



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

Case: S ECI 2020 03282

S ECI 2020 03282 Filed 2022 09:28 AM

BETWEEN

SEBASTIAN AGNELLO

Plaintiff

and

HERITAGE CARE PTY LTD (ACN 106 873 796)

Defendant

**DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM –
PURSUANT TO THE ORDERS OF THE HON JOHN DIXON J MADE ON 13
SEPTEMBER 2022**

Date of document: ~~29 April 2022~~ 29 September 2022

Filed on behalf of: the Defendant

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To the plaintiff's **second** further amended statement of claim dated **14 September** ~~7 February~~ 2022 (**FASOC**), the defendant (**Heritage Care**) says as follows:

A. Parties and Group Members

- 1 As to paragraph 1, it:
- (a) admits subparagraphs 1(a) and 1(c);
 - (b) does not admit subparagraph 1(b);
 - (c) admits subparagraph 1(d)(i);
 - (d) says that:

- (i) save that it admits that from 26 September 2018, it provided Mrs Agnello with 'hotel services' and 'care and services' within the meaning of the *Quality of Care Principles 2014* (Cth), it says that subparagraph 1(d)(ii) is otherwise vague and embarrassing absent particularisation as to the precise nature of the 'services' said to comprise the definition of 'Residential Care Services' adopted by the plaintiff, which is said to 'include' the 'hotel services' and 'care and services' referred to above;
 - (ii) subparagraphs 1(d)(iii) and 1(d)(iii)(1) are vague and embarrassing absent particularisation as to the 'services' being referred to for the purpose of subparagraph 1(d);
 - (iii) further, subparagraph 1(d)(iii)(2) is vague and embarrassing on the basis that the Quality of Care Principles do not define the term 'services'; and
 - (iv) under the cover of these objections, it denies subparagraphs 1(d)(ii)-(iii); and
- (e) save that it admits that Mrs Agnello died on 28 July 2020, does not admit subparagraph 1(e).

2 It admits paragraph 2.

3 It does not plead to paragraph 3 as it contains no allegations against it.

4 As to paragraph 4, it:

- (a) admits subparagraph 4(a);
- (b) admits subparagraph 4(b); and
- (c) as to subparagraph 4(c), it refers to and repeats subparagraph 1(d) above; and
 - (i) on that basis, denies subparagraph 4(c); and
 - (ii) says further that it did not supply 'hotel services' and 'care and support services' (as referred to at subparagraph 1(d) of the FASOC) to:
 - (A) persons who resided in the Northern Health Palliative Care Unit, located at Epping Gardens;

- (B) persons while those persons resided in the Transition Care Program (**TCP**) Ward at Epping Gardens; and
- (C) the legal representatives of the estates of Residents.

5 It admits paragraph 5.

6 It admits paragraph 6.

7 It does not admit paragraph 7 and says further that data released by the Commonwealth Department of Health (**Department**) (and upon which the Independent Review (as defined) relies) records 38 residents as having died at Epping Gardens as at 23 October 2020, and states that “[i]n Victoria, a death is reported when a person with COVID-19 dies during an active outbreak at an aged care facility irrespective of the cause of death”.

Particulars

Document titled ‘COVID-19 outbreaks in Australian residential aged care facilities’
dated 23 October 2020, p 8.

8 As to paragraph 8, it:

- (a) denies paragraph 8 to the extent that it alleges that Residents (or their estates) or Family suffered loss or damage ~~in the COVID-19 Period~~ as a result of the defendant's alleged conduct **in the COVID-19 Period** as set out in the FASOC; and
- (b) otherwise does not plead to paragraph 8 as it contains no allegations against it.

9 It refers to and repeats paragraph 8 above and 10 below and otherwise does not admit paragraph 9.

10 As to paragraph 10 it:

- (a) as to subparagraph 10(a), denies that any Residents (or their estates) suffered any loss or damage caused by the alleged breaches set out at subparagraphs 10(a)(i)-(iii);
- (b) as to subparagraph 10(b), denies that any Family (as defined) suffered any loss or damage caused by the alleged Breaches of Family Duty (as defined);

- (c) says that by reason of subparagraphs 10(a)-(b) above, there are no 'Resident Sub-Group Members' or 'Family Sub-Group Members' (as defined at subparagraphs 10(a) and 10(b) of the FASOC);
- (d) by reason of the above, says that for the purpose of this defence:
 - (i) any reference to 'Resident Sub-Group Members' made in this defence or in the FASOC is to be understood as a reference to the Resident Sub-Group Members as alleged in the FASOC (but whose existence is otherwise denied); and
 - (ii) any reference to 'Family Sub-Group Members' made in this defence or in the FASOC is to be understood as a reference to the Family Sub-Group Members as alleged in the FASOC (but whose existence is otherwise denied);
- (e) refers to and repeats paragraph 8, above; and
- (f) otherwise does not plead to paragraph 10 as it contains no allegations against it.

11 It refers to and repeats subparagraph 1(d) and paragraph 4 above, and otherwise denies paragraph 11.

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

B. Statutory and Regulatory Context

13 Save that it admits that it was required to comply with the provisions referred to at subparagraphs (a) to (d) of paragraph 13, to the extent any of those provisions applied to it and imposed compliance obligations upon it, it otherwise does not admit paragraph 13.

14 As to paragraph 14:

- (a) subject to reference to the full terms and effect of the Infection Control Guidelines, it admits subparagraph 14(a);
- (b) subject to reference to the full terms and effect of the CDNA National Guidelines, it admits subparagraph 14(b); and

- (c) it admits that it was aware of guidelines published from time to time by the Department regarding social distancing measures, to the extent any such guidelines were relevant to residential aged care facilities, but otherwise denies subparagraph 14(c).
- 15 As to paragraph 15, it admits that those sections of the *Aged Care Act 1997* (Cth) applied and says further that, at trial, it will refer to the full terms and effect of the provisions referred to in that paragraph.
- 16 As to paragraph 16, it admits that those provisions of the Quality of Care Principles applied and says further that, at trial, it will refer to the full terms and effect of the provisions referred to in that paragraph.
- 17 As to paragraph 17, it admits that those provisions of the Aged Care Quality Standards applied and says further that, at trial, it will refer to the full terms and effect of the provisions referred to in that paragraph.
- 18 As to paragraph 18, it admits that those provisions of the User Rights Principles applied and says further that, at trial, it will refer to the full terms and effect of the provisions referred to in that paragraph.
- 19 As to paragraph 19, it admits that those provisions of the Charter applied and says further that, at trial, it will refer to the full terms and effect of the provisions referred to in that paragraph.
- 20 As to paragraph 20, it:
- (a) admits that certain sections of the Victorian Directions listed in Annexure A to the FASOC applied to it in its capacity as a provider of residential aged care services during the period 21 March 2020 to 9 September 2020; and
 - (b) relies on the terms of the Victorian Directions for their full effect to the extent the Victorian Directions did apply to it as a provider of residential aged care services.
- 21 As to paragraph 21, it:
- (a) says that from 21 March 2020 to 31 May 2020 the Victorian Directions listed in Annexure A were to the effect alleged in subparagraph 21(a) with respect to “care and support visits”; and

- (b) otherwise denies that from 1 June 2020 to 20 July 2020 the Victorian Directions listed in Annexure A were to the effect alleged in subparagraph 21(a) and says that from 1 June 2020, when the Care Facilities Directions (No 4), Special Gazette No. S 267 came into force, until 20 July 2020, a resident of a residential aged care facility could have up to two care and support visits per day provided that, for each resident, the total number of visitors did not exceed two per day and the total duration of the visits did not exceed two hours per day;
- (c) admits subparagraph 21(b);
- (d) refers to and repeats subparagraphs 21(a) and (b) above and otherwise admits subparagraph 21(c); and
- (e) otherwise relies on the Victorian Directions set out in Annexure A to the FASOC for their full terms and effect.

22 As to paragraph 22, subject to reference to the full terms and effect of the Infection Control Guidelines at trial, it:

- (a) admits that the Infection Control Guidelines contained provisions to the effect alleged at subparagraphs 22(a) to (f); and
- (b) says that on their proper construction, the Infection Control Guidelines provided general guidance and recommendations regarding the implementation of infection prevention and control measures in a diverse range of healthcare settings.

23 As to paragraph 23, subject to reference to the full terms and effect of the CDNA National Guidelines at trial (both the version pleaded by the plaintiff as well as subsequent versions), it:

- (a) admits that on 13 March 2020, the CDNA National Guidelines were published and says that those guidelines were subsequently updated in April 2020 and July 2020;
- (b) admits that the clauses of the CDNA National Guidelines referred to in paragraph 23 of the FASOC were to the effect alleged by reference to the version of the CDNA National Guidelines dated 13 March 2020;

- (c) says that subsequent versions of the CDNA National Guidelines contained amendments to the version dated 13 March 2020, including to those clauses referred to in paragraph 23 of the FASOC;
- (d) otherwise says that the CDNA National Guidelines (as varied from time to time):
 - (i) provided information for the prevention and management of COVID-19 outbreaks in residential care facilities; and
 - (ii) contained words to the effect that, among other things:
 - (A) the CDNA National Guidelines were adapted from previous work on influenza and respiratory illness outbreaks in residential care facilities;
 - (B) the CDNA National Guidelines provide guidance on good practice based upon the available evidence at the time of completion;
 - (C) in relation to COVID-19, “it is important to note that assumptions about the epidemiology and impact of COVID-19 may change” as new knowledge emerges;
 - (D) as at July 2020, “[a]irborne spread may occur during aerosol generating procedures but these are unlikely in [residential care facilities]”;
 - (E) readers should not rely solely on the information contained within the CDNA National Guidelines and that such information is not a substitute for advice from other relevant sources, including advice from a health care professional; and
 - (F) clinical judgment and discretion may be required in the interpretation and application of the CDNA National Guidelines.

24 As to paragraph 24, it:

- (a) admits that the Department issued guidelines in relation to social distancing measures to the effect alleged at subparagraphs 24(a) to (f); and

- (b) says that:
 - (i) the guidance issued by the Department to wear a surgical mask when in the same room as a sick person was issued in relation to "households" specifically;
 - (ii) the Social Distancing Measures, as alleged:
 - (A) were not absolute, rather they ought to be adhered to "wherever possible";
 - (B) on their proper construction, were of general application across the community and did not, and could not, have specific application at all times and to all people in a residential aged care setting which requires close interpersonal care being provided to residents of aged care facilities; and
 - (C) by reason of the above, did not restrict staff or visitors from providing care and support to Residents based on clinical need;
- (c) otherwise admits paragraph 24.

C. Events surrounding COVID-19 Outbreak

25 As to paragraph 25, it:

- (a) admits subparagraphs 25(a), (b) and (d);
- (b) does not admit subparagraph 25(c); and
- (c) says that at all material times, the knowledge and understanding of COVID-19 and its effect was continually evolving and the extent to which COVID-19 could be transmitted other than through face-to-face contact and contact with surfaces with which an infected person has been in contact remained uncertain during the relevant period.

26 It denies paragraph 26 and says that "human coronavirus with pandemic potential" was added as a "listed human disease" on 21 January 2020.

27 It admits paragraph 27.

- 28 It admits paragraph 28.
- 29 It admits paragraph 29.
- 30 It admits paragraph 30, save that the Department's information sheet titled 'COVID-19 – Identifying the Symptoms' identified diarrhoea as a "rare" symptom of COVID-19.
- 31 As to paragraph 31, it:
- (a) admits that the Department's information sheet titled 'Coronavirus (COVID-19) Outbreak Management' contained information to the effect alleged at subparagraphs 31(a)-(f); and
 - (b) says further that the information sheet also stated that:
 - (i) "information regarding the COVID-19 pandemic is continually evolving"; and
 - (ii) use of airborne precautions is recommended, but only when performing certain high-risk procedures and their use is "unlikely to be needed" in a residential care facility.
- 32 As to paragraph 32, it:
- (a) admits that on 26 February 2020, it received a letter from the Chief Medical Officer of the Commonwealth, Professor Brendan Murphy, titled 'Residential Aged Care Infection Control and Emergency Planning';
 - (b) says that that letter:
 - (i) reiterated the importance of infection control and being prepared for health emergencies;
 - (ii) emphasised the importance of implementing standard and transmission-based precautions to prevent and control infections generally;
 - (iii) set out a range of matters that were unique to COVID-19;

(iv) acknowledged the unique and novel nature of COVID-19 by referring to COVID-19 specific resources and stating that the Department will continue to communicate with providers as the situation evolves; and

(c) otherwise denies paragraph 32.

33 As to paragraph 33, it:

(a) admits that the 26 February Notification contained the statements set out at subparagraphs 33(a) to (f) of the FASOC; and

(b) refers to and repeats paragraph 32(b), above.

34 It admits paragraph 34.

35 It does not admit paragraph 35.

36 As to paragraph 36, it:

(a) admits that the statement from the Australian Health Protection Principal Committee referred to at paragraph 36 of the FASOC contained the statements set out at subparagraphs 36(a)-(e) of the FASOC; and

(b) says that the Australian Health Protection Principal Committee statement also stated that:

(i) *“Transmission of COVID-19 is through contact with respiratory droplets containing the virus, produced when an infectious individual coughs or sneezes”*; and

(ii) *“The recommendations outlined may be altered according to the particular circumstance of the resident, including those who are in palliative care or residents in dementia units, which should be considered on a case-by-case basis. These situations will likely necessitate increased social contact with visitors”*.

37 As to paragraph 37, it:

(a) admits subparagraph 37(a);

- (b) admits that the Aged Care Facilities Directions were issued under s 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic) and refers to those Directions for their full terms and effect; and
- (c) otherwise denies that the Aged Care Facilities Directions pleaded at subparagraph 37(b) had the effect alleged and says that:
 - (i) those Directions permitted visits for the purposes of providing end of life support for a resident of a residential aged care facility;
 - (ii) those Directions permitted “care and support” visits, being a visit of no longer than 2 hours made to a resident of a residential aged care facility by one person, or two persons together, for the purposes of providing care and support to the resident; and
 - (iii) properly understood, the reference to a “care and support” visit includes visits by persons to provide physical care as well as emotional support to residents of residential aged care facilities.

38 As to paragraph 38, it:

- (a) does not admit that the 22 March Letter was sent to all persons who may constitute Family (as defined in the FASOC);
- (b) says that the 22 March Letter stated that:
 - (i) the COVID-19 situation is rapidly evolving and in response Heritage Care has implemented many measures to ensure the safety and wellbeing of Residents, families and staff;
 - (ii) “some persons” have chosen to ignore these measures and in some circumstances have verbally and physically threatened and abused staff members; and
 - (iii) for this reason, access to Epping Gardens was to be limited to essential services and contractors but Heritage Care was reviewing this imposition daily and that restricted access was intended as a temporary measure; and
- (c) otherwise admits paragraph 38.

- 39 It admits paragraph 39.
- 40 It admits paragraph 40, and refers to and repeats subparagraph 25(c) above.
- 41 It does not admit paragraph 41.
- 42 It admits paragraph 42.
- 43 Save that it says that paragraph 42 does not make any allegations as to roster changes, it admits paragraph 43.
- 44 In response to paragraph 44, it:
- (a) does not admit subparagraph 44(a);
 - (b) as to subparagraph 44(b), it:
 - (i) refers to and repeats subparagraph 44(a) above;
 - (ii) says that it communicated to staff members that the roster was being reviewed to ensure that an appropriate number of staff with an appropriate mix of professional skills were available to Residents at Epping Gardens having regard to occupancy levels and the care needs of Residents; and
 - (iii) otherwise denies subparagraph 44(b);
 - (c) denies subparagraph 44(c); and
 - (d) denies subparagraph 44(d).
- 45 In response to paragraph 45, it:
- (a) in response to subparagraph 45(a), it:
 - (i) admits terminating the employment of some nurses at Epping Gardens and reducing the working hours of PCAs at Epping Gardens after the 1 June Meeting;
 - (ii) denies terminating the employment of any casual staff as a result of the 1 June Meeting; and

- (iii) says further that as at 1 June 2020, it was exceeding industry benchmarks with respect to staffing ratios at Epping Gardens, and, accordingly, it determined in advance of the 1 June Meeting to review and change its roster so that its staffing ratios became aligned with industry benchmarks, taking into account factors including occupancy levels and staff skill mix at Epping Gardens, while continuing to allow it to meet the care requirements of Residents at Epping Gardens;
- (b) denies subparagraph 45(b); and
- (c) refers to and repeats paragraph 44 above and otherwise denies paragraph 45.

46 In response to paragraph 46, it says as follows:

- (a) in response to subparagraph 46(a), it:
 - (i) says one registered nurse was rostered to be responsible for the Residents across the two “upstairs” wards at Epping Gardens;
 - (ii) says that the rostered registered nurse in the upstairs wards was supported by an enrolled nurse and PCAs during the day shift, as well by the Director of Nursing and the Clinical Care Coordinator on weekdays;
 - (iii) says that the rostered registered nurse in the upstairs wards was supported by PCAs during the night shift;
 - (iv) says that the Director of Nursing and the General Manager were ‘on call’ at all times when not physically present at Epping Gardens;
 - (v) says that members of Heritage Care’s Quality Team were available at all times to provide support to clinical staff at Epping Gardens; and
 - (vi) refers to and repeats paragraphs 44 to 45 above, and otherwise denies subparagraph 46(a);
- (b) denies subparagraph 46(b) and:
 - (i) says:

- (A) PCAs were rostered to work either across the “upstairs” wards, or across the “downstairs” wards at Epping Gardens (excluding the Northern Health Palliative Care Unit);
 - (B) PCAs were generally rostered to work in the same area of Epping Gardens on an ongoing basis, being the “upstairs” or “downstairs” area, to ensure continuity of care;
 - (C) PCAs rostered to work downstairs worked in the TCP Ward as well as the Merri residential ward as the two wards shared a common corridor; and
- (ii) otherwise refers to and repeats paragraphs 44 to 45 above;
- (c) as to paragraph 46(c), it:
- (i) says:
 - (A) that the defendant’s rostering system recorded when staff worked and in which location of the Epping Gardens facility staff were rostered to work;
 - (B) staff were required to sign in and sign out at the end of each shift;
 - (C) the clinical notes taken by staff recorded where a staff member had been on a particular day; and
 - (ii) refers to and repeats paragraphs 44 to 45 above and otherwise denies paragraph 46(c).

47 In response to paragraph 47, it:

- (a) denies each of the matters alleged at subparagraph 47(a) and says further that:
 - (i) it acted in accordance with the defendant’s infection prevention and control measures (as those measures stood from time to time) and in a manner that was consistent with the Victorian Directions that were in force from time to time and which applied to it with regard to face masks (as pleaded below);

- (ii) staff were allocated a face mask at the commencement of a shift, and additional face masks were available onsite for all staff at Epping Gardens as required;
- (iii) from 10 July 2020, Heritage Care mandated the use of face masks by all staff, contractors, visitors and other personnel onsite at Epping Gardens where safe physical distancing was not feasible;

Particulars

This was communicated in an update to staff at Epping Gardens dated 10 July 2020.

- (iv) it was not until 13 July 2020 that the Department issued guidance to the effect that all aged care staff who work in Victorian residential care facilities or provide home care support across Victoria's lock down zones were to wear face masks when providing close personal or clinical care, based on recommendations from the Australian Health Protection Principal Committee; and
- (v) it was not until on or about 22 July 2020 that:
 - (A) the Victorian Government introduced the Restricted Activity Directions (Restricted Areas) (No 3), which required, for the first time, that employees wear face coverings at all times when working at their employer's premises, with certain exemptions;
 - (B) the Victorian Government introduced the Stay at Home Directions (Restricted Areas) (No 4), which required people leaving their place of residence to wear a face covering at all times, with certain exemptions;
- (b) denies subparagraph 47(b) and says that it complied with the Victorian Directions with respect to mask wearing requirements.

48 In response to paragraph 48, it says as follows:

- (a) as to subparagraph 48(a)(i), it:

- (i) admits that certain visitors (including Family) were given permission by management to enter Epping Gardens to visit Residents from time to time during the period 22 March 2020 to 20 July 2020;
 - (ii) denies that:
 - (A) such permission was granted frequently and says that such permission was granted by exception; and
 - (B) visitors were given permission by management to visit Residents otherwise than in accordance with the relevant Victorian Directions that applied to it from time to time;
 - (iii) says that in the period from 22 March 2020 to 20 July 2020, Heritage Care introduced visiting restrictions which were consistent with the relevant Victorian Directions that applied to it from time to time as well as advice and guidelines issued by various governmental and industry bodies during this period; and
 - (iv) otherwise denies subparagraph 48(a)(i);
- (b) as to paragraph 48(a)(ii), it:
- (i) says that from time to time, certain family members were permitted by management at Epping Gardens to attend the facility to care for or feed their Resident in the interests of a Resident's emotional wellbeing or for behavioural reasons and that such attendances complied with the Victorian Directions that applied to it from time to time;
 - (ii) says that any such visits were granted by exception and were not a substitute for clinical care otherwise provided by the defendant;
 - (iii) denies that family members (including Family as defined) were permitted to attend Epping Gardens to care for or feed their Resident because there were insufficient staff members to care for or feed Residents; and
 - (iv) otherwise denies subparagraph 48(a)(ii);
- (c) as to subparagraph 48(a)(iii), it:

- (i) admits subparagraph 48(a)(iii) and says that all visits permitted by it were in accordance with the Victorian Directions; and
 - (ii) otherwise refers to and repeats subparagraphs 48(a) to (b) above.
- (d) as to subparagraph 48(a)(iv), it:
 - (i) denies subparagraph 48(a)(iv); and
 - (ii) says that:
 - (A) the entrance doors to Epping Gardens were closed and visitors required the assistance of a staff member to let them in;
 - (B) there were procedures in place at times during the period 22 March 2020 to July 2020 to facilitate monitoring of visitors, including seeking permission before visiting, signing in at the Epping Gardens facility on arrival, undertaking a temperature check and completing the COVID-19 Entry Assessment Tool when entering the facility, which was overseen by the receptionist during business hours and by the registered nurse in charge outside business hours;
 - (C) it took reasonable steps to ensure that visitors complied with visitation rules, including by asking that persons report anyone who may have stayed longer than their allocated time without the knowledge of Heritage Care;
 - (D) management at Epping Gardens relied on visitors acting honestly and consistently with the requirements of the Victorian Directions, Heritage Care's conditions of entry and Heritage Care's visitation rules, which were communicated to visitors and family members in advance of a permitted visit;
- (e) as to subparagraph 48(b), it:
 - (i) admits subparagraph 48(b)(i);
 - (ii) denies subparagraph 48(b)(ii) and says that:

- (A) staff were required to complete the COVID-19 Entry Assessment Tool and take their temperature when entering Epping Gardens;
 - (B) this process was monitored by a receptionist during business hours and the nurse in charge outside of business hours;
- (iii) denies subparagraph 48(b)(iii);
- (f) as to subparagraph 48(c), it:
 - (i) denies subparagraph 48(c)(i); and
 - (ii) as to subparagraph 48(c)(ii):
 - (A) refers to the Victorian Directions, which limited entry to aged care facilities;
 - (B) says staff were not encouraged, requested or required to attend the Epping Gardens facility unless attending for the purpose of their employment at Epping Gardens; and
 - (iii) otherwise denies the allegation in subparagraph 48(c)(ii);
- (g) as to subparagraph 48(d), it:
 - (i) denies subparagraph 48(d)(i), and further refers to paragraph 24 above;
 - (ii) as to subparagraph 48(d)(ii), it:
 - (A) denies that the Director of Nursing directed staff to feed Residents together in communal dining areas due to staff shortages or that Residents were fed together in communal dining areas due to staff shortages and refers to and repeats paragraph 45 above;
 - (B) says that Residents were fed in communal dining areas from time to time, but in circumstances where additional infection control measures, including increased cleaning and hand sanitation, were being used (and physical distancing practised) as this form of dining was not prohibited;

(C) says further that:

- (1) social distancing requirements did not require the closure of communal areas or Residents to isolate from each other, beyond maintaining a 1.5 metre distance from each other where possible;
- (2) communal areas which remained open and in use had appropriate social distancing measures in place, including the spacing out of chairs in the dining rooms and other common areas; and
- (3) the continued use of communal areas, where appropriate, was important in order to maintain and promote the emotional and social wellbeing of Residents;

(iii) denies subparagraph 48(d)(iii) and says:

- (A) each Resident had their own bathroom and toilet that were not for use by visitors or staff;
- (B) common toilets were available for use by staff and visitors and were cleaned more regularly during the COVID-19 Period;

(h) as to subparagraph 48(e), it:

(i) says that the phrase “regularly or systematically” is vague and embarrassing and under the cover of that objection denies subparagraph 48(e); and

(ii) in any event, says further that:

- (A) from 26 March 2020, Residents had their temperature taken twice daily;
- (B) if a Resident's temperature was greater than 37.5 degrees or the Resident was showing signs or symptoms of illness, staff were required to complete a ‘COVID-19 Screening Tool for Residents’ which set out steps to follow to mitigate the risk of a COVID-19

outbreak within the workplace, including arranging for the Resident to be tested for COVID-19 if appropriate; and

(C) there was no general Government requirement that residents of residential aged care facilities be tested for COVID-19 absent a specific reason for doing so, such as if a resident exhibited symptoms consistent with COVID-19 or was identified as a close contact of someone who has tested positive for COVID-19;

(i) as to subparagraph 48(f), it:

(i) admits that complaints from Families were received from time to time, including with respect to the matters identified at paragraph 48 above;

(ii) says further that the allegation is otherwise vague and embarrassing; and

(iii) under the cover of that objection, denies subparagraph 48(f).

