Victorian DHHS, Media Release entitled 'Coronavirus update for Victoria – 03 July 2020' dated 3 July 2020.

51 By reason of the matter pleaded in paragraph 50(a), by 3 July 2020, COVID-19 had been detected in the area local to Epping Gardens.

52 At material times from approximately 3 to 13 July 2020:

(a) with respect to the café on the bottom floor of Epping Gardens (**Café**):

(i) the owner of the Café frequently took orders from staff and delivered the orders throughout the facility without wearing a mask;

(ii) the owner of the Café was directed by management to host a 'coffee party' every day in the morning and afternoon;

(b) the Director of Nursing ordered pizza for staff working in each ward, which led to a delivery person entering Epping Gardens up to three times per day in the month of July 2020 without wearing a mask; and

(c) communal facilities such as the lounge and the Café were still in use.

Particulars

Further particulars may be provided after discovery.

53 On or about 13 July 2020, the Department mandated that all aged care workers in metropolitan Melbourne (including Epping Gardens) wear masks.

Particulars

Ministers Hunt and Colbeck, joint media release dated 13 July 2020.

54 On or about 14 July 2020, the defendant directed its staff to wear masks at Epping Gardens.

55 Notwithstanding the direction pleaded in the preceding paragraph, from 14 July 2020:

(a) staff did not always wear masks;

(b) visitors were not asked to wear masks; and

(c) no Residents wore masks.

Particulars

By way of example, on or about 19 July 2020, the Family of Sam Scicluna observed the receptionist and a nurse not wearing a mask or gloves. Moreover, when receptionist was asked if Family was required to wear a mask, the receptionist said it was not necessary.

56 On 15 July 2020:

(a) a mandatory meeting was held in the Hub Theatre at Epping Gardens, which only afternoon shift workers attended;

(b) management told attendees that if there was an outbreak of COVID-19, they must wear a mask and wash their hands;

(c) no other infection control training was provided.

57 In the evening of 16 July 2020, a 'baby shower' celebration took place in a vacant room:

(a) at which six staff members attended, at least four of whom wore masks;

(b) which most staff members attended for less than 10 minutes; and

(c) after which all surfaces were sanitised and disinfected.

C.8 COVID-19 Outbreak

58 At a time prior to 20 July 2020 that the plaintiff cannot presently better particularise, the defendant allowed COVID-19 positive patients from Northern Hospital to be admitted into the TCP Ward.

Particulars

Further particulars may be provided after discovery.

59 In or around June 2020, on a date which the plaintiff cannot presently better particularise, Resident Mr Antonio Croce (**Mr Croce**) began experiencing Symptoms.

Particulars

Further particulars may be provided after discovery.

60 From the date pleaded in the preceding paragraph until at least 19 July 2020:

(a) Mr Croce was frequently coughing and spluttering and developing a fever;

(b) by reason of the matters pleaded in the preceding subparagraph, Mr Croce had Symptoms;

(c) Mr Croce would call for help using his buzzer, but staff did not respond to his calls and other residents pressed their buzzers to assist him to get the staff's attention;

(d) the defendant did not:

(i) promptly recognise the matters pleaded in subparagraph (a) as Symptoms;

(ii) isolate Mr Croce, confine him to his room or otherwise prevent Mr Croce from walking around the facility;

(iii) promptly communicate the deterioration of Mr Croce's condition to his Family;

(iv) promptly organise for Mr Croce to undergo a COVID-19 test.

61 On or about 18 July 2020, a staff member began experiencing Symptoms.

Particulars

Group Members reserve the right to contend that other Residents or staff members were experiencing Symptoms prior to 20 July 2020.

62 On or about 19 July 2020:

(a) Family of Mr Croce visited him at Epping Gardens, found him with a fever and struggling to breathe, and did not receive assistance from the defendant's staff for over three hours, after which Mr Croce was taken to the Royal Melbourne Hospital;

(b) a staff member attempted to contact the Wurun Ward of Epping Gardens to inform them that she was feeling unwell, but the phone was not answered. The staff member then called the Director of Nursing and said that she was feeling unwell, to which the Director of Nursing responded that the staff member must contact the relevant Ward as the Director could not help her.

63 On or about 20 July 2020:

(a) at 9:15am, the General Manager received a call from a staff member who advised that she had received a notification the previous evening of a positive COVID-19 test result;

(b) later that morning, the defendant was notified that a Resident (Mr Croce) had also tested positive to COVID-19;

(c) at 12:28pm, the defendant notified the Department of the two positive COVID-19 tests, following advice to the Public Health Unit earlier on the same day;

Particulars

Independent Review, page 40. Further particulars may be provided after discovery.

(d) testing for COVID-19 was scheduled to be undertaken on the afternoon of 23 July 2020;

Particulars

Independent Review, page 42. Further particulars may be provided after discovery.

64 At material times between 20 and 22 July 2020, staff members were told by the General Manager, the Director of Nursing and/or Susan Musico (Lifestyle Coordinator):

(a) not to get tested for COVID-19 at local testing sites, because this would mean they would need to isolate for two weeks and Epping Gardens could not afford the further staff shortages; and

(b) to wait until on-site testing took place at Epping Gardens on 23 July 2020.

65 The defendant did not have a formal surge workforce plan in place other than a reliance on its own casual staff pool.

Particulars

Independent Review, page 48. Further particulars may be provided after discovery.

66 On or about 21 July 2020, a clinical first responder arrived on-site at Epping Gardens and identified, as was the fact, that:

(a) the defendant's level of infection prevention and control preparation, training and leadership capacity relative to the unfolding situation; and

(b) the defendant was extensively reliant on external resources rather than those resources available within and across the defendant's other aged care facilities.

Particulars

Independent Review, page 41. Further particulars may be provided after discovery.

67 From 22 July 2020, Infection Prevention and Control Outreach Nurses commenced a series of on-site visits to Epping Gardens and identified, as was the fact, that there were significant issues relating to:

(a) correct PPE training;

(b) donning and doffing PPE;

(c) zoning and managing potential for cross-contamination;

(d) time taken to implement recommendations from prior assessments; and

(e) delays in cohorting.

Particulars

Independent Review, page 45. Further particulars may be provided after discovery.

68 On or about 23 July 2020, on-site testing of staff members took place at Epping Gardens.

Particulars

Independent Review, page 42. Further particulars may be provided after discovery.

69 By 24 July 2020, due to staff shortages, the defendant could only safely provide staff to care for approximately 30 per cent of its usual capacity.

Particulars

Independent Review, page 49. Further particulars may be provided after discovery.

70 At material times between 20 and 27 July 2020, staff members who had been tested for COVID-19 were:

(a) directed by management to return to Epping Gardens to complete their shifts while waiting for the test results; and

(b) not told to self-isolate.

71 By 26 July 2020:

(a) contact tracing had identified 110 residents as close-contacts of positive staff members, and subsequent testing identified COVID-19 positive Residents in all areas of the facility; and

(b) 60 residents and 22 staff had tested positive to COVID-19.

Particulars

Independent Review, page 45. Further particulars may be provided after discovery.

72 On or about 27 July 2020:

(a) Austin Health was requested to provide clinical support to the defendant; and

Particulars

Independent Review, pages 50-51. Further particulars may be provided after discovery.

(b) the defendant began 'cohorting' Residents, in that Residents who tested positive for COVID-19 began to be moved to the Wurun ward and Residents who tested negative for COVID-19 began to be moved to the TCP Ward (**Cohorting**).

73 As at 28 July 2020, the situation at Epping Gardens was such that:

(a) there was no visible leadership on site;

(b) there were meal trays piling up and being left untouched in Residents' rooms;

(c) the defendant was failing to provide adequate hydration and nutrition to Residents;

(d) the defendant was failing to provide adequate personal care to Residents related to hygiene and continence management; and

(e) there was a lack of organisation and clear direction around PPE.

Particulars

Independent Review, page 51. Further particulars may be provided after discovery.

