



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

No. S ECI 2023 04435

Case: S ECI 2023 04435

Filed on: 27/06/2024 05:19 PM

BETWEEN

JANE JONES (a pseudonym)

Plaintiff

- and -

WALLER LEGAL PTY LTD (ACN 167 030 757)

Defendant

DEFENCE

Date of document: 27 June 2024

Filed on behalf of the Defendant

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To the plaintiff's second further amended statement of claim filed on 12 April 2024 (**2FASOC**), the defendant says as follows. Defined terms used in the 2FASOC are adopted, unless otherwise indicated; headings are adopted for ease of reference only.

A. INTRODUCTION

A.1 Group members

1. Save to:

(a) refer to and repeat paragraph 2 below;

(b) say that by email from the plaintiff's solicitors to the defendant's solicitors on 24 June 2024, the plaintiff clarified that the circumstances described in paragraphs 1.3 and 1.4 of the 2FASOC are intended to be confined to the Relevant Period (as defined);

the defendant otherwise admits paragraph 1.

2. The defendant does not know and therefore cannot admit paragraph 2.

A.2 Waller Legal

3. In response to paragraph 3, the defendant:

- (a) admits sub-paragraphs 3.1, 3.3 and 3.4; and
- (b) denies sub-paragraph 3.2 and says further that it was an “incorporated legal practice” within the meaning of s 6 of Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic) (*Legal Profession Uniform Law*).

4. The defendant admits paragraph 4.

5. In response to paragraph 5, the defendant:

- (a) admits sub-paragraphs 5.1, 5.3 and 5.4; and
- (b) says that the defendant was dedicated to working with survivors of sexual assault, including (but not exclusively) people who were physically, sexually or psychologically abused or neglected when they were a child; and
- (c) otherwise denies the paragraph.

B. CLAIMS OF GROUP MEMBERS

B.1 Retainer with Waller Legal

6. In response to paragraph 6, the defendant:

- (a) says that:
 - (i) it entered into a retainer with each Group Member during the Relevant Period;
 - (ii) the content and/or scope of the retainer agreements differed according to the instructions and circumstances of each Group Member;
 - (iii) each Group Member’s retainer agreement specified the terms by which that Group Member would be liable to pay the defendant for legal work done in respect of that Group Member; and
- (b) otherwise denies the paragraph.

7. In response to paragraph 7, the defendant

- (a) refers to and repeats paragraph 6 above;

3.

- (b) says that subject to the terms of the relevant retainer for an individual Group Member, it owed that Group Member a duty to exercise reasonable care and skill in the performance of that Group Member's retainer; and
- (c) otherwise denies the paragraph.

8. In response to paragraph 8, the defendant says that:

- (a) the standard of reasonable care and skill to be exercised by the defendant in the performance of each Group Member's retainer was that of a person professing to have specialised skill and experience in claims for compensation against Institutional Defendants arising from sexual abuse and/or physical abuse; and
- (b) otherwise denies the paragraph.

B.2 Common law duty of care owed by Waller Legal

9. In response to paragraph 9, the defendant:

- (a) says that subject to the terms of the relevant retainer for an individual Group Member, it owed that Group Member a duty to exercise reasonable care and skill in the performance of that Group Member's retainer; and
- (b) otherwise denies the paragraph

10. The defendant refers to and repeats paragraph 8 above, and otherwise denies paragraph 10.

B.3 Provision of legal services by Waller Legal

11. In response to paragraph 11, the defendant:

- (a) says that:
 - (i) pursuant to each retainer it had with a Group Member, and subject to instructions, it provided the legal services that it was retained to provide; and
 - (ii) some Group Members did not pay the defendant for part or all of the legal work that the defendant performed for them;

- (iii) many Group Members paid the defendant for part or all of the legal work that the defendant performed for them in accordance with their individual retainers with the defendant; and
- (b) otherwise denies the paragraph.

B.4 Investigation and assessment of Group Members' Abuse Claims

12. In response to paragraph 12, the defendant:

- (a) refers to and repeats paragraph 11(a)(i) above;
- (b) in response to sub-paragraph 12.1, denies that it provided advice about steps that "should be taken", but rather, having regard to its trauma-informed practice, provided advice about what options were available to investigate and assess the Group Member's Abuse Claim;
- (c) in response to sub-paragraphs 12.4 to 12.6, whether an expert medical assessment was recommended and a report obtained depended on:
 - (i) whether any medical report was already in existence;
 - (ii) the Group Member's instructions about whether they wished to be assessed by an expert in respect of the alleged abuse;
 - (iii) the Group Member's instructions to rely on a treating practitioner's report, rather than being assessed by a psychiatrist;
 - (iv) whether as part of an alternative dispute resolution process, a medico-legal assessment by a psychiatrist or psychologist would take place; and
- (d) says that it undertook one or more of the steps described in sub-paragraphs 12.2, 12.3, 12.7 of the 2FASOC and those described above at sub-paragraphs 12(b)-(c) of this defence; and
- (e) otherwise denies the paragraph.