(j) As to paragraph 48 generally, it:

(i) says further that as of at least 24 June 2020, social distancing measures had been implemented at the facility, which included the following:

(A) limiting the number of staff present at one time at the nurse's station and imposing density limits in all common areas, staff rooms and lifts (among other places);

(B) restricting the numbers of places per dining table;

(C) erecting signage around the facility and in all common areas indicating the number of people who were permitted to be in a particular area;

(D) imposing social distancing during recreational activities for Residents;

(E) persons seeking to visit Residents at Epping Gardens were encouraged to attend 'virtual visits' with their Resident via video-conferencing software, where appropriate; and

(k) says further that as of at least March 2020, additional cleaning measures were in place.

49 As to paragraph 49, it:

(a) admits subparagraph 49(a)(i);

(b) as to subparagraph 49(a)(ii), it:

(i) refers to and repeats paragraph 46(b) and denies subparagraph 49(a)(ii); and

(ii) says further with respect to subparagraph 49(a) that:

(A) as of at least 24 June 2020, the section of the facility allocated to the “Northern Health Palliative Care Unit” had been sectioned off with its own entrance and was not linked to the other services at Epping Gardens; and

(B) as of at least 24 June 2020, new admissions to the TCP Ward were required to complete a mandatory quarantine period in dedicated isolation rooms at the facility;

(c) denies subparagraph 49(a)(iii);

(d) denies subparagraph 49(b); and

(e) denies each of the allegations at subparagraphs 49(c) to 49(d), and says further that all reasonable measures were taken by it to avoid the matters set out in subparagraphs 49(c) to (d).

50 It admits paragraph 50 and says with regard to subparagraph 50(a) that it was also reported that the positive results at the Northern Hospital were confined to the emergency department of that hospital, that contact tracing of staff and patients was underway and that the healthcare workers wore appropriate PPE during patient interactions on the shifts worked.

Particulars

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

51 It refers to and repeats paragraph 50 above, and otherwise admits paragraph 51.

52 In answer to paragraph 52, it says as follows:

(a) as to subparagraph 52(a)(i), it:

(i) admits the owner of the Café frequently took orders from staff and says that orders were generally collected by staff from the Café premises;

(ii) denies that the owner of the Café delivered orders “throughout” the Epping Gardens facility and says that, from time to time, orders would be delivered to staff and to Residents in their rooms via a mobile trolley service if they were unable to collect the order from the Café premises;

(iii) says that, from 10 July 2020, the Café owner was required to wear a mask in circumstances where it was not possible to maintain social distancing;

(iv) says further that in order to enter the Epping Gardens facility, the Café owner was expected to sign in, practise hand hygiene, undertake a temperature check and complete the COVID-19 Entry Assessment Tool; and

(v) otherwise denies paragraph 52(a)(i);

(b) as to subparagraph 52(a)(ii), it denies management directed the owner of the Café to host 'coffee parties' or that 'coffee parties' were held;

(c) it denies subparagraph 52(b) and says further that on any occasion when pizza was delivered to Epping Gardens, it was collected at the front door and the delivery person did not enter Epping Gardens;

(d) it admits subparagraph 52(c) and says that the relevant Victorian Directions and health advice at the time permitted communal facilities such as the lounge and Café to continue to operate.

53 As to paragraph 53, it:

- (a) admits that on or about 13 July 2020 the Department announced that all aged care workers in Victoria's lock down zones would be required to wear masks, when providing close personal or clinical care;
- (b) says that on or about 13 July 2020 the Victorian Government announced that, for staff working at aged care facilities in metropolitan Melbourne and Mitchell Shire where there were no positive cases of COVID-19, mask wearing was recommended when they had a role that involved interaction and contact with residents; and

Particulars

Victorian Government Department of Health and Human Services document titled 'Coronavirus (COVID-19) Advice for residential aged care staff and visitors in metropolitan Melbourne and Mitchell Shire' dated 13 July 2020.

Media Release issued by the Hon Greg Hunt MP titled 'Face masks required for aged care workers in Melbourne hotspots' dated 13 July 2020.

- (c) otherwise denies paragraph 53.

54 It admits paragraph 54 and says further that:

- (a) it informed staff in an update dated 10 July 2020 that it was mandatory to wear masks at Epping Gardens when it was not feasible to maintain safe physical distancing; and
- (b) it provided a similar update to contractors on 13 July 2020 regarding the use of masks when it was not feasible to maintain safe physical distancing.

55 It denies paragraph 55 and says that:

- (a) as to subparagraphs 55(a) and (b):
 - (i) from 10 July 2020, it was a requirement that all staff, contractors, visitors and other personnel wear face masks at Epping Gardens where it was not possible to maintain a safe physical distance;
 - (ii) masks were available to any visitor who did not have a mask;

- (iii) on 14 July 2020, the Director of Nursing issued a notification to all staff informing them of a general requirement to wear masks during their shifts;
- (b) as to subparagraph 55(c), Residents were offered masks, and some Residents wore masks, but Residents were otherwise not required by any government instrument to wear masks while at Epping Gardens, where they resided; and
- (c) mask wearing was not mandated in Victoria until 22 July 2020.

56 It denies paragraph 56 and says that:

- (a) in relation to subparagraph 56(a):
 - (i) management held a meeting involving clinical staff on 16 July 2020 (the **16 July Meeting**), which was a routine monthly clinical meeting;
 - (ii) the 16 July Meeting was held at handover time to capture incoming afternoon staff and outgoing morning staff;
 - (iii) says further that on 15 July 2020 the Director of Nursing sent an email to the General Manager, Clinical Care Coordinator and registered nurses at Epping Gardens with information and documents relating to COVID-19, requiring all registered nurses to review the email and its attachments ahead of the 16 July Meeting;
- (b) in relation to subparagraph 56(b):
 - (i) at the 16 July Meeting registered nurses and enrolled nurses were, among other things:
 - (ii) provided with an update in relation to visitor restrictions in place at Epping Gardens;
 - (iii) provided with an update in relation to the policies and procedures they should follow in the event there was a suspected case of COVID-19 at Epping Gardens;
 - (iv) reminded of the requirement for them to wear masks as referred to at paragraph 55 above;

- (v) reminded of the need for staff to maintain social distancing in the staff room and in the nurses' stations;
- (c) in relation to subparagraph 56(c) it:
 - (i) refers to and repeats the matters identified at subparagraphs 56(a) and (b) above and denies paragraph 56(c); and
 - (ii) in any event, says all Heritage Care staff involved in caregiving hold at least a Certificate III in Individual Support and had undertaken infection control training.

57 As to paragraph 57, it:

- (a) admits that a small number of staff illicitly and without authorisation convened a social gathering on 16 July 2020 at Epping Gardens;
- (b) does not admit subparagraphs 57(a) and (c);
- (c) says that the gathering of staff was unauthorised by the defendant and the defendant was unaware of the gathering until on or around 22 July 2020, following which the staff who attended were formally disciplined and the incident reported to Victoria Police and the Australian Health Practitioner Regulation Agency; and
- (d) otherwise admits paragraph 57.

58 As to paragraph 58, it says that:

- (a) it is not aware of any COVID-19 positive patients from the Northern Hospital being admitted into the TCP Ward prior to 20 July 2020 or at all;
- (b) any patients being transferred from the Northern Hospital to Epping Gardens who were exhibiting symptoms consistent with COVID-19 were subject to testing and isolation requirements;
- (c) any patients being transferred from the Northern Hospital to Epping Gardens who were not exhibiting symptoms consistent with COVID-19 were required to isolate following their admission to Epping Gardens; and
- (d) otherwise does not admit paragraph 58.

59 As to paragraph 59, it:

~~(a) says that it does not plead to paragraph 59 by reason of s 62-1 of the Aged Care Act 1997 (Cth);~~

~~(b) otherwise does not admit paragraph 59.~~

(a) says that during June 2020, Mr Croce exhibited symptoms which may also be symptoms of COVID-19;

(b) denies that Mr Croce contracted COVID-19 during June 2020; and

(c) otherwise does not admit paragraph 59.

60 As to paragraph 60, it:

~~(a) says that it does not plead to paragraph 60 by reason of s 62-1 of the Aged Care Act 1997 (Cth);~~

~~(b) otherwise denies paragraph 60 including subparagraphs (a)-(d) thereof.~~

(a) denies subparagraph 60(a) and says that Mr Croce was not recorded as having a fever until shortly before his admission to hospital on 19 July 2020;

(b) denies subparagraph 60(b);

(c) denies subparagraph 60(c);

(d) denies subparagraph 60(d) and says further that:

(i) Mr Croce was regularly monitored for symptoms consistent with COVID-19;

(ii) Mr Croce was confined to his room and required to isolate during periods when he was awaiting the result of a COVID-19 test;

(iii) Mr Croce's family were promptly and regularly updated about Mr Croce's condition; and

(iv) Mr Croce was tested for COVID-19 on 10 June 2020 and 24 June 2020 and returned a negative result on both occasions.

61 It does not admit paragraph 61.

62 As to paragraph 62:

~~(a) — it says that it does not plead to paragraph 62 by reason of s 62-1 of the Aged Care Act 1997 (Cth);~~

~~(b) — it otherwise denies subparagraph 62(a); and~~

~~(c) — it otherwise does not admit subparagraph 62(b).~~

(a) save that it admits that on 19 July 2020, family of Mr Croce visited him at Epping Gardens and that Mr Croce was taken to the Royal Melbourne Hospital, it denies subparagraph 62(a); and

(b) it does not admit subparagraph 62(b).

63 As to paragraph 63, it:

(a) admits subparagraphs 63(a) to 63(c); and

(b) as to subparagraph 63(d):

(i) says that the COVID-19 testing that was arranged by the Department on 20 July 2020 was not undertaken by the external testing provider arranged by the Department until 23 July 2020 for external reasons beyond the control of the defendant; and

(ii) otherwise denies that the testing was “scheduled” to be undertaken on the afternoon of 23 July 2020.

64 In response to paragraph 64, it says as follows:

(a) as to subparagraph 64(a), it:

(i) says that Heritage Care was advised by, among others, the Victorian Department of Health and Human Services (**DHHS**) and Aspen Medical, that only staff who were identified as close contacts of positive cases should get tested at local testing sites, and that all other staff who were not identified as close contacts and who were not exhibiting symptoms

consistent with COVID-19 (**Non-Close Contact Staff**) should wait to be tested as part of the onsite testing being organised by the Department;

- (ii) says Non-Close Contact Staff, with the knowledge and consent of the DHHS and other organisations dealing with the outbreak, were permitted to continue to work at Epping Gardens while waiting to undertake onsite testing which ultimately occurred on 23 July 2020;
 - (iii) says that when communicating with staff members regarding COVID-19 testing in the period 20 to 22 July 2020, it acted in accordance with advice and directions received from, among others, the DHHS and Aspen Medical; and
 - (iv) otherwise denies subparagraph 64(a).
- (b) as to subparagraph 64(b), it:
- (i) refers to and repeats subparagraphs 63(b) and 64(a) above;
 - (ii) says any staff members who were identified as close contacts of positive COVID-19 cases were sent home immediately and advised to get tested at a local testing site or at a hospital in accordance with advice received from, among others, the DHHS and Aspen Medical;
 - (iii) says further that staff members who called in sick were not permitted to return to work until they had received two negative COVID-19 tests, in accordance with advice received from, among others, the DHHS and Aspen Medical; and
 - (iv) otherwise admits subparagraph 64(b).

65 It denies paragraph 65 and says that:

- (a) in addition to its capacity to roster additional staff as required, it had several workforce options available to it to source additional staff, including its casual staff pool, agency staff, interstate resources and staff from its own support office including registered nurses employed in the Quality Team;

- (b) additionally, it understood that it was the case that workforce options in addition to the above were available to it by reason of the COVID-19 pandemic. For example:
- (i) on or about 11 March 2020, the Department issued a fact sheet titled 'Coronavirus (COVID-19) – National Health Plan: Pathology Testing in Aged Care', which stated, amongst other things, that:
- (A) the Australian Government will fund a range of measures to support senior Australians in aged care and home care;
- (B) a temporary workforce will be made available in case of a staff shortage in a facility due to the impacts of COVID-19, enabling facilities to maintain care for senior Australians. A support team, skilled in managing urgent health issues, will be deployed as needed to assist those experiencing a COVID-19 outbreak;
- (C) aged care providers will be able to access additional workers over and above ordinary workforce costs, in case of an infection; and
- (ii) on 12 April 2020, the Department announced that it had engaged Mable to help residential aged care providers to replace a critical skill shortage, as well as new emergency response teams on standby through Aspen Medical, if there was a significant outbreak in a residential aged care facility.

Particulars

Protecting Older Australians COVID-19 Update; Department of Health FAQs titled 'Aged Care Workforce Measures' dated 6 May 2020.

66 As to paragraph 66, it:

- (a) admits that a clinical first responder arrived onsite at Epping Gardens on or about 21 July 2020;
- (b) does not admit the matters said to have been identified by the clinical first responder at the time; and

- (c) says that subparagraphs 66(a) and 66(b) are vague and embarrassing and under the cover of that objection, denies paragraph 66.

67 As to paragraph 67, it:

- (a) admits that from 22 July 2020, Infection Prevention and Control Outreach Nurses commenced a series of onsite visits to Epping Gardens;
- (b) does not admit the matters said to have been identified by those nurses; and
- (c) says that the phrase “significant issues” is vague and embarrassing and under the cover of that objection, denies paragraph 67.

68 As to paragraph 68, it admits that onsite testing of staff members for COVID-19 took place at Epping Gardens on and from 23 July 2020 and says that the testing was conducted by an external pathology provider and arranged by the Department.

69 As to paragraph 69, it:

- (a) does not admit that by 24 July 2020, it could only safely provide staff to care for approximately 30 per cent of its usual capacity;
- (b) says that any staffing issues that existed as at 24 July 2020 arose in circumstances where there was an outbreak of COVID-19 at the Epping Gardens facility, which led to the following circumstances:
 - (i) staff tested positive to COVID-19 or were identified as close contacts of positive cases, with the effect that those staff then had to isolate in accordance with government requirements;
 - (ii) otherwise well staff did not attend or refused to attend the Epping Gardens facility despite not being required to isolate;
 - (iii) otherwise well casual staff were unable to attend the Epping Gardens facility because of their election to work in only one aged care facility (being a facility other than Epping Gardens);
 - (iv) external aged care workers provided by agencies which Heritage Care had identified as being capable of replacing staff employed by Heritage Care if required in the event of a COVID-19 outbreak:

- (A) refused to work at Epping Gardens because of the COVID-19 outbreak;
- (B) were otherwise unable to work at Epping Gardens due to simultaneous COVID-19 outbreaks at other aged care facilities; or
- (C) were unavailable due to the high demand at that time for agency staff due to other aged care providers experiencing staffing issues at the time.

70 As to paragraph 70, it:

- (a) refers to and repeats paragraph 64 above;
- (b) admits that, in consultation with the clinical first responder and with the knowledge and consent of at least the clinical first responder and the DHHS, management permitted staff who had been tested for COVID-19 either onsite at Epping Gardens on 23 July 2020 or at local test centres to continue working pending receipt of test results providing those staff were asymptomatic and not a close contact of a positive COVID-19 case; and
- (c) otherwise denies the allegations in paragraph 70.

71 As to paragraph 71, it:

- (a) admits that by 26 July 2020, contact tracing had identified some Residents as close contacts;
- (b) does not admit that by 26 July 2020, 110 Residents had been identified as close contacts of positive staff members;
- (c) says that the phrase “subsequent testing” in the circumstances of the allegation at subparagraph 71(a) is vague and embarrassing and, under the cover of that objection otherwise denies paragraph 71(a); and
- (d) says that by 26 July 2020, 61 Residents and 22 staff had tested positive to COVID-19 and otherwise denies subparagraph 71(b).

72 As to paragraph 72, it:

- (a) admits subparagraph 72(a);
- (b) as to paragraph 72(b), it:
 - (i) says that:
 - (A) cohorting of Residents was implemented with the assistance of Austin Health and Northern Health, pursuant to which the Warun ward was designated as the COVID-19 positive wing;
 - (B) cohorting could not commence until results of COVID-19 testing were made available; and
 - (ii) otherwise admits the allegations in subparagraph 72(b).

73 It denies paragraph 73.

74 As to paragraph 74, it:

- (a) admits that it received the Notice to Agree on 28 July 2020; and
- (b) otherwise does not admit paragraph 74 and relies on the Notice to Agree for its full terms and effect.

75 As to paragraph 75, it:

- (a) admits that it agreed to undertake the actions specified in the Notice to Agree; and
- (b) denies that it accepted the matters set out in the Notice to Agree.

76 It admits that a number of Residents were transferred to hospitals between 27 and 29 July 2020 based on assessments conducted by representatives of, among others, Northern Health and Ambulance Victoria and otherwise does not admit paragraph 76.

77 As to paragraph 77, it:

- (a) says that the persons 'commissioned' on or about 31 July 2020 to assist at Epping Gardens were contract cleaners and not 'staff' and otherwise does not admit subparagraph 77(a); and

- (b) save that it says that a total of 86 Residents and 40 staff at Epping Gardens had tested positive to COVID-19 by 31 July 2020, it admits subparagraph 77(b).
- 78 Save that it says that a total of 102 Residents and 85 staff at Epping Gardens had tested positive to COVID-19 by 3 September 2020, it admits paragraph 78.
- 79 It admits paragraph 79, and says that by the conclusion of the outbreak, a total of 103 Residents and 86 staff had been identified as having tested positive to COVID-19.
- 80 It admits paragraph 80.
- 81 ~~It says that it does not plead to paragraph 81 by reason of s 62-1 of the Aged Care Act 1997 (Cth); and it otherwise does not admit paragraph 81.~~ It admits paragraph 81.
- 82 ~~It says that it does not plead to paragraph 82 by reason of s 62-1 of the Aged Care Act 1997 (Cth); and it otherwise does not admit paragraph 82.~~ It does not admit paragraph 82.
- 83 As to paragraph 83, it:
- (a) ~~says that it does not plead to paragraph 83 by reason of s 62-1 of the Aged Care Act 1997 (Cth); and~~
- (b) ~~otherwise does not admit paragraph 83.~~
- (a) admits that Mrs Agnello tested positive for COVID-19; and
- (b) says that Mrs Agnello tested positive for COVID-19 on either 25 or 26 July 2020.
- 84 ~~It says that it does not plead to paragraph 84 by reason of s 62-1 of the Aged Care Act 1997 (Cth); and it otherwise does not admit paragraph 84.~~ It admits paragraph 84 and refers to and repeats subparagraph 1(e), above.

D. Breach of Contract Claim

- 85 As to paragraph 85, it:
- (a) denies that it entered into Resident Agreements with all residents in the TCP Ward or with residents in the Northern Health Palliative Care Unit; and
- (b) refers to the matters pleaded at paragraph 86 below and otherwise does not admit paragraph 85.

86 As to paragraph 86, it:

- (a) as to subparagraph 86(a), it:
 - (i) admits the existence of the 'standard form' contract pleaded at subparagraph 86(a) of the FASOC;
 - (ii) does not admit that there were any Residents at Epping Gardens during the relevant period to whom an agreement referred to at subparagraph 86(a) of the FASOC applied; and
 - (iii) by reason of subparagraph 86(a)(ii) above, otherwise does not admit paragraph 86(a);
- (b) admits the existence of the 'standard form' contract pleaded at subparagraph 86(b);
- (c) refers to and repeats paragraph 85, above;
- (d) says that the agreements of some Residents at Epping Gardens may differ from the standard form agreement pleaded at paragraph 86(b) of the FASOC;
- (e) says further that by reason of subparagraph 86(d) above, whether a 'standard form' contract applied to a particular Resident is an individual issue, not a common issue, which cannot be addressed until that group member's claims have been properly pleaded and particularised; and
- (f) under the cover of that objection, otherwise denies paragraph 86.

87 Subject to it referring at trial to the full terms and effect of the agreements, it:

- (a) admits that its 'standard form' contracts contained terms to the effect pleaded at paragraph 87;
- (b) refers to and repeats paragraph 86 above; and
- (c) otherwise does not admit paragraph 87.

88 As to paragraph 88, it:

- (a) refers to and repeats paragraphs 1(d), 4 and 85 to 87 above;

- (b) admits that there was an implied term in each Resident Agreement that existed between it and a Resident that the defendant would exercise reasonable care in the provision of the services it was to provide to that Resident as set out in the relevant Resident Agreement; and
- (c) otherwise denies paragraph 88.

89 It denies paragraph 89.

90 In response to paragraph 90, it:

- (a) refers to and repeats paragraphs 42 to 46, 48, 49(e), 60 and 75 above and subparagraphs 90(b) to (m) below and denies the allegations in subparagraph 90(a);
- (b) refers to and repeats paragraphs 49(e), 73 and 77(a) above and denies the allegations in subparagraph 90(b)(i);
- (c) refers to and repeats paragraphs 49(e) and 73 above and denies the allegations in subparagraph 90(b)(ii);
- (d) refers to and repeats paragraph 49(e) above and denies the allegations in subparagraph 90(b)(iii);
- (e) refers to and repeats paragraph 49(e) above and denies the allegations in subparagraph 90(b)(iv);
- (f) refers to and repeats paragraphs 46(a), 49(e) and 60 and denies the allegations in subparagraph 90(b)(v);
- (g) refers to and repeats paragraphs 49(e) and 73 above and denies the allegations in subparagraph 90(c)(i);
- (h) refers to and repeats paragraphs 46(a), 49(e) and 60 above and denies the allegations in subparagraph 90(c)(ii);
- (i) refers to and repeats paragraph 49(e) above and denies the allegations in subparagraph 90(c)(iii);
- (j) refers to and repeats paragraphs 47 to 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 and 77(a) above and denies the allegations in subparagraph 90(d)(i);

- (k) refers to and repeats paragraphs 47 to 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 and 77(a) above and denies the allegations in subparagraph 90(d)(ii);
- (l) refers to and repeats paragraph 49(e) above and denies the allegations in subparagraph 90(d)(iii);
- (m) refers to and repeats paragraphs 47 to 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75 to 79 above and denies the allegations in subparagraph 90(d)(iv);
- (n) refers to and repeats paragraphs 48(i) above and denies the allegations in subparagraph 90(e);
- (o) refers to and repeats paragraphs 90(a) to (n) above and denies the allegations in subparagraph 90(f);
- (p) refers to and repeats paragraphs 1(d), 4, 85 to 87 and 88(b), above; and
- (q) otherwise denies the allegations at paragraph 90.

91 It denies paragraph 91.

E. Consumer Guarantee Claims

92 As to paragraph 92, it:

- (a) refers to and repeats subparagraph 1(d) and paragraph 4 above;
- (b) by reason of subparagraph 92(a), does not admit that all of the matters that might fall within the definition of Residential Care Services (the issues with which are identified at paragraph 1(d) above) are “services” for the purposes of s 60 of the ACL; and
- (c) otherwise admits paragraph 92.

93 In response to the allegations in paragraph 93, it:

- (a) refers to and repeats paragraph 92 above;
- (b) refers to and repeats each of the paragraphs of the defence above which correspond to the paragraphs referred to in paragraph 93 and denies subparagraph 93(a);

- (c) further denies that it was required to implement each of the Infection Control Measures (as defined);
- (d) as to subparagraph 93(b)(i), says that pursuant to s 53-2 of the *Aged Care Act 1997* (Cth), any failure in respect of a responsibility under Chapter 4 of the *Aged Care Act 1997* (Cth) (including the Quality of Care Principles) (which failure is denied) has no consequences under the ACL;
- (e) otherwise refers to and repeats paragraph 90 above, and denies subparagraph 93(b); and
- (f) otherwise denies paragraph 93.

94 It refers to and repeats subparagraph 1(d) and paragraph 4 above and otherwise denies paragraph 94.

95 As to paragraph 95, it:

- (a) refers to and repeats subparagraph 1(d) and paragraph 4 above and otherwise denies paragraph 95; and
- (b) says further that the phrase “the acquisition of services” is vague and embarrassing absent particularisation as to the services being referred to.

96 It refers to and repeats paragraphs 94 to 95 above and denies paragraph 96.

97 It refers to and repeats paragraphs 42 to 80 and 96 above and otherwise denies paragraph 97.

98 It refers to and repeats paragraphs 42 to 80 and 96 above and otherwise denies paragraph 98.

99 It does not plead to paragraph 99 as it contains no allegations against it.

100 In response to paragraph 100, it says as follows:

- (a) as to subparagraph 100(a), it refers to and repeats paragraphs 92, 93 and 96 to 98 above and denies subparagraph 100(a);
- (b) it refers to and repeats subparagraph 1(d) and paragraph 4 above; and
- (c) it otherwise denies paragraph 100.

101 It refers to and repeats paragraph 100 above and otherwise denies paragraph 101.

102 As to paragraph 102, it:

(a) refers to and repeats paragraphs 92, 93, 96 to 98 and 100 to 101 above; and

(b) otherwise denies paragraph 102 and says that:

(i) to the extent that any group member who is the legal personal representative of the estate of a Resident seeks relief pursuant to s 267 of the ACL for the alleged Breaches of Consumer Guarantees (as defined), that group member is unable to do so by reason of not being the relevant 'consumer' for the purpose of that section; and

(ii) to the extent that any group member (who is not the legal personal representative of the estate of a Resident) claims personal injury damages for pain and suffering and/or non-economic loss, they are precluded from doing so until they comply with the requirements of Part VBA of the *Wrongs Act 1958* (Vic) pursuant to s 275 of the ACL.

F. Negligence claim – Residents

103 As to paragraph 103, it:

(a) admits that there was a risk that Residents could suffer loss or damage if it failed to exercise reasonable care and skill in the provision of certain of the 'hotel services' and 'care and services' as defined in the Quality of Care Principles;

(b) refers to and repeats subparagraph 1(d) and paragraph 4 above;

(c) otherwise does not admit subparagraph 103(a); and

(d) in response to subparagraph 103(b) it:

(i) refers to and repeats paragraphs 22 and 23 above;

(ii) admits that there was a risk that a failure to exercise reasonable care and skill in implementing measures to control the spread of infection could lead to Residents becoming infected with and dying of causes relating to COVID-19; and

(iii) otherwise does not admit subparagraph 103(b).

104 In response to paragraph 104, it:

- (a) refers to and repeats paragraph 103 above;
- (b) admits that the risks referred to in paragraphs 103(a) and 103(d) above are not remote or insignificant, and that they were reasonably foreseeable; and
- (c) otherwise does not admit paragraph 104(a)-(b).

105 As to paragraph 105, it:

- (a) refers to and repeats subparagraph 1(d) and paragraph 4, above;
- (b) admits that it owed those Residents to whom it supplied 'hotel services' and 'care and services' as defined in the Quality of Care Principles a duty to take reasonable care in the provision of those services;
- (c) admits that it owed Residents a duty to exercise reasonable care in implementing measures to control the spread of infection; and
- (d) otherwise denies paragraph 105.

106 In response to the allegations in paragraph 106, it:

- (a) refers to and repeats subparagraph 1(d) and paragraph 4, above;
- (b) as to subparagraph 106(a) it:
 - (i) refers to and repeats paragraph 105 above;
 - (ii) admits that it had a duty to take reasonable care in the presenting circumstances in respect of the matters set out subparagraphs 106(a)(i), (iv), (v), (vi), (vii), (viii), (ix), (x), (xi) and otherwise does not admit those subparagraphs;
 - (iii) does not admit subparagraph 106(a)(ii) in respect of Residents, and denies subparagraph 106(a)(ii) in respect of Resident Sub-Group Members who were not Residents;

- (iv) in respect of subparagraph 106(a)(iii), refers to paragraph 103 above and otherwise does not admit the subparagraph;
- (c) as to subparagraph 106(b) it:
- (i) refers to paragraph 103 above;
 - (ii) admits that its duty to Residents included the provision of training to staff on measures to control infection, if and as required;
 - (iii) says that it did provide “face-to-face” infection prevention and management training to staff during the COVID-19 Period but denies it was required to provide “face-to-face” training in relation to the Infection Control Measures (as defined);
 - (iv) otherwise does not admit subparagraph 106(b);
- (d) as to subparagraph 106(c) it:
- (i) refers to paragraph 103 above;
 - (ii) admits that its duty to Residents included a duty to exercise reasonable care in implementing measures to control the spread of infection;
 - (iii) admits that it had a duty to take reasonable care in the presenting circumstances in respect of the matters set out subparagraphs 106(c)(i), (vii), (viii), (xi), and otherwise does not admit those subparagraphs;
 - (iv) denies subparagraphs 106(c)(ii), (ix);
 - (v) does not admit subparagraphs 106(c)(iii), (iv), (v);
 - (vi) in respect of subparagraph 106(c)(vi), it admits that its duty included to take reasonable care in the presenting circumstances to seek to restrict Residents with Symptoms to their rooms and to take reasonable steps to seek that they wear a mask if leaving their room, and otherwise does not admit the subparagraph;
 - (vii) in respect of subparagraph 106(c)(x), it admits that its duty included to take reasonable care in the presenting circumstances to isolate

Residents who tested positive for COVID-19 from other Residents who were negative, and otherwise denies the subparagraph;

(viii) in respect of subparagraph 106(c)(xii), it admits that its duty included to take reasonable care in the presenting circumstances to have leadership available, either on site or remotely, to assist in planning, coordinating and managing logistics in an outbreak setting as well as to communicate and liaise with the Department and/or the DHHS, and otherwise does not admit the subparagraph; and

(ix) otherwise does not admit subparagraph 106(c).

107 As to paragraph 107, it:

(a) admits the circumstances alleged in subparagraphs 107(a), (b) and (c);

(b) refers to and repeats paragraphs 15 to 24, 34 to 36 and 40 to 41 above, and otherwise does not admit subparagraphs (d) and (e);

(c) refers to and repeats paragraphs 105 and 106 above, and denies subparagraph 107(iii); and

(d) refers to paragraphs 44 and 45 above, and otherwise denies the allegations in paragraph 107.

108 In response to paragraph 108, it:

(a) refers to paragraph 105 above and denies that it breached the duties of care referred to therein;

(b) refers to and repeats each of the paragraphs of the defence above which correspond to the paragraphs referred to in paragraph 108; and

(c) otherwise denies paragraph 108.

109 It refers to and repeats paragraph 108 above and denies the allegations in paragraph 109.

110 As to paragraph 110, it:

(a) refers to and repeats paragraphs 108 to 109 above;

- (b) says further that the Residents who died during the COVID-19 Period died of various causes; and
- (c) otherwise denies paragraph 110.

111 In response to paragraph 111, it:

- (a) denies paragraph 111; and
- (b) says that to the extent that any group members claim personal injury damages for pain and suffering and/or non-economic loss, they are precluded from doing so until they comply with the requirements of Part VBA of the *Wrongs Act 1958* (Vic).

G. Negligence Claim - Family

112 It does not admit paragraph 112.

113 It denies paragraph 113 and refers to and repeats paragraphs 13 to 84 above.

114 As to paragraph 114, it

- (a) refers to and repeats paragraphs 1 to 91 above;
- (b) denies the matters pleaded at subparagraph 114(a)(i), and says further that the responsibility for the care and safety of Residents was shared including between itself, relevant medical professionals and support workers and family/friends/carers of Residents;
- (c) refers to paragraph 103(d) above, says that up until on or about 20 July 2020 it determined and implemented measures to control the spread of infection, that infection control measures were in place through the COVID-19 Period and otherwise denies subparagraph 114(a)(ii);
- (d) in response to subparagraph 114(a)(iii):
 - (i) says Residents had a right to have visitors but this right was subject to visitors complying with Heritage Care's reasonable requests and directions and the Victorian Directions;

- (ii) otherwise admits subparagraph 114(a)(iii) up until on or about 20 July 2020; and
 - (iii) otherwise denies subparagraph 114(a)(iii).
- (e) as to subparagraph 114(a)(iv), admits that it controlled what information it communicated to Family about events taking place at Epping Gardens, but denies that Family could not or did not receive communications about those matters from other sources including Residents and staff members;
 - (f) admits subparagraph 114(a)(v) in relation to any complaints that it received, and otherwise denies subparagraph 114(a)(v);
 - (g) does not admit subparagraph 114(b), and says further that the relationships between Residents and their family members differed from Resident to Resident;
 - (h) refers to paragraphs 130, 131 and 132 below in relation to the alleged representations, and otherwise denies subparagraph 114(c);
 - (i) as to subparagraph 114(d), it:
 - (i) refers to and repeats subparagraph 1(d) and paragraph 4 above and denies the allegations in subparagraphs 114(d)(i), (ii), (iv) and (v); and
 - (ii) does not admit the allegations in subparagraph 114(d)(iii) up to on or about 20 July 2020, denies the allegations in subparagraph 114(d)(iii) after on or about 20 July 2020, and further refers to subparagraphs 114(a) and (b) above;
 - (j) denies the allegations in subparagraph 114(e) and further refers to paragraph 103 above; and
 - (k) does not admit the allegations in subparagraph 114(f).

115 As to paragraph 115, it:

- (a) refers to and repeats paragraphs 112 and 113 above; and
- (b) denies paragraph 115.

116 It denies paragraph 116.

117 It denies paragraph 117.

118 As to paragraph 118, it:

- (a) refers to and repeats paragraphs 5 to 7 and 13 to 84 above;
- (b) admits the circumstances alleged in subparagraphs 118(a), (b) and (e);
- (c) does not admit subparagraph 118(c) and relies on the communications sent by it on 17 April 2020 and 23 April 2020 for their full terms and effect;
- (d) denies subparagraph 118(d); and
- (e) denies subparagraphs (i)-(iv).

119 It refers to and repeats paragraphs 25 to 84 above, denies paragraph 119, and:

- (a) refers to and repeats paragraphs 130 to 136 below and denies subparagraph 119(a);
- (b) denies subparagraph 119(b);
- (c) denies subparagraph 119(c);
- (d) denies subparagraph 119(d) and refers to and repeats paragraphs 85 to 111 above;
- (e) as to subparagraph 119(e), it:
 - (i) refers to and repeats paragraphs 47 to 57 and 119(c) above;
 - (ii) says further that Family Sub-Group members were not required to attend Epping Gardens but did so voluntarily, and with the permission of management, where the relevant Resident's care needs were best served by the attendance of a family member;
 - (iii) otherwise denies subparagraph 119(e); and
- (f) denies subparagraph 119(f).

120 As to paragraph 120, it:

- (a) denies subparagraph 120(a) and refers to and repeats paragraphs 23 to 24, 48(i), 93, 97 to 98 and 105 to 106 above;
- (b) denies subparagraph 120(b) and says that it took reasonable care to protect Residents from COVID-19 and neglect;
- (c) denies subparagraph 120(c) and refers to and repeats paragraphs 60, 106, 108, 114 and 117 to 119 above;
- (d) says further that the Residents who died during the COVID-19 Period died of various causes; and
- (e) otherwise denies paragraph 120.

121 It denies paragraph 121, and says that to the extent that any group members claim personal injury damages for pain and suffering and/or non-economic loss, they are precluded from doing so until they comply with the requirements of Part VBA of the *Wrongs Act 1958* (Vic).

H. Misleading or deceptive conduct claim

122 As to paragraph 122, it:

- (a) admits that Mr Agnello was given a Facility Tour;
- (b) says that whether a group member was given a tour of the Epping Gardens facility by representatives of the defendant is an individual issue, not a common issue, which cannot be addressed until that group member's claims have been properly pleaded and particularised; and
- (c) under the cover of that objection, otherwise denies paragraph 122.

123 As to paragraph 123, it:

- (a) admits that a function of providing prospective residents and their families with a tour of the Epping Gardens facility was to promote Epping Gardens and its residential aged care services;
- (b) refers to and repeats paragraph 122; and
- (c) otherwise denies paragraph 123.

124 As to paragraph 124, it:

- (a) does not admit that Mr Agnello was provided with a copy of the 'Resident Handbook' during the Facility Tour;
- (b) refers to and repeats paragraph 122(b) above;
- (c) says that the Resident Handbook, as defined, existed only on and from May 2018; and
- (b) otherwise denies paragraph 124.

125 As to paragraph 125, it:

- (a) denies subparagraph 125(a) and says that the Resident Handbook, including earlier versions, stated that every effort would be made to respect residents' privacy and dignity and to meet individual needs;
- (b) denies subparagraph 125(b) and says that the Resident Handbook, including earlier versions, stated that management and staff at Epping Gardens are committed to providing the best care and service to residents;
- (c) denies subparagraph 125(c) and says that the Resident Handbook, including earlier versions, stated that:
 - (i) a cleaning service would detail resident rooms on a scheduled basis; and
 - (ii) spot cleaning would be attended to promptly on an as needs basis;
- (d) refers to and repeats paragraphs 122 to 124 above;
- (e) otherwise denies paragraph 125; and
- (f) further or alternatively, says that it had reasonable grounds to make each of the statements referred to at subparagraphs 125(a) to (c), above.

126 As to paragraph 126, it:

- (a) refers to the matters set out at paragraph 125 above;

- (b) admits that any representations made in the Resident Handbook or a version of the Resident Handbook were made in trade or commerce; and
- (c) otherwise denies paragraph 126.

127 As to paragraph 127, it:

- (a) refers to and repeats paragraphs 125 and 126 above, and otherwise denies paragraph 127; and
- (b) says in the alternative that if it did make the Handbook Representations as defined (which is denied), whether those representations were qualified or withdrawn or were continuing representations with respect to individual group members is an individual issue, not a common issue, which cannot be addressed until that group member's claims have been properly pleaded and particularised.

128 It repeats paragraphs 47 to 57, 90, 107 to 110 and 125 to 127 above, and otherwise denies paragraph 128.

129 As to paragraph 129, it:

- (a) refers to and repeats paragraphs 124, 125 and 127 above and, by reason of those paragraphs, denies paragraph 129; and
- (b) says further that whether a group member acted in reliance on the Handbook Representations as defined (which is denied) is an individual issue, not a common issue, which cannot be addressed until that group member's claims have been properly pleaded and particularised.

130 As to paragraph 130, it:

- (a) admits that a letter from Mr Greg Reeve dated 17 April 2020 contained the matters set out at subparagraphs 130(a)-(d) of the FASOC;
- (b) says that the 10-minute time limit on visits to Residents was a time limit that applied subject to the care and support requirements of individual Residents, as permitted by the Victorian Directions;
- (c) says further that:

- (i) the prohibition on visitors assisting Residents to consume meals and drinks did not apply in circumstances where that assistance was deemed to be in the best interests of a Resident's health or emotional well-being;
 - (ii) the matters pleaded at subparagraphs 130(c) and (d) of the FASOC are to be understood in light of the matters pleaded at paragraph 130(b) and (c)(i) above;
 - (d) refers to and repeats paragraph 48(a) above;
 - (e) by reason of the above matters, does not admit paragraph 130; and
 - (f) says that it had reasonable grounds for making the statements referred to at subparagraphs 130(a)-(d) of the FASOC.
- 131 Save that it does not admit that the letter as alleged was sent to all persons who may constitute Family (as defined in the FASOC), it:
- (a) refers to and repeats paragraph 130; and
 - (b) otherwise admits the allegations in paragraph 131.
- 132 Save that it says that it had reasonable grounds for making the statements referred to at paragraph 131 of the FASOC, it otherwise denies paragraph 132.
- 133 As to paragraph 133, it:
- (a) refers to and repeats paragraphs 130 to 132 above and otherwise denies paragraph 133; and
 - (b) says in the alternative that if it did make the 17 April Representations or the 23 April Representations as defined (which is denied), whether those representations were qualified or withdrawn or were continuing representations with respect to individual group members is an individual issue, not a common issue, which cannot be addressed until that group member's claims have been properly pleaded and particularised.
- 134 As to paragraph 134, it:
- (a) refers to and repeats paragraphs 21, 48(a) to 48(d), 130 and 133 above; and

(b) otherwise denies paragraph 134.

135 As to paragraph 135, it:

(a) refers to and repeats paragraphs 25 to 84 and 131 to 133 above; and

(b) denies paragraph 135.

136 As to paragraph 136, it:

(a) refers to and repeats paragraphs 130 to 135 above;

(b) does not admit the paragraph to the extent it relates to the plaintiff;

(c) says further that whether a group member acted in reliance on the 17 April Representations and/or the 23 April Representations as defined (which is denied) is an individual issue, not a common issue, which cannot be addressed until that group member's claims have been properly pleaded and particularised;

(d) under cover of that objection, denies paragraph 136 to the extent it applies to any person other than the plaintiff.

137 As to paragraph 137, it:

(a) refers to and repeats paragraphs 128 and 130 to 135 above; and

(b) denies paragraph 137.

138 It denies paragraph 138, and says that:

(a) to the extent that damages are sought under s 236 of the ACL, no such remedy may be claimed for any loss or damage resulting from death or personal injury by reason of a breach of s 18 of the ACL: s 137C of the *Competition and Consumer Act 2010* (Cth);

(b) to the extent that any group member who is the legal personal representative of the estate of a Resident seeks relief pursuant to s 236 of the ACL for the alleged s 18 Contraventions (as defined), that group member is unable to do so by reason of not being the relevant 'person who has suffered loss or damage' for the purpose of s 236; and

- (c) to the extent that any group member claims personal injury damages for pain and suffering and/or non-economic loss, they are precluded from doing so until they comply with the requirements of Part VBA of the *Wrongs Act 1958* (Vic).
- 139 It does not plead to paragraph 139 as that paragraph contains no allegations against it.
- 140 As to paragraph 140, it:
 - (a) admits it knew it was obliged to plan for a COVID-19 outbreak in its facility and says that it did so; and
 - (b) otherwise denies paragraph 140.
- 141 As to paragraph 141, it:
 - (a) admits that it knew that a failure to implement appropriate infection control measures applicable to residential aged care facilities could lead to a loss of life;
 - (b) says that it did implement appropriate infection control measures at all material times and based on the information available to it; and
 - (c) otherwise denies paragraph 141.
- 142 It denies paragraph 142.
- 143 In response to the allegations in paragraph 143, it:
 - (a) refers to and repeats paragraphs 22, 23, 47, 48(a) to 48(h), 49, 52, 55 to 57, 59, 60, 62, 64 to 67, 69, 70, 75, 77(a) and 93 above and denies subparagraph 143(a);
 - (b) refers to and repeats paragraphs 130 to 136 above and denies subparagraph 143(b); and
 - (c) refers to and repeats paragraph 44 above and denies subparagraphs 143(c) and 143(d).
- 144 It denies paragraph 144.

Further matters

144A. It says further that:

- (a) to the extent that the plaintiff or any group member claims on behalf of the estate of a deceased person, any damages that may be recovered for the benefit of the estate of that deceased person are to be assessed having regard to the matters set out at s 29(2) of the *Administration and Probate Act 1958* (Vic); and
- (b) to the extent that the plaintiff or any group member claims personal injury damages for pain and suffering and/or non-economic loss, they are precluded from doing so until they comply with the requirements of Part VBA of the *Wrongs Act 1958* (Vic).
- (c) Pursuant to s 73 of the *Wrongs Act 1958* (Vic), Family Sub-Group Members who:
 - i. did not witness at the scene their Resident being killed, injured, or put in danger; or
 - ii. 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.

are not entitled to an award of damages as they do not satisfy one of the matters in sub-paragraphs (c)(i) and (ii).

Dated ~~29 April~~ 29 September 2022

C M CALEO

R L KAYE

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