74 On or about 28 July 2020, the Commission notified the defendant, by way of a 'Notice to Agree' under s 63U(2) of the *Aged Care Quality and Safety Commission Act 2018* (Cth), of the defendant's non-compliance with the following Aged Care Quality Standards:

(a) ongoing assessment and planning with consumers (Standard 2);

(b) personal care and clinical care (Standard 3);

(c) feedback and complaints (Standard 6); and

(d) organisational governance (Standard 8),

(Notice to Agree).

Particulars

The Notice to Agree is in writing and is published on the Commission's website.

75 In response to the Notice to Agree, on 28 July 2020 or shortly thereafter, the defendant accepted the matters set out in the Notice to Agree and agreed to conditions set out in that Notice.

Particulars

Independent Review, page 53. Further particulars may be provided after discovery.

76 Between 27 to 29 July 2020, more than 50 Residents were transferred to numerous public and private hospitals based on clinical assessment.

Particulars

Independent Review, page 54. Further particulars may be provided after discovery.

77 On or about 31 July 2020:

(a) additional staff were commissioned to assist the defendant to, *inter alia*, clean rooms to the required infection control standards; and

(b) 86 Residents and 40 staff at Epping Gardens tested positive to COVID-19.

Particulars

Independent Review, pages 43 and 46. Further particulars may be provided after discovery.

78 On or about 3 September 2020, 102 Residents and 85 staff at Epping Gardens tested positive to COVID-19.

Particulars

Independent Review, page 43. Further particulars may be provided after discovery.

79 As pleaded in paragraph 6 above, at the conclusion of the outbreak, 103 residents and 86 staff were identified as having tested positive to COVID-19.

80 On or about 10 September 2020, Epping Gardens was declared 'outbreak free'.

Particulars

Independent Review, page 61. Further particulars may be provided after discovery.

C.9 Mrs Agnello

81 On or about 25 July 2020, Mrs Agnello was transferred to Northern Hospital because she had experienced a fall.

82 Upon Mrs Agnello's admission to Northern Hospital, her Family were called by a doctor who said there were signs Mrs Agnello was infected with COVID-19, along with dehydration, fluid in her lungs, heart problems, a cough and a fever.

83 Later on 25 July 2020, Mrs Agnello tested positive for COVID-19.

84 Mrs Agnello died three days later, on 28 July 2020.

Particulars

The plaintiff refers to and repeats the matters set out in paragraph 1(e) above.

D BREACH OF CONTRACT CLAIM

D.1 Resident Agreement

85 At material times before the COVID-19 Period, Mrs Agnello and the other Resident Sub-Group Members entered into a Resident Agreement with the defendant.

Particulars

The plaintiff refers to and repeats the matters set out in paragraph 1(c) above.

86 The Resident Agreement took one of two forms:

(a) a standard form contract entitled "Resident Agreement for Pre 1 July 2014 Care Recipients", which applied to those Resident Sub-Group Members who had been residents in another aged care facility prior to 1 July 2014 (**pre-2014 Resident Agreement**); or

Particulars

The pre-2014 Resident Agreement is in writing. Some Resident Sub-Group Members signed the pre-2014 Resident Agreement and some did not.

In respect of those Resident Sub-Group Members who did not sign the pre-2014 Resident Agreement, their acceptance is implied by the fact that:

(i) they were given a copy of the pre-2014 Resident Agreement by the defendant;

(ii) they paid the relevant fees and deposits, and moved into accommodation at Epping Gardens, in accordance with the pre-2014 Resident Agreement; and

(iii) the defendant thereafter supplied them with accommodation and Residential Care Services in accordance with the pre-2014 Resident Agreement.

(b) a standard form contract entitled "Resident Agreement for Residential Care", which applied to those Resident Sub-Group Members who had become residents in aged care facilities after 1 July 2014 (**post-2014 Resident Agreement**).

Particulars

The post-2014 Resident Agreement is in writing. Some Resident Sub-Group Members signed the post-2014 Resident Agreement and some did not.

In respect of those Resident Sub-Group Members who did not sign the post-2014 Resident Agreement, their acceptance is implied by the fact that:

(i) they were given a copy of the post-2014 Resident Agreement by the defendant;

(ii) they paid the relevant fees and deposits, and moved into accommodation at Epping Gardens, in accordance with the post-2014 Resident Agreement; and

(iii) the defendant thereafter supplied them with accommodation and Residential Care Services in accordance with the post-2014 Resident Agreement.

Group Members reserve the right to contend that there were other forms of the Resident Agreement following discovery.

87 There were terms of each Resident Agreement that:

(a) the defendant would provide the Resident Sub-Group Member with accommodation services and care services at Epping Gardens as assessed for the Resident's needs;

Particulars

Pre-2014 Resident Agreement, clause 2.1(a).

Post-2014 Resident Agreement, Recital B and clause 12.1.

(b) the defendant would notify the Resident Sub-Group Member should their care needs exceed the defendant's capacity to provide care and services;

Particulars

Pre-2014 Resident Agreement, clause 2.1(c).

In respect of the Post-2014 Resident Agreement, the term is implied in fact.

(c) the accommodation services provided to the Resident Sub-Group Member would include the Hotel Services specified in the Quality of Care Principles that the Resident was assessed as requiring;

Particulars

Pre-2014 Resident Agreement, clause 2.2 and Schedule 1.

Post-2014 Resident Agreement, clause 21.1 and Schedule 5.

The plaintiff refers to and repeats the matters set out in paragraph 16(a)(i) above.

(d) the care services provided to the Resident Sub-Group Member would include the Care Services specified in the Quality of Care Principles that the Resident was assessed as requiring;

Particulars

Pre-2014 Resident Agreement, clause 2.2 and Schedule 1.

Post-2014 Resident Agreement, clause 21.1 and Schedule 6.

The plaintiff refers to and repeats the matters set out in paragraph 16(a)(ii) above.

(e) the defendant would observe and act in accordance with the Charter, including the following rights of the Resident Sub-Group Member:

(i) the right to full and effective use of his or her personal, civil, legal and consumer rights;

(ii) the right to quality care appropriate to his or her needs;

(iii) the right to be treated with dignity and respect, and to live without exploitation, abuse or neglect; and

(iv) the right to live in a safe, secure and home-like environment;

Particulars

Pre-2014 Resident Agreement, clauses 8.7 and 9.1.

Post-2014 Resident Agreement, clause 5.1 and Schedule 9.

(f) any complaints would be handled fairly and promptly and the defendant would respond to all complaints within a reasonable timeframe having regard to the nature of the complaint.

Particulars

Pre-2014 Resident Agreement, clauses 8.16(a).

Post-2014 Resident Agreement, clause 5.2 and Schedule 10. As Schedule 10 is blank, the term is implied in fact.

88 There was an implied term of each Resident Agreement that the defendant would exercise proper or reasonable care or skill in the discharge of its duties under the Resident Agreement, including in the provision of the Residential Care Services to the Resident Sub-Group Member.

Particulars

The term is implied by law.

89 The purpose of the Resident Agreement was to supply Residents with peace of mind and the experience of being cared for in a safe, secure and home-like environment.

Particulars

The purpose is to be inferred from the provisions of the Aged Care Act, Aged Care Quality Standards and the Charter. Further, the plaintiff refers to and repeats the particulars to paragraph 94 below.