13. In response to paragraph 13, the defendant:

- (a) says that it knew during the Relevant Period, as was the fact, that:
 - (i) where:

5.

- (A) a person had suffered sexual and/or physical abuse, when they were a minor, which had caused economic loss; and
- (B) that person had a viable cause of action enabling him or her to seek damages for injury from the sexual and/or physical abuse; and
- (C) that person had commenced a court proceeding against a perpetrator of the sexual and/or physical abuse and/or an institution associated with the perpetrator that brought a cause of action for damages for injury from the sexual and/or physical abuse including damages for economic loss; and
- (D) the court had determined that proceeding and found that the perpetrator and/or institution was liable to pay damages for the injury from the sexual and/or physical abuse; and
- (E) the court had determined liability of the perpetrator and/or institution to pay damages for the injury from the sexual and/or physical abuse included a liability to pay damages for economic loss; and
- (F) the court did not make significant discounts to the damages sum;

Particulars to (a)(i)(F)

The matters that may have led to a significant discount to the damages sum included:

- i. time out of the workforce for reasons unrelated to the claim, such as caring responsibilities or periods of incarceration;
 - ii. vicissitudes;
 - iii. whether evidence was available to support the economic loss claim, or whether instead the Court adopted an allowance of the type described in *Victorian Stevedoring v Farlow* [1963] VR 594.
- (ii) in those circumstances, the value of the damages for economic loss as assessed by a court could be significant; and

(b) otherwise denies the paragraph.

14. The defendant refers to and repeats paragraph 13 and otherwise denies paragraph 14.

B.4.1 First Breach of Retainer and First Breach of Duty

15. In response to paragraph 15, the defendant:

- (a) refers to and repeats paragraph 13 above;
- (b) says further that:
 - (i) the advice the defendant gave to each Group Member in respect of any economic loss component of the Group Member's Abuse Claim, including its investigation and assessment, depended on the Group Member's retainer, instructions and personal circumstances;

Particulars to (b)(i)

- i. The circumstances that affected what advice the defendant gave a Group Member in respect of the economic loss component of the Group Member's Abuse Claim, including its investigation and assessment, included one or more of the following:
 - a. whether the person could prove on the balance of the probabilities that they had suffered the alleged abuse;
 - b. whether the alleged abuse had caused economic loss;
 - c. the willingness of the alleged victim to participate in the litigation process, given the attendant stresses of that process;
 - d. the available evidence (including evidence concerning any past or future lost earnings);
 - e. until 1 July 2018, whether the alleged victim had a claim in law against any juridical entity that could be named as a defendant to the proceeding;
 - f. whether a juridical entity that could be named as a defendant to the proceeding:
 - i. could be established to be directly liable in the law of negligence; or
 - ii. could be established to be vicariously liable for the alleged abuse; and
 - iii. had assets and was likely to have assets at the time of judgment or verdict against which any judgment or verdict could be enforced;
 - g. the risk that a defendant could apply for and obtain a permanent stay of the proceeding;

- h. for any Group Members where the *Limitation Act 2005* (WA) applied, the application of any relevant limitation period under that Act; and
 - i. for any Group Members where the *Limitation Act 1974* (Tas) applied, the application of any relevant limitation period under that Act.
- ii. As to Group Members' instructions:
 - a. in circumstances, some Group Members:
 - i. did not wish to seek damages of economic loss, having regard to the possibility of, for example:
 - 1. repayment of Centrelink benefits that had been received; or
 - 2. disclosures to the Australian Tax Office; or
 - 3. the disclosure of the allegations of abuse to their employers;
 - ii. instructed that they did not experience any detriment to their employment; or
 - iii. experienced a catastrophic event, for example, an accident at a young age, or acquired a disability; or
 - iv. left the workforce for reasons unrelated to the alleged abuse, such as:
 - 1. caring responsibilities; or
 - 2. a long period of incarceration; and
 - b. in (at least) these circumstances, it may not have been appropriate to take some of the steps pleaded at paragraph 15.
- (ii) not all Group Members had a viable cause of action against any defendant and accordingly, some Group Members could not bring a proceeding against a defendant and/or had little to no prospect of recovering damages for economic loss in a proceeding; and

Particulars to (b)(ii)

Whether a Group Member had a viable cause of action against any defendant depended on one or more of the matters at particulars (i)(a), (d) to (f) to sub-paragraph 15(b)(i) above.

