



Rule 14.04

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDING LIST**

Case: S ECI 2021 04738

Filed on: 23/05/2022 05:57 PM

No. S ECI 2021 04738

BETWEEN

PAUL LEIGHTON MUMFORD

First Plaintiff

-and-

GAYLE MUMFORD

Second Plaintiff

-and-

EML PAYMENTS LTD

Defendant

DEFENCE

Date of Document:	23 May 2022	Solicitor's Code:	420
Filed on behalf of:	the Defendant	Telephone:	(03) 9288 1234
Prepared by:	Herbert Smith Freehills	Ref:	82732284
	Level 22	Email:	harry.edwards@hsf.com
	80 Collins Street		
	MELBOURNE VIC 3000		

Preliminary

- A In this Defence, a reference to the "**PFS Business**" means the business conducted by Prepaid Financial Services (Ireland) Limited (**PFSIL**) and its subsidiaries, including PFS Card Services (Ireland) Limited (**PCSIL**) and Prepaid Financial Services Limited (**PFS UK**).
- B For the purposes of this Defence, terms defined in the Statement of Claim dated 16 December 2021 are adopted unless the context indicates otherwise.
- C For ease of reference, the defendant adopts the headings used in the Statement of Claim but makes no admission thereby, and does not plead to those headings.

- D In accordance with general principles and usual practice, the defendant has not pleaded to the particulars in the Statement of Claim, and nothing in this defence should be taken to be an admission of any fact alleged in the particulars to the Statement of Claim.

In answer to the allegations in the Statement of Claim, the defendant says as follows.

A.1 The Plaintiffs and Group Members

1. It does not plead to paragraph 1 as it contains no allegation against it.
2. As to paragraph 2, it:
 - (a) admits that the plaintiffs were recorded on the EML share register as holders of 10,150 ordinary fully paid shares on 12 May 2021;
 - (b) says further that the plaintiffs sold their shares on 21 May 2021;
 - (c) otherwise does not know and cannot admit the allegations.
3. As to paragraph 3, it:
 - (a) admits that there were more than seven persons who met the conditions referred to in paragraphs 1(a) and 1(c) of the Statement of Claim;
 - (b) otherwise denies the allegations.

A.2 The Defendant

4. It admits paragraph 4.
5. As to paragraph 5:
 - (a) it admits subparagraph (a);
 - (b) it admits subparagraph (b);
 - (c) it admits subparagraph (c);
 - (d) it admits subparagraph (d);
 - (e) as to subparagraph (e), it:
 - i. says that:
 - (A) pursuant to s 1362A of the Corporations Act, the operation of s 674(2) of the Corporations Act in its application to the defendant was modified by the Corporations (Coronavirus Economic Response) Determination (No 2) and (No 4);

- (B) by reason of the modifications to s 674(2) of the Corporations Act effected by those legislative instruments, at all material times between 26 May 2020 and 22 March 2021, EML was not obliged under s 674(2) of the Corporations Act to notify the ASX of information unless, inter alia, it knew or was reckless or negligent with respect to whether the information would, if it were generally available, have a material effect on the price or value of ED securities of the defendant;
- ii. admits that during the Relevant Period, the Continuous Disclosure Obligations applied to it on and from 23 March 2021.
6. It admits paragraph 6.

B EML's Business

B.1 Relevant EML committees and personnel

Audit and Risk Committee

7. It admits paragraph 7.

Directors and officers of EML

8. It admits paragraph 8.
9. It admits paragraph 9.
10. It admits paragraph 10.
11. It admits paragraph 11.
12. It admits paragraph 12.
13. It admits paragraph 13 and says further that Mr Wenk was at all material times from 26 November 2019 to June 2021:
- (a) a joint Company Secretary of EML along with Ms Tissera-Isaacs;
 - (b) in the premises, an officer of EML within the meaning of s 9 of the Corporations Act and 19.12 of the ASX Listing Rules.
14. It admits paragraph 14 and says further that, between 26 November 2019 and June 2021, Ms Tissera-Isaacs was a joint Company Secretary along with Mr Wenk.
15. It admits paragraph 15.
16. As to paragraph 16, it:

- (a) admits that, during the Relevant Period, Mr Betts was EML's Chief Risk and Compliance Officer;
- (b) says that from about February 2021 to the end of the Relevant Period, Mr Betts was a director of PCSIL;
- (c) admits that during the period that he was a director of PCSIL, Mr Betts was an officer of EML within the meaning of s 9 of the Corporations Act and r 19.12 of the ASX Listing Rules;
- (d) says further that Mr Betts did not have the authority or responsibility for planning, directing and controlling the activities of EML, either directly or indirectly;

Particulars

EML determined in 2018 and in 2020 that Mr Betts was not a Key Management Personnel for the purpose of the applicable accounting standards (AASB124).