D.2 Breaches of contract

90 In breach of the Resident Agreements:

(a) by reason of the matters set out in paragraphs 42 to 46, 48(e), 49(c), 49(d), 60 and 75 above, and subparagraphs (b) to (d) below, as from 1 June 2020, at the latest, the care needs of the Resident Sub-Group Members were exceeded by the defendant's capacity to provide care and services, and the defendant did not notify Resident Sub-Group Members of that fact;

(b) the Hotel Services provided did not comply with the Quality of Care Principles, in that as from 1 June 2020, at the latest:

(i) by reason of the matters set out in paragraphs 49(c)(ii) to 49(c)(v), 73(b) and 77(a) above, the defendant failed to ensure that Epping Gardens and the furniture, equipment and fittings therein, were adequately cleaned, contrary to item 1.6 of the table at Schedule 1, Part 1 of the Quality of Care Principles (**Table**);

(ii) by reason of the matters set out in paragraphs 49(d)(i), 49(d)(ii) and 73(c) above, the defendant failed to ensure that meals of adequate quality and

quantity were provided to each Resident Sub-Group Member, contrary to item 1.10(a) of the Table;

(iii) by reason of the matters set out in paragraph 49(d)(ii) above, the defendant failed to ensure that special dietary requirements were observed, contrary to item 1.10(b) of the Table;

(iv) by reason of the matter set out in paragraph 49(d)(iii) above, the defendant failed to provide fruit of adequate variety, quality and quantity, contrary to item 1.10(c) of the Table;

(v) by reason of the matters set out in paragraphs 49(d)(vi), 49(d)(vii) and 60 above, the defendant failed to ensure that there was at least one responsible person continuously on call and in reasonable proximity to render emergency assistance to Resident Sub-Group Members, contrary to item 1.12 of the Table;

(c) the Care Services provided did not comply with the Quality of Care Principles, in that as from 1 June 2020, at the latest:

(i) by reason of the matters set out in paragraphs 49(c)(i) and 73(d) above, the defendant failed to ensure that Resident Sub-Group Members' personal hygiene was maintained, contrary to item 2.1 of the Table;

(ii) by reason of the matters set out in paragraphs 49(d)(vi), 49(d)(vii) and 60 above, the defendant failed to ensure that Resident Sub-Group Members were provided with physical assistance when required, contrary to item 2.4 of the Table;

(iii) by reason of the matters set out in paragraph 49(d)(iii) above, the defendant failed to ensure that Resident Sub-Group Members were assisted to take medication when required, contrary to item 2.4 of the Table;

(d) the defendant did not act in accordance with Residents' rights under the Charter in that, as from 1 June 2020, at the latest, Resident Sub-Group Members:

(i) by reason of the matters set out in paragraphs 47 to 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 and 77(a) above, did not receive quality care appropriate to their needs;

(ii) by reason of the matters set out in paragraphs 47 to 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 and 77(a) above, were not provided with safe and high quality care and services;

(iii) by reason of the matters set out in paragraph 49(c) and 49(d) above, were not able to live at Epping Gardens without neglect; and

(iv) by reason of the matters set out in paragraphs 47 to 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 to 79 above, were not able to live in a safe, secure and home-like environment;

(e) by reason of the matters set out in paragraph 48(f) above, as from 22 March 2020, at the latest, the defendant did not handle complaints made by Residents or their Families promptly and/or within a reasonable timeframe; and

(f) by reason of the matters set out in subparagraphs (a) to (e) above, as from 1 June 2020, at the latest, the defendant did not exercise proper or reasonable care or skill in the provision of the Residential Care Services,

(**Breaches of Contract**).

D.3 Loss and damage

91 As a result of the Breaches of Contract, Mrs Agnello and the other Resident Sub-Group Members suffered loss and damage.

Particulars

The plaintiff contends, in support of his personal claim as the legal personal representative of Mrs Agnello's estate, that Mrs Agnello suffered the following loss and damage as a result of the Breaches of Contract:

(i) disappointment and distress prior to her death;

(ii) death; and

(iii) funeral expenses.

Other Resident Sub-Group Members suffered the following loss and damage as a result of the Breaches of Contract:

(iv) disappointment and distress;

(v) personal injury or death;

(vi) pain and suffering;

(vii) nervous shock; and/or

(viii) economic loss, including funeral expenses.

Particulars of the losses and damage suffered by individual Resident Sub-Group Members will be supplied after the determination of common issues in the plaintiff's case.

E CONSUMER GUARANTEE CLAIMS

E.1 Care and Skill Guarantee under s 60 ACL

92 In supplying the Residential Care Services to Mrs Agnello and the other Resident Sub-Group Members, the defendant guaranteed to Mrs Agnello and the other Resident Sub-Group Members that the Residential Care Services would be rendered with due care and skill (**Care and Skill Guarantee**).

Particulars

The guarantee arose in law pursuant to s 60 of the ACL.

93 In contravention of the Care and Skill Guarantee, the defendant failed to exercise due care in supplying the Residential Care Services, in that:

(a) by reason of the matters set out in paragraphs 47, 48(a), 48(b), 48(c), 48(d), 48(e), 49(a), 49(b), 49(c), 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 and 77(a) above, the defendant failed to implement adequate Infection Control Measures during the COVID-19 Period; and

(b) by reason of the matters set out in paragraph 90 above, the Residential Care Services provided by the defendant did not comply with:

(i) the Quality of Care Principles; or

(ii) Residents' rights under the Charter,

such that it was unlikely that Mrs Agnello and the other Resident Sub-Group Members would be able to experience peace of mind or being cared for in a safe, secure and home-like environment.

E.2 Purpose Guarantee and Result Guarantee under s 61 ACL

94 Further and alternatively, Mrs Agnello and the other Resident Sub-Group Members made known to the defendant that the particular purpose for the acquisition of Residential Care Services from it, as a supplier, was to bring them peace of mind and supply them with the experience of being cared for in a safe, secure and home-like environment.

Particulars

In the case of Mrs Agnello and the other Resident Sub-Group Members, the particular purpose was impliedly made known by them to the defendant by: the nature of the relationship between Mrs Agnello and the other Resident Sub-Group Members and the defendant (the supply of Residential Care Services to each and every one of them), the purpose of the transactions that Mrs Agnello and the other Resident Sub-Group Members entered into with the defendant, and the obligations of the defendant under the Aged Care Act and related instruments.

Group Members reserve the right to contend that the particular purpose was also made expressly known to the defendant; however, this would be the subject of individual enquiry and may be subject of further particulars after determination of the common issues.

95 Further and alternatively, Mrs Agnello and the other Resident Sub-Group Members made known to the defendant that the desired result that they wished to achieve from the acquisition of services from the defendant was peace of mind and the experience of being cared for in a safe, secure and home-like environment.

Particulars

In the case of Mrs Agnello and the other Resident Sub-Group Members, the desired result was impliedly made known by the plaintiff and each of group members by: the nature of the relationship between Mrs Agnello and the other Resident Sub Group Members and the defendant (the supply of Residential Care Services to each and every one of them), the purpose of the transactions that Mrs Agnello and the other Resident Sub-Group Members entered into with the defendant, and the obligations of the defendant under the Aged Care Act and subsidiary instruments.

Group Members reserve the right to contend that the desired result was also made expressly known to the defendant; however, this would be the subject of individual enquiry and may be subject of further particulars after determination of the common issues.

96 In the premises, in supplying the Residential Care Services, the defendant further guaranteed to Mrs Agnello and the other Resident Sub-Group Members that:

(a) the Services supplied would be reasonably fit for that purpose (**Purpose Guarantee**);

Particulars

The guarantee arose in law pursuant to s 61(1) of the ACL.

(b) the Services might reasonably be expected to achieve that result (**Result Guarantee**).

Particulars

The guarantee arose in law pursuant to s 61(2) of the ACL.

97 By reason of the matters set out in Sections C.6, C.7 and C.8 above, in contravention of the Purpose Guarantee, the Residential Care Services provided by the defendant were not reasonably fit for the particular purpose for which they were acquired, in that:

(a) during the COVID-19 Period, the Resident Sub-Group Members were not enjoying peace of mind or the experience of being cared for in a safe, secure and home-like environment; and

(b) despite that circumstance, the defendant failed to improve its quality of care, implement the Infection Control Measures, remedy the Pre-Existing Staff Shortages and/or request assistance prior to 27 July 2020.

98 By reason of the matters set out in Sections C.6, C.7 and C.8 above, in contravention of the Result Guarantee, the Residential Care Services provided by the defendant were not of such nature and quality as reasonably might be expected to achieve the result the subject of the Result Guarantee, in that:

(a) during the COVID-19 Period, the Resident Sub-Group Members were not enjoying peace of mind or the experience of being cared for in a safe, secure and home-like environment; and

(b) despite that circumstance, the defendant failed to improve its quality of care, implement the Infection Control Measures, remedy the Pre-Existing Staff Shortages and/or request assistance prior to 27 July 2020.