- (iii) for a number of Group Members, the defendant retained counsel to, among other things, advise the relevant Group Member on the availability and quantum of damages for economic loss; and

(c) otherwise denies the paragraph.

16. The defendant refers to repeats paragraph 15 above, and otherwise denies paragraph 16.

B.5 Resolution of Group Members' Abuse Claims

17. The defendant denies paragraph 17.

B.5.1 Second and Third Breaches of Retainer

18. The defendant denies paragraph 18.

19. In response to paragraph 19, the defendant:

- (a) refers to and repeats paragraph 15 above;
- (b) says that for many Group Members, on instructions, it pursued claims for economic loss on the relevant Group Member's behalf, including through the commencement of proceedings; and
- (c) otherwise denies the paragraph.

B.5.2 Second and Third Breaches of Duty

20. The defendant refers to and repeats paragraphs 18 and 19 above and otherwise denies paragraph 20.

B.6 Settlement of Group Members' Abuse Claims

21. In response to paragraph 21, the defendant:

- (a) says that:
 - (i) the legal services it provided to Group Members during the Relevant Period depended on:
 - (A) the particular circumstances of each Group Member's case;
 - (B) the terms of the particular Group Member's retainer;
 - (C) the Group Member's instructions; and
 - (ii) in most cases:

- (A) Group Members' Abuse Claims were either subject of an informal settlement conference or, where proceedings were initiated, a court-ordered mediation; and
- (B) it represented Group Members at such informal settlement conferences and/or mediations, including by providing the services alleged at paragraph 21.1, or briefed counsel to do so; and

(b) otherwise denies the paragraph.

B.6.1 Fourth and Fifth Breach of Retainer and Fourth and Fifth Breach of Duty

22. The defendant denies paragraph 22.

23. The defendant denies paragraph 23.

B.6.2 Sixth and Seventh Breach of Retainer and Sixth and Seventh Breach of Duty

24. The defendant denies paragraph 24 and says further that:

- (a) the advice it gave each Group Member, including about terms of settlement differed according to the individual circumstances of the case;
- (b) on a number of occasions, counsel was engaged to provide the Group Member with advice about settlement sums;
- (c) the terms of deeds of release differed on a case-by-case basis;
- (d) on many occasions during the Relevant Period, it made claims for economic loss on behalf of Group Members.

25. The defendant refers to and repeats paragraph 24 above and otherwise denies paragraph 25.

B.7 Misleading or deceptive conduct

B.7.1 First Representation and First ACL Contravention

26. The defendant admits paragraph 26.

27. The defendant admits paragraph 27.

28. The defendant denies paragraph 28.

29. The defendant denies paragraph 29.

Particulars

If the First Representation is found to be a representation as to a future matter, the reasonable grounds upon which the First Representation was made included the following:

- i. The defendant has been at all times a law practice representing sexual abuse survivors.
- ii. For a long period, it was the only law practice in Australia that performed work solely for and on behalf of sexual assault survivors.
- iii. The defendant, and its principal solicitor, Dr Vivian Waller, has played a significant role in law reform, including representing survivors and witnesses in the *Royal Commission into Institutional Responses to Child Sexual Abuse*, and has been consulted in relevant law reform.
- iv. The defendant did not adopt the practice alleged at paragraph 28 of the 2FASOC.

30. The defendant refers to and repeats paragraphs 3, 6, 11 and 26 to 29 above and otherwise denies paragraph 30.

B.7.2 Second Representation and Second and Third ACL Contravention

31. The defendant refers to and repeats paragraph 24 above, and otherwise denies paragraph 31.

32. The defendant refers to and repeats paragraph 31 and otherwise denies paragraph 32.

33. The defendant refers to and repeats paragraph 24 above and otherwise denies paragraph 33.

34. The defendant refers to and repeats paragraphs 3, 6, 11, 31, 32 and 33 above and otherwise denies paragraph 34.

35. The defendant refers to and repeats paragraphs 3, 6, 11, 31, 32 and 33 above and otherwise denies paragraph 35.

B.8 Causation

B.8.1 First Breach of Retainer and First Breach of Duty

36. If (which is denied) there was the First Breach of Retainer and/or First Breach of Duty, the defendant denies the breach caused loss.

37. In response to paragraph 37, the defendant:

- (a) if (which is denied) there was the First Breach of Retainer and/or First Breach of Duty, denies the breach caused loss; and
- (b) says further that insofar as a Group Member is or was entitled, by statute, to apply to set aside the settlement agreement by which they compromised their Abuse Claim, the alleged breach of retainer and/or breach of duty (which is denied) was not causative of their loss.

Particulars

- i. Insofar as the *Limitation of Actions Act 1958* (Vic) applies:
 - a. section 27QD of that Act permits a victim of child physical or sexual abuse, who settled their claim before 1 July 2018, to apply to the Court to set aside their settlement agreement;
 - b. section 27QE empowers the Court to set aside the settlement agreement if satisfied that it is just and reasonable to do so;
 - c. if the Court were to set aside the settlement agreement, the Group Member can fully recover damages for the Abuse Claim so that the Group Member has not suffered or will not suffer any damage arising from the settlement.
- ii. Insofar as the *Limitation Act 2005* (WA) applies:
 - a. section 92(2) of that Act permits a victim of child sexual abuse, who settled their claim before 1 July 2018, to apply to a Court that would have jurisdiction to deal with a proposed action on the previously settled cause of action, for leave to commence the action;
 - b. section 92(3) empowers the Court, if satisfied that it is just and reasonable to do so, to grant leave to commence the action, subject to conditions, and to the extent necessary for that, to set aside the settlement agreement and any judgment giving effect to that settlement;
 - c. if the Court were to grant leave and set aside the settlement agreement, the Group Member can fully recover damages for the Abuse Claim so that the Group Member has not suffered or will not suffer any damage arising from the settlement.
- iii. Insofar as the *Limitation Act 1974* (Tas) applies:
 - a. section 5C(2) of that Act provides that an action may be brought on a previously settled right of action, in respect of child abuse, that was settled before 1 July 2018, but after a limitation period applying before that day to the right of action had expired if a relevant court, by order on application, sets aside the agreement effecting the settlement, on the ground that it is in the interests of justice to do so;
 - b. if the Court were to set aside the settlement agreement, the Group Member can fully recover damages for the Abuse Claim so that the

Group Member has not suffered or will not suffer any damage arising from the settlement.

B.8.2 Second Breach of Retainer and Second Breach of Duty

38. If (which is denied) there was the Second Breach of Retainer and/or Second Breach of Duty, the defendant denies that the breach caused loss.
39. In response to paragraph 39, the defendant:
- (a) if (which is denied) there was the Second Breach of Retainer and/or Second Breach of Duty, denies that the breach caused loss; and
 - (b) refers to and repeats paragraph 37(b) above.

B.8.3 Third Breach of Retainer and Third Breach of Duty

40. If (which is denied) there was the Third Breach of Retainer and/or Third Breach of Duty, the defendant denies that the breach caused loss.
41. In response to paragraph 41, the defendant:
- (a) if (which is denied) there was the Third Breach of Retainer and/or Third Breach of Duty, denies that the breach caused loss; and
 - (b) refers to and repeats paragraph 37(b) above.

B.8.4 Fourth Breach of Retainer and Fourth Breach of Duty

42. If (which is denied) there was the Fourth Breach of Retainer and/or Fourth Breach of Duty, the defendant denies that the breach caused loss.
43. In response to paragraph 43, the defendant:
- (a) if (which is denied) there was the Fourth Breach of Retainer and/or Fourth Breach of Duty, denies that the breach caused loss; and
 - (b) refers to and repeats paragraph 37(b) above.

B.8.5 Fifth Breach of Retainer and Fifth Breach of Duty

44. If (which is denied) there was the Fifth Breach of Retainer and/or Fifth Breach of Duty, the defendant denies that the breach caused loss.
45. In response to paragraph 45, the defendant:

- (a) if (which is denied) there was the Fifth Breach of Retainer and/or Fifth Breach of Duty, denies that the breach caused loss; and
- (b) refers to and repeats paragraph 37(b) above.

B.8.6 Sixth Breach of Retainer and Sixth Breach of Duty

- 46. If (which is denied) there was the Sixth Breach of Retainer and/or Sixth Breach of Duty, the defendant denies that the breach caused loss.
- 47. In response to paragraph 47, the defendant:
 - (a) if (which is denied) there was the Sixth Breach of Retainer and/or Sixth Breach of Duty, denies that the breach caused loss; and
 - (b) refers to and repeats paragraph 37(b) above.

B.8.7 Seventh Breach of Retainer and Seventh Breach of Duty

- 48. If (which is denied) there was the Seventh Breach of Retainer and/or Seventh Breach of Duty, the defendant denies that the breach caused loss.
- 49. In response to paragraph 49, the defendant:
 - (a) if (which is denied) there was the Seventh Breach of Retainer and/or Seventh Breach of Duty, denies that the breach caused loss; and
 - (b) refers to and repeats paragraph 37(b) above.

B.8.8 First ACL Contravention

- 50. If (which is denied) there was the First ACL Contravention, the defendant denies that the contravention caused loss.
- 51. In response to paragraph 51, the defendant:
 - (a) if (which is denied) there was the First ACL Contravention, denies that the contravention caused loss;
 - (b) says further that insofar as a Group Member is or was entitled, by statute, to apply to set aside the settlement agreement by which they compromised their Abuse Claim, the alleged misleading or deceptive conduct (which is denied) was not causative of their loss.

Particulars

The defendant refers to and repeats the particulars to paragraph 37(b) above.

B.8.9 Second ACL Contravention

52. If (which is denied) there was the Second ACL Contravention, the defendant denies that the contravention caused loss.
53. In response to paragraph 53, the defendant:
 - (a) if (which is denied) there was the Second ACL Contravention, denies that the contravention caused loss; and
 - (b) refers to and repeats paragraph 51(b) above.

B.8.10 Third ACL Contravention

54. If (which is denied) there was the Third ACL Contravention, the defendant denies that the contravention caused loss.
55. In response to paragraph 55, the defendant:
 - (a) if (which is denied) there was the Third ACL Contravention, denies that the contravention caused loss; and
 - (b) refers to and repeats paragraph 51(b) above.

B.9 Loss and damage

56. In response to paragraph 56, the defendant:
 - (a) refers to and repeats paragraphs 15, 18, 19, 22, 24, and 36-49 and otherwise denies sub-paragraph 56.1;
 - (b) refers to and repeats paragraphs 16, 20, 23, 25, and 36-49 and otherwise denies sub-paragraph 56.2;
 - (c) refers to and repeats paragraphs 30, 34, 35, and 50-55 and otherwise denies sub-paragraph 56.3; and
 - (d) says further that:

- (i) insofar as any Group Member resolved an Abuse Claim by way of a settlement (as pleaded at paragraph 1.4 of the 2FASOC) when that person was not a client of the defendant:
 - (A) that Group Member has not suffered any loss or damage that is actionable as against the defendant;
 - (B) insofar as that Group Member had retained a law practice other than the defendant in relation to the settlement, then any claim the Group Member may have for loss and damage arising out of the settlement should be made against that law practice, and not the defendant;
 - (C) further and in the alternative, if the settlement caused any loss and damage which is actionable against the defendant (which is denied):
 - (1) the Group Member's action against the defendant is an apportionable claim within the meaning of that term in Part IVAA of the *Wrongs Act 1958* (Vic);
 - (2) the law practice that the person retained at the time of the settlement is a concurrent wrongdoer within the meaning of that term in Part IVAA of the *Wrongs Act 1958* (Vic);
 - (3) the law practice, once identified, will need to be joined as a defendant to the proceeding pursuant to s 24AL of the *Wrongs Act 1958* (Vic);
 - (4) the liability of the defendant will be limited pursuant to s 24AI of the *Wrongs Act 1958* (Vic);
 - (D) further and in the alternative, insofar as Group Members' claims are made under the Australian Consumer Law, if the settlement caused any loss and damage which is actionable against the defendant (which is denied):
 - (1) the Group Member's action against the defendant is an apportionable claim within the meaning of that term in

Part VIA of the *Competition and Consumer Act 2010* (Cth);

- (2) the law practice that the person retained at the time of the settlement is a concurrent wrongdoer within the meaning of Part VIA of the *Competition and Consumer Act 2010* (Cth);
- (3) the liability of the defendant will be limited pursuant to s 87CD of the *Competition and Consumer Act 2010* (Cth);

(ii) insofar as any Group Member resolved an Abuse Claim by way of a settlement (as pleaded at paragraph 1.4 of the 2FASOC), and later accepted an offer of redress under the National Redress Scheme, while that Group Member was not a client of the defendant, and in circumstances where that Group Member was, before accepting the offer of redress entitled, by statute, to apply to set aside the settlement agreement by which they compromised their Abuse Claim, then:

- (A) that Group Member has not suffered any loss or damage that is actionable as against the defendant;
- (B) insofar as that Group Member had retained a law practice other than the defendant in relation to the offer of redress, then any claim the Group Member may have for loss and damage arising out of the Abuse Claim should be made against that law practice, and not the defendant;
- (C) further and in the alternative, if the earlier settlement caused any loss and damage which is actionable against the defendant (which is denied), then:
 - (1) the Group Member's action against the defendant is an apportionable claim within the meaning of that term in Part IVAA of the *Wrongs Act 1958* (Vic);
 - (2) the law practice that the person retained at the time of the offer of redress is a concurrent wrongdoer within the meaning of that term in Part IVAA of the *Wrongs Act 1958* (Vic);

- (3) the law practice, once identified, will need to be joined as a defendant to the proceeding pursuant to s 24AL of the *Wrongs Act 1958* (Vic);
 - (4) the liability of the defendant will be limited pursuant to s 24AI of the *Wrongs Act 1958* (Vic);
- (D) further and in the alternative, insofar as Group Members' claims are made under the Australian Consumer Law, if the earlier settlement caused any loss and damage which is actionable against the defendant (which is denied):
 - (1) the Group Member's action against the defendant is an apportionable claim within the meaning of that term in Part VIA of the *Competition and Consumer Act 2010* (Cth);
 - (2) the law practice that the person retained at the time of the offer of redress is a concurrent wrongdoer within the meaning of Part VIA of the *Competition and Consumer Act 2010* (Cth);
 - (3) the liability of the defendant will be limited pursuant to s 87CD of the *Competition and Consumer Act 2010* (Cth);
- (iii) insofar as any Group Member resolved an Abuse Claim by way of a settlement when that person was a client of the defendant and a member of counsel had been briefed to represent the client in respect of the Abuse Claim (including, but not limited to, preparing the client's claim, advising about what type of claim the client should make, representing the client at an informal settlement conference and/or mediation, and/or to advise about the reasonableness of any offer or any settlement) and the settlement caused any loss or damage (which is denied):
 - (A) the Group Member's action against the defendant is an apportionable claim within the meaning of that term in Part IVAA of the *Wrongs Act 1958* (Vic);
 - (B) the relevant member of counsel is a concurrent wrongdoer within the meaning of that term in Part IVAA of the *Wrongs Act 1958* (Vic);

- (C) the member of counsel, once identified, will need to be joined as a defendant to the proceeding pursuant to s 24AL of the *Wrongs Act 1958* (Vic); and
- (D) the liability of the defendant will be limited pursuant to s 24AI of the *Wrongs Act 1958* (Vic);
- (E) further and in the alternative, insofar as Group Members' claims are made under the Australian Consumer Law, if the settlement caused any loss or damage (which is denied):
 - (1) the Group Member's action against the defendant is an apportionable claim within the meaning of that term in Part VIA of the *Competition and Consumer Act 2010* (Cth);
 - (2) the law practice that the person retained at the time of the settlement is a concurrent wrongdoer within the meaning of Part VIA of the *Competition and Consumer Act 2010* (Cth);
 - (3) the liability of the defendant will be limited pursuant to s 87CD of the *Competition and Consumer Act 2010* (Cth).

B.10 Failure to mitigate

56A. Insofar as the Court finds that Group Members suffered loss and damage on any basis, based on a settlement that occurred before 1 July 2018 (which is denied), then those Group Members (or some of them) have failed to mitigate their loss.

Particulars

- i. A Group Member who settled his or her claim before 1 July 2018 can commence a proceeding against the relevant Institutional Defendant and/or make a further claim in respect of his or her Abuse Claim;
- ii. If the Institutional Defendant does not plead or rely on a defence that the settlement of the Abuse Claim is a bar to the proceeding and/or claim, the Group Member can fully recover damages for the Abuse Claim so that the Group Member has not suffered or will not suffer any damage arising from the settlement;
- iii. If the Institutional Defendant pleads that the prior settlement of the Abuse Claim is a bar to the proceeding and/or claim:

- a. insofar as the *Limitation of Actions Act 1958* (Vic) applies, the defendant refers to and repeats particular (i) to paragraph 37(b) above
- b. Insofar as the *Limitation Act 2005* (WA) applies, the defendant refers to and repeats particular (ii) to paragraph 37(b) above.
- c. Insofar as the *Limitation Act 1974* (Tas) applies, the defendant refers to and repeats particular (iii) to paragraph 37(b) above.

B.10 Limitation of actions

56B. If and to the extent that there are Group Members whose causes of action accrued more than six years before 25 September 2023, alternatively 21 September 2023, their causes of action are time-barred.

B.11 Peer professional practice

56C. At all relevant times the defendant and each Australian legal practitioner employed by the defendant:

- (a) was a professional within the meaning of s 57 of the *Wrongs Act 1958* (Vic);
- (b) in respect of each Group Member's claim (or some Group Members' claims) acted in a manner that was widely accepted in Australia by a significant number of respected practitioners in the field as competent professional practice in the circumstances and was therefore not negligent by reason of the operation of s 59 of the *Wrongs Act 1958* (Vic).

B.12 Loss of chance

56D. Further, the defendant says that if a Group Member has lost the chance of obtaining damages or greater compensation from an Institutional Defendant because of any negligence, breach of retainer or contravention of the ACL by it (which is denied) then, in evaluating the value of the lost chance for an individual Group Member, regard must be had to (among other things):

- (a) the chance of the relevant Group Member in fact obtaining damages or greater compensation in respect of the abuse;
- (b) the amount or likely amount of the damages or further compensation that may have been obtained in respect of the abuse;
- (c) if damages or further compensation were obtained, the amount that the Group Member was likely to have received from the damages or further compensation

after likely deductions, including (but not limited to) legal costs payable and any repayments such as to Centrelink, Medicare Australia, the NDIS or a private health insurer;

- (d) the risk of not obtaining damages or further compensation in respect of the abuse and the associated costs with this outcome including an adverse costs order; and
- (e) if the Group Member had received an amount of money from damages or further compensation, whether the receipt of that money would or could have meant that he or she would not have or may not have received a monetary benefit that he or she has otherwise received.

B.13 Immunity

56E. If and to the extent there are Group Members who had litigation guardians appointed and who therefore required, and obtained, a judicial determination approving the settlement of their Abuse Claim, the defendant's alleged acts or omissions were work done out of court which lead to the judicial determination, arrived at by the exercise of judicial power, so that the defendant is immune from suit by reason of advocate's immunity.

C. CLAIMS OF THE PLAINTIFF

C.1 Background

- 57. The defendant admits paragraph 57.
- 58. The defendant admits paragraph 58.
- 59. The defendant admits paragraph 59.
- 60. The defendant admits paragraph 60.

C.2 Abuse

- 61. Save to say that Brother Benignus was a member of the Redemptorists, the defendant does not know and therefore cannot admit paragraph 61.
- 62. The defendant does not know and therefore cannot admit paragraph 62.
- 63. The defendant admits paragraph 63.

64. The defendant admits paragraph 64.

C.3 Retainer with Waller Legal

65. In response to paragraph 65, the defendant:

- (a) says that on or before 11 January 2017, Ms Jones entered into a Cost Agreement and Disclosure Statement with the defendant;
- (b) refers to and relies upon the terms of the Costs Agreement and Disclosure Statement dated 11 November 2016 issued by the defendant with subject "Re: Your Claim", and signed by Ms Jones on 11 January 2017, for their full force and effect; and
- (c) otherwise denies the paragraph.

66. In response to paragraph 66, the defendant:

- (a) says that on or about 30 July 2019, it determined that it would cease acting for Ms Jones because Ms Jones was not responding to telephone calls; and
- (b) refers to and repeats paragraph 65 above; and
- (c) otherwise denies the paragraph.

67. In response to paragraph 67, the defendant:

- (a) says that on or about 28 August 2019, Ms Jones instructed the defendant to resume her claim and attempt to settle her claim out of Court;

Particulars to (a)

Telephone call between Ms Jones and the defendant.

- (b) refers to and repeats paragraph 65; and
- (c) otherwise denies the paragraph.

68. In response to paragraph 68, the defendant:

- (a) says that on 13 November 2019, Ms Jones executed a Costs Agreement and Disclosure Statement issued by the defendant and dated 14 October 2019 (**2019 Cost Agreement and Disclosure Statement**);

(b) refers to and relies upon the terms of the 2019 Cost Agreement and Disclosure Statement for their full force and effect;

(c) says further that:

(i) the 2019 Cost Agreement and Disclosure Statement included the following 'Scope of Work' that had been requested by Ms Jones: "Representing you in negotiations to resolve your claim against the Redemptorist Fathers in relation to the abuse you experienced by Brother Benignus aka Ross Grant including undertaking investigations, providing advice and undertaking out-of-court negotiations with the Redemptorist Fathers to attempt to resolve your claim without recourse to court proceedings";

(ii) the 2019 Cost Agreement and Disclosure Statement was enclosed to a letter from the defendant to Ms Jones dated 21 October 2019;

(iii) in the 21 October 2019 letter, among other things, the defendant observed that:

(A) "There are several benefits to litigation. If successful, litigated claims can result in greater compensation. Further, the defendant can be ordered to pay a portion of your legal costs and disbursements";

(B) "An alternative to running your case in court is to attempt to progress your claims through out-of-court negotiations";

(C) "We confirm your instructions are to, at this stage, pursue alternative dispute resolution with the aim of resolving your claim through out-of-court negotiation. You have not instructed us to issue proceedings in Court";

(d) refers to and repeats paragraph 65 above; and

(e) otherwise denies the paragraph.

69. In response to paragraph 69, the defendant:

(a) refers and repeats paragraphs 65 and 68 above;

(b) says that:

- (i) it was an implied term of the 2019 Cost Agreement and Disclosure Statement that the defendant would exercise reasonable care and skill in the performance of that agreement;
- (ii) the express terms of the 2019 Cost Agreement and Disclosure Statement included that:
 - (A) an uplift fee of 25% of the total professional fees would be charged upon a successful outcome being achieved (clause 5.3);
 - (B) Ms Jones would be liable for payment of the defendant's professional fees and the uplift fee upon a successful outcome being achieved in Ms Jones' matter (clause 6);
 - (C) a "successful outcome" was defined as any of seven possibilities, including where an offer of settlement is made which, in the defendant's opinion represents an appropriate conclusion to Ms Jones' claim or proceedings and which either the defendant or counsel recommend she accept (clause 6(c));
 - (D) disbursements were payable whether or not a successful outcome is achieved and the defendant was entitled to request payment of disbursements either in advance, as and when they fall due or as considered appropriate by it (with payment due 30 days after receipt of a bill of costs) (clause 7);
 - (E) Ms Jones was obliged to, among other things, accept and follow all reasonable advice the defendant gives to her (clause 4); and

(c) otherwise denies the paragraph.

70. In response to paragraph 70, the defendant:

- (a) says the standard of reasonable care and skill to be exercised by the defendant in the performance of the scope of work specified in in the 2019 Cost Agreement and Disclosure Statement was that of a person professing to have specialised skill and experience in claims for compensation against Institutional Defendants arising from sexual abuse and/or physical abuse;
- (b) otherwise denies the paragraph.

C.4 Common law duty of care owed by Waller Legal

71. In response to paragraph 71, the defendant:

- (a) says that it owed the plaintiff a duty to exercise reasonable care and skill in the performance of the 2019 Cost Agreement and Disclosure Statement; and
- (b) otherwise denies the paragraph.

72. In response to paragraph 72, the defendant:

- (a) refers to and repeats paragraph 70;
- (b) otherwise denies the paragraph.

C.5 Provision of legal services by Waller Legal

73. In response to paragraph 73, the defendant:

- (a) refers to and repeats paragraph 68;
- (b) says further that the defendant performed the scope of work specified in the 2019 Cost Agreement and Disclosure Statement, for which Ms Jones paid the defendant on the terms set out in that agreement;
- (c) otherwise denies the paragraph.

C.6 Investigation and assessment of the Redemptorist Abuse Claim

74. In response to paragraph 74, the defendant:

- (a) refers to and repeats paragraphs 65 and 68 above;
- (b) save to say that the matters pleaded at paragraph 74 do not comprise an exhaustive list of the services the defendant provided Ms Jones, it otherwise admits the paragraph.

75. In response to paragraph 75, the defendant:

- (a) refers to and repeats paragraph 13; and
- (b) otherwise denies the paragraph.

76. The defendant refers to and repeats paragraph 75 and otherwise denies paragraph 76.

C.6.1 First Breach of Plaintiff's Retainer and First Breach of Duty

77. The defendant refers to and repeats paragraphs 68, 74 and 76, and otherwise denies paragraph 77.
78. The defendant refers to and repeats paragraphs 68 and 77, and otherwise denies paragraph 78.

C.7 Resolution strategy of Ms Jones's Redemptorist Abuse Claim

79. In response to paragraph 79, the defendant:
- (a) refers to and repeats paragraph 68 and the terms of the agreement between the parties there pleaded;
 - (b) denies the paragraph; and
 - (c) says further the defendant provided the plaintiff with advice about commencing litigation, which would include a claim for economic loss, and the plaintiff did not provide instructions to commence such litigation.

Particulars

- i. On 8 May 2020:
 - a. the defendant advