



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

Case: S ECI 2022 03433

Filed on: 20/11/2023 10:17 AM

No. S ECI 2022 03433

BETWEEN

GERALD FULLER

Plaintiff

AND

FLETCHER BUILDING LIMITED (ARBN 096 046 936)

Defendant

DEFENCE

Date of document:	20 November 2023	Solicitor's Code: 420
Filed on behalf of:	The Defendant	
Prepared by:	Herbert Smith Freehills ANZ Tower 161 Castlereagh St Sydney NSW 2000	Tel: (02) 9225 5323 Ref: 82755113 E-mail: jason.betts@hsf.com

Note: Unless otherwise stated, a defined term used in this Defence has the same meaning as assigned to it in the Amended Statement of Claim dated 24 August 2023 (**ASOC**). Headings and definitions are adopted from the ASOC for ease of reference. The Defendant (**Fletcher**) does not make any admissions by the use of the headings or defined terms.

In answer to the ASOC, Fletcher says as follows:

A. PARTIES

A.1. The Plaintiff Group Members

1. It does not plead to paragraph 1 as it makes no allegation against it.
2. As to paragraph 2, it:
 - (a) says that:

- (i) the capitalised term “Fletcher Shares” is not defined in the ASOC;
and
- (ii) in this defence, Fletcher pleads on the understanding that the capitalised term “Fletcher Shares” is intended to mean fully paid ordinary shares in Fletcher traded on the ASX or the NZSX; and

(b) otherwise admits that paragraph.

3. It does not know and therefore cannot admit paragraph 3.

A.2. Fletcher Building Limited

4. As to paragraph 4, it:

- (a) says that the phrase “all material times” is unparticularised and that, in this defence, it pleads on the understanding that the phrase “all material times” in the ASOC is intended to refer to “all material times during the Relevant Period”;
- (b) admits sub-paragraphs 4(a) and 4(b);
- (c) admits that it is and was carrying on business within Australia within the meaning of s 5(1)(g) of the Competition Consumer Act and otherwise denies sub-paragraph 4(c);
- (d) admits sub-paragraph 4(d); and
- (e) admits sub-paragraph 4(e) save as to say in relation to sub-paragraph 4(e)(iii)(C) that it is and was a person within the meaning of s 18 of the ACL, as applicable pursuant to s 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

B. FLETCHER’S OBLIGATIONS

5. It admits paragraph 5.

6. It admits paragraph 6.

C. FLETCHER'S OFFICERS

7. As to paragraph 7, it:

- (a) says that the allegations are vague and embarrassing as they allege that what certain persons “knew or ought to have known” is to be attributed to Fletcher, but do not allege the circumstances in which knowledge is sought to be attributed;
- (b) under cover of the objection at sub-paragraph (a), says as follows:
 - (i) in relation to sub-paragraphs 7(a) to (i), admits those persons were directors or officers of Fletcher during the periods alleged, insofar as those periods concern the Relevant Period, and what those persons knew, or ought reasonably to have known, for purpose of s 1041E of the Corporations Act, is to be attributed to Fletcher from the time that those persons were directors or officers of Fletcher insofar as those periods concern the Relevant Period;
 - (ii) in relation to sub-paragraphs 7(k), and (s), admits those persons were officers of Fletcher during the periods alleged, insofar as those periods concern the Relevant Period, and what those persons knew, or ought reasonably to have known for the purpose of s 1041E of the Corporations Act, is to be attributed to Fletcher from the time that those persons were officers of Fletcher insofar as those periods concern the Relevant Period;
 - (iii) in relation to sub-paragraph 7(r), admits that Mr Francisco Irazusta was an officer of Fletcher during the period 24 July 2017 to 21 November 2017, while in the position of Interim Chief Executive Officer, and what Mr Irazusta knew, or reasonably to have known for purpose of s 1041E of the Corporations Act, is to be attributed to Fletcher from the time Mr Irazusta was an officer of Fletcher during the Relevant Period;

(c) otherwise denies that paragraph.

D. RELEVANT PROJECTS UNDERTAKEN BY BUILDING + INTERIORS

D.1. Fletcher business units

8. Save that it says that, during the Relevant Period, it carried on a diverse business as a building products manufacturer and distributor, property developer, and infrastructure and buildings construction company, and operated across multiple markets and countries, including New Zealand, Australia, Asia, Europe, North America, and the Pacific, it admits paragraph 8.
9. It admits paragraph 9 and says further that at all material times during the Relevant Period its Construction division comprised several business units in addition to Building + Interiors.

Particulars

During the Financial Year (FY) ended 30 June 2017 (FY17), its Construction division comprised the following business units: (i) Infrastructure; (ii) Fletcher Earthquake Recovery (EQR); (iii) South Pacific; (iv) Higgins Contracting; and (v) Building + Interiors.

During the FY ended 30 June 2018 (FY18), its Construction division comprised the following business units: (i) Fletcher Infrastructure; (ii) South Pacific; (iii) Higgins; (iv) Building + Interiors; and (v) Brian Perry Civil.

10. It admits paragraph 10.

D.2. The CJESP Project

11. Save that it admits the NZ MOJ commissioned a project to develop the Christchurch Justice and Emergency Services Precinct, it does not know and therefore cannot admit paragraph 11.

12. As to paragraph 12, it:
- (a) admits that on about 1 August 2014, the NZ MOJ and FCL entered the CJESP Building Contract in respect of the CJESP Project;
 - (b) says that the CJESP Building Contract was for FCL to design and construct the CJESP;
 - (c) relies on the full terms and effect of the CJESP Building Contract; and
 - (d) otherwise denies that paragraph.

Particulars

The CJESP Building Contract was written and comprised the Contract Agreement, annexed Special Conditions of Contract: Part A – Specific Conditions of Contract, annexed Special Conditions of Contract: Part B – Other Conditions of Contract, the General Conditions of Contract, and the annexures and schedules thereto.

13. As to paragraph 13, it:
- (a) says there were terms of the CJESP Building Contract that:
 - (i) the CJESP Building Contract was “a guaranteed maximum price contract with fixed price elements and Provisional Sums” (Part A: Specific Conditions of Contract, clause 2.1.1);
 - (ii) the Contract Price was NZD 239,294,000 or such greater or lesser sum as shall become payable under the CJESP Building Contract plus GST (Contract Agreed terms, clause 4) and included:
 - (A) a Fixed-Price Lump-Sum Amount for carrying out and completing the Fixed-Price Lump-Sum Works (Part B: Other Conditions of Contract, clause 2.4A.1(a); Annexure C – Contract Price composition); and

- (B) the lesser of the Guaranteed Maximum Price Amount, as may only be adjusted in accordance with the terms of the CJESP Building Contract, and the Actual Cost of the Guaranteed Maximum Price Works plus the amount of any savings to which FCL may become entitled to (Part B: Other Conditions of Contract, clause 2.4A.1(b); Annexure C – Contract Price composition);
- (iii) the parties intended to convert the entire price payable for the Guaranteed Maximum Price Works under clause 2.4A.1(b) into a fixed-price lump-sum amount after the last significant trade price had been agreed for the Guarantee Maximum Price Works, which was envisaged to occur by 31 December 2014, with progressive conversion occurring in accordance with clause 2.4A.3(d) (Part B: Other Conditions of Contract, clause 2.4A.3(a));
- (iv) the Contract Works were divided into two Separable Portions and the Due Dates for Completion of the Separable Portions were as follows:
 - (A) Separable Portion 1 – a period equal to the period in Working Days between the date of access to the Site under clause 5.4(a) and 15 December 2016;
 - (B) Separable Portion 2 – a period equal to the period in Working Days between the date of access to the Site under clause 5.4(b) and 15 December 2016
 (Part A: Specific Conditions of Contract, clauses 1.2 and 10.2.1);
- (b) otherwise denies that paragraph; and
- (c) says further that there were also terms of the CJESP Building Contract that:
 - (i) the sum stated as liquidated damages in the Special Conditions shall be paid by FCL to NZ MOJ for the period between the Due Date of

Completion of the Contract Works or any Separable Portion and the time of Practical Completion (General Conditions of Contract, clause 10.5.1);

(ii) liquidated damages for late completion of the whole of the Contract Works were:

(A) for the period from 13 January 2017 up to 2 February 2017: NZD 35,000 per calendar day;

(B) for the period from 3 February 2017: NZD 45,000 per calendar day;

(Part A: Specific Conditions of Contract, clause 10.5.1)

(iii) liquidated damages for late completion of the Separable Portions were:

(A) Separable Portion 1: NZD 5,000 per calendar day;

(B) Separable Portion 2: NZD 25,000 per calendar day

(Part A: Specific Conditions of Contract, clause 10.5.1).

D.3. The NZICC Project

14. As to paragraph 14, it:

- (a) admits that the NZICC Project was a project to develop an international convention centre to be known as the New Zealand International Convention Centre in the city of Auckland, New Zealand;
- (b) says that the NZICC Project did not include a hotel on Hobson Street, which was the subject of a separate project; and
- (c) otherwise, does not know and therefore cannot admit paragraph 14.

15. As to paragraph 15, it:

- (a) admits that on about 27 October 2017 SkyCity announced FCL had been appointed the main contractor for the NZICC Project and the development of a hotel on Hobson Street; and

Particulars

SkyCity ASX announcement dated 27 October 2015 titled “SKYCITY appoints contractor for New Zealand International Convention Centre and Hobson St Hotel”.

- (b) otherwise denies that paragraph.

16. As to paragraph 16, it:

- (a) refers to and repeats paragraph 14 above;
- (b) admits that on about 11 November 2015, SkyCity and FCL entered into a contract for the design and construction of the NZICC Project (**NZICC Contract**);
- (c) relies on the full terms and effect of the NZICC Contract; and

Particulars

The NZICC Contract was written and comprised the Building Works Contract, specified schedules thereto, General Conditions of Contract (NZS 3910:2013) sections 1 to 15, and specified tender and post-tender documents.

- (d) otherwise denies that paragraph.

17. It denies paragraph 17 and says further that there were terms of the NZICC Contract that:

- (a) the Guaranteed Maximum Price for the Contract Works was the sum of NZD 376,014,277 as may be adjusted in accordance with the NZICC Contract (Building Works Contract, clause 3.1);

- (b) the final Contract Price for the Contract Works was to be calculated in accordance with NZICC Contract (Building Works Contract, clause 3.1);
- (c) the Contract Works were divided into Separable Portions (Appendix B to the Schedule 2 – Special Conditions of Contract, clause 6); and
- (d) the time for completion of each Separable Portion was as follows:
 - (i) Separable Portion 1 was 27 months from 11 November 2015 (i.e. 10 February 2018);
 - (ii) Separable Portion 2 was 17 months from 11 November 2015 (i.e. 10 April 2017);
 - (iii) Separable Portion 3 was 25 months from 11 November 2015 (i.e. 10 December 2017); and
 - (iv) the balance of the Contract Work was 38 months from 11 November 2015 (i.e. 10 January 2019)(Building Works Contract, clause 4.1);
- (e) the sum stated as liquidated damages in the Special Conditions shall be paid by FCL to SkyCity for the period between the Due Date of Completion of the Contract Works or any Separable Portion and the time of Practical Completion (General Conditions of Contract, clause 10.5.1);
- (f) the liquidated damages for any Separable Portion shall continue to apply in respect of any period for which liquidated damages are applied in respect of the whole of the Contract Works in addition to the liquidated damages in respect of the whole of the Contract Works (to the extent Practical Completion of that Separable Portion had not occurred (Schedule 2 – Special Conditions of Contract – Other Conditions of Contract, section 10; General Conditions of Contract, clause 10.5.1);

(g) the following liquidated damages applied where Practical Completion of the relevant Separable Portion did not occur by the Due Date for Completion of the Separable Portion:

- (i) Separable Portion 1: NZD 14,647 per calendar day;
- (ii) Separable Portion 2: NZD 49,000 per calendar day;
- (iii) Separable Portion 3: NZD 49,000 per calendar day

(Part A of Appendix C (Liquidated Damages Tables) to the Schedule 2 – Special Conditions of Contract – Other Conditions of Contract)

(h) the following liquidated damages applied where Practical Completion of the Contract Works did not occur by the Due Date for Completion of the Contract Works:

Number of calendar days from the Due Date for Completion	Liquidated damages per calendar day
1 to 30	NZD 0 per calendar day
31 to 60	NZD 20,750 per calendar
61 to 90	NZD 37,500 per calendar
91 to 120	NZD 86,250 per calendar
121 to 150	NZD 88,000 per calendar
151 onwards	NZD 100,000 per calendar

(Part A of Appendix C (Liquidated Damages Tables) to the Schedule 2 – Special Conditions of Contract – Other Conditions of Contract)

- (i) subject to clause 16.1.4, FCL's maximum aggregate liability to SkyCity for liquidated damages under clause 10.5 and Part A of Appendix C to the Special Conditions – Liquidated Damages Tables was limited to NZD 30M (**Delay LD Cap**) (Schedule 2 – Special Conditions of Contract – Other Conditions of Contract, clause 16.1.2); and
- (j) the Delay LD Cap was exclusive of certain items as specified in clause 16.1.4 (Schedule 2 – Special Conditions of Contract – Other Conditions of Contract, clause 16.1.4).

18. It admits paragraph 18.

E. FLETCHER'S CONDUCT

E.1. Announcement of FY17 Guidance

19. As to paragraph 19, it:

- (a) says that the phrase “associated commentary” is unparticularised and therefore vague and embarrassing;
- (b) admits that on 17 August 2016, it lodged with the ASX (at 7:30am AEST) and the NZSX (at 8:44am NZST) and publicly released its Annual Report for the financial year ended 30 June 2016 (**AR FY16**);
- (c) says that at the same time as lodging and publicly releasing its AR FY16, it lodged with ASX and NZSX and publicly released the following documents:
 - (i) a news release titled “Financial Results for the Year Ended 30 June 2016” (**News Release FY16 Results**);
 - (ii) its Management Commentary for the Financial Results for the Year Ended 30 June 2016 (**Management Commentary FY16**); and
 - (iii) its Annual Results to 30 June 2016 presentation (**FY16 Presentation**); and

- (d) under cover of the objection referred to in sub-paragraph (a), otherwise denies that paragraph.