99 The contraventions pleaded at paragraphs 93, 97 and 98 above are hereafter defined as **Breaches of Consumer Guarantees**.

E.3 Sections 267(3) and 268 ACL

100 The Residential Care Services supplied to Mrs Agnello and the other Resident Sub-Group Members:

(a) would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure to comply with the Care and Skill Guarantee, the Purpose Guarantee and/or the Result Guarantee;

(b) were substantially unfit for the purpose for which services of the same kind were commonly supplied and could not, easily and within a reasonable time, be remedied so as to make them fit for such a purpose;

(c) were unfit for the particular purpose they were acquired by Mrs Agnello and the other Resident Sub-Group Members, that was made known to the defendant, and could not, easily and within a reasonable time, be remedied so as to make them fit for such a purpose; and/or

(d) were not of such a nature, quality, state or condition that might reasonably be expected to achieve the result desired by Mrs Agnello and the other Resident Sub-Group Members, that was made known to the defendant, and could not, easily and within a reasonable time, be remedied to achieve such a result.

101 In the premises, the Breaches of Consumer Guarantees could not or cannot be remedied, or were a 'major failure' within the meaning of ss 267(3) and 268 of the ACL.

E.4 Loss and damage

102 Mrs Agnello and the other Resident Sub-Group Members suffered loss or damage because of the said contraventions of the Care and Skill Guarantee, Purpose Guarantee and/or Result Guarantee.

Particulars

The plaintiff contends, in support of his personal claim as the legal personal representative of Mrs Agnello's estate, that Mrs Agnello suffered the following loss and damage as a result of the defendant's contravention of the Care and Skill Guarantee, Purpose Guarantee and/or Result Guarantee:

(i) disappointment and distress prior to her death, not being personal injury within the meaning of s 4 of the *Competition and Consumer Act 2010* (Cth);

(ii) death; and

(iii) funeral expenses.

Other Resident Sub-Group Members suffered the following loss and damage as a result of the defendant's contravention of the Care and Skill Guarantee, Purpose Guarantee and/or Result Guarantee:

(iv) disappointment and distress, not being personal injury within the meaning of s 4 of the *Competition and Consumer Act 2010* (Cth);

(v) personal injury or death;

(vi) pain and suffering;

(vii) nervous shock; and/or

(viii) economic loss, including funeral expenses.

Particulars of the losses and damage suffered by individual Resident Sub-Group Members will be supplied after the determination of common issues in the plaintiff's case.

F NEGLIGENCE CLAIM – RESIDENTS

F.1 Foreseeability of risks of harm

103 At all material times:

(a) there was a risk that a failure by the defendant to exercise reasonable care and skill in the provision of the Residential Care Services during the COVID-19 Period would cause the Resident Sub-Group Members to suffer loss or damage arising from neglect, infection, disease, malnutrition, dehydration, choking, failure to be given the correct medication or any at all, or any other failure by the defendant to provide the Residential Care Services with reasonable care or at all (**Care Risk of Harm**); and

(b) there was a risk that a failure by the defendant to exercise reasonable care and skill in the implementation of Infection Control Measures during the COVID-19 Period would lead to Resident Sub-Group Members becoming infected with and dying of causes relating to COVID-19 (**Infection Risk of Harm**).

104 Each of the Care Risk of Harm and Infection Risk of Harm:

(a) was not remote or insignificant; and

(b) was reasonably foreseeable by the defendant.

Particulars

The plaintiff refers to and repeats the matters set out in Sections B and C above.

F.2 Resident Duty of Care

105 At all relevant times, the defendant had a direct and non-delegable duty:

(a) to take reasonable care in the provision of the Residential Care Services to Resident Sub-Group Members and in the implementation of Infection Control Measures; and

(b) to ensure that reasonable care was taken by any third party engaged by or on behalf of the defendant to provide Residential Care Services and implement Infection Control Measures,

to avoid or minimise each of the Care Risk of Harm and the Infection Risk of Harm (**Resident Duty of Care**).

106 The Resident Duty of Care required that, during the COVID-19 Period, the defendant:

(a) with respect to the provision of Residential Care Services:

(i) maintain an adequate number of appropriately skilled staff to ensure that the care needs of the Resident Sub-Group Members were met;

(ii) provide safe and effective personal care and/or clinical care to Resident Sub-Group Members that was best practice, tailored to their needs and optimised their health and well-being;

(iii) effectively manage high-impact or high-prevalence risks associated with the care of each consumer, including the Care Risk of Harm and the Infection Risk of Harm;

(iv) ensure that deterioration or change in a Resident Sub-Group Members' mental and/or physical health was recognised and responded to in a timely manner;

(v) ensure that Epping Gardens, and any furniture, fittings and equipment, was safe, clean, well-maintained and comfortable;

(vi) ensure that Resident Sub-Group Members' personal hygiene was maintained;

(vii) provide sufficient and appropriate meals to Resident Sub-Group Members;

(viii) provide sufficient and appropriate medication to Resident Sub-Group Members, as needed;

(ix) ensure at least one responsible person was continuously on call and in reasonable proximity to Resident Sub-Group Members to render emergency assistance;

(x) notify the Aged Care Quality and Safety Commissioner of any change of circumstances that materially affected the defendant's suitability to be an aged care provider within 28 days of the change occurring; and

(xi) respond to complaints in a timely manner;

(b) provide face-to-face training to staff on the Infection Control Measures before 20 July 2020;

(c) minimise infection-related risks through implementing the Infection Control Measures to prevent and control infection, including by:

(i) limiting visitors to Epping Gardens in accordance with the applicable Victorian Directions;

(ii) implementing the Social Distancing Measures;

(iii) cleaning frequently touched surfaces with detergent solution at least daily, and cleaning visibly soiled surfaces immediately after contaminated;

(iv) providing staff with sufficient masks (and PPE where appropriate), and ensuring they were worn when in close contact with a Resident;

(v) constantly monitoring Residents and staff for Symptoms with a high level of vigilance and having a low threshold for investigation;

(vi) restricting Residents with Symptoms in their room, or cohorting them in a designated bay or ward, and if they must leave, ensuring they wear a mask;

(vii) immediately excluding from Epping Gardens any staff member who develops Symptoms and instructing them to remain away whilst a diagnosis is sought;

(viii) ensuring any Resident or staff member with Symptoms is promptly tested for COVID-19;

(ix) regularly testing Residents for COVID-19;

(x) immediately cohorting any Resident who tests positive for COVID-19 away from Residents who are negative;

(xi) having a staff contingency plan in the event of an outbreak when unwell staff members need to be excluded from work for a prolonged period; and

(xii) ensuring leadership was on-site to plan, co-ordinate and manage logistics in an outbreak setting as well as to communicate and liaise with the Department and/or Victorian Department of Health and Human Services (**DHHS**).

F.3 Breaches of Resident Duty

107 Further, by reason of the matters pleaded in Sections A.3, B and C, and in circumstances where:

(a) COVID-19 had been detected in Victoria from 25 January 2020;

(b) two prior COVID-19 outbreaks in aged care homes in Sydney had led to significant loss of life;

(c) COVID-19 had been detected in the area local to Epping Gardens from 3 July 2020;

(d) aged care providers had the obligations set out in Sections B.1 to B.6 above; and

(e) guidelines and advice had been published as set out in Sections B.7 to B.9, C.3 and C.5 above,

a reasonably prudent approved aged care provider would have ensured that:

(i) the Staff Cuts were not made;

(ii) alternatively to (a):

(1) the Commissioner was notified of the Staff Cuts by 28 June 2020, as a change of circumstances that materially affected the provider's suitability to be a provider of aged care, in accordance with ss 9-1(1) and 63-1(1)(c) of the Aged Care Act; and

(2) Residents were notified that their care needs were exceeded by the provider's capacity to provide care and services;

(iii) the measures pleaded in paragraph 106 were taken, and were taken in a reasonable time after the 26 February Notification.