EML's Delegations of Authority Policy dated 5 June 2020.

- (e) otherwise denies the allegations.
17. As to paragraph 17, it:
- (a) admits that, at all material times from March 2009 until 31 March 2021, Mr Moran's title was the Chief Executive Officer of PFSIL;
 - (b) says that Mr Moran ceased to have any substantive role in the EML business or the PFS Business from 28 February 2021, and his employment ceased on 31 March 2021;
 - (c) says that, from on or about 31 March 2020:
 - i. PFSIL has been a wholly owned subsidiary of EML Payments European Holdings Limited, which entity has in turn been a wholly owned subsidiary of EML;
 - ii. notwithstanding his title as CEO and the terms of the delegations of authority policy referred to in the particulars to paragraph 16(d) above, in practice, while Mr Moran remained in his role, all material strategic decisions in respect of the PFS Business were made by Mr Cregan and Mr Shore without the participation of Mr Moran;

- (d) says further that Mr Moran has never had the authority or responsibility for planning, directing and controlling the activities of EML, either directly or indirectly;

Particulars

EML determined in 2020 that Mr Moran was not a Key Management Personnel for the purpose of the applicable accounting standards (AASB124).

- (e) otherwise denies the allegations.

18. As to paragraph 18, it:

- (a) says that from about June 2011 to March 2021, Mr Britton was the Commercial Director of PFS UK, which was a wholly owned subsidiary of PFSIL;
- (b) says that from about March 2021 to the end of the Relevant Period, Mr Britton was CEO Europe;
- (c) admits that during the period that he was CEO Europe, Mr Britton was an officer of EML within the meaning of s 9 of the Corporations Act and r 19.12 of the ASX Listing Rules;
- (d) says further that, save for the period during which he was CEO Europe, all material strategic decisions in respect of the PFS Business were made by Mr Cregan and Mr Shore without the participation of Mr Britton;
- (e) it otherwise denies the allegations.

19. As to paragraph 19:

- (a) it admits that, at all material times from 31 March 2020, Ms Evans was the regional CEO for EML's business in Europe, Middle East and Africa (**EMEA**);
- (b) says that, during the Relevant Period, Ms Evans' role did not include responsibility for the PFS Business, whether in EMEA or otherwise;
- (c) says further that Ms Evans has never had the authority or responsibility for planning, directing and controlling the activities of EML, either directly or indirectly;

Particulars

EML determined in 2020 that Ms Evans was not a Key Management Personnel for the purpose of the applicable accounting standards (AASB124).

- (d) it otherwise denies the allegations.
20. As to paragraph 20, it:
- (a) refers to and repeats paragraphs 8 to 19 above;
 - (b) admits that, for the purposes of r 3.1 of the ASX Listing Rules, EML is or became aware of information if, and as soon as, Mr Cregan, Mr Liddy, Ms Wilson, Mr Adcock, Mr Gresham, Mr Wenk, Ms Tissera-Isaacs, Mr Shore, Mr Betts or Mr Britton had, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of EML;
 - (c) says further that the effect of rr 3.1 and 19.12 of the ASX Listing Rules was not to deem EML to have been or become aware of information which Mr Betts or Mr Britton had, or ought reasonably to have, come into possession of prior to them becoming an officer of EML;
 - (d) says further that it will rely at trial upon the full terms and effect of rr 3.1 and 19.12 of the ASX Listing Rules;
 - (e) otherwise denies the allegations.
- B.2 EML and its acquisition of PFS**
21. It admits paragraph 21.
22. It admits paragraph 22 and says further that:
- (a) PFSIL was founded in 2008 primarily as a reseller of pre-paid cards;
 - (b) by the time EML agreed to acquire PFSIL, and at all material times thereafter, the PFS Business had evolved to include provision of white-label payments and banking-as-a-service technology.
23. It admits paragraph 23.
24. It admits paragraph 24.
25. It admits paragraph 25.
26. It admits paragraph 26.

B.3 Regulation of PFS

27. As to paragraph 27, it:

- (a) admits that at all material times prior to 19 December 2020:
 - i. the PFS Business in the European Economic Area (**PFS EU Business**) and the PFS Business in the UK primarily operated through PFS UK;
 - ii. PFS UK was authorised to operate as an electronic money institution under the *Electronic Money Regulations 2011 (UK Authorisation)*;
 - iii. up until around April 2013, PFS UK was regulated by the Financial Services Authority (**FSA**), being the UK's competent authority for the regulation of electronic money institutions;
 - iv. since around April 2013, PFS UK has been regulated by the Financial Conduct Authority (**FCA**), being the entity which replaced the FSA as the UK's competent authority for regulation of electronic institutions from April 2013;
 - v. the UK Authorisation permitted PFS UK to operate lawfully as an electronic money institution throughout the European Economic Area under passporting arrangements;
- (b) refers to and repeats paragraph 27A below;
- (c) otherwise denies the allegations.

27A. Further to paragraph 27, it says:

- (a) at all material times prior to 19 December 2020, PFS UK operated a branch in Ireland and the PFS EU Business included the provision of e-money and payment services in Ireland;
- (b) at all material times prior to 19 December 2020, PFS UK was subject to regulation by the CBI in relation to the operation of its Irish branch including, inter alia, compliance with AML/CTF obligations under the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (Ireland) (CJ Act)*;
- (c) from around 4 April 2019, PCSIL has been authorised to operate as an electronic money institution under the *European Communities (Electronic Money) Regulations 2011 (Irish Authorisation)*;

- (d) the Irish Authorisation permits PCSIL lawfully to operate as an electronic money institution in the European Economic Area under passporting arrangements;
 - (e) the Irish Authorisation was granted to PCSIL on the basis that PCSIL had robust governance arrangements including:
 - i. a clear organisational structure with well-defined, transparent and consistent lines of responsibility;
 - ii. effective procedures to identify, manage, monitor and report the risks to which it is, or might be, exposed;
 - iii. adequate internal control mechanisms, including sound administrative and accounting procedures;
 - (f) prior to 19 December 2020, the PFS EU Business was operated primarily through PFS UK under its UK Authorisation and not through PCSIL under its Irish Authorisation;
 - (g) from 19 December 2020, the PFS EU Business has been operated primarily through PCSIL under its Irish Authorisation;
 - (h) at all material times, PFS UK and PCSIL were, in practice, managed as one business, operated in the same manner by the same personnel, and had the same AML/CTF risk and control frameworks.
28. As to paragraph 28, it:
- (a) admits that from 19 December 2020, the PFS EU Business operated through PCSIL, which was regulated in Ireland by the CBI;
 - (b) otherwise denies the allegations.
29. It admits that CBI had power to issue directions of the kind referred to in paragraph 29 of the Statement of Claim and says further that:
- (a) the CBI's power to give a CBI Written Direction was subject to the conditions set out in s 45(1) of the Central Bank Act;
 - (b) it will rely at trial upon the full terms and effect of that Act.
30. Save to say that any decision by the CBI to issue a CBI Written Direction was required to be made lawfully, it admits paragraph 30 and says further that the CBI could not make and issue a CBI Written Direction to PCSIL unless the conditions for a CBI Written Direction were satisfied.

B.4 Investigations and enforcement action by banking regulators

31. As to paragraph 31:

- (a) it says that the paragraph is vexatious for the want of proper particulars and liable to be struck out;
- (b) under cover of that objection, it:
 - i. admits that the PFS Business included issuing a range of prepaid card programs;
 - ii. says that the nature and extent of any AML/CTF risk varied based on the nature of the particular prepaid card program and the customer;
 - iii. otherwise denies the allegations.

32. Save to say that a fine and sanctions were imposed upon PFS UK not PFSIL, it admits paragraph 32 and says further that:

- (a) the conduct the subject of the French Prudential Supervision and Resolution Authority (**ACPR**) fine related to PFS UK's operations in France between January and November 2017;
- (b) at all material times, the matters referred to in paragraph 32 of the Statement of Claim were public and generally available information;
- (c) improvements to the AML/CTF risk and control frameworks were implemented in the PFS Business after November 2017;

Particulars

- i. PCSIL improved its AML/CTF risk and control frameworks by hiring additional compliance personnel; increasing the headcount of compliance personnel from around 22 to 40 personnel following EML's acquisition.
- ii. In around October 2020, PCSIL established a Business Risk & Compliance Committee and implemented an Operational Risk Management Policy.
- iii. In around October 2020, PCSIL enhanced its Know Your Business (**KYB**) processes with the purchase of the Bureau Van Dijk global KYB AML solutions Orbis and Compliance Catalyst.

- iv. In around October 2020, PCSIL enhanced its Know Your Customer (**KYC**) software with the purchase of eKYC, Adriad Next, a document verification and scanning service.
 - v. In around November 2020, PCSIL enhanced its KYC compliance software with the purchase of eKYC, Jumio, an end-to-end identity verification and authentication solution to enhance automated KYC processes.
 - vi. Following EML's acquisition of PCSIL, PCSIL sought the CBI's approval to add additional Directors, including an independent non-Executive Chairman, to the PCSIL Board.
- (d) in the premises, the AML/CTF risk and control frameworks applicable to the PFS Business during the Relevant Period were materially different to the risk and control frameworks that existed between January and November 2017 in respect of PFS UK's operations in France.
33. As to paragraph 33, it:
- (a) admits that, on or about 16 December 2020, CBI published on its website the 19 December 2020 CBI Letter;
 - (b) refers to and repeats paragraph 34 below;
 - (c) otherwise denies the allegations.
34. It admits paragraph 34 and:
- (a) says that:
 - i. the letter was not specific to PCSIL, but was addressed to CEOs of financial institutions required to be registered under s 108A of the CJ Act and thus subject to regulatory oversight by the CBI (**Schedule 2 Firms**);
 - ii. the stated purposes of the letter were:
 - (A) to provide an overview of findings identified by the CBI in the course of supervisory engagements with registered Schedule 2 Firms undertaken by CBI since January 2020;
 - (B) to set out the CBI's expectations in relation to all Schedule 2 Firms;

- iii. Appendix A to the letter purported to outline the key findings identified by the CBI in the course of its supervisory engagement with certain Schedule 2 Firms in 2020 and to outline the CBI's expectations in relation to those findings for all Schedule 2 Firms;
 - iv. the letter indicated that the CBI expected recipients of the letter (including PCSIL) to carefully consider its contents, bring it to the attention of the firm's Board and relevant committees, assess the firm against the areas outlined in Appendix A and address any issues relevant to the firm;
 - v. the letter did not:
 - (A) make any adverse findings by the CBI of the kind referred to in paragraph 50(a) of the Statement of Claim (being adverse findings in respect of PCSIL's compliance with AML/CTF regulations);
 - (B) otherwise contain any findings by the CBI regarding the AML/CTF risk control frameworks and governance applicable to the PFS Business;
 - (b) it says further that the letter did not cause EML or any of the persons identified in paragraph 20 of the Statement of Claim, to become aware of, and it is not the case that the letter ought reasonably to have caused those persons to become aware of, the "CBI Response Information" alleged in paragraph 50 of the Statement of Claim.
35. As to paragraph 35:
- (a) it says the paragraph is embarrassing and liable to be struck out;
 - (b) under cover of that objection, it:
 - i. says PCSIL is a regulated business which regularly interacts with the CBI in the ordinary course of its business;
- Particulars**
- The CBI has broad statutory powers to regulate e-money institutions, which included ongoing reporting and approval requirements under:
- (A) Chapter 8 of the CJ Act;

- (B) Part 2 and 4 of the *European Communities (Electronic Money) Regulations 2011* (Ireland);
- (C) Part 3 of the *Central Bank Reform Act 2010* (Ireland).

Further particulars may be provided prior to trial.

- ii. admits that, in the context of transitioning the PFS EU Business from the United Kingdom to Ireland as a consequence of Brexit, during the Relevant Period, it was usual for PCSIL to have interactions with the CBI in relation to regulatory, compliance, governance and internal control matters;
- iii. otherwise denies the allegations.

36. As to paragraph 36 it:

- (a) admits that the 13 May 2021 Teleconference was attended by representatives of CBI, PCSIL and EML;
- (b) says that the PCSIL and EML representatives were Andrew Betts, Lee Britton, Michelle Bennett, Stefan Gadiot, Brendan O'Kelly and Cathal Smyth;
- (c) denies that Mr Shore attended the teleconference.

37. As to paragraph 37:

- (a) as to subparagraph (a), it admits that, during the 13 May 2021 Teleconference, CBI made statements to the effect that it had significant concerns regarding PCSIL's AML/CTF control frameworks and governance;
- (b) as to subparagraph (b), it admits that during the 13 May 2021 Teleconference CBI made statements to the effect that it was minded to issue PCSIL with a CBI Written Direction;
- (c) it says further that the CBI had not, at any time prior to 13 May 2021, stated or indicated that it was minded to issue PCSIL with a CBI Written Direction;
- (d) it refers to and repeats paragraphs 39(b) to 39(g) below;
- (e) it otherwise denies the allegations.

38. Save to say that Mr Shore did not receive the 13 May 2021 CBI Letter from CBI, it admits paragraph 38.

39. As to paragraph 39:

- (a) it admits that the 13 May 2021 CBI Letter contained statements to the effect that:
 - i. the CBI held significant concerns regarding PCSIL's AML/CTF risk and control frameworks and governance;
 - ii. the CBI was minded to issue PCSIL with certain CBI Written Directions as specified in the letter (**Proposed CBI Written Directions**);
- (b) it says that the 13 May 2021 CBI Letter only concerned PCSIL's AML/CTF risk and control frameworks and governance and not that of the broader EML business;
- (c) it says that, at all material times, no evidence was provided to PCSIL of:
 - i. PCSIL's products in fact being used to conduct money laundering or counterterrorism financing activities;
 - ii. failings with respect to EML or PCSIL's capital adequacy, solvency or safeguarding of consumer funds;
- (d) it says that the 13 May 2021 CBI Letter:
 - i. contained draft proposed findings only;
 - ii. did not contain any final findings;
 - iii. invited PCSIL to make submissions as to why the Proposed CBI Written Directions should not be made;
- (e) it says that, following the receipt of the 13 May 2021 CBI Letter:
 - i. PCSIL provided written submissions to the CBI as to why the Proposed CBI Written Directions should not be made;
 - ii. PCSIL informed the CBI, as was in fact the case, that:
 - (A) it disagreed with observations made by the CBI in the 13 May 2021 CBI Letter, including the Preliminary Observations Report annexed to that letter;
 - (B) some or all of the issues identified in the 13 May 2021 CBI Letter could be explained and clarified and tempered when considered in the context of PCSIL's business;

Particulars

PCSL informed the CBI of these matters in letters from PCSIL to the CBI dated 27 May 2021. Further particulars may be provided prior to trial.

- iii. PCSIL actively engaged with the CBI on a remediation program which PCSIL thereafter designed and implemented;
 - iv. the CBI never made the Proposed CBI Written Directions;
- (f) it says that the statements in the 13 May 2021 CBI Letter were made in circumstances where the PFS Business's AML/CTF risk control frameworks and governance had been the subject of previous regulatory inspections, in 2019 and 2020, which did not result in any finding to the effect that the standard of AML/CTF risk control frameworks and governance was such as to justify the regulatory action suggested in the Proposed CBI Written Direction, nor did those inspections result in any such action;

Particulars

The regulatory inspections between around 2018 and 2020 included:

- i. An inspection by the CBI of PFS UK which commenced prior to October 2019 and which the CBI advised PFS UK had been closed on or about 8 January 2021, being the same day that CBI's inspection of PCSIL commenced.
- ii. An inspection by the FCA of PFS UK's AML/CTF risk and control frameworks which occurred between 15 January 2019 and 26 February 2019 and closed on or about 16 January 2021.

Further particulars may be provided prior to trial.

- (g) at all material times, EML considered, as was in fact the case, that:
- i. the standard of PCSIL's AML/CTF risk control frameworks and governance were not such as to justify the Proposed CBI Written Directions;
 - ii. the Proposed CBI Written Directions were not justified by reason of the matters referred to in the 13 May 2021 CBI Letter.

40. It admits paragraph 40.
41. It admits paragraph 41.

C The 19 May 2021 Disclosure and its Impact**C.1 19 May 2021**

42. It admits paragraph 42.
43. It admits paragraph 43.
44. It admits paragraph 44.

C.2 Price effect of the 19 May 2021 Announcement

45. As to paragraph 45, it:

- (a) admits that the closing price of EML's shares was \$5.15 on Friday 14 May 2021 and dropped to a closing price of \$2.80 on Wednesday 19 May 2021;
- (b) refers to and repeats paragraph 43 above;
- (c) refers to and repeats paragraphs 74, 74A and 75 below;
- (d) otherwise denies the allegations.

D The True Position**D.1 Standard of PFS's AML/CTF Risk Control Frameworks**

46. As to paragraph 46, it:

- (a) admits that, at the time EML agreed to buy PFSIL, the PFS Business's AML/CTF risk control frameworks and governance were not of as high a standard as the AML/CTF risk control frameworks and governance that EML had developed and implemented in other parts of its business;
- (b) otherwise denies the allegations.

47. As to paragraph 47, it:

- (a) admits that, after it completed the acquisition of PFSIL, EML implemented improvements to the PFS Business's risk control frameworks and governance, including in relation to AML/CTF risks;
- (b) otherwise denies the allegations.

48. As to paragraph 48, it:

- (a) says that it continued to implement improvements to the PFS Business's risk control frameworks and governance, including in relation to AML/CTF risks after the end of the Relevant Period;

- (b) otherwise denies the allegations.
49. As to paragraph 49, it:
- (a) admits that, during the Relevant Period, the PFS Business's AML/CTF risk control frameworks and governance were not of as high a standard as the AML/CTF risk control frameworks and governance that EML had developed and implemented in other parts of its business (**PFS Information**);
 - (b) says that the AML/CTF risk control frameworks and governance that EML had developed and implemented in other parts of its business were of a high standard which exceeded the minimum standard required to meet its regulatory obligations;
 - (c) says further that EML was not aware that, and it was not in fact the case that, the standard of the PFS Business's AML/CTF risk control frameworks and governance during the Relevant Period was such as to:
 - i. justify the Proposed CBI Written Directions or make it likely that, or give rise to a material risk that, CBI would make such directions;
 - ii. otherwise justify the making of a CBI Written Direction of a kind that would have a material impact on EML's earnings or make it likely that, or give rise to a material risk that, CBI would make such a direction;
 - iii. otherwise be likely to have a materially adverse effect on EML's earnings or the price or value of its securities.
 - (d) otherwise denies the allegations.

D.2 CBI Response

50. As to paragraph 50:
- (a) it denies subparagraph (a) and refers to and repeats paragraph 34 and 39 above regarding the content and effect of the 19 December 2020 CBI Letter and the 13 May 2021 CBI Letter;
 - (b) it denies subparagraph (b);
 - (c) it denies subparagraph (c) and says further that:
 - i. on or about 15 April 2021, CBI informed PCSIL that PCSIL would be issued with a preliminary findings report prior to the issuance of

a final findings report and that CBI would schedule a close out meeting with PCSIL prior to issuing a preliminary findings report;

Particulars

Email from the CBI to PCSIL on 15 April 2021.

- ii. CBI did not issue PCSIL with a preliminary findings report or schedule a close out meeting with PCSIL at any time prior to 13 May 2021; and
- iii. if at any time from 19 December 2020 it was likely, or there was a material risk, that the CBI would make a CBI Written Direction in respect of PCSIL which would result in material impacts to EML's earnings (which is denied), then such likelihood or risk did not arise before 10pm (AEST) on 13 May 2021.

E EML's Statements Prior to 21 May 2021

51. It admits paragraph 51.

E.1 Corporate Governance Statement

52. It admits paragraph 52 and says further that:

- (a) the Corporate Governance Statement was issued in accordance with EML's obligations under the ASX Listing Rules, including rr 4.7.1 and 4.7.4;
- (b) those rules require a Corporate Governance Statement to be given to the ASX annually, either incorporated in or provided at the same time as, the company's annual report;
- (c) ASX Listing Rule 4.10.3 requires such a statement to specify the date at which it is current, which must be the entity's balance date or a later date specified by the entity;
- (d) in accordance with r 4.10.3, the Corporate Governance Statement stated that it was accurate and up to date as at 19 August 2020;
- (e) the Corporate Governance Statement did not give rise to any representation by EML that, and was not likely to lead a reader of the statement to form the impression that, the matters set out in the Corporate Governance Statement:
 - i. were accurate and up to date on or after 20 August 2020; or

- ii. reflected or took into account events or circumstances occurring on or after 20 August 2020.
53. It admits the Corporate Governance Statement included statements to the effect set out in paragraph 53 and says further that it will rely at trial upon the full terms and effect of the Corporate Governance Statement.
- F Misleading or Deceptive Conduct**
- F.1 Compliance Representations**
54. As to paragraph 54:
- (a) it denies subparagraph (a);
 - (b) it denies subparagraph (b);
 - (c) it admits subparagraph (c);
 - (d) it says further that if, on 19 August 2020, EML represented the matters alleged in subparagraphs 54(a) to 54(c) of the Statement of Claim (which is denied in respect of subparagraphs (a) and (b)), EML only represented that those matters existed or were true as at 19 August 2020.
55. It denies the allegations in paragraph 55 and says alternatively that if, on 19 August 2020, EML made the alleged Compliance Basis Representation (which is denied), such representations were statements of opinion, for which EML had a reasonable basis as at 19 August 2020.
- Particulars**
- EML refers to and repeats paragraph 58 below.
56. It denies the allegations in paragraph 56 and refers to and repeats paragraph 52 above.
- F.2 Misleading or deceptive conduct**
57. As to paragraph 57, it:
- (a) admits that, if EML made each of the Compliance Representations and/or the Compliance Basis Representation as alleged (which is denied), the making of those representations would constitute conduct in trade or commerce;
 - (b) otherwise denies the allegations.
58. It denies paragraph 58 and says further that:

- (a) in relation to the plaintiffs' reliance on paragraphs 46 to 49 of the Statement of Claim, it refers to and repeats paragraphs 46 to 49 above;
 - (b) even if the Compliance Representations and Compliance Basis Representation were made:
 - i. the representations related to EML's business as a whole and were not confined or specific to the PFS Business;
 - ii. the representations were true and accurate having regard to the governance practices and framework of EML as a whole;
 - (c) in the premises, even if the Compliance Representations and Compliance Basis Representation were made, the making of those representations was not conduct which was misleading or deceptive or liable to mislead or deceive.
59. It denies paragraph 59 and, in relation to the plaintiffs' reliance on paragraphs 46 to 50 of the Statement of Claim, refers to and repeats paragraphs 46 to 50 above.
60. It denies paragraph 60 and, in relation to the plaintiffs' reliance on paragraphs 54 to 59 of the Statement of Claim, refers to and repeats paragraph 54 to 59 above.

G Continuous Disclosure Contraventions

G.1 PFS Control Standard Information

61. As to paragraph 61:
- (a) as to subparagraph (a), it:
 - i. admits that during the Relevant Period it was aware of the PFS Information;
 - ii. otherwise denies the allegations;
 - (b) it denies subparagraph (b) and refers to and repeats paragraph 49(c) above;
 - (c) as to subparagraph (c):
 - i. it says that the subparagraph is embarrassing and liable to be struck out;
 - ii. under cover of that objection, it denies the subparagraph and refers to and repeats paragraphs 27A(h), 39(d), 39(g), 39(h), 49 and 50 above, and 62 below.

62. It denies paragraph 62 and says further that, the PFS Information and, if and to the extent it existed (which is denied), the PFS Control Standard Information:

- (a) was information which had been made known in a manner that would be likely to bring it to the attention of persons who commonly invest in EML Shares;

Particulars

EML relies upon:

- i. the information disclosed by EML at its Annual General Meeting held on 19 November 2019, the video of which is and at all material times since 19 November 2019 has been publicly available on EML Payments YouTube channel, including the following statements made by EML's Chair:

"But there's always a chance that something comes out of the blue and sets you back a bit, but we've also got a lot of work out skills in the business so in the case of this new acquisition just a couple of things I think we should say is, we will be putting in our own compliance people and lifting, if you like, the industrial quality of compliance because private companies aren't – they don't run themselves quite like listed public companies and also the finance function. They're the two areas where Tom and the guys will be putting in resources in the first instance because we've got get the – that side of their business up to industrial strength. I mean its running fine but it's not where we would want it as a global business so I think you'll see in a year or so those businesses really kick on for us."

- ii. the information disclosed in an investor presentation entitled "Acquisition of Prepaid Financial Services and Equity Raising" dated 11 November 2019, a copy of which formed part of EML's ASX Market Announcement on 11 November 2019, including the statement that:

"Following completion of the Acquisition, EML will be responsible for any outstanding liabilities that PFS has incurred prior to the Acquisition... and which may result in EML being liable for fines and penalties or subject to other sanctions. Such liabilities could include liabilities relating to... failure by PFS to hold required regulatory approvals, authorisations or licences, regulatory actions (including without limitation in relation to any such failure), health and safety claims, warranty or performance claims, liabilities relating to deferred consideration payable under acquisition agreements previously entered into by PFS, historical tax liabilities and other liabilities.

For example, EML is aware that on 24 September 2019, the French banking regulator (“ACPR”) published an enforcement action against PFS and imposed a €1 million fine. The ACPR enforcement decision will remain published on the ACPR website for 5 years. The ACPR identified regulatory breaches by PFS, broadly relating to failures by PFS to carry out a robust ‘know your customer’ processes and report suspicious transactions to the French regulator. No remediation or corrective measures are imposed by the ACPR in its decision, but the ACPR may carry out further on-site inspections. PFS may be subject to other similar regulatory actions...

Such liabilities may adversely affect the financial performance or position of EML and even put at risk the group’s capacity to carry on its business, either at all or in one or more of the geographic regions in which the group currently operates, and may be more costly than expected to remedy.”

Further particulars may be provided prior to trial.

- (b) further or alternatively, was information which could be deduced, concluded or inferred from the information referred to in the particulars to subparagraph (a) above;
 - (c) in the premises, by reason of s 676 of the Corporations Act, was generally available.
63. It denies paragraph 63, refers to and repeats paragraph 62 above, and says alternatively that, if the PFS Control Standard Information was information which, but for ASX Listing Rule 3.1A, was information which EML became obliged to tell the ASX on and from 19 December 2020 (which is denied), then:
- (a) the information comprised matters of supposition or was insufficiently definite to warrant disclosure;
 - (b) the information was confidential and the ASX had not formed the view that the information had ceased to be confidential;
 - (c) a reasonable person would not have expected the information to be disclosed;
 - (d) in the premises, the information was within the exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A.
64. As to paragraph 64, it:
- (a) refers to and repeats paragraph 62 above;
 - (b) says that, in the circumstances, it was not obliged further to communicate the PFS Control Standard Information to the ASX before 19 May 2021;

- (c) otherwise denies the allegations.
- 65. It denies paragraph 65 and, in relation to the plaintiffs' reliance upon paragraphs 61 to 64 of the Statement of Claim, refers to and repeats paragraph 61 to 64 above.

G.2 CBI Response Information

- 66. As to paragraph 66:
 - (a) it denies subparagraph (a);
 - (b) it denies subparagraph (b) and refers to and repeats paragraph 50 above;
 - (c) as to subparagraph (c):
 - i. it says that the subparagraph is embarrassing and liable to be struck out;
 - ii. under cover of that objection, it denies the subparagraph and refers to and repeats paragraphs 27A(h), 34, 39 and 50 above.
- 67. As to paragraph 67, it refers to and repeats paragraph 50 and otherwise admits paragraph 67.
- 68. It denies paragraph 68 and says:
 - (a) if, but for ASX Listing Rule 3.1A, the alleged CBI Response Information was information which EML became obliged to tell the ASX on and from 19 December 2020 (which is denied), then:
 - i. the information pleaded in subparagraphs 50(b) and 50(c) of the Statement of Claim:
 - (A) comprised matters of supposition or was insufficiently definite to warrant disclosure; and/or
 - (B) concerned an incomplete proposal or negotiation;
 - ii. the information was confidential and ASX had not formed the view that the information had ceased to be confidential;
 - iii. a reasonable person would not have expected the information to be disclosed;
 - iv. in the premises, the information was within the exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A;
 - (b) further that:

- i. the 19 May 2021 Announcement contained the information that EML was obliged to tell the ASX in relation to the 13 May 2021 CBI Letter pursuant to its obligations under ASX Listing Rule 3.1 and s 674 of the Corporations Act;
 - ii. the 19 May 2021 Announcement was made in circumstances where:
 - (A) PCSIL received the CBI's letter at 11.12pm on Thursday 13 May 2021;
 - (B) EML requested a trading halt on the morning of Monday 17 May 2021, prior to the market opening;
 - (C) between the time it received the 13 May 2021 CBI Letter and the time of the 19 May 2021 Announcement, EML considered its Continuous Disclosure Obligations and the form of the announcement that should be made to the ASX;
 - (D) EML made the 19 May 2021 Announcement on the morning of Wednesday 19 May before trading resumed;
 - iii. in the premises, EML at all material times complied with its obligations under ASX Listing Rule 3.1 and s 674 of the Corporations Act.
69. It refers to and repeats paragraph 68(b) and otherwise admits paragraph 69.
70. It denies paragraph 70 and, in relation to the plaintiffs' reliance on paragraphs 66 to 69 of the Statement of Claim, refers to and repeats paragraphs 66 to 69 above.

H Alleged Contravening Conduct Causing Group Members Loss

H.1 Acquisition of EML Shares

71. It admits that, during the Relevant Period, the plaintiffs acquired interests in EML Shares and otherwise does not know and cannot admit paragraph 71.

H.2 Market-based causation

72. As to paragraph 72, it:

- (a) admits that the EML Shares traded in a market operated by the ASX;

- (b) admits that the market was regulated by, inter alia, the ASX Listing Rules and s 674(2) of the Corporations Act;
 - (c) admits that EML had the obligations referred to in paragraphs 5 and 6 above;
 - (d) admits that the price or value of EML shares would reasonably be expected to have been informed or affected by information disclosed in accordance with the ASX Listing Rules and s 674(2) of the Corporations Act;
 - (e) otherwise denies the allegations.
73. It denies paragraph 73.
74. It denies paragraph 74.
- 74A. Further to paragraph 74 above, if it is found that:
- (a) the alleged "Market Contraventions" occurred (which is denied); and
 - (b) the decline in the price of EML shares pleaded in paragraph 45 of the Statement of Claim was caused or materially contributed to by the market's reaction to the information contained in the 19 May 2021 Announcement (which is also denied),
- then the defendant says further that:
- (c) the information contained in the 19 May 2021 Announcement:
 - i. is materially different to the alleged PFS Control Standard Information and the alleged CBI Response Information, the non-disclosure of which is alleged to give rise to the Continuous Disclosure Contravention;
 - ii. is materially different to the information that would have been necessary to be disclosed by EML to avoid the alleged Continuous Disclosure Contravention;
 - iii. is materially different to any 'correction' or 'qualification' of the alleged Compliance Representations (the absence of which is alleged in paragraphs 59 of the Statement of Claim to give rise to the Misleading Conduct Contraventions) that would have been reasonably necessary to be made, further or alternatively that would have been likely to have been made, by EML in order to avoid the Misleading Conduct Contraventions occurring;

- (d) in the premises, the decline in the price of EML Shares pleaded in paragraph 45 of the Statement of Claim could not have been caused or materially contributed to by the market's reaction to the alleged Market Contraventions.
75. It says paragraph 75 is embarrassing and liable to be struck out, and under cover of that objection, it:
- (a) refers to and repeats paragraphs 62 and 68(b) above;
 - (b) says that, if the alleged Material Information existed and was required to be disclosed by EML (which is denied):
 - i. the disclosure required would depend on the point in time such disclosure was required or made;
 - ii. EML would also have disclosed further contextual information;

Particulars

Particulars will be provided following expert evidence.

- (c) denies paragraph 75.

H.3 Reliance

76. It denies the allegations in paragraph 76.

H.4 Loss and damage

77. It denies the allegations in paragraph 77, and says further that those Group Members who sold shares prior to 17 May 2021 sold those shares in a market affected by the same (alleged) misinformation in which they purchased those shares, and therefore have suffered no loss in respect of those shares.

R C A HIGGINS

T SPENCER BRUCE

K RAGHAVAN

Dated 23 May 2022



Herbert Smith Freehills
Solicitors for the defendant