



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

No. S ECI 2020 03339
Case: S ECI 2020 03339
Filed on: 27/09/2022 11:19 AM

B E T W E E N

EFSTATHIA (EFFIE) FOTIADIS

Plaintiff

-and-

ST. BASIL'S HOMES FOR THE AGED IN VICTORIA
(ACN 070 511 616)

Defendant

DEFENDANT'S AMENDED DEFENCE
PURSUANT TO ORDER 3 OF THE ORDERS OF THE HONOURABLE JUSTICE JOHN DIXON
MADE ON 26 SEPTEMBER 2022

Date of document: ~~24 May~~ 27 September 2022
Filed on behalf of: the Defendant

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In defence of the plaintiff's **second** further amended statement of claim dated ~~7 February~~
26 September 2022 (the **2FASOC**), the defendant says as follow by reference to the
paragraphs in the **2FASOC**.

Defined terms have the same meaning as in the **2FASOC** unless otherwise stated.

A. PARTIES AND GROUP MEMBERS

A.1 Plaintiff

1. In respect of paragraph 1, it:

- (a) admits the allegations in sub-paragraph 1(a);
- (b) does not know and cannot admit the allegations in sub-paragraph 1(b);
- (c) in response to the allegations in sub-paragraph 1(c):
 - (i) admits that:
 1. on or about 15 November 2016 it entered into an agreement with Mr Fotiadis entitled 'Resident and Accommodation Agreement';
 2. the agreement was signed on behalf of Mr Fotiadis by State Trustees Limited (ACN 064 593 148), who had been appointed as his administrator by the Victorian Civil and Administrative Tribunal pursuant to the *Guardianship and Administration Act 1986* (Vic);
 3. pursuant to the agreement it was to provide Mr Fotiadis residential care and services at the residential facility at 24-36 Lorne Street, Fawkner, Victoria (the **residential facility**) based on his assessed care needs and its capacity to meet those needs;
 - (ii) relies on the whole of the agreement for its full force and effect;
 - (iii) otherwise denies the allegation made in sub-paragraph (c);
- (d) in respect of the allegations made in sub-paragraph (d):
 - (i) the term "residential care service" is defined in Schedule 1 of the *Aged Care Act 1997* (Cth) to mean the undertaking through which residential care is provided with the term "residential care" defined in s 41-3 of the Act;

- (ii) subject to the reference to “residential care services” in the sub-paragraph being in fact a reference to “residential care”, it admits the allegations made in sub-paragraph (d) for the period from and after 16 November 2016;
 - (iii) it otherwise denies the allegations in subparagraph (d);
 - (iv) further the term “residential care” in this defence is used in accordance with the meaning of that term in the *Aged Care Act 1997* (Cth).
- (e) admits that Mr Fotiadis died on or about 25 July 2020 but otherwise does not know the cause of his death and cannot admit the allegations in sub-paragraph 1(e).
2. In respect of paragraph 2, it:
- (a) does not know and cannot admit the allegations in sub-paragraph (a);
 - (b) admits the allegations in sub-paragraph (b).
3. It does not plead to paragraph 3 as it contains no allegations against it.

A.2 Defendant

4. In respect of paragraph 4:
- (a) it admits the allegations in sub-paragraph (a) and (b);
 - (b) it refers to the matters pleaded in sub-paragraph 1(d)(i) of this defence and admits that where it provided residential care to residents at the residential facility during the period from 26 February 2020 and 22 October 2020 (the **residents**) it did so in trade or commerce but otherwise denies the allegations in sub-paragraph (c).

A.3 COVID-19 Period

5. In respect of paragraph 5, it:

(a) denies the allegations in paragraph 5;

(b) says further that:

(i) at about 1130 hrs on 8 July 2020, it was notified by a staff member that the staff member's sister had tested positive for COVID-19 and that it directed the staff member (and staff members who had worked with her) to leave the residential facility and have urgent tests for COVID-19;

(ii) at about 0947 hrs on 9 July 2020, it received an SMS from the staff member to the effect that she had tested positive to COVID-19.

6. In respect of paragraph 6, it:

(a) admits that on and from an unknown date in early-July 2020 there was an outbreak of COVID-19 amongst residents and staff members at the residential facility and that it had ended by 22 October 2020;

(b) admits that during the outbreak residents of the residential facility tested positive to COVID-19 with:

(i) on 14 July 2020 a resident demonstrated symptoms consistent with COVID-19 and was transferred from the residential facility to a public hospital and subsequently at the hospital tested positive for COVID-19;

(ii) subsequent to 14 July 2020 further residents demonstrated symptoms consistent with COVID-19 and were transferred from the residential facility to a public hospital and subsequently at the hospital tested positive for COVID-19;

- (iii) the Commonwealth Department of Health (the **Department**) by its servants and agents took samples from residents at the residential facility at about 2 pm on 15 July 2020 for COVID-19 testing and subsequently the Department informed it that some residents had tested positive to COVID-19;
 - (iv) the Department by its servants and agents took samples from residents at the residential facility at about 2 pm on 19 July 2020 for COVID-19 testing and subsequently informed it that some residents had tested positive to COVID-19;
 - (v) residents had COVID-19 testing after 19 July 2020 either organised by one or more of the Department, a resident's medical practitioner, or a public hospital, and it was informed that some residents had tested positive to COVID-19;
- (c) does not know the exact number of residents who tested positive to COVID-19 throughout the outbreak;
- (d) admits that staff members of the residential facility tested positive to COVID-19 with:
- (i) it first having been notified that a staff member had tested positive to COVID-19 at about 0947 hrs on 9 July 2020;
 - (ii) subsequent to the matters in sub-paragraph (i) some staff members undertook testing for COVID-19 and advised it that they had tested positive to COVID-19;
 - (iii) the Department by its servants and agents took samples from staff at the residential facility on 15 July 2020 for COVID-19 testing and

subsequently informed it that some staff tested positive to COVID-19;

(iv) the Department by its servants and agents took samples from staff at the residential facility on 19 July 2020 for COVID-19 testing and subsequently informed it that some staff tested positive to COVID-19;

(e) does not know the exact number of staff who tested positive to COVID-19 throughout the outbreak;

(f) otherwise, does not admit the allegations in paragraph 6.

7. In respect of paragraph 7, it:

(a) does not know and cannot admit the allegations;

(b) says further that while the Department “COVID-19 outbreaks in aged care facilities” document reports that 45 residents of the residential facility died it also states that *“a death is reported when a person with COVID-19 dies during an active outbreak at an aged care facility, irrespective of cause of death”*.

A.4 Group Members

8. In respect of paragraph 8:

(a) it denies that any of the residents (or the estates of residents) or Family suffered loss or damage ~~in the COVID-19 Period~~ as a result of its conduct **in the COVID-19 Period** as alleged in the 2FASOC **or at all**;

(b) otherwise, does not plead to paragraph 8 as it contains no allegations against it.

9. In respect of paragraph 9:

- (a) it refers to its denial pleaded in sub-paragraph 8(a) of this defence;
- (b) says that on the basis of the denial there are no group members to the proceeding and therefore no sub-group members;
- (c) however, in this defence for the sake of convenience it uses the defined sub-groups even though it says they do not exist;
- (d) otherwise it does not plead to the paragraph as it contains no allegations against it.

10. In respect of paragraph 10:

- (a) it refers to its denial pleaded in sub-paragraph 8(a) of this defence;
- (b) otherwise, it does not plead to paragraph 10 as it contains no allegations against it.

11. It admits the allegations in paragraph 11.

12. It does not plead to paragraph 12 as it contains no allegations against it.

B STATUTORY AND REGULATORY CONTEXT

13. It admits the allegations in paragraph 13.

14. It admits the allegations in paragraph 14.

B.1 Aged Care Act

15. In respect of paragraph 15, it:

- (a) admits the identified provisions of the Aged Care Act applied at all material times;
- (b) relies upon the text of the provisions of the Aged Care Act for their effect;
- (c) otherwise, does not admit the allegations in paragraph 15.

B.2 Quality of Care Principles

16. In respect of paragraph 16, it:

- (a) admits the identified provisions of the Quality of Care Principles applied at all material times;
- (b) relies upon the text of the provisions of the Quality of Care Principles for their effect; and
- (c) otherwise, does not admit the allegations in paragraph 16.

B.3 Aged Care Quality Standards

17. In respect of paragraph 17, it:

- (a) admits the identified provisions of the Aged Care Quality Standards applied at all material times;
- (b) relies upon the text of the provisions of the Aged Care Quality Standards for their effect; and
- (c) otherwise, does not admit the allegations in paragraph 17.

B.4 User Rights Principles

18. In respect of paragraph 18, it:

- (a) admits the identified provisions of the User Rights Principles applied at all material times;
- (b) relies upon the text of the provisions of the User Rights Principles for their effect; and
- (c) otherwise, does not admit the allegations in paragraph 18.

B.5 Charter

19. In respect of paragraph 19, it:

- (a) admits the identified provisions of the Charter applied at all material times;
- (b) relies upon the text of the provisions of the Charter for their effect; and
- (c) otherwise, does not admit the allegations in paragraph 19.

B.6 Victorian Directions

20. In respect of paragraph 20, it:

- (a) admits the identified Victorian Directions applied at the times specified;
- (b) relies upon the text of the Victorian Directions as to their effect at any particular time; and
- (c) otherwise, does not admit the allegations in paragraph 20.

21. In respect of paragraph 21, it

- (a) says that, from 1 June 2020, when the Care Facilities Directions (No. 4) came into force, until 8 July 2020, a resident of a care facility was permitted up to two 'care and support visits' per day, provided the total duration of such visits was no longer than two hours and the total number of visitors was no more than two;
- (b) relies upon the text of the Victorian Directions as to their effect at any particular time; and
- (c) otherwise, admits the paragraph.

B.7 Infection Control Guidelines

22. In respect of paragraph 22, it:

- (a) admits the identified provisions of the Infection Control Guidelines were published publicly;
- (b) relies upon the text of the provisions of the Infection Control Guidelines as to their effect; and
- (c) otherwise, does not admit the allegations in paragraph 22.

B.8 CDNA National Guidelines

23. In respect of paragraph 23, it:

- (a) admits that:
 - (i) on or about 13 March 2020 the Communicable Diseases Network Australia (CDNA) published version 1 of a document entitled 'CDNA National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Residential Care Facilities';
 - (ii) version 1 of the document contained guidelines to assist in preventing and managing COVID-19 outbreaks in residential care facilities;
- (b) relies upon the text of version 1 of the document as to the content of the guidelines and their effect;
- (c) otherwise denies the allegation in paragraph 23;
- (d) says further that:
 - (i) the CDNA published updated versions of the document entitled 'CDNA National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Residential Care Facilities' including version 2 on 30 April 2020 and version 3 on 14 July 2020;
 - (ii) versions 2 and 3 of the document contained guidelines to assist in preventing and managing COVID-19 outbreaks in residential care facilities;
 - (iii) relies upon the text of version 2 and 3 of the document as to the content of the guidelines and their effect.

B.9 Department of Health Guidelines on social distancing

24. In respect of paragraph 24, it:

- (a) admits that:
 - (i) the Department issued on or about 15 March 2020 version 1 of an information sheet entitled 'Social Distancing Guidelines':
 - (ii) the information sheet contained guidelines on social distancing in public, at home, at workplaces and in schools;
- (b) relies upon the text of the information sheet as to the content of the guidelines;
- (c) otherwise denies the allegations in paragraph 24.

B.10 Department of Health Guidance on Outbreak Management

25. In respect of paragraph 25, it:

- (a) admits that:
 - (i) the Aged Care Quality and Safety Commission (the **Commission**) issued on or about 18 June 2020 version 2.1 of a document entitled 'COVID-19 management flowchart':
 - (ii) that document contained guidance that a residential care facility should notify a confirmed case of COVID-19 amongst its residents or staff by email to agedcareCOVIDcases@health.gov.au and to the relevant state or territory Public Health Unit;
- (b) otherwise, does not admit the allegations in paragraph 25.

26. In respect of paragraph 26, it:

- (a) admits that on or about 29 June 2020 the Department published guidelines entitled 'First 24 Hours – Managing COVID-19 in a Residential Aged Care Facility';
- (b) relies upon the text of the guidelines as to the content of the guidelines;

(c) otherwise, does not admit the allegations in paragraph 26.

27. In respect of paragraph 27, it:

(a) relies upon the text of the guidelines entitled 'First 24 Hours – Managing COVID-19 in a Residential Aged Care Facility' as to the content of the guidelines;

(b) otherwise, does not admit the allegations in paragraph 27.

28. In respect of paragraph 28, it:

(a) relies upon the text of the guidelines entitled 'First 24 Hours – Managing COVID-19 in a Residential Aged Care Facility' as to the content of the guidelines;

(b) otherwise, does not admit the allegations in paragraph 28.

C. EVENTS SURROUNDING COVID-19 OUTBREAK

C.1 COVID-19 and the Symptoms

29. In respect of paragraph 29, it:

(a) admits that:

(i) COVID-19 is the disease caused by infection with the severe acute respiratory syndrome coronavirus 2 (**SARS-CoV-2**);

(ii) a person with COVID-19 can infect others with SARS-CoV-2 so that the other person contracts COVID-19;

(iii) a person with COVID-19 can be asymptomatic and yet still infect others with SARS-CoV-2 so that the other person contracts COVID-19;

(iv) some people who have COVID-19 are at risk of dying from it;

(b) otherwise, does not admit the allegations in paragraph 29.

30. It admits the allegations in paragraph 30.
31. It admits the allegations in paragraph 31.
32. It admits the allegations in paragraph 32.
33. It admits the allegations in paragraph 33.
34. In respect of paragraph 34 it:
 - (a) admits:
 - (i) the Department published an information sheet entitled ‘Coronavirus (COVID-19) – Identifying the symptoms’;
 - (ii) the information sheet contained a table that set out symptoms of COVID-19, cold, and flu;
 - (iii) described symptoms of COVID-19 as alleged in sub-paragraphs (a) and (b) save that diarrhea was stated to be a rare (and not sometimes) symptom of COVID-19;
 - (b) denies that diarrhea was stated in the information sheet to be a sometimes (as opposed to rare) symptom of COVID-19
35. In respect of paragraph 35, it:
 - (a) admits the Department published on or about 2 April 2020 an information sheet entitled ‘Coronavirus (COVID-19): Outbreak Management’;
 - (b) admits the information sheet was for residential care facilities;
 - (c) relies upon the whole of the information sheet as to its contents; and
 - (d) otherwise, does not admit the allegations in the paragraph.

C.2 The 26 February Notification

36. In respect of paragraph 36, it:
 - (a) admits that:

- (i) the Chief Medical Officer sent a letter to recipients on or about 26 February 2020;
 - (ii) the letter notified aged care providers who were recipients of the letter that their existing obligations with respect to infection prevention and control applied to COVID-19; and
 - (b) otherwise, does not admit the allegations in the paragraph.
37. In respect of paragraph 37, it:
- (a) admits that the letter referred to in sub-paragraph 36(a)(i) of this defence contains the quotes referred to in sub-paragraphs (a) to (f);
 - (b) otherwise relies upon the text of the letter as to its content;
 - (c) otherwise, does not admit the allegations in paragraph 37.

C.3 Further advice and Dorothy Henderson Lodge Outbreak

38. In respect of paragraph 38, it:
- (a) admits that:
 - (i) Commissioner Janet Anderson, the Aged Care Quality and Safety Commissioner, sent a letter to recipients on or about 2 March 2020;
 - (ii) the letter provided aged care providers who were recipients of it with updated advice about COVID-19 and contained the quotes referred to in sub-paragraphs (a) and (b);
 - (b) otherwise, does not admit the allegations in the paragraph.
39. In respect of paragraph 39, it:
- (a) admits that in March and April 2020 there was an outbreak of COVID-19 at an aged care facility called 'Dorothy Henderson Lodge' in New South Wales at which residents and staff were infected with COVID-19;

(b) otherwise, it does not know and therefore cannot admit the allegations in paragraph 39.

40. In respect of paragraph 40, it:

(a) admits:

(i) the Australian Health Protection Principal Committee published on or about 17 March 2020 recommendations to residential aged care facilities;

(ii) the recommendations contained the quotes referred to in subparagraphs (a) to (e).

(b) relies upon the whole of the Australian Health Protection Principal Committee recommendations;

(c) otherwise, does not admit the allegations in paragraph 40.

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

41. In respect of paragraph 41, it:

(a) does not know and cannot admit the number of people with COVID-19 in Victoria as of 21 March 2020;

(b) admits that:

(i) on 21 March 2020 the Deputy Chief Health Officer of Victoria from the DHHS issued directions called the Aged Care Facilities Directions under s 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic);

(ii) the directions restricted access to residential facilities between 6 pm on 21 March 2020 and 13 April 2020 and they set out the nature and extent of the restrictions;

(c) otherwise denies the allegations made in the paragraph.

42. In respect of paragraph 42, it:

(a) admits that in March 2020 it restricted visitors to the residential facility but otherwise denies the allegations made in sub-paragraph (a) and says further that:

(i) before the issuing of the Aged Care Facilities Directions on 21 March 2020 it was restricting visitors to the residential facility;

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1. From 3 March 2020 it required that all visitors who were sick (signs and symptoms of cold and flu) not to enter the residential facility; that all healthy visitors had to wash their hands before entry; it made available to visitors face masks, disposable aprons, disposable gloves and hand sanitiser; and it encouraged visitors to maintain safe practices when visiting the residential facility.
2. From 9 am on 17 March 2020 it requested that visitors only make essential visits and preferably contact residents by telephone; it required all visitors had to enter via the main entrance and sign in; all visitors had to have their temperature checked and could not enter if they did not have such a check or had a check that showed they had a temperature of 37 degrees Celsius or above; all visitors had to sanitise their hands on entry and observe hygiene rules within the residential facility at all times; children under 12

and pets could not enter; a resident was to have a maximum of two visitors at a time; and a visitor could only visit a resident in his or her own room and could not visit in the common areas of the residential facility.

3. From 9 am on 18 March 2020 in addition to the restrictions referred to in particular 2 it required that visitors certify that they had not travelled anywhere outside Australia in the last 14 days; they had not been directed by any lawful authority to self-isolate; and they do not have any symptoms of COVID-19 (such as temperature, coughing, sore throat, aches and pains, flu like symptoms).

(ii) at 6 pm on 26 March 2020 it stopped all visitors to the residential facility save for exceptional circumstances such as end of life support for a resident of the residential facility;

(b) admits the allegations in sub-paragraph (b);

(c) denies the allegations sub-paragraphs (c) and (d).

C.5 Continued advice and Newmarch House Outbreak

43. In respect of paragraph 43 it admits:

(a) the Department published on or about 26 March 2020 an information sheet entitled 'Coronavirus disease (COVID-19): Environmental cleaning and disinfection principles for health and residential care facilities';

(b) the information sheet contained statements similar to those in sub-paragraphs (a) to (d) and otherwise refers to the whole of the information sheet.

44. In respect of paragraph 44, it:

- (a) admits that from about mid-April 2020 there was an outbreak of COVID-19 at an aged care facility called 'Newmarch House' at which residents and staff were infected with COVID-19;
- (b) otherwise, it does not know and therefore cannot admit the allegations in paragraph 44.

C.6 IPC Training

45. In respect of paragraph 45, it:

- (a) admits that during the period between March and June 2020 it provided infection prevention and control (**IPC**) training to its staff; and
- (b) otherwise denies the allegations in paragraph 45;
- (c) says further that it provided IPC training to its staff between March and June 2020 as follows:
 - (i) it organised for general practitioners who treated residents at the residential facility to attend at the residential facility and conduct training for staff about IPC and these sessions took place on 4 March, 15 March, 23 April, 8 May 2020, and 14 June 2020, however, they were stopped, first, so as to avoid external providers attending the residential facility and, second, so as to minimise large gatherings at the residential facility;
 - (ii) from March 2020 it used its existing system of preparing staff memorandums and providing them to staff and placing them on noticeboards, and this included information to staff about COVID-19 including about IPC;

- (iii) from about early-March 2020 at each staff handover a person, normally a senior staff member or a registered nurse, provided training to staff about COVID-19 including about IPC. This included referring to any new staff memorandums about COVID-19;
- (iv) from March 2020 senior staff including registered nurses did spot checks and audits on staff including about IPC training;
- (v) from about April 2020, it engaged an independent contractor to prepare a folder that contained documents specifically relating to COVID-19 including IPC. In May 2020 the folder was placed at the main office with copies at each nurse station and reception. Staff were required to read the documents and they were discussed at the staff handovers;
- (vi) in about April 2020 it engaged an independent contractor to produce a document entitled 'Infection Control – Pandemic and Outbreak Management', the independent contractor prepared the document in about May 2020, and it was provided or made available to staff;
- (vii) in about April 2020 it engaged an independent contractor to create an outbreak management booklet and that booklet was provided or made available to staff.

C.7 Conditions preceding COVID-19 Outbreak

46. In respect of paragraph 46, it:

- (a) admits that:

- (i) it engaged an independent contractor to produce a document entitled 'Infection Control – Pandemic and Outbreak Management';
 - (ii) the independent contractor prepared the document in about May 2020; and
 - (b) otherwise denies the allegations in the paragraph.
47. In respect of paragraph 47, it:
- (a) in respect of the allegations in sub-paragraph (a):
 - (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020, does not know and cannot admit the allegations;
 - (b) in respect of the allegations in sub-paragraph (b):
 - (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020, does not know and cannot admit the allegations;
 - (c) in respect of the allegations in sub-paragraph (c):
 - (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 - 1. does not know and cannot admit the allegations;
 - 2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
 - (d) in respect of the allegations in sub-paragraph (d):

- (i) for the period from 1 May 2020 to 22 July 2020, it denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 - 1. denies the allegations;
 - 2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
- (e) in respect of the allegations in sub-paragraph (e):
 - (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 - 1. denies the allegations;
 - 2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
- (f) in respect of the allegations in sub-paragraph (f);
 - (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 - 1. does not know and cannot admit the allegations;
 - 2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
- (g) in respect of the allegations in sub-paragraph (g):

- (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 - 1. does not know and cannot admit the allegations;
 - 2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
- (h) in respect of the allegations in sub-paragraph (h):
- (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 - 1. does not know and cannot admit the allegations;
 - 2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
- (i) in respect of the allegations in sub-paragraph (i):
- (i) for the period from 1 May 2020 to 22 July 2020:
 - 1. denies the allegations;
 - 2. says further that:
 - a. staff who had Symptoms were directed by it not to attend the residential facility and to be tested for COVID-19;
 - b. residents were regularly monitored for Symptoms including having their temperature taken and by way of visual observation;

c. the Department by its servants and agents took samples from residents at the residential facility on 15 July 2020 for COVID-19 testing;

d. the Department by its servants and agents took samples of residents at the residential facility on 19 July 2020 for COVID-19 testing;

(ii) from the period from 22 July 2020 to 31 July 2020:

1. does not know and cannot admit the allegations;
2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;

(j) in respect of the allegations in sub-paragraph (j):

(i) for the period from 1 May 2020 to 22 July 2020:

1. staff who had Symptoms were required not to attend the residential facility and to be tested for COVID-19;
2. in May 2020 a large number of staff individually undertook testing for COVID-19 (not at the residential facility);
3. residents who had Symptoms were required to be tested for COVID-19;
4. after it was notified on 9 July 2020 that a staff member had tested positive for COVID-19, it directed staff members who had worked with that staff member to isolate and be tested for COVID-19 and furthermore encouraged other staff members who had worked at the residential facility to be tested for COVID-19 and staff members individually sought

testing for COVID-19 (not at the residential facility), though some were not tested as they were told by the testers that as they were not symptomatic they did not need to be tested;

5. sometime between 9 to 11 July 2020 the DHHS advised that it would assist in facilitating widespread testing for COVID-19 of all residents and staff members at the residential facility;

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The advice is likely to have been given by DHHS to Ms Vicky Kos in a telephone call. Further particulars will be provided. Currently the defendant has not been able to take any instructions from Ms Vicky Kos about the matters in the proceeding.

6. on or about 12 July 2020 the DHHS advised by email that it would assist in facilitating widespread testing for COVID-19 of all residents and staff members at the residential facility;
7. on or about 12 July 2020 sent letters to general practitioners who had residents at the residential facility under their care notifying them that two staff members had tested positive for COVID-19 and inquiring whether the general practitioner required the residents under his or her care to have a COVID-19 test;
8. when no testing had yet been performed of residents at the residential facility, on or about 14 July 2020 a staff member

- contacted the Northern Hospital to request it to assist with performing COVID-19 testing of residents at the residential facility but was told that DHHS should do the testing;
9. on 14 July 2020 it sent a resident to a public hospital as she was showing symptoms consistent with COVID-19 and she was tested for COVID-19;
 10. on 14 July 2020 the Department advised that it would organise testing of residents and staff at the residential facility for COVID-19 as follows:
 - a. a first round of testing as soon as possible of all residents and staff who had worked in the past 2 weeks;
 - b. a second round of testing on day 11 after last exposure of close-contact staff and residents;
 11. the Department by its servants and agents took samples from staff and residents at the residential facility for COVID-19 testing at about 2 pm on 15 July 2020 and subsequently tested those samples for COVID-19;
 12. the Department by its servants and agents took samples from staff and residents at the residential facility for COVID-19 testing at about 19 July 2020 and subsequently tested those samples for COVID-19;
 13. otherwise says that the allegation that “*Residents and staff members were not regularly tested for COVID-19*” over the period from 1 May 2020 to 22 July 2020 is vague and

embarrassing and under cover of that objection does not admit the allegations in the sub-paragraph;

(ii) from the period from 22 July 2020 to 31 July 2020:

1. does not know and cannot admit the allegations;
2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;

(k) in respect of the allegation in sub-paragraph (k):

(i) admits that it did not form an outbreak management committee;

(ii) says further that:

1. the functions of an outbreak management committee were performed by the continuous improvement committee from March 2020 onwards, including after the identification of a positive case on 9 July 2020;
2. the continuous improvement committee was attended by its key operational personnel and met regularly over the relevant period;
3. members of the continuous improvement committee met daily after the first recorded case of COVID-19 on 9 July 2020 to consider the response to the outbreak;

(l) in respect of the allegations in sub-paragraph (l):

(i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;

(ii) from the period from 22 July 2020 to 31 July 2020:

1. does not know and cannot admit the allegations;

2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
- (m) in respect of the allegations in sub-paragraph (m):
- (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 1. does not know and cannot admit the allegations;
 2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
- (n) in respect of the allegations in sub-paragraph (n):
- (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 1. does not know and cannot admit the allegations;
 2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;
- (o) in respect of the allegations in sub-paragraph (o):
- (i) for the period from 1 May 2020 to 22 July 2020, denies the allegations;
 - (ii) from the period from 22 July 2020 to 31 July 2020:
 1. does not know and cannot admit the allegations;

2. says further that its staff were not present or in attendance at the residential facility and did not provide any residential care to residents at the residential facility;

(p) says further that:

(i) on 21 July 2020 the Chief Health Officer of Victoria notified it that:

1. all of its staff who had been present in clinical areas of the residential facility for more than 2 hours from 1 July 2020 to 15 July 2020:
 - a. were designated or determined close contacts for the purpose of the *Diagnosed Persons and Close Contacts Directions (No 6)*;
 - b. had to quarantine for a period of 14 days starting on the last date he or she had worked at the residential facility;
 - c. had to have a test for COVID-19 on day 11 (or later);
 - d. could not return to the residential facility until after they had completed their period of quarantine and returned a negative COVID-19 test;
2. one or more of the Department, DHHS and the Commission would arrange an alternative workforce to provide residential care to residents at the residential facility;

PARTICULARS

The notice was given by letter from Adjunct Professor Brett Sutton, Chief Health Officer of Victoria to Mr Konstantin H Kontis, Chairman dated 21 July 2020.

3. DHHS would organise urgent IPC training and advice to the alternative workforce who would provide residential care to residents at the residential facility;
- (ii) that by close of business on 22 July 2020:
1. all staff who had been present in clinical areas of the residential facility for more than 2 hours from 1 July 2020 to 15 July 2020:
 - a. were designated or determined to be close contacts for the purpose of the *Diagnosed Persons and Close Contacts Directions (No 6)*;
 - b. as close contacts were required by law to comply with the *Diagnosed Persons and Close Contacts Directions (No 6)*;
 - c. had to quarantine for a period of 14 days starting on the last date he or she had worked at the residential facility;
 - d. had to have a test for COVID-19 on day 11 (or later);
 - e. could not return to the residential facility until after they had completed their period of quarantine and returned a negative COVID-19 test;
- (iii) that on morning of 22 July 2020 there was a handover at the residential facility from its staff to the alternative workforce that were the servants and agents of one or more of the Department, DHHS and the Commission;
- (iv) that on 22 July 2020:

1. it no longer could and did not provide residential care to residents at the residential facility;
 2. it no longer could and did not control, manage, or operate the residential facility;
 3. the residential facility was controlled, managed, and/or operated by one or more of the Department, DHHS and the Commission and their servants and agents;
 4. the residential care provided to residents at the residential facility were provided by one or more of the Department, DHHS and the Commission and their servants and agents;
- (v) it did not resume providing residential care to resident at the residential facility until about mid-September 2020.

C.8 COVID-19 Outbreak

48. It admits the allegations in paragraph 48.

49. In respect of paragraph 49, it:

(a) admits that:

(i) as of 3 July 2020 people in Victoria had tested and were testing positive to COVID-19;

(ii) there was a risk that there were people infected with COVID-19 in the Victorian community including in areas local to the residential facility;

(b) otherwise, does not admit the allegations in paragraph 49.

50. In respect of paragraph 50:

(a) does not admit the allegations in paragraph 50; and

(b) refers to the matters set out in sub-paragraph 5(b) of this defence.

51. In respect of paragraph 51, it:

(a) admits the allegations in paragraph 51;

(b) says further that:

(i) within 30 minutes of a staff member of the residential facility having notified it by SMS that they had tested positive to COVID-19 Ms Vicky Kos, Director of Nursing, telephoned the Department and spoke to an employee of the Department and:

1. Ms Kos said in the conversation, inter alia, that:

a. she was calling from St Basil's Homes for the Aged, which was an aged care facility, and gave its address and contact details;

b. a staff member of the residential facility had tested positive for COVID-19, had worked at the residential facility before testing positive and she had been in contact with residents of the residential facility;

c. she wanted to do the right thing and notify who she had to;

d. described the steps that it had already taken in response to the staff member having tested positive to COVID-19;

2. the staff or agent of the Department:

a. placed Ms Kos on hold for an extended period so she could speak to her manager or supervisor;

- b. informed Ms Kos that she should notify the local Public Health Unit and gave her a phone number for DHHS being 1800 675 398;
- c. described the steps as described by Ms Kos that it had taken in response to the staff member having tested positive to COVID-19 as really good;
- d. did not tell her that she had to notify the Department by any other means such as sending an email to agedcareCOVIDcases@health.gov.au.

(ii) soon after the telephone call to the Department, Ms Kos telephoned the DHHS and spoke to an employee or agent of DHHS and in that telephone conversation:

1. Ms Kos, inter alia:

- a. said she was calling from St Basil's Homes for the Aged;
- b. said a staff member of the residential facility had tested positive for COVID-19;
- c. described the steps it had implemented or was implementing in response to the staff member having tested positive to COVID-19; and

2. the employee or agent of DHHS:

- a. described the steps it had implemented or was implementing in response to the staff member having tested positive to COVID-19 as meeting all needed requirements;

- b. said that DHHS would contact it within 48 hours to obtain the contact and trace details of staff and residents;
- c. said that until DHHS contacted it, it should observe and report any concerns on 1300 651 160.

52. In respect of paragraph 52, it:

- (a) admits that it did not send an email to agedcareCOVIDcases@health.gov.au;
- (b) otherwise denies the allegations and says that it did notify the Department and refers to the matters in paragraph 51(b) of this defence.

53. In respect of paragraph 53, it:

- (a) denies the allegations in paragraph 53;
- (b) says further that:
 - (i) from March 2020 to 9 July 2020, it had been providing PPE training to its staff as part of its IPC training referred to in sub-paragraph 45(c) of this defence;
 - (ii) on being notified that a staff member had tested positive for COVID-19 on 9 July 2020, it continued to provide PPE training to its staff.

54. In respect of paragraph 54, it:

- (a) denies the allegations in sub-paragraph 54(a) and says further that:
 - (i) before 9 July 2020 it had established visiting areas at the residential facility for contactless and restricted visits of a resident and by the morning of 9 July 2020, it stopped all visitors for residents to the residential facility save for exceptional circumstances such as end-of-life support for a resident of the residential facility;

(ii) visitors who attended at the residential facility after 9 July 2020 were limited, for example, to medical services (such as pathology, Aspen Medical, and general practitioner), contractors relating to services provided at the residential facility and staff and agents of one or more of the Department and the DHHS.

(b) denies the allegation in sub-paragraph 54(b).

55. In respect of paragraph 55, it:

(a) admits the allegations in paragraph 55;

(b) says further that:

(i) on or and from 9 July 2020 it had told some family of residents by telephone that a staff member had tested positive for COVID-19;

(ii) on or after 10 July 2020 it had sent a letter from Vicky Kos dated 10 July 2020 to contacts for residents.

56. It does not plead to paragraph 56 as it contains no allegations against it, and it says further that it had already notified the Department that a staff member had tested positive to COVID-19 on 9 July 2020, and it refers to the matters in sub-paragraph 51(b)(i) of this defence.

57. In respect of paragraph 57, it:

(a) admits the allegations in sub-paragraph (a);

(b) in respect of the allegations in sub-paragraph (b);

(i) admits that two IPC Outbreak Nurses from the DHHS's Infection Prevention and Control Outreach Nurses (**IPCON**) team attended at the residential facility between about 1.15 pm to 3 pm on 15 July 2020 to observe, review infection control plans and procedures in place, and make recommendations;

(ii) does not know and cannot admit what the IPC Outreach Nurses observed;

(iii) says further that subsequent to the IPCON team's attendance at the residential facility the IPCON team prepared a site visit report.

58. It does not admit the allegations in paragraph 58 and says further that it has not been able in preparing this defence to take any instructions from Ms Vicky Kos.

59. It admits the allegations in paragraph 59.

60. It admits the allegations in paragraph 60.

61. It denies the allegations in paragraph 61.

62. In respect of paragraph 62, it:

(a) denies the allegations sub-paragraph 62(a);

(b) denies the allegations in sub-paragraph 62(b) and says further that:

(i) when it was first notified on 9 July 2020 that a staff member had tested positive for COVID-19 it confined residents located in the Nursing Home West Wing, being the area that the staff member had previously worked, to that wing and to their individual rooms;

(ii) as of 18 July 2020:

1. residents in the Nursing Home who had tested positive were being confined in individual rooms in the Nursing Home West Wing or had been sent to a public hospital;

2. if a resident of the Hostel or the Sensitive Care unit was known to have tested positive for COVID-19 (and it is not admitted that there were any such residents as of 18 July 2020), he or she was being confined in their individual

rooms in the section of the residential facility they normally resided in or had been sent to a public hospital;

63. It admits the allegations in paragraph 63.
64. It admits the allegations in paragraph 64 and further refers to the matters in sub-paragraph 47(p) of this defence.
65. In respect of paragraph 65, it:
 - (a) admits that on 21 July 2020 it was confining residents who had tested positive to COVID-19 in parts of the residential facility but otherwise denies the allegations in paragraph 65; and
 - (b) it refers to the matters in sub-paragraph 62(b) of this defence.
66. In respect of paragraph 66, it:
 - (a) denies the allegations in sub-paragraphs (a) to (f) and (h) to (i);
 - (b) does not admit the allegations in sub-paragraph (g) and says further that:
 - (i) the taking of samples from residents for COVID-19 on 15 and 19 July 2020 was performed by the Department by its servants and agents;
 - (ii) there was a delay between when a sample was taken and when it was notified or became aware of the result of a test on the sample;
 - (iii) refers to the matters in sub-paragraph 72(b) of this defence in respect of its notification of the plaintiff that Mr Fotiadis had tested positive to COVID-19.
67. In respect of paragraph 67, it:
 - (a) admits that:
 - (i) the Commission sent it a Notice to Agree under s 63U(2) of the *Aged Care Quality and Safety Commission Act 2018* (Cth);
 - (ii) in the Notice:

1. the Commission stated satisfaction that it had not complied with paragraphs 3(a), 3(c) and 3(e) of Standard 2, paragraphs 3(a), 3(b) and 3(g) of Standard 3, paragraphs 6.3(a) and 6.3(c) of Standard 6 and paragraphs 8.3(d) and 8.3(e) of Standard 8;
 2. set out actions the Commission required it to do;
 - (b) relies upon the whole of the Notice to Agree; and
 - (c) otherwise denies the allegations in the paragraph.
68. In respect of paragraph 68, it:
- (a) admits that it agreed to take the actions set out by the Commission in the Notice to Agree;
 - (b) otherwise denies the allegations made in the paragraph.
69. It admits the allegations in paragraph 69.
70. In respect of paragraph 70, it repeats and relies upon the matters in paragraphs 6 and 7 of this defence.

C.9 Mr Fotiadis

71. In respect of paragraph 71, it:
- (a) denies the allegations in paragraph 71; and
 - (b) says further that:
 - (i) Mr Fotiadis had a sample taken for testing for COVID-19 on 15 July 2020 by the Department and its servants and agents;
 - (ii) it does not know when the sample taken from Mr Fotiadis tested positive for COVID-19 save that it was informed on or about 17 July 2020 that he had tested positive for COVID-19.

72. In respect of paragraph 72, it:

(a) denies the allegations in paragraph 72; and

(b) says further that:

(i) Mr Fotiadis had a sample taken for testing for COVID-19 on 15 July 2020 by the Department and its servants and agents;

(ii) it does not know when the sample taken from Mr Fotiadis tested positive for COVID-19 save that it was informed on or about 17 July 2020 that he had tested positive;

(iii) on 17 July 2020 it informed the plaintiff by telephone that Mr Fotiadis had tested positive to COVID-19 and his then current condition.

73. In respect of paragraph 73, it:

(a) admits that Mr Fotiadis died on or about 25 July 2020; but

(b) otherwise, does not know the cause of his death and cannot admit the allegations in paragraph 73.

D. BREACH OF CONTRACT CLAIM

D.1 Resident Agreement

74. In respect of paragraph 74, it:

(a) admits that:

(i) on or about 15 November 2016 it entered into an agreement with Mr Fotiadis entitled 'Resident and Accommodation Agreement';

(ii) the agreement was signed on behalf of Mr Fotiadis by State Trustees Limited (ACN 064 593 148), who had been appointed as his

administrator by the Victorian Civil and Administrative Tribunal pursuant to the *Guardianship and Administration Act 1986* (Vic);

(iii) pursuant to the agreement it was to provide Mr Fotiadis residential care and services at the residential facility based on his assessed care needs and its capacity to meet those needs;

(iv) relies on the whole of the agreement with Mr Fotiadis for its full force and effect;

(b) admits that it had entered into similar versions of that agreement with the other Resident Group Members to provide him or her with residential care and services at the residential facility based on his or her assessed care needs and its capacity to meet those needs;

(c) relies on the whole of an agreement with a particular Resident Sub-Group Member for its full force and effect.

75. In respect of paragraph 75, it:

(a) admits that some of the agreements between it and some Resident Sub-Group Members were in the form of the 2014 Resident Agreement and the 2019 Resident Agreement;

(b) says further that there were further versions of the agreements between it and some Resident Sub-Group Members;

(c) relies on the whole of an agreement with a particular Resident Sub-Group Member for its full force and effect.

76. In respect of paragraph 76:

(a) admits each allegation insofar as it relates to the 2014 Residential Agreement and the 2019 Residential Agreement and the Residential Agreement that it had with Mr Fotiadis;

(b) in respect of agreements that it had with other Resident Sub-Group Members:

(i) it admits that each contained terms that it would provide him or her with residential care and services at the residential facility based on his or her assessed care needs and its capacity to meet those needs;

(ii) otherwise:

1. it relies on the form of the agreement as to its terms;
2. it does not admit the allegations in the paragraph but will make further admissions once the name of a Resident Sub-Group Member is identified.

77. It admits the allegation in paragraph 77.

78. It denies the allegations in paragraph 78.

D.2 Breaches of contract

79. It denies the allegations in paragraph 79.

D.3 Loss and damage

80. It denies the allegations in paragraph 80.

80A. In respect of the Breach of Contract claim:

(a) pursuant to s 44 of the *Wrongs Act 1958* (Vic), Part X of that Act applies to the claim on the basis it is a claim for damages brought in contract, and specifically s 51(1) of that Act;

(b) pursuant to s 68 of the *Wrongs Act 1958* (Vic), Part XI of that Act applies to the claim on the basis it is a claim for damages brought in contract;

- (c) if Mr Fotiadis and the other Resident Sub-Group Members have suffered loss and damage from one or more of the alleged Breaches of Contract (which is denied) and claim damages:
- (i) the Resident Sub-Group Member (or his or her legal representative) are seeking an award of personal injury damages within the meaning of that term in ss 28B and 28LB of the *Wrongs Act 1958* (Vic):
1. pursuant to s 28C(1), Part VB of that Act applies to any award of damages;
 2. pursuant to s 28LC(1), Part VBA of that Act applies to any claim for damages for non-economic loss;
- (ii) if the claim is brought by the legal representative of the estate of a deceased Resident Sub-Group Member, s 29(2) of the *Administration and Probate Act 1958* (Vic) applies to the recovery of any damages.

E. CONSUMER GUARANTEE CLAIMS

E.1 Care and Skill Guarantee under s 60 ACL

81. It admits the allegation in paragraph 81.
82. In respect of the allegations in paragraph 82, it:
- (a) denies the allegations in paragraph 82; and
 - (b) refers to the matters pleaded in this defence in respect of each of the paragraphs of the 2FASOC referred to in paragraph 82.

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

83. It denies the allegations in paragraph 83.

84. It denies the allegations in paragraph 84.
85. It denies the allegations in paragraph 85.
86. It denies the allegations in paragraph 86.
87. It denies the allegations in paragraph 87.
88. It does not plead to paragraph 88 as it contains no allegations against it.

E.3 Sections 267(3) and 268 ACL

89. It denies the allegations in paragraph 89.
90. It denies the allegations in paragraph 90.

E.4 Loss and damage

91. It denies the allegations in paragraph 91.

91A. In respect of the Consumer Guarantee Claims, it says further that:

(a) insofar as Resident Sub-Group Members seek to recover an amount for his or her loss and damage pursuant to ss 236, 267(3) or 267(4) of the Australian Consumer Law (the **ACL**) for an alleged contravention:

- (i) the action is based on an alleged failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2 of the ACL;
- (ii) the law of Victoria is the proper law for the contract for the supply of services to which the action relates;
- (iii) pursuant to s 275 of the ACL the law of Victoria applies to limit or preclude liability for the alleged failure, and recovery of damages for that liability (if any) including, where applicable, *Wrongs Act 1958* (Vic) and / or s 29(2) of the *Administration and Probate Act 1958* (Vic);

- (b) insofar as Resident Sub-Group Members seek to recover an amount for his or her loss and damage pursuant to Part VIB of the *Competition and Consumer Act 2010* (the **CCA**):
- (i) the action is based on an alleged failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2 of the ACL;
 - (ii) he or she is not entitled to bring such an action pursuant to Part VIB of the CCA;
- (c) insofar as the action is based on an alleged failure to comply with a guarantee on or after 22 July 2020 to mid-September 2020 that failure to comply occurred because of the act, default or omission of a person other than it or its servants or agents and:
- (i) it refers to the matters in sub-paragraph 47(p) of this defence for the period from 22 July 2020;
 - (ii) it says further that by 2 August 2020 all residents of the residential facility had been moved from the residential facility and were not receiving any residential care at the residential facility;
 - (iii) some previous residents of the residential facility returned to the residential facility by mid-September 2020 .

F. NEGLIGENCE CLAIM – RESIDENTS

F.1 Foreseeability of risks of harm

92. In respect of paragraph 92:

- (a) in respect of the allegations in sub-paragraph (a), it:

- (i) admits there was risk that a failure by it to exercise reasonable care and skill in providing residential care at the residential facility to Resident Sub-Group Members for the periods from 26 February 2020, being the start of the COVID-19 period, to the end of the handover on 22 July 2020 and from mid-September 2020 to 22 October 2020 may or could cause injury to them;
 - (ii) otherwise denies the allegations for the period from the handover on 22 July 2020 to mid-September 2020;
- (b) in respect of the allegations in sub-paragraph (b), it:
 - (i) admits a failure by it to exercise reasonable care in implementing adequate infection control measures at the residential facility for the periods from 26 February 2020, being the start of the COVID-19 period, to the end of the handover on 22 July 2020 and from mid-September 2020 to 22 October 2020 could or may increase the risk of a resident being infected with SARS-CoV-2 and developing COVID-19 (including the risk of death caused by COVID-19);
 - (ii) otherwise denies the allegations for the period from the handover on 22 July 2020 to mid-September 2020;
 - (iii) otherwise denies the allegations in the paragraph.

93. In respect of paragraph 93:

- (a) admits the allegations in paragraph 93 in respect of the risk identified in sub-paragraph 92(a)(i) and (b)(i) of this defence;
- (b) otherwise denies the allegations in paragraph 93.

F.2 Resident Duty of Care

94. In respect of paragraph 94, it:

(a) admits for the periods from 26 February 2020, being the start of the COVID-19 period, to the end of the handover on 22 July 2020 and from mid-September 2020 to 22 October 2020:

(i) it owed Resident Sub-Group Members a duty to take reasonable care in providing residential care to residents at the residential facility including in the implementation of infection control measures;

(ii) it employed and engaged staff to provide residential care to residents at the residential facility including in the implementation of infection control measures;

(iii) it was vicariously liable for any lack of reasonable care of the staff that it employed and engaged in providing residential care to residents at the residential facility including in the implementation of infection control measures;

(b) otherwise denies the allegations made in this paragraph.

95. In respect of paragraph 95, it:

(a) refers to the duty of care pleaded in sub-paragraph 94(a) of this defence;

(b) otherwise denies the allegations in paragraph 95 or, alternatively does not plead to it as relates to allegations of law rather than fact.

F.3 Breaches of Resident Duty

96. It denies the allegations in paragraph 96.

97. In respect of paragraph 97:

- (a) insofar as there is any reference to a paragraph or sub-paragraph in the 2FASOC, it refers to its response in the defence to that paragraph or sub-paragraph;
- (b) otherwise denies the allegations made in this paragraph.

98. In respect of paragraph 98, it:

- (a) refers to the matters in sub-paragraph 6(a) to (e) of this defence;
- (b) otherwise denies the allegations in paragraph 98.

99. In respect of paragraph 99, it:

- (a) refers to the matters in sub-paragraph 6(a) to (e) of this defence;
- (b) otherwise denies the allegations made in paragraph 99.

F.4 Loss and Damage

100. It denies the allegations in paragraph 100.

100A. In respect of the Negligence Claim - Residents:

- (a) pursuant to s 44 of the *Wrongs Act 1958* (Vic), Part X of that Act applies to the claim on the basis it is a claim for damages brought in negligence, and specifically s 51(1) of that Act;
- (b) pursuant to s 68 of the *Wrongs Act 1958* (Vic), Part XI of that Act applies to the claim on the basis it is a claim for damages brought in negligence;
- (c) the Resident Sub-Group Members (or his or her legal representative) are seeking an award of personal injury damages within the meaning of that term in ss 28B and 28LB of the *Wrongs Act 1958* (Vic) and therefore:
 - (i) pursuant to s 28C(1), Part VB of that Act applies to any award of damages;

- (ii) pursuant to s 28LC(1), Part VBA of that Act applies to any claim for damages for non-economic loss;
- (d) if the claim is brought by the legal representative of the estate of a deceased Resident Sub-Group Member, s 29(2) of the *Administration and Probate Act 1958* (Vic) applies to the recovery of any damages.

G. NEGLIGENCE CLAIM – FAMILY

G.1 Foreseeability of risks of harm

101. In respect of paragraph 101, it:

- (a) admits that at all material times there was risk that if Family who had a close relationship with a resident were exposed to distressing circumstances arising from death or injury to their related resident at the residential facility that some of them could or were at risk of suffering distress and anguish;
- (b) otherwise denies the allegations in paragraph 101.

102. In respect of paragraph 102, it:

- (a) admits the allegations in paragraph 102 in respect of the risk identified in sub-paragraph 101(a) of this defence;
- (b) otherwise denies the allegations in paragraph 102.

G.2 Salient features

103. In respect of paragraph 103, it:

- (a) in respect of the allegations in sub-paragraph (a):
 - (i) admits them for the periods from 26 February 2020, being the start of the COVID-19 period, to the end of the handover on 22 July 2020 and from mid-September 2020 to 22 October 2020;

- (ii) otherwise denies the allegations;
- (b) in respect of the allegations in sub-paragraph (b):
 - (i) admits that some Family had or were likely to have close relationships with their related residents and, therefore, had or were likely to have emotional and interpersonal attachment to their related residents;
 - (ii) otherwise denies the allegations;
- (c) in respect of the allegations in sub-paragraph (c), it:
 - (i) admits that over the periods from 26 February 2020, being the start of the COVID-19 period, to the end of the handover on 22 July 2020 and from mid-September 2020 to 22 October 2020:
 1. it owed residents the duty of care referred to in sub-paragraph 94(a) of this defence;
 2. that some Family Sub-Group Members were reliant on it to exercise the duty of care it owed to their associated resident and that a failure to do so may or could materialise for those Family Sub-Group Members the risk identified in sub-paragraph 101(a) of this defence and cause them anguish and distress;
 - (ii) otherwise denies the allegations made in this sub-paragraph;
- (d) in respect of the allegations in sub-paragraph (d):
 - (i) admits that over the periods from 26 February 2020, being the start of the COVID-19 period, to the end of the handover on 22 July 2020 and from mid-September 2020 to 22 October 2020:

1. it owed residents the duty of care referred to in sub-paragraph 94(a) of this defence;
2. that some Family Sub-Group Members were reliant on it to exercise the duty of care it owed to their associated resident and that a failure to do so may or could materialise for those Family Sub-Group Members the risk identified in sub-paragraph 101(a) of this defence and cause them anguish and distress;

(ii) otherwise denies the allegations made in this sub-paragraph;

(e) it does not admit the allegations made in this sub-paragraph;

G.3 Family Duty of Care

104. It denies the allegations in paragraph 104.

105. It denies the allegations in paragraph 105.

106. It denies the allegations in paragraph 106.

G.4 Breaches of Family Duty

107. It denies the allegations in paragraph 107.

108. It denies the allegations in paragraph 108.

109. In respect of paragraph 109, it:

(a) admits that:

(i) Family Sub-Group Members were informed or received information about the COVID-19 outbreak at the residential facility;

(ii) that some Family Sub-Group Members were or were likely to have been concerned and distressed about the health and safety of their associated family member;

(iii) it refers to the matters in sub-paragraph 47(p) of this defence and says further that:

1. after the handover on 22 July 2020, it was contacted by some Family Sub-Group Members inquiring about the health and safety of their associated resident;
2. it sought to obtain information from one or more of the Department, DHHS and the Commission and their servant and agents;
3. in some cases, it could not obtain any information about the associated resident;
4. in cases where it could obtain information about the associated resident, it relayed this to the inquiring Family Sub-Group Members;

(b) otherwise denies the matters in paragraph 109

110. It denies the allegations in paragraph 110.

G.5 Loss and damage

111. It denies the allegations in paragraph 111.

111A. In respect of the Negligence Claim - Family:

- (a) pursuant to s 44 of the *Wrongs Act 1958* (Vic), Part X of that Act applies to the claim on the basis it is a claim for damages brought in negligence, and specifically s 51(1) of that Act;
- (b) pursuant to s 68 of the *Wrongs Act 1958* (Vic), Part XI of that Act applies to the claim on the basis it is a claim for damages brought in negligence and specifically s 73 and 75 of that Act;

- (c) further to sub-paragraph (b) and s 73 of the *Wrongs Act 1958* (Vic):
 - (i) the Family Sub-Group Members or alternatively some of them did not witness at the scene their resident being killed, injured, or put in danger;
 - (ii) the Family Sub-Group Members or alternatively some of them were not at the relevant time in a close relationship with their resident who is alleged to have been killed, injured, or put in danger;
 - (iii) the Family Sub-Group Members or alternatively some of them are not entitled to an award of damages as they do not satisfy one of the matters in sub-paragraphs (c)(i) and (ii);
- (d) further to sub-paragraph (b) and s 75 of the *Wrongs Act 1958* (Vic), insofar as the Family Sub-Group Members are seeking an award of damages for economic loss for mental harm, they or alternatively some of them have not suffered a recognisable psychiatric injury and therefore cannot recover damages for economic loss;
- (e) the Family Sub-Group Member are seeking an award of personal injury damages within the meaning of that term in ss 28B and 28LB of the *Wrongs Act 1958* (Vic) and therefore:
 - (i) pursuant to s 28C(1), Part VB of that Act applies to any award of damages;
 - (ii) pursuant to s 28LC(1), Part VBA of that Act applies to any claim for damages for non-economic loss.

H. MISLEADING OR DECEPTIVE CONDUCT

112. In respect of paragraph 112, it:

- (a) says that State Trustees and not the plaintiff made the decision to admit Mr Fotiadis to the residential facility;
 - (b) does not know and cannot admit the allegations in paragraph 112.
113. It does not know and cannot admit the allegations in paragraph 113.
114. It does not know and cannot admit the allegations in paragraph 114.
115. It does not know and cannot admit the allegations in paragraph 115.
116. In respect of paragraph 116, it:
- (a) admits that it sent letters to relatives, resident representatives and visitors dated 10 July 2020, 15 July 2020, and 17 July 2020;
 - (b) relies upon the whole of the letters dated 10 July 2020, 15 July 2020, and 17 July 2020;
 - (c) admits the letter dated 10 July 2020 contained the statement as alleged in sub-paragraph (a);
 - (d) admits the letter dated 15 and 17 July 2020 contained the statement as alleged in sub-paragraph (b);
 - (e) otherwise denies the allegations made in paragraph 116.
117. It does not admit the allegations in paragraph 117.
118. In respect of paragraph 118:
- (a) it says that the State Trustees and not the plaintiff made the decision to admit Mr Fotiadis to the residential facility;
 - (b) otherwise, does not know and cannot admit the allegations in paragraph 118.
119. It denies the allegations in paragraph 119.
120. It denies the allegations in paragraph 120.

120A. If the plaintiff and the Representee Sub-Group Members have suffered loss and damage because of a s 18 Contravention (which is denied):

(a) insofar as any of them seeks to recover an amount for his or her loss and damage for the s 18 Contravention pursuant to s 236 of ACL:

(i) the action would be based on conduct contravening a provision of Part 2-1 of the ACL;

(ii) in accordance with s 137C(1) of the CCA he or she is not entitled to recover any amount where the loss and damage is or results from death or personal injury (not being related to smoking or the use of tobacco products) within the meaning of the term 'personal injury' in s 4 of the CCA;

(b) insofar as any of them brings an action to recover an amount for his or her loss and damage pursuant to s 267(3) or (4) of the ACL:

(i) the action would be based on conduct contravening a provision of Part 2-1 of the ACL;

(ii) he or she is not entitled to bring such an action under s 267 of the ACL;

(c) insofar as any of them brings an action to recover an amount for his or her loss and damages pursuant to Part VIB of the CCA:

(i) the action would be based on conduct contravening a provision of Part 2-1 of the ACL;

(ii) he or she is not entitled to bring such an action under Part VIB of the CCA.

I. COMMON ISSUES OF FACT AND LAW

121. It does not plead to paragraph 121 as it contains no allegations against it.

J. MATTERS RELATING TO EXEMPLARY DAMAGES

122. It admits the allegations in paragraph 122.

123. It admits the allegations in paragraph 123.

124. It admits the allegations in paragraph 124.

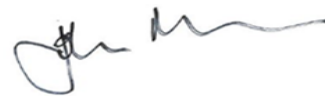
125. It denies the allegations in paragraph 125.

126. It denies the allegations in paragraph 126.

127. It denies the allegations in paragraph 127.

128. It says further where a legal representative of the estate of a deceased Resident Sub-Group Member is claiming exemplary damages, s 29(2) of the *Administration and Probate Act 1958* (Vic) prohibits the estate from claiming exemplary damages.

Patrick Over
Counsel for the defendant



JOHN MITCHELL
Solicitor for the Defendant