20. As to paragraph 20, it:

- (a) admits that, in its AR FY16, Management Commentary FY16 and FY16 Presentation, it stated the FY17 Guidance and it relies upon the full terms and effect of those documents;
- (b) otherwise denies that paragraph and says further that:
 - (i) from time to time, it issued earnings guidance statements to participants in the market, which provided guidance in relation to its then current expectation of its likely earnings for the current financial year (**Guidance Statements**);
 - (ii) its Guidance Statements, including the FY17 Guidance:
 - (A) were statements that were made by it, and received by participants in the market, in the context of the industries in which it operated, and the reports, trading updates, and presentations in which they were contained;
 - (B) were point-in-time assessments made, and expressed, only at the date of issue, in light of the then prevailing conditions, facts, and matters known to it;
 - (C) involved estimates and assessments made as to its business activities, including, within its Construction division, as to the progress and profitability of current and future projects; and
 - (D) were consequently, and was apparent, difficult matters of judgment.

21. As to paragraph 21, it:
- (a) says that the August 2016 Earnings Call was held at 10:30am NZST (8:30am AEST) on 17 August 2016 and not at 2:30pm NZST; and
 - (b) otherwise admits that paragraph and relies on the full terms and effect of the transcript of the August 2016 Earnings Call.
22. It admits paragraph 22 and says further that the FY17 Guidance Representations were Guidance Statements that were representations of existing fact or opinion with respect to future matters and that it had reasonable grounds for making them.

Particulars

The FY17 Guidance, and the FY17 Guidance Representations, was produced and issued by Fletcher following, and consequent upon, its preparation of an annual budget for the FY17 (**FY17 Budget**). Fletcher had in place processes for the preparation of a robust and detailed FY17 Budget (**FY17 Budget Process**).

Fletcher undertook the FY17 Budget Process between around December 2015 and August 2016, which included the following:

- (A) the preparation of a bottom up budget for each business unit, which in respect of the Building + Interiors business unit involved the analysis of each project being undertaken or expected to be undertaken within the FY17 (both secured and unsecured);
- (B) review of business unit budgets and presentations by divisional leadership;
- (C) consolidation of business unit budgets into divisional budgets;
- (D) review of divisional budgets and business unit budgets by its Chief Executive Officer and Chief Financial Officer;
- (E) presentation of budget paper by the divisional executive teams to its Board of Directors;

- (F) on 16 May 2016, consideration by its Board of Directors of the FY17 Budget, and subsequent approval. Fletcher's estimated EBIT for FY17 in the FY17 Budget was NZD 738M: minutes of a meeting of its Board of Directors held on 16 May 2016;
- (G) on 16 August 2016, consideration and approval by its Board of Directors of the announcement of the FY17 Guidance consequent upon the FY17 Budget: minutes of a meeting of its Board of Directors held on 15 and 16 August 2016.

Further particulars may be provided following evidence.

- 23. As to paragraph 23, it:
 - (a) refers to and repeats paragraph 22 above, and otherwise admits sub-paragraph 23(a); and
 - (b) says that sub-paragraph 23(b) makes no allegation against it, and otherwise denies sub-paragraph 23(b).

E.2. Half Year Report FY17

- 24. As to paragraph 24, it:
 - (a) says that the phrase "associated commentary" is unparticularised and therefore vague and embarrassing;
 - (b) admits that on 22 February 2017, it lodged with the ASX (at 7:34am AEDT) and the NZSX (at 8:30am NZDT), and publicly released, its financial results for the six months ending 31 December 2016 (**HY Report FY17**);
 - (c) says that at the same time as lodging and publicly releasing its Half Year Report FY17, it lodged with ASX and NZSX and publicly released the following documents:
 - (i) a new release titled "Financial Results for the Six Months Ending 31 December 2016" (**News Release 1H17 Results**); and

- (ii) its Management Commentary for the financial results for the six months ending 31 December 2016 (**Management Commentary 1H17**); and
 - (d) under cover of the objection referred to in sub-paragraph (a), otherwise denies that paragraph.
25. As to paragraph 25, it:
- (a) relies on the full terms and effect of the documents referred to at paragraphs 24(b) and 24(c) above;
 - (b) says that in its HY Report FY17 it:
 - (i) reported that the Construction division half year result was NZD 24M, down from NZD 36M for 1H16; and
 - (ii) stated that the reduction was “*due to a range of factors, notably: timing of earnings recognition for major projects; bid costs incurred in the period; reduced contribution from Fletcher EQR as the Canterbury earthquake home repair programme nears completion; and losses incurred on a major construction project*”; and

Particulars

HY Report FY17, pages 3, 9, and 10.

- (c) otherwise admits that paragraph.
26. As to paragraph 26, it:
- (a) admits that by its HY Report FY17 and News Release 1H17 Results it repeated the FY17 Guidance Representations;
 - (b) says that the repeated FY17 Guidance Representations were Guidance Statements that were representations of existing fact or opinion with respect to future matters and that it had reasonable grounds for making them; and

- (c) otherwise denies that paragraph.

Particulars

Fletcher refers to and repeats the particulars to paragraph 22 above.

Further, during the Relevant Period, it had in place adequate processes for reliably monitoring its financial and business performance (**Monitoring Processes**) regularly throughout the financial year. The Monitoring Processes included:

- (A) performance reviews of projects in the Building + Interiors business unit on a monthly basis, involving a review of project timelines, forecast cost and financial outcomes;
- (B) monthly operational reviews of each business unit, which in respect of the Building + Interiors business unit, involved a review of financial performance, people, operations, and progress on key initiatives;
- (C) monthly divisional performance reviews, based on consolidated business unit reviews. The Construction division monthly divisional reviews involved consideration of financial performance against budget, and updated financial forecast; and
- (D) monthly financial reporting to the Board of Directors, based on the divisional reviews, involving consideration of financial performance against budget, updated financial forecast, and key drivers for performance.

The HY Report FY17 was produced and issued by Fletcher following, and consequent upon, its Monitoring Processes, and included:

- (A) presentation by the CFO to its Audit & Risk Committee (**ARC**) on its financial results for the six months ending 31 December 2016;
- (B) on 13 February 2017, consideration by ARC of the financial results for the six months ending 31 December 2016: minutes of a meeting of its ARC held on 13 February 2017;

- (C) review by Ernst & Young, including of Fletcher's expected EBIT for FY17, the subject of a report dated 13 February 2017;
- (D) on 21 and 22 February 2017, consideration and approval by its Board of Directors of the HY Report FY17: minutes of a meeting of its Board of Directors held on 21 and 22 February 2017.

Further particulars may be provided following evidence.

E.3. March 2017 Trading Update

27. As to paragraph 27, it:

- (a) admits that on 17 March 2017, it requested, and was granted by each the ASX and NZSX, a halt to trading in Fletcher Shares pending the outcome of an internal review of the financial performance of the Construction division (**Construction Review Process**) and its impact on earnings guidance previously provided to market;
- (b) admits that the Construction Review Process included a review of the Business + Interiors business unit, as a business unit of the Construction division; and
- (c) otherwise denies that paragraph.

28. It admits paragraph 28.

29. As to paragraph 29, it:

- (a) relies on the full terms and effect of the March 2017 Trading Update;
- (b) admits sub-paragraph 29(a);
- (c) as to sub-paragraph 29(b):
 - (i) admits that in the March 2017 Trading Update, it stated that:

“The reduction in EBIT guidance relates to the Building and Interiors business unit (“B&I”). The reduction has two components:

- 1) *There has been an increase in the estimated loss on the major construction project which we referenced at the time of the half-year results announcement. This additional estimated loss represents approximately half of the reduction in guidance announced today.*
- 2) *The remaining portion of the reduction is due to the identification of downside risk on other B+I projects, with the majority being a provision for losses on one other major project, and a smaller amount due to increased costs elsewhere in the B&I business unit”; and*

(ii) otherwise denies that sub-paragraph;

Particulars

March 2017 Trading Update, page 2.

(d) denies sub-paragraph 29(c);

(e) as to sub-paragraph 29(d):

(i) admits it stated in the March 2017 Trading Update that:

(A) *“The major projects involved are large and highly complex”; and*

(B) *“The most significant issues [in the construction projects concerned] relate to complexity in design, subcontractor management and building program delivery on key projects. This has led to an extension of project timelines and increase in project resource requirements and costs, relative to original budgets”; and*

(ii) otherwise denies that sub-paragraph; and

Particulars

March 2017 Trading Update, page 2.

- (f) as to sub-paragraph 29(e):
 - (i) admits it stated in the March 2017 Trading Update that:
 - (A) *“We have made, and are continuing to make, changes to Construction governance process and personnel which is enabling us to clearly identify and address project performance issues”*; and
 - (B) *“We believe these changes will drive improvement in future periods”*; and
 - (ii) otherwise denies that sub-paragraph.

Particulars

March 2017 Trading Update, page 2.

- 30. As to paragraph 30, it:
 - (a) says the March 2017 Earnings Call was held by it at about 11:00am NZDT (9:00am AEDT) on 20 March 2017;
 - (b) relies on the full terms and effect of the transcript of the March 2017 Earnings Call; and
 - (c) otherwise does not know and therefore does not admit that paragraph.
- 31. As to paragraph 31, it:
 - (a) admits that, in the March 2017 Earnings Call, it repeated the substance of the statements admitted in sub-paragraphs 29(b), 29(c)(i), 29(e)(i) and 29(f)(i) above; and
 - (b) otherwise denies that paragraph.

32. As to paragraph 32, it:

- (a) admits that the opening, high, low and closing price of Fletcher Shares on 20 March 2017, on each of the ASX and NZSX, were as follows:

Stock Exchange	Opening price	High price	Low price	Closing price
ASX	7.33	7.56	7.30	7.51
NZSX	7.83	7.93	7.66	7.92

- (b) otherwise denies that paragraph.

33. It admits paragraph 33 and says further that the Revised FY17 Guidance Representations were Guidance Statements that were representations of existing fact or opinion with respect to future matters and that it had reasonable grounds for making them.

Particulars

Fletcher refers to the FY17 Budget Process, the Monitoring Processes and the Construction Review Process.

The Revised FY17 Guidance was produced and issued by Fletcher following, and consequent upon, the Monitoring Processes and the Construction Review Process, and included:

- (A) detailed review of the Construction division and Building + Interiors business unit financial performance;
- (B) regular monitoring of the forecast financial performance of FY17;
- (C) on 16 March 2017, consideration by the CEO of the then forecast group earnings for FY17;
- (D) on 17 March 2017, consideration by the Chairman and Chair of the ARC of the then forecast group earnings for FY17;

- (E) on 18 and 19 March 2017, consideration and delegation of approval to its Chairman by the Board of Directors of the announcement of the Revised FY17 Guidance: minutes of meetings of its Board of Directors held on 18 March 2017 and 19 March 2017.

Further particulars may be provided following evidence.

34. As to paragraph 34, it:
- (a) refers to and repeats paragraph 33 above, and otherwise admits sub-paragraph 34(a); and
 - (b) says that sub-paragraph 34(b) makes no allegation against it, and otherwise denies sub-paragraph 34(b).

E.4. July 2017 Trading Update

35. It admits paragraph 35.

36. As to paragraph 36, it:

- (a) relies on the full terms and effect of the July 2017 Trading Update;
- (b) as to sub-paragraph 36(a):
 - (i) admits that in the July 2017 Trading Update it stated that it expected EBIT for FY17 to be approximately NZD 525 million; and
 - (ii) otherwise denies that sub-paragraph;
- (c) as to sub-paragraph 36(b):
 - (i) admits that, in the July 2017 Trading Update, it stated:

“... as work on major projects in the Building + Interiors (‘B+I’) business unit has progressed, it has become apparent that losses in

B+I will exceed those previously estimated. The deterioration is due to:

- *A major project subject to previous write-downs, which has required an increase in project resourcing and therefore cost as it nears completion;*
- *A second major project where construction timelines and the likely completion date have been extended;*
- *Reduced profit expectations on a number of smaller projects in the remainder of the B+I portfolio”; and*

Particulars

July 2017 Trading Update, page 1.

- (ii) otherwise denies that sub-paragraph;
- (d) as to sub-paragraph 36(c):
- (i) admits sub-paragraph 36(c)(i);
 - (ii) admits that, in the July 2017 Trading Update, it stated that the most significant issues, in respect of the two major construction projects, remained complexity in design, subcontractor management and building program delivery, which had led to an extension of project timelines and increase in project resource requirements and costs, relative to original budgets; and

Particulars

July 2017 Trading Update, page 2.

- (iii) otherwise denies that sub-paragraph;

- (e) as to sub-paragraph 36(d):
- (i) admits that in the July 2017 Trading Update, it stated:
- (A) *“one of the major projects was close to completion, which provided greater certainty over the ultimate cost”*;
- (B) *“a review of remaining projects has been completed”*; and
- (C) *“the construction timelines and the likely completion date extended on a second major project”*; and
- (ii) otherwise denies that sub-paragraph; and

Particulars

July 2017 Trading Update, page 2.

- (f) as to sub-paragraph 36(e):
- (i) admits it stated its *“Construction Division is benefiting from the leadership and robust management expertise of Chief Executive Michele Kernahan and B+I has a newly appointed General Manager, David Kennedy, who brings with him 30 years’ experience in the construction industry across multiple markets”*;
- (ii) otherwise denies that sub-paragraph.

Particulars

July 2017 Trading Update, page 2.

37. It admits paragraph 37 and relies on the full terms and effect of the transcript of the July 2017 Earnings Call.
38. As to paragraph 38, it:
- (a) admits that, in the July 2017 Earnings Call, it repeated the substance of the statements admitted in sub-paragraphs 36(b) to 36(f) above; and

(b) otherwise denies that paragraph.

39. As to paragraph 39, it:

(a) admits that the opening, high, low and closing price of Fletcher Shares on 20 July 2017, on each of the ASX and NZSX, were as follows:

Stock Exchange	Opening price	High price	Low price	Closing price
ASX	6.91	7.23	6.86	7.05
NZSX	7.08	7.44	7.06	7.26

(b) otherwise denies that paragraph.

E.5. Annual Report 2017

40. As to paragraph 40, it:

(a) says that the phrase “associated commentary” is unparticularised and therefore vague and embarrassing;

(b) admits that on 16 August 2017, it lodged with the ASX (at 7:30am AEST) and the NZSX (at 8:30am NZST) and publicly released its Annual Report for the financial year ended 30 June 2017 (**AR FY17**);

(c) says that at the same time as lodging and publicly releasing its AR FY17, it lodged with ASX and NZSX and publicly released the following documents:

(i) a new release titled “Fletcher Building announces 2017 annual results” (**News Release FY17 Results**);

(ii) its Management Commentary for the Financial Results for the Year Ended 30 June 2017 (**Management Commentary FY17**);

(iii) its Annual Results to 30 June 2017 presentation (**FY17 Presentation**); and

- (d) under cover of the objection referred to in sub-paragraph (a), otherwise denies that paragraph.

41. As to paragraph 41, it:

- (a) refers to and repeats paragraph 40 above;
- (b) as to sub-paragraph 41(a), admits that in the AR FY17 it announced a FY17 EBIT result of NZD 525M;
- (c) as to sub-paragraph 41(b), admits that in the AR FY17 it reported an EBIT loss of NZD 204M in its Construction division;
- (d) as to sub-paragraph 41(c), admits it stated in the AR FY17 that the Building + Interiors business unit recorded an operating loss of NZD 292M;

Particulars

AR FY17, page 51.

- (e) as to sub-paragraph 41(d), admits it stated in the AR FY17 that “... *there is now an acute focus on ensuring the issues that led to these losses are addressed through improved project governance, on-site project management, process and bid strategy*”;

Particulars

AR FY17, Chairman’s report, page 10.

- (f) as to sub-paragraph 41(e), admits it stated in the AR FY17 that:
 - (i) the losses in the Building + Interiors business unit of its Construction division “*have been primarily driven by underperformance in management on two key contracts*”; and

- (ii) *“In both cases the issues we experienced included complex design issues, substandard project management and stretched resourcing in a capacity-constrained New Zealand construction market”;*

Particulars

AR FY17, Chairman’s report, page 11.

- (g) as to sub-paragraph 41(f), admits it stated in the AR FY17 that:
 - (i) *“the project in Christchurch is now very close to being finished, meaning the losses included in the 2017 results are unlikely to be extended into FY18”;*
 - (ii) *“In March 2017 a provision was taken on the Auckland project to cover losses that were expected over the lifetime of the contract”;*
and
 - (iii) *“In July 2017 it was announced that [the provision taken on the Auckland project] was to be extended as further review of the project pointed to the need to extend the construction period, bringing with it additional cost”;*

Particulars

AR FY17, Chairman’s report, page 11.

- (h) as to sub-paragraph 41(g), admits it stated:
 - (i) in the Management Commentary FY17:
 - (A) *“Group operating earnings before significant items in FY18 will benefit from a significantly improved performance of the Construction division, reflecting the turnaround of the Building + Interiors (B+I) business”;* and
 - (B) *“Construction – operating earnings will benefit from a turnaround of the B+I business, but will be slightly below the long run mid-cycle earnings due to the South Pacific*

backlog taking some time to replenish, and two large Infrastructure projects not yet sufficiently advanced for earnings to be recognised under the group's policy"; and

Particulars

Management Commentary FY17, page 14.

(ii) in the FY17 Presentation:

"Financial outlook FY18

Earnings before interest and tax and significant items

- *Benefit from turnaround of B+I business..."*

Particulars

FY17 Presentation, slide 41.

(i) otherwise denies that paragraph.

42. Save that it says the August 2017 Earnings Call was held by it at about 11:00am NZST (9:00am AEST) on 16 August 2017, it admits paragraph 42 and relies on the full terms and effect of the transcript of the August 2017 Earnings Call.
43. It admits paragraph 43.
44. As to paragraph 44, it:
- (a) save that it says the representation was made by its Management Commentary FY17, admits sub-paragraph 44(a);
 - (b) save that it says the representation was made by the August 2017 Earnings Call, admits sub-paragraph 44(b);
 - (c) denies sub-paragraph 44(c) and refers to and repeats sub-paragraph 41(f) above;

- (d) admits that it represented that it had reasonable grounds for the representations pleaded in sub-paragraphs 44(a) and 44(b) above, and otherwise denies sub-paragraph 44(d);
- (e) says further that the representations referred to in sub-paragraphs 44(a), 44(b) and 44(d) above (**August 2017 Building + Interiors Representations**) were:
 - (i) expressly stated to the market as not constituting the provision of any Guidance Statement in respect of the EBIT for FY18;

Particulars

Transcript of August 2017 Earnings Call, page 10, question from Keith Chau (Evans & Partners Pty Ltd) and answered by Bevan McKenzie; page 13, question from Emily Smith (Deutsche Bank AG) answered by Bevan McKenzie; pages 13 and 14, question from Stephen Hudson (Macquarie Research) answered by Sir Ralph Norris.

- (ii) further or alternatively, subject to the matters set out in paragraphs 20(b)(ii)(A) to 20(b)(ii)(D) above; and
- (iii) representations of existing fact or opinion with respect to future matters for which Fletcher had reasonable grounds.

Particulars

The August 2017 Building + Interiors Representations were made by Fletcher following, and consequent upon, its preparation of an annual budget for FY18 (**FY18 Budget**) pursuant to the processes it had in place for the preparation of a robust and detailed FY18 Budget (**FY18 Budget Process**).

Fletcher undertook the FY18 Budget Process around November 2016 and August 2017 which included:

- (A) the preparation of a bottom up budget for each business unit, which in respect of the Building + Interiors business unit involved the analysis of each project being undertaken or expected to be undertaken within the FY18 (both secured and unsecured);

- (B) review of business unit budgets and presentations by divisional leadership;
- (C) consolidation of business unit budgets into divisional budgets;
- (D) review of divisional and business unit budgets by its Chief Executive Officer and Chief Financial Officer;
- (E) presentation of budget paper by the divisional executive teams to its Board of Directors;
- (F) on 15 and 16 May 2017, consideration and approval of a budget by its Board of Directors: minutes of a meeting of its Board of Directors held on 15 and 16 May 2017;
- (G) on 21 June 2017, consideration by its Board of Directors of the FY18 Budget, and subsequent approval: minutes of a meeting of its Board of Directors held on 21 June 2017; and
- (H) on 14 to 16 August 2017, consideration and approval by its Board of Directors of the AR FY17: minutes of a meeting of its Board of Directors held on 14 and 15 August 2017.

Further particulars may be provided following evidence.

45. As to paragraph 45, it:
- (a) refers to and repeats paragraph 44(e)(ii) above, and otherwise admits sub-paragraph 45(a); and
 - (b) says that sub-paragraph 45(b) makes no allegation against it, and otherwise denies that sub-paragraph.

E.5. October 2017 Trading Update

46. It admits paragraph 46.

47. As to paragraph 47, it:

- (a) as to sub-paragraph 47(a):
 - (i) admits it held its Annual Shareholders' Meeting on about 25 October 2017; and
 - (ii) otherwise denies that sub-paragraph and says that, during its Annual Shareholders' Meeting, it stated that the two major projects on which it had incurred the majority of the losses in the Building + Interiors business unit were the CJESP Project and NZICC Project; and

Particulars

2017 AGM – Chairman Speech, page 9.

- (b) admits sub-paragraphs 47(b) and 47(c).

48. As to paragraph 48, it:

- (a) relies on the full terms and effect of the October 2017 Trading Update;
- (b) admits sub-paragraphs 48(a) and 48(b);
- (c) denies sub-paragraph 48(c);
- (d) denies sub-paragraph 48(d) and says it stated in the October 2017 Trading Update:

“Given the uncertainty in estimating the final outcomes of the major Building and Interiors (B+I) projects, and the resulting impact on in-year earnings, Fletcher Building has separated guidance of the B+I business from the remainder of the Group’s earnings”;

Particulars

October 2017 Trading Update, page 1.

- (e) as to sub-paragraph 48(e):
 - (i) admits that, in the October 2017 Trading Update, it stated the earnings guidance for the Business + Interiors business unit for FY18 was expected to be a loss of NZD 160M;
 - (ii) says it stated the loss of NZD 160M for the Business + Interiors business unit for FY18 comprised:
 - (A) approximately NZD 125M expected project losses, of which approximately 80% was associated with the NZICC Project and CJESP Project; and
 - (B) approximately NZD 35M expected Building + Interiors business unit overhead costs in the current year;

Particulars

October 2017 Trading Update, page 1 – “The estimated loss of \$160 million in FY18 comprises additional provisions of approximately \$125 million for expected B+I project losses and approximately \$35 million of expected B+I overhead costs in the current year... The expected additional losses on NZICC, plus further costs being incurred in the close out of the Justice Precinct project, represent approximately 80% of the \$125 million provision announced today.”

- (iii) otherwise denies that sub-paragraph.

49. As to paragraph 49, it:

- (a) admits it held the October 2017 Earnings Call as alleged and relies on the full terms and effect of the transcript of the October 2017 Earnings Call;
- (b) otherwise denies that paragraph; and

- (c) says further it stated during the October 2017 Earnings Call “*the 2 major projects on which we have incurred the majority of our losses are the [CJESP Project] and the [NZICC Project]*”.

Particulars

Transcript of October 2017 Earnings Call, page 6, Sir Ralph Norris.

50. As to paragraph 50, it:

- (a) admits that the opening, high, low and closing price of Fletcher Shares on 25 October 2017, on each of the ASX and NZSX, were as follows:

Stock Exchange	Opening price	High price	Low price	Closing price
ASX	6.76	6.96	6.73	6.84
NZSX	7.23	7.47	7.17	7.34

- (b) otherwise denies that paragraph.

F. PROBLEMS AFFECTING THE CJESP AND NZICC PROJECTS

F.1. Events up to 17 August 2016

51. As to paragraph 51, it:

- (a) refers to and repeats sub-paragraph 12(a) above and says that the CJESP Building Contract was not executed in “early 2014”;
- (b) says that in the absence of further and better particulars of the:
- (i) “poor coordination and project management” alleged at sub-paragraph 51(a);
 - (ii) “complexity of the design of the CJESP” alleged at sub-paragraph 51(b); and
 - (iii) “works” which are the subject of the allegations at paragraph 51(c),

the allegations in paragraph 51 are vague and embarrassing; and

(c) under cover of that objection, denies that paragraph.

52. As to paragraph 52, it:

(a) says that in the absence of particulars of the:

(i) “schedule” alleged at sub-paragraphs 52(a) and 52(b);

(ii) “risk of a substantial claim from subcontractors” alleged at sub-paragraph 52(c); and

(iii) lack of “cohesive or systematic approach” alleged at paragraph 52(d),

the allegations in paragraph 52 are vague and embarrassing; and

(b) under cover of that objection, denies that paragraph.

53. It admits paragraph 53 and relies on the full terms and effect of the CJESP Variation Contract.

54. As to paragraph 54, it:

(a) as to sub-paragraph 54(a):

(i) refers to and repeats paragraphs 13(a)(i) and 13(a)(ii)(A) above;

(ii) admits that pursuant to the CJESP Variation Contract that NZ MOJ and FCL agreed to convert the balance of the Contract Price payable under the CJESP Building Contract for the Guaranteed Maximum Price Works to a fixed price lump sum amount;

Particulars

Clause 3.1 of the CJESP Variation Contract.

(iii) otherwise denies that sub-paragraph;

- (b) admits sub-paragraph 54(b);
- (c) denies sub-paragraph 54(c) and says, pursuant to the terms of the CJESP Variation Contract, NZ MoJ and FCL agreed to amend the bases for an entitlement to an adjustment to the contract price of the CJESP Building Contract effective from 23 May 2016;

Particulars

Clause 3.3 of the CJESP Variation Contract.

- (d) denies sub-paragraph 54(d) and says there were terms of the CJESP Variation Contract that FCL agreed:
 - (i) the arrangements agreed in the CJESP Variation Contract fully and finally settled and resolved all Claims made by FCL where the subject matter or circumstance giving rise to the Claim occurred or arose on or before 23 May 2016; and
 - (ii) FCL waived its rights and entitlement to any Claim, where the subject matter or circumstance giving rise to that Claim occurred or arose on or before 23 May 2016, whether or not:
 - (A) the subject matter or circumstance giving rise to that Claim was known or unknown; or
 - (B) whether or not a Claim had been claimed, made or notified.

Particulars

Clause 5 of the CJESP Variation Contract.

- (e) save that it says, pursuant to the terms of the CJESP Variation Contract, NZ MOJ and FCL agreed to amend the Separable Portions and revised the Due Date for Completion for Separable Portion 1 to 13 January 2017 and the Due

Date for Completion for Separable Portion 2 to 18 January 2017, admits sub-paragraph 54(e);

Particulars

Clauses 4.1 and 4.2 of the CJESP Variation Contract.

- (f) as to sub-paragraph 54(f):
 - (i) says the phrase “significant daily liquidated damages” is unparticularised and is therefore vague and embarrassing;
 - (ii) admits that it was a term of the CJESP Variation Contract that liquidated damages for late completion of the whole of the Contract Works (i.e. both Separable Portions) were payable by FCL at a rate of NZD 45,000 per calendar day from 3 February 2017;

Particulars

Clause 4.3 of the CJESP Variation Contract.

- (iii) refers to paragraph 13(c) above; and
- (iv) otherwise denies that sub-paragraph.

55. As to paragraph 55, it:

- (a) refers to and repeats sub-paragraphs 13(a)(i) to 13(a)(iii), and 54(a) above; and
- (b) otherwise denies that paragraph.

56. It denies paragraph 56 and refers to and repeats paragraph 55 above.

57. As to paragraph 57, it:

- (a) denies sub-paragraph 57(a);
- (b) denies sub-paragraph 57(b);

- (c) as to sub-paragraph 57(c):
 - (i) says that in the absence of particulars of the “major projects” alleged at sub-paragraph 57(c) the allegations in that sub-paragraph are vague and embarrassing; and
 - (ii) under cover of that objection, says that as at 17 August 2016, the Building + Interiors business unit was committed to fixed price lump or guaranteed maximum price contracts, subject to the terms of those contracts, and otherwise denies that sub-paragraph;
- (d) as to sub-paragraph 57(d):
 - (i) says that in the absence of particulars of the “deficient processes” alleged at sub-paragraph 57(d) the allegations in that sub-paragraph are vague and embarrassing; and
 - (ii) under cover of that objection, denies that sub-paragraph;
- (e) as to sub-paragraph 57(e):
 - (i) says that in the absence of particulars of the “appropriate risk premiums” alleged at sub-paragraph 57(e) the allegations in that sub-paragraph are vague and embarrassing; and
 - (ii) under cover of that objection, denies that sub-paragraph;
- (f) as to sub-paragraph 57(f):
 - (i) says that as at 17 August 2016 the local and global industry challenges included skill and labour scarcity;
 - (ii) says that at 17 August 2016, its challenges included a large growth in project pipeline in a short space of time; and
 - (iii) otherwise denies that sub-paragraph; and
- (g) denies sub-paragraph 57(g).

F.2. Events between 17 August 2016 and 20 March 2017

58. As to paragraph 58, it:
- (a) admits that on and from 3 February 2017 it was liable to NZ MOJ pursuant to the CJESP Variation Contract for liquidated damages;
 - (b) refers to and repeats paragraph 54(f) above; and
 - (c) otherwise denies that paragraph.
59. It denies paragraph 59.
60. Save that it says the review commenced in around December 2016, it admits paragraph 60.
61. As to paragraph 61, it:
- (a) says that paragraphs 51 to 60 of the ASOC contain no allegation of “managerial and systemic issues”, the phrase is otherwise not particularised, and is therefore vague and embarrassing;
 - (b) says further that in the absence of particulars of the “extensions of construction timelines” alleged to have been led to by managerial and systemic issues, the allegations are vague and embarrassing;
 - (c) refers to and repeats paragraphs 51 to 60 above; and
 - (d) otherwise, under cover of those objections, denies that paragraph.
62. It denies paragraph 62.
63. It denies paragraph 63 and refers to and repeats paragraph 55 above.

F.3. Events between 20 March 2017 and 20 July 2017

64. As to paragraph 64, it:

- (a) says that the “information” is unparticularised and therefore paragraph 64 is vague and embarrassing; and
- (b) under cover of that objection, denies that paragraph.

65. It denies paragraph 65.

66. As to paragraph 66, it:

- (a) admits sub-paragraph 66(a);
- (b) save that it says that by 30 June 2017, it had forecasted a margin for the CJESP Project which was a “large negative”, admits sub-paragraph 66(b).

Particulars

FY17 Presentation, slide 30.

67. It denies paragraph 67 and refers to and repeats paragraph 55 above.

F.4. Events after 20 July 2017

68. As to paragraph 68, it:

- (a) says the phrase “significant liquidated damages” is unparticularised and is therefore vague and embarrassing;
- (b) refers to and repeats sub-paragraphs 17(d) to 17(h) above;
- (c) says that, under the terms of the NZICC Contract, as at 16 August 2017:
 - (i) liquidated damages were payable in respect of Separable Portion 2 at a rate of NZD 49,000 per calendar day after 10 April 2017; and
 - (ii) no liquidated damages were payable in respect of Separable Portion 1, Separable Portion 3 or the balance of the Contract Works; and

(d) otherwise denies that paragraph.

69. As to paragraph 69, it:

(a) admits that it engaged KPMG in September 2017 and the review undertaken by KPMG did not include the CJESP Project; and

(b) otherwise denies that paragraph.

70. It denies paragraph 70 and refers to and repeats paragraph 55 above.

G. TRUE POSITION

71. As to paragraph 71, it:

(a) refers to paragraphs 51 to 63 above; and

(b) denies that paragraph.

72. As to paragraph 72, it:

(a) refers to paragraphs 51 to 67 above; and

(b) denies that paragraph.

73. As to paragraph 73, it:

(a) refers to paragraphs 51 to 70 above; and

(b) denies that paragraph.

H. FLETCHER'S MISLEADING OR DECEPTIVE CONTRAVENTIONS

H.1. Introduction

74. As to paragraph 74, it:

(a) as to sub-paragraph 74(a):

(i) refers to paragraphs 19 to 33;

- (ii) admits that publishing and/or lodging with the NZSX and ASX the documents pleaded at paragraphs 19 and 24 above, holding the August 2016 Earnings Call, and making the FY17 Guidance Representations was conduct:
 - (A) in relation to a financial product (being Fletcher Shares) within the meaning of s 1041H of the Corporations Act and in relation to dealing in a quoted financial product within the meaning of s 19 of the FMC Act NZ; and
 - (B) in trade or commerce, in relation to financial services within the meaning of s 12DA(1) of the ASIC Act; and
 - (C) in trade or commerce, within the meaning of s 18 of the ACL;
 - (iii) otherwise denies that sub-paragraph; and
 - (iv) says further the plaintiffs do not allege that it was under any obligation to modify, qualify or correct the FY17 Guidance Representations any time prior to 20 March 2017;
- (b) as to sub-paragraph 74(b):
- (i) refers to paragraphs 35 to 38;
 - (ii) admits that publishing and/or lodging with the NZSX and ASX of the March 2017 Trading Update, holding the March 2017 Earnings Call, and making the Revised FY17 Guidance Representations was conduct:
 - (A) in relation to a financial product (being Fletcher Shares) within the meaning of s 1041H of the Corporations Act and in relation to dealing in a quoted financial product within the meaning of s 19 of the FMC Act NZ; and

- (B) in trade or commerce, in relation to financial services within the meaning of s 12DA(1) of the ASIC Act; and
 - (C) in trade or commerce, within the meaning of s 18 of the ACL;
 - (iii) otherwise denies that sub-paragraph; and
 - (iv) says further the plaintiffs do not allege that Fletcher was under any obligation to modify, qualify or correct the Revised FY17 Guidance Representations any time prior to 20 July 2017;
- (c) as to sub-paragraph 74(c):
- (i) refers to paragraphs 40 to 44;
 - (ii) admits that publishing and/or lodging with the NZSX and ASX of the documents pleaded at paragraph 40 above, holding the August 2017 Earnings Call, and making the August 2017 Building + Interiors Representations was conduct:
 - (A) in relation to a financial product (being Fletcher Shares) within the meaning of s 1041H of the Corporations Act and in relation to dealing in a quoted financial product within the meaning of s 19 of the FMC Act NZ; and
 - (B) in trade or commerce, in relation to financial services within the meaning of s 12DA(1) of the ASIC Act; and
 - (C) in trade or commerce, within the meaning of s 18 of the ACL;
 - (iii) otherwise denies that sub-paragraph; and
 - (iv) says further the plaintiffs do not allege that Fletcher was under any obligation to modify, qualify or correct the FY17 Guidance Representations any time prior to 24 October 2017.

H.2. Misleading or deceptive conduct: FY17 Guidance

75. As to paragraph 75, it:

- (a) refers to paragraphs 22, 26 and 71; and
- (b) denies that paragraph.

76. As to paragraph 76:

- (a) the capitalised term “FY17 Guidance Information Representation” (referred to in paragraph 76(a) of the ASOC) is not defined in the ASOC;
- (b) on the understanding that the capitalised term “FY17 Guidance Information Representation” is intended to be a reference to “FY17 Guidance Representations”, it pleads as follows:
 - (i) refers to paragraphs 22, 26, 71 and 74; and
 - (ii) denies that paragraph.

77. As to paragraph 77, it:

- (a) refers to paragraphs 75 and 76; and
- (b) denies that paragraph.

H.3. Misleading or deceptive conduct: Revised FY17 Guidance

78. As to paragraph 78, it:

- (a) refers to paragraphs 33 and 72; and
- (b) denies that paragraph.

79. As to paragraph 79, it:

- (a) refers to paragraphs 33, 72 and 74; and
- (b) denies that paragraph.

80. As to paragraph 80, it:

- (a) refers to paragraphs 78 and 79; and
- (b) denies that paragraph.

H.4. Misleading or deceptive conduct: August 2017 Building + Interior Guidance

81. As to paragraph 81, it:

- (a) refers to paragraphs 45 and 73; and
- (b) denies that paragraph.

82. As to paragraph 82, it:

- (a) refers to paragraphs 45, 73 and 74; and
- (b) denies that paragraph.

83. As to paragraph 83, it:

- (a) refers to paragraphs 81 and 82; and
- (b) denies that paragraph.

I. FLETCHER'S SECTION 1041E CONTRAVENTIONS

I.1. Section 1041E contravention: FY17 Guidance Representations

84. As to paragraph 84, it:

- (a) admits that by making the FY17 Guidance Representations on 17 August 2016 and/or 22 February 2017, it disseminated information to the market of actual or potential investors in Fletcher Shares;
- (b) refers to paragraphs 22 and 26 above; and
- (c) otherwise denies that paragraph.

85. As to paragraph 85, it:
- (a) refers to paragraphs 71, 75 and 76 above; and
 - (b) denies that paragraph.

86. It denies paragraph 86.

87. It denies paragraph 87.

88. It denies paragraph 88.

I.2. Section 1041E contravention: Revised FY17 Guidance Representations

89. As to paragraph 89, it:
- (a) admits that by making the Revised FY17 Guidance Representations on 20 March 2017, it disseminated information to the market of actual or potential investors in Fletcher Shares;
 - (b) refers to paragraph 33 above; and
 - (c) otherwise denies that paragraph.

90. As to paragraph 90, it:
- (a) refers to paragraphs 72, 78 and 79 above; and
 - (b) denies that paragraph.

91. It denies paragraph 91.

92. It denies paragraph 92.

93. It denies paragraph 93.

I.3. Section 1041E contravention: August 2017 Building + Interior Guidance Representations

94. As to paragraph 94, it:

- (a) admits that by making the August 2017 Building + Interiors Representations on 16 August 2017, it disseminated information to the market of actual or potential investors in Fletcher Shares;
- (b) refers to paragraph 44 above; and
- (c) otherwise denies that paragraph.

95. As to paragraph 95, it:

- (a) refers to paragraphs 73, 81 and 82 above; and
- (b) denies that paragraph.

96. It denies paragraph 96.

97. It denies paragraph 97.

98. It denies paragraph 98.

J. CONTRAVENING CONDUCT CAUSED LOSS

J.1 Inflated price of Fletcher Shares

99. As to paragraph 99, it:

- (a) admits that Fletcher Shares traded on the ASX and NZSX in a market where the price or value of Fletcher Shares was, or would reasonably be expected to be, informed or affected by information published to the ASX and NZSX, or otherwise made publicly available by Fletcher; and
- (b) otherwise does not admit that paragraph.

100. As to paragraph 100, it:

- (a) says the plea is embarrassing and does not plead a proper cause of action as there is no pleading of the counterfactual on which that Plaintiff and Group Members rely to establish the requisite causal link between the alleged loss or damage and the alleged Misleading or Deceptive Conduct Contraventions and/or Section 1041E Contraventions; and
- (b) under cover of the foregoing objection, denies paragraph 100.

101. As to paragraph 101, it:

- (a) refers to and repeats paragraph 100; and
- (b) denies that paragraph.

102. It denies paragraph 102.

J.2 Reliance

103. It denies paragraph 103.

J.2 Loss or damage suffered by the Applicant and Group Members

104. It denies paragraph 104.

K. LIMITATION ON ACTIONS

K.1 Reduction to damages recoverable

105. Further, or in the alternative, as to the whole of the ASOC, it says that:

- (a) insofar as the Plaintiff and the Group Members make claims pursuant to:
 - (i) s 1041I of the Corporations Act in relation to economic loss allegedly caused by Fletcher's conduct allegedly done in contravention of ss 1041E and/or 1041H of the Corporations Act;

- (ii) s 12GF(1) of the ASIC Act in relation to economic loss allegedly caused by Fletcher's conduct allegedly done in contravention of s 12DA of the ASIC Act;
 - (iii) s 236(1) of the ACL in relation to economic loss allegedly caused by Fletcher's conduct that was allegedly done in contravention of s 18 of the ACL;
 - (iv) ss 494 and 495 of the FMC Act NZ in relation to loss or damage caused by the Fletcher's conduct that was allegedly done in contravention of s 19 of the FMC Act NZ; and
 - (v) s 43 of the Fair Trading Act NZ in relation to loss or damage caused by Fletcher's conduct that was allegedly done in contravention of s 9 of the Fair Trading Act NZ;
- (b) if and to the extent that the Plaintiff or any Group Member failed to have adequate regard to any of the documents referred to or otherwise admitted at paragraphs 19, 21, 24, 28, 30, 35, 37, 40 or 42 above, or any of the August 2016 Earnings Call, the March 2017 Earnings Call, the July 2017 Earnings Call or August 2017 Earnings Call, in full then, if the Plaintiff or Group Member suffered the loss claimed or any loss at all (which is denied), the Plaintiff or Group Member did so as a result wholly or partly of the Plaintiff's or Group Member's failure to take reasonable care;
- (c) it did not intend to cause the loss claimed by the Plaintiff or Group Member or any loss at all and, if it caused that loss (which is denied), it did not do so fraudulently; and
- (d) in the premises, if the Plaintiff or Group Member suffered the loss claimed or any loss at all (which is denied), the damages which the Plaintiff or Group Member may recover in relation to the loss are to be reduced to the extent to which the Court thinks just and equitable having regard to the Plaintiff's or Group Member's responsibility for the loss.

Particulars

Section 1041I(1B) of the Corporations Act, s 12GF(1B) of the ASIC Act, s 137B of the Competition Consumer Act, ss 494 and 495 of the FMC Act NZ and s 43 of the Fair Trading Act NZ.

J.2 Causes of action are statute barred

106. Further or in the alternative, in relation to any Group Member that acquired Fletcher Shares prior to 2 September 2016, any action by a Group Member under:

- (a) s 1041I of the Corporations Act for contravention of s 1041E or s 1041H;
- (b) s 12GF(1) of the ASIC Act for contravention of s 12DA of the ASIC Act; and/or
- (c) s 236(1) of the ACL for contravention of s 18 of the ACL;

accrued more than 6 years prior to the commencement of this proceeding and is consequently statute barred by operation of:

- (d) s 1041I(2) of the Corporations Act;
- (e) s 12GF(2) of the ASIC Act; and/or
- (f) s 236(2) of the ACL.

107. Further or in the alternative, in an answer to the whole of the Plaintiff's action and/or any Group Member's action for contravention of s 9 of the Fair Trading Act NZ, it says that:

- (a) any loss or damage (which is denied) or the likelihood of any loss or damage (which is denied), the subject of the Plaintiff's and any Group Member's action, was discovered, or ought reasonably have been discovered, more than 3 years prior to the commencement of this proceeding on 2 September 2022;

Particulars

Fletcher refers to the allegations in paragraph 101 of the ASOC that declines in the price of Fletcher Shares were

caused by the market's reaction to the March 2017 Trading Update, July 2017 Trading Update and October 2017 Trading Update.

- (b) consequently, and by operation of s 43A of the Fair Trading Act NZ, the Plaintiff and any Group Member is barred from applying for any order under s 43 of the Fair Trading Act NZ.

108. Further or in the alternative, in relation to the Plaintiff's action and/or any Group Member's action for contravention of s 19 of the FMC Act NZ, it says that:

- (a) the action is a money claim within the meaning of s 508 of the FMC Act NZ and s 11 of the *Limitation Act 2010* (NZ) (**Limitation Act NZ**); and
- (b) insofar as the act or omission on which the claim is based occurred prior to 2 September 2016 (and is thereby more than 6 years prior to the date on which the claim was filed), the Plaintiff's action and/or Group Member's action for contravention of s 19 of the FMC Act NZ is statute barred by operation of s 11(1) of the Limitation Act NZ.

Date: 20 November 2023

R G CRAIG

R ROZENBERG

E E BATEMAN

Herbert Smith Freehills

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Herbert Smith Freehills

Solicitors for the Defendant