108 In breach of the Resident Duty of Care:

(a) the defendant did not exercise reasonable care and skill in the provision of the Residential Care Services or ensure that reasonable care and skill was taken, in that during the COVID-19 Period (**Care Breaches**):

(i) the defendant made the Staff Cuts on approximately 1 June 2020, leading to the Pre-Existing Staff Shortage, and did not maintain an adequate number of appropriately skilled staff to ensure the care needs of Resident Sub-Group Members were met;

(ii) by reason of the matters set out in paragraphs 47 to 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 and 77(a) above, the quality of personal care of Resident Sub-Group Members was inadequate and in breach of Standard 3 of the Aged Care Quality Standards;

(iii) by reason of the matters set out in paragraphs 47 to 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 and 77(a) above, the defendant failed to adequately or at all manage high-impact or high-prevalence risks, including the Care Risk of Harm and the Infection Risk of Harm, and was in breach of Standard 3 of the Aged Care Quality Standards;

(iv) by reason of the matters set out in paragraphs 49(d), 60, 62(a), 71, 76, 77(b), 78 and 79 above, deterioration or change in Resident Sub-Group Members' mental and/or physical health was not responded to in a timely manner;

(v) by reason of the matters set out in paragraphs 49(c)(ii) to 49(c)(v), 75 and 77(a) above, Resident Sub-Group Members' rooms, ensuites and furniture were not cleaned;

(vi) by reason of the matters set out in paragraphs 49(c)(i) and 73(d) above, Resident Sub-Group Members' personal hygiene was not maintained;

(vii) by reason of the matters set out in paragraphs 49(d)(i), 49(d)(ii) and 73(c) Resident Sub-Group Members were not adequately nourished or hydrated;

(viii) by reason of the matters set out in paragraph 49(d)(iii) above, Resident Sub-Group Members were not adequately or appropriately medicated;

(ix) by reason of the matters set out in paragraphs 49(d)(vi), 49(d)(vii) and 60 above, emergency assistance was not always available to Resident Sub-Group Members;

(x) the defendant did not notify the Aged Care Quality and Safety Commissioner of the Staff Cuts by 28 June 2020; and/or

(xi) by reason of the matters set out in paragraphs 48(f), the defendant did not respond to complaints in a timely manner;

(b) with respect to training (**Training Breaches**):

(i) as pleaded in paragraph 56 above, face-to-face training on the Infection Control Measures was not provided until 15 July 2020; and

(ii) the training provided on 15 July 2020 was deficient in that:

(1) it was provided too late;

(2) it was not provided to all staff members; and

(3) the content covered only wearing of masks and washing of hands and not any other Infection Control Measure;

(c) the defendant did not exercise reasonable care and skill in the provision of the Infection Control Measures during the COVID-19 Period or ensure that reasonable care and skill was taken, in that (**Infection Breaches**):

(i) by reason of the matters set out in paragraphs 48(a) and 52 above, visitors stayed at Epping Gardens for longer than two hours, contrary to the Victorian Directions;

(ii) by reason of the matters set out in paragraph 48(d) and 57 above, Social Distancing Measures were not implemented or enforced at Epping Gardens;

(iii) by reason of the matters set out in paragraphs 52 and 55 above, persons delivering food and coffee were permitted entry into Epping Gardens without wearing a mask;

(iv) by reason of the matters set out in paragraph 49(c) above, frequently touched surfaces in Residents' rooms were not cleaned with detergent solution at least daily;

(v) by reason of the matters set out in paragraphs 47 and 49(b) above, staff were not given access to sufficient masks or PPE;

(vi) by reason of the matters set out in paragraphs 47 and 55 above, staff were not encouraged to wear masks when in close contact with Residents;

(vii) by reason of the matters set out in paragraphs 48(e), 60 to 64 and 72(b) above, Residents and staff were not vigilantly monitored for Symptoms, and instead Residents with Symptoms:

(1) were left untreated;

(2) were not promptly tested for COVID-19; and

(3) were not isolated promptly or in some cases at all;

(viii) by reason of the matters set out in paragraph 48(b) above, Family and other visitors were not vigilantly monitored for Symptoms when entering Epping Gardens;

(ix) as pleaded in paragraph 64 above, staff members were not instructed to remain away from Epping Gardens while awaiting test results for COVID-19 but instead were asked to return to work;

(x) by reason of the matters set out in paragraphs 46 and 49(a) above, the defendant did not limit Staff Movement;

(xi) by reason of the matters set out in Section C.8 above, the defendant did not adequately plan for a COVID-19 outbreak; and

(xii) by reason of the matters set out in paragraph 72(b) above, cohorting of positive COVID-19 Residents was not implemented in a timely manner and only began 7 days after the first positive COVID-19 test was received on 20 July 2020,

(the Care Breaches, Training Breaches and Infection Breaches are hereafter defined as the **Breaches of Resident Duty**).

109 By reason of the Breaches of Resident Duty:

(a) COVID-19 was not promptly detected in Family and other visitors, Residents or staff at Epping Gardens;

(b) COVID-19 was able to spread quickly to all areas of the Epping Gardens facility; and

(c) Resident Sub-Group Members were neglected by the defendant's failure to provide the Residential Care Services with reasonable care or at all,

giving rise to the materialisation of the Care Risk of Harm and the Infection Risk of Harm.

110 But for the Breaches of Resident Duty:

(a) those Resident Sub-Group Members who died, would not have died in connection with neglect or COVID-19 during the COVID-19 Period;

(b) alternatively to (a), some of those Residents who died, would not have died in connection with neglect or COVID-19 during the COVID-19 Period;

(c) Resident Sub-Group Members would not have been infected with COVID-19 at Epping Gardens;

(d) alternatively to (c), the number of Resident Sub-Group Members infected with COVID-19 at Epping Gardens would have been limited and quickly contained;

(e) those Resident Sub-Group Members who suffered injury by reason of the Care Breaches, would not have suffered that injury;

(f) alternatively to (e), some of the Resident Sub-Group Members who suffered injury by reason of the Care Breaches, would not have suffered that injury.

F.4 Loss and damage

111 In the premises, the Breaches of Resident Duty, or one or more of them, caused loss or damage to Mrs Agnello and the other Resident Sub-Group Members.

Particulars

The plaintiff contends, in support of his personal claim as the legal personal representative of Mrs Agnello's estate, that Mrs Agnello suffered death as a result of the Breaches of Resident Duty, and that her estate incurred funeral expenses by way of consequence.

Other Resident Sub-Group Members suffered the following loss and damage as a result of the Breaches of Resident Duty:

(i) personal injury or death;

(ii) pain and suffering;

(iii) nervous shock; and/or

(iv) economic loss, including funeral expenses.

Particulars of the losses and damage suffered by individual Resident Sub-Group Members will be supplied after the determination of common issues in the plaintiff's case.

G NEGLIGENCE CLAIM – FAMILY

G.1 Foreseeability of risks of harm

112 At all material times, there was a risk that exposing Family to distressing circumstances arising from the death of or injury to their Residents at Epping Gardens by the defendant's conduct, would cause loss or damage to the Family of those Residents (**Family Risk of Harm**).

113 The Family Risk of Harm:

(a) was not remote or insignificant; and

(b) was reasonably foreseeable by the defendant.

Particulars

The plaintiff refers to and repeats the matters set out in Sections B to C above.

G.2 Salient features

114 By reason of the matters pleaded in Sections A to D above, at material times during the COVID-19 Period:

(a) the defendant exercised control over:

(i) the Residents, their safety and their care at Epping Gardens;

(ii) the decision of whether or not to implement Infection Control Measures at Epping Gardens;

(iii) the entry of non-Residents, including Family, onto the premises of Epping Gardens;

(iv) communications to Family about events taking place at Epping Gardens;

(v) the decision of whether or not to respond to complaints received from Family;

(b) the defendant knew or ought to have known that Family had deep emotional and interpersonal attachments to their Residents, by virtue of their close relationship with the Residents;

(c) in communicating the 17 April Representations and 23 April Representations to Family Sub-Group Members (as pleaded below), the defendant reassured Family Sub-Group Members as to the safety, health and well-being of the Residents and, in doing so, the defendant increased the Family Risk of Harm should the Residents become injured or die due to the defendant's Breaches of Resident Duty;

(d) once their Resident was admitted to the defendant's care:

(i) Family were vulnerable to the Family Risk of Harm, arising from any failure to provide the Residential Care Services with reasonable care and skill and/or to protect the relevant Resident from the Care Risk of Harm and the Infection Risk of Harm;

(ii) Family were further vulnerable to the Family Risk of Harm arising from the risk of their Resident becoming infected with COVID-19 at Epping Gardens;

(iii) Family were reliant on the defendant to provide care to their Resident and keep them safe;

(iv) Family were reliant on the defendant to communicate changes in their Resident's condition to them; and

(v) Family were reliant on the defendant to accurately and in a timely way inform them of the conditions at Epping Gardens;

(e) the defendant knew or ought to have known that if the Care Risk of Harm and/or Infection Risk of Harm eventuated in respect of a Resident, their Family would or would be likely to suffer associated harm;

(f) the liability alleged herein is determinate in that it is limited to liability for harm suffered by Family of persons who were Residents during the COVID-19 Period.

G.3 Family Duty of Care

115 In the premises, the defendant owed a duty to each of the Family Sub-Group Members to take reasonable care to avoid the materialisation of the Family Risk of Harm (**Family Duty of Care**).

116 Alternatively to paragraph 115, the Family Duty of Care was owed to those Family Sub-Group Members who were partners, siblings, children or grand-children of Resident Sub-Group Members.

117 The Family Duty of Care required the defendant to:

(a) take reasonable care to ensure that information provided to Family Sub-Group Members about the conditions in which the Residents were being accommodated and cared for, was accurate;

(b) promptly communicate changes in Residents' mental and/or physical condition to the relevant Family Sub-Group Members;

(c) respond to complaints received from Family Sub-Group Members in a timely manner;

(d) take reasonable care to ensure that its system of care at Epping Gardens did not cause or materially contribute to the death or injury of Residents; and

(e) otherwise take reasonable care to avoid exposing Family Sub-Group Members to circumstances that might result in them suffering psychiatric harm.

G.4 Breaches of Family Duty

118 By reason of the matters pleaded in Sections A.3, B and C, and in circumstances where:

(a) COVID-19 had been detected in Victoria from 25 January 2020;

(b) two prior COVID-19 outbreaks in aged care homes in Sydney had led to significant loss of life;

(c) Families had been assured that their Residents were safe at Epping Gardens on 17 April 2020 and on 23 April 2020;

(d) there were Pre-Existing Staff Shortages from approximately 1 June 2020;

(e) COVID-19 had been detected in the area local to Epping Gardens from 3 July 2020; and

a reasonably prudent approved aged care provider would have ensured that:

(i) information provided to Family about the conditions in which Residents were being accommodated and cared for, was accurate;

(ii) changes in Residents' mental and/or physical condition were promptly communicated to Family;

(iii) complaints by Family regarding infection control and the quality of care provided to Residents were responded to in a timely manner; and

(iv) its system of care did not cause or materially contribute to the death or injury of Residents.

119 In the circumstances of the matters pleaded in Section C above, in breach of the Family Duty of Care:

(a) the defendant failed to exercise reasonable care to ensure that the 17 April Representations and 23 April Representations to Family Sub-Group Members (which as pleaded below were inaccurate) were accurate;

(b) the defendant did not promptly notify Family Sub-Group Members of the deterioration of their Residents' mental or physical condition, and only notified them if their Resident had tested positive to COVID-19;

(c) the defendant routinely ignored complaints by Family Sub-Group Members regarding infection control and quality of care during the COVID-19 Period;

(d) the defendant's system of care caused and/or materially contributed to the death or injury of Residents, as pleaded in Sections D, E and F herein;

(e) further, Family Sub-Group Members were exposed to distressing circumstances likely to cause psychiatric harm in that:

(i) they were required to care for, clean and/or feed their Resident at Epping Gardens;

(ii) they saw the conditions of care and infection control at Epping Gardens prior to the COVID-19 Outbreak and complained to management, but did not observe improvements;

(iii) they observed their Residents suffering death or injury during the COVID-19 Period and suffered distress and psychiatric harm as a consequence;

(f) further, Family Sub-Group Members were exposed to a risk of psychiatric injury consequent upon:

(i) suffering distress and regret at deciding to keep their Resident in Epping Gardens during the COVID-19 Period, in reliance on the Handbook Representations (defined below); and

(ii) having been reassured by the 17 April Representations and 23 April Representations and discovering that the 17 April and 23 April Representations were inaccurate (as pleaded below),

(**Breaches of Family Duty**).

120 But for the Breaches of Family Duty:

(a) the defendant would have improved its quality of care and implementation of the Infection Control Measures by listening and responding to complaints by Family Sub-Group Members;

(b) Residents would have been properly cared for and protected from COVID-19 and neglect such that:

(i) those Resident Sub-Group Members who died, or some of them, would not have died in connection with COVID-19 or neglect during the COVID-19 Period;

(ii) Resident Sub-Group Members would not have been infected with COVID-19, or any infections would have been limited and quickly contained;

(iii) those Resident Sub-Group Members who suffered injury by reason of the Care Breaches, or some of them, would not have suffered that injury;

(c) Family Sub-Group Members would have been given accurate and timely information regarding their Residents' mental and physical condition, and regarding the conditions at Epping Gardens, and, as a result, would not have been shocked or surprised to learn that their Resident had died or suffered injury,

with the consequence that Family Sub-Group Members would not have been exposed to such distressing circumstances as to be likely to cause psychiatric harm.

G.5 Loss and damage

121 The Breaches of Family Duty, or one or more of them, caused loss or damage to Mr Agnello and other Family Sub-Group Members.

Particulars

The plaintiff contends, in support of his personal claim, that he suffered the following loss and damage as a result of the Breaches of Family Duty:

(i) psychological reaction marked by depression and anxiety;

(ii) mental or nervous shock; and

(iii) medical and like expenses, details of which will be provided prior to trial.

Other Family Sub-Group Members suffered the following loss and damage as a result of the Breaches of Family Duty:

(iv) personal injury;

(v) pain and suffering;

(vi) nervous shock; and/or

(vii) economic loss.

Particulars of the losses and damage suffered by individual Family Sub-Group Members will be supplied after the determination of common issues in the plaintiff's case.

H MISLEADING OR DECEPTIVE CONDUCT CLAIM

H.1 Handbook Representations

122 At material times before the COVID-19 Period, Mr Agnello and the other Representee Sub-Group Members were each given a tour of the Epping Gardens facility by representatives of the defendant (**Facility Tour**).

Particulars

By way of example, Mr Agnello attended the Facility Tour around late June or early July 2018.

123 The purpose of the Facility Tour was for the defendant to advertise Epping Gardens and its residential aged care services to prospective Residents and their Family.

Particulars

The purpose is to be inferred from the nature of the relationship between Mr Agnello and the other Representee Sub-Group Members and the defendant, being prospective customers of the defendant or their representatives.

124 During their respective Facility Tours, Mr Agnello and the other Representee Sub-Group Members were each given a copy of a document entitled "Heritage Care: Resident Handbook" dated May 2018 by a representative of the defendant (**Resident Handbook**).

Particulars

By way of example, Mr Agnello was given a copy of the Resident Handbook by Menza Katsis, Admissions and Marketing Manager of the defendant.

125 Prior to Mr Agnello and the other Representee Sub-Group Members deciding to admit their Residents into Epping Gardens the defendant represented and warranted to them that:

(a) Management and Staff would make every effort to care for residents, to respect their privacy and to meet their needs, for the duration of their residence at Epping Gardens;

Particulars

The representation was conveyed by page 7 of the Resident Handbook.

(b) Management at Epping Gardens would ensure that the best available care and service would be provided to residents, for the duration of their residence at Epping Gardens;

Particulars

The representation was conveyed by page 8 of the Resident Handbook.

(c) Residents' rooms would be cleaned regularly, with spot cleaning attended to promptly and whenever needed,

Particulars

The representation was conveyed by page 15 of the Residents Handbook.

(**Handbook Representations**).

126 The Handbook Representations were made in trade and commerce.

127 The Handbook Representations were never qualified nor withdrawn and were continuing representations.

128 By reason of the defendant failing to qualify, withdraw or correct the Handbook Representations prior to the COVID-19 Outbreak, the defendant engaged in misleading or deceptive conduct.

Particulars

The failure to correct or qualify the representation pleaded at paragraph 125(a) was misleading or deceptive as from 1 June 2020 following and as a consequence of the Staff Cuts.

The failure to correct or qualify the representation pleaded at paragraph 125(b) and the representation pleaded at 125(c) was misleading or deceptive

as from 22 March 2020 by reason of the matters set out in Section C.7, Section D.2 and Section F.3.

Further particulars may be provided following discovery.

129 In reliance on the Handbook Representations, Mr Agnello and the other Representee Sub-Group Members decided:

(a) to admit their Resident to Epping Gardens (in the case of Family) or agree to be admitted to Epping Gardens (in the case of Residents) instead of another aged care facility; and

(b) thereafter, not to withdraw the Resident from Epping Gardens.

H.2 17 April and 23 April Representations

130 On or about 17 April 2020, the defendant represented to Mr Agnello and the other Representee Sub-Group Members that:

(a) it had placed a 10-minute time limit on visits to Residents;

(b) Family or visitors assisting Residents to consume meals and drinks could not happen, as it breached the Social Distancing Measures of maintaining a 1.5m distance;

(c) the defendant had "zero tolerance" toward anyone who ignored those rules; and

(d) the defendant had acted against those who had breached social distancing rules and would continue to do so on a case-by-case basis,

(**17 April Representations**).

Particulars

The 17 April Representations were in writing and were contained in a Letter sent by email from Greg Reeve, Chief Executive Officer of the defendant, on 17 April 2020.

131 On or about 23 April 2020, by letter to Residents and Family the defendant notified Residents and Family that:

(a) "All actions we have and will continue to implement remain necessary to protect the lives and safety of our communities";

(b) it felt that it was "duty-bound to continue to act with extreme caution in relation to visitation access";

(c) the defendant believed the precautionary measures it had in place regarding COVID-19 were in the best interest of the health and safety of its residents and staff;

(d) the defendant "remained confident" that its strategies had served it well to date as all residents and staff remained safe and secure.

132 In making the statements pleaded in paragraph 131, the defendant represented to Mr Agnello and the other Representee Sub-Group Members that:

(a) it was and was continuing to adopt an extremely cautious approach to its management of infection control protocols and to its management of the risks posed by COVID-19 generally;

(b) it was taking and would continue to take such steps as were necessary to protect Residents from the risks posed by COVID-19;

(c) it had a reasonable basis for making the statements set out therein,

(23 April Representations).

Particulars

The 23 April Representations are to be implied from the fact that the statements alleged were made.

133 Each of the 17 April Representations and the 23 April Representations were:

(a) made in trade or commerce; and

(b) never qualified nor withdrawn and were continuing representations.

134 By reason of the defendant failing to qualify, withdraw or correct the 17 April Representations, the defendant engaged in misleading or deceptive conduct in circumstances where:

(a) the defendant was in fact permitting visitors to enter Epping Gardens for longer than 10 minutes, and to assist Residents to consume meals and drinks;

(b) the defendant had no practice of monitoring or reporting visitors who stayed at Epping Gardens for longer than the period prescribed by the Victorian Directions, as pleaded in paragraph 48(a)(iv) above.

135 By reason of the defendant failing to qualify, withdraw or correct the 23 April Representations, the defendant engaged in misleading or deceptive conduct, in that in the circumstances pleaded in Section C above:

(a) the precautionary measures the defendant had in place were not appropriate or sufficient to protect the health and safety of its Residents;

(b) the defendant had no reasonable basis for making the 23 April Representations.

136 In reliance on the 17 April Representations and/or the 23 April Representations, Mr Agnello and the other Representee Sub-Group Members decided not to withdraw their Residents from Epping Gardens prior to the COVID-19 Outbreak.

H.3 Contravention

137 By reason of the matters alleged in paragraphs 128, 134 and 135 above, the defendant engaged in conduct in trade or commerce which was misleading or deceptive in contravention of s 18 of the ACL (**s 18 Contraventions**).

H.4 Loss and damage

138 Because of the s 18 Contraventions, Mr Agnello and the other Representee Sub-Group Members suffered loss and damage.

Particulars

The plaintiff contends, in support of his personal claim, that he suffered the following loss and damage because of the s 18 Contraventions:

(i) psychological reaction marked by depression and anxiety;

(ii) mental or nervous shock;

(iii) medical and like expenses, details of which will be provided prior to trial;

(iv) disappointment and distress, not being personal injury within the meaning of s 4 of the *Competition and Consumer Act 2010* (Cth); and

(v) injured feelings, or disappointment, anger and mental stress, not being personal injury within the meaning of s 4 of the *Competition and Consumer Act 2010* (Cth).

Other Representee Sub-Group Members suffered the following loss and damage because of the s 18 Contraventions:

(vi) personal injury;

(vii) pain and suffering;

(viii) nervous shock;

(ix) economic loss;

(x) disappointment and distress, not being personal injury within the meaning of s 4 of the *Competition and Consumer Act 2010* (Cth); and

(xi) injured feelings, or disappointment, anger and mental stress, not being personal injury within the meaning of s 4 of the *Competition and Consumer Act 2010* (Cth).

Particulars of the losses and damage suffered by individual Representee Sub-Group Members will be supplied after the determination of common issues in the plaintiff's case.

I COMMON ISSUES OF FACT AND LAW

~~139 The questions of law or fact common to the claims of the Group Members are:~~

~~(a) whether the events surrounding the COVID-19 Outbreak pleaded in Sections A.3 and C took place;~~

~~(b) whether the defendant had the obligations, responsibilities and/or duties pleaded in Sections B and D.1;~~

~~(c) whether the defendant owed the Resident Duty of Care and/or the Family Duty of Care;~~

~~(d) whether the acts and omissions of the defendant in Sections A, C to H occurred and, if so, whether the defendant was:~~

~~(i) in breach of contract;~~

~~(ii) in contravention of s 60 and/or 61 of the ACL;~~

~~(iii) negligent or otherwise in breach of the Resident Duty of Care and/or the Family Duty of Care; and/or~~

~~(iv) in contravention of s 18 of the ACL;~~

~~(e) whether the plaintiff and the Group Members suffered loss by reason of the defendant's Breaches of Contract, Breaches of Consumer Guarantees, Breaches of Resident Duty, Breaches of Family Duty and/or s 18 Contraventions as alleged.~~

139 The questions of law or fact common to the claims of the Group Members are:

(a) in respect of common questions of fact:

(i) was the defendant an approved provider of aged care services within the meaning of the Aged Care Act and *Aged Care Quality and Safety Commission Act 2018* (Cth)?

(ii) did the defendant provide Residential Care Services to the Residents between 26 February 2020 and 9 September 2020?

(iii) if so, what Residential Care Services did the defendant provide?

(iv) in providing the Residential Care Services, was the defendant subject to the Aged Care Act, Quality of Care Principles (including the Aged Care Quality Standards) and the User Rights Principles (including the Charter) (together, the **Aged Care legislation**)?

(v) were the Residential Care Services provided under a written Resident Agreement?

(vi) what standard of Residential Care Services was the defendant required to provide?

(vii) how did the Aged Care legislation, as supplemented by the directions issued under s 200(1) of the *Public Health and Wellbeing Act 2008* (Vic), affect or inform the standard of aged care the defendant was required to provide?

(viii) did the standard of Residential Care Services the defendant was required to provide to avoid the Care Risk of Harm differ from the standard of Residential Care Services the defendant was required to provide to avoid the Infection Risk of Harm?

(b) in respect of the negligence claim regarding Residents:

(i) did the defendant owe to Resident Sub-Group Members the Resident Duty of Care in respect of the Care Risk of Harm – being a duty to take care in the provision of the Residential Care Services to avoid them, and each of them, suffering loss and damage through materialisation of the Care Risk of Harm?

(ii) did the defendant owe to Resident Sub-Group Members the Resident Duty of Care in respect of the Infection Risk of Harm – being a duty to take care in the provision of the Residential Care Services to avoid them, and each of them, suffering loss and damage through materialisation of the Infection Risk of Harm?

(iii) did the defendant provide the Residential Care Services with reasonable care between 26 February 2020 and 9 September 2020?

(iv) if the answer to (i) or (ii) is 'yes', was the Resident Duty of Care breached by any one or more of—

(1) the Care Breaches;

(2) the Training Breaches; or

(3) the Infection Breaches?

(v) did any failure by the defendant to provide the Residential Care Services with reasonable care cause the Resident Sub-Group Members loss and damage?

(c) in respect of the negligence claim regarding Family:

(i) did the defendant owe to Family Sub-Group Members the Family Duty of Care – being a duty to take care in the provision of the Residential Care Services to avoid them, and each of them, suffering loss and damage through materialisation of the Family Risk of Harm?

(ii) if the answer to (i) is 'yes', was the Family Duty of Care breached by any one or more of—

(1) the Care Breaches;

(2) the Training Breaches; or

(3) the Infection Breaches?

(iii) did any failure by the defendant to provide the Residential Care Services with reasonable care cause the Family Sub-Group Members loss and damage?

(d) in respect of the breach of contract claim:

(i) did the defendant breach any of the Resident Agreements, and if so, how?

(ii) did any breaches of contract by the defendant cause the Resident Sub-Group Members loss and damage?

(e) in respect of the consumer guarantee claims:

(i) was the provision of Residential Care Services by the defendant a supply in trade or commerce governed by the *Australian Consumer Law*?

(ii) did the defendant owe to the Resident Sub-Group Members any or all of the Care and Skill Guarantee, the Purpose Guarantee or the Result Guarantee (**the Consumer Guarantees**)?

(iii) did the defendant fail to comply with any of the Consumer Guarantees, and if so, how?

(iv) if the answer to (iii) is yes, could any such failures be remedied or were they a major failure within the meaning of ss 267(3) and 268 of the *Australian Consumer Law*?

(v) did the Resident Sub-Group members suffer loss or damage because of any failure of the defendant to comply with any of the Consumer Guarantees?

(f) in respect of the misleading or deceptive conduct claim:

(i) did the defendant make in trade or commerce any, and if so what, representations generally to prospective or existing Residents and/or Family relating to the Residential Care Services provided or to be provided at Epping Gardens?

(ii) in making, or in failing to qualify, withdraw or correct, any of the representations referred to at (i) above, did the defendant engage in

misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law*?

(iii) did the Representee Sub-Group members suffer loss and damage because of any contraventions of s 18 of the *Australian Consumer Law*?

J MATTERS RELATING TO EXEMPLARY DAMAGES

140 At all material times after the 26 February Notification, the defendant knew or ought to have known that it was obliged to plan for a COVID-19 outbreak in its aged care facilities, including by implementing Infection Control Measures at Epping Gardens and by having a staff contingency plan in case staff became unwell during a COVID-19 outbreak.

141 At all material times after the Dorothy Henderson Lodge Outbreak and the Newmarch House Outbreak, the defendant knew or ought to have known that if COVID-19 entered one of its aged care facilities and Infection Control Measures were not adequately implemented, it could lead to a significant loss of life.

142 At all material times, the defendant knew or ought to have known that:

(a) if it did not promptly, regularly and accurately communicate information regarding Residents' health and safety to their Family during the COVID-19 Outbreak, Family would suffer distress and would be at risk of psychiatric harm; and

(b) if it did not provide the requisite level of care and infection control pleaded herein, vulnerable people under its care would die.

143 Despite the knowledge pleaded in paragraphs 140 to 142 above:

(a) the defendant did not implement any or any adequate Infection Control Measures at Epping Gardens;

(b) the defendant told Residents' Families on 17 April 2020 and 23 April 2020 words to the effect that their loved ones at Epping Gardens were safe when that was not true;

(c) the defendant implemented the Staff Cuts on 1 June 2020 due to low profits; and

(d) the defendant did not notify Residents' Families or the Commissioner of the Staff Cuts.

144 In the premises, the defendant chose to cut costs and maintain profits during the COVID-19 Period in contumelious disregard of:

(a) the Resident Sub-Group Members' rights under the Charter; and

(b) the Family Sub-Group Members' interest in seeing the Residents' rights under the Charter upheld.

AND THE PLAINTIFF CLAIMS ON HIS OWN BEHALF AND ON BEHALF OF GROUP MEMBERS:

A. Damages.

B. Damages pursuant to s 236 of the ACL.

C. Compensation pursuant to s 267(3) of the ACL.

D. Damages pursuant to s 267(4) of the ACL.

E. Personal injury damages pursuant to Part VIB of the ACL.

F. A declaration that the defendant has engaged in misleading or deceptive conduct.

G. Exemplary damages.

H. Interest.

I. Costs.

~~J. B. RICHARDS~~
A. T. BROADFOOT
D. C. DEALEHR
S. C. B. BRENKER

Carbone Lawyers

CARBONE LAWYERS
Solicitors for the plaintiff

ANNEXURE A

Victorian Directions relating to visits

No	Description	In force
1.	*Aged Care Facilities Directions*, Special Gazette No. S 142, 22 March 2020	21 March 2020 to 7 April 2020
2.	*Care Facilities Directions*, Special Gazette No. S 191, 8 April 2020	8 April 2020 to 13 April 2020
3.	*Care Facilities Directions (No 2)*, Special Gazette No. S 194, 14 April 2020	14 April 2020 to 11 May 2020
4.	*Care Facilities Directions (No 3)*, Special Gazette No. S 231, 12 May 2020	11 May 2020 to 31 May 2020
5.	*Care Facilities Directions (No 4)*, Special Gazette No. S 267, 1 June 2020	31 May 2020 to 21 June 2020
6.	*Care Facilities Directions (No 5),* Special Gazette No. S 297, 22 June 2020	21 June 2020 to 1 July 2020
7.	*Care Facilities Directions (No 6),* Special Gazette No. S 339, 2 July 2020	1 July 2020 to 19 July 2020
8.	*Care Facilities Directions (No 7),* Special Gazette No. S 361, 20 July 2020	19 July 2020 to 22 August 2020
9.	*Care Facilities Directions (No 8),* Special Gazette No. S 367, 23 July 2020	22 July 2020 to 3 August 2020
10.	Care Facilities *Directions (No 9),* Special Gazette No. S 387, 4 August 2020	3 August 2020 to 16 August 2020
11.	*Care Facilities Directions (No 10)*, Special Gazette No. S 417, 17 August 2020	16 August 2020 to 13 September 2020

1. Place of trial – Melbourne.

2. Mode of trial – Judge alone.

3. This writ was filed for the plaintiff by Carbone Lawyers of 302 King Street, Melbourne VIC 3000.

4. The address of the plaintiff is 43 The Avenue, Sunbury, VIC 3429.

5. The address for service of the plaintiff is care of Carbone Lawyers, 302 King Street, Melbourne VIC 3000.

6. The email address for service of the plaintiff is tony.carbone@carbonelawyers.com.au

7. The address of the defendant is 1118-1120 High Street, Armadale VIC 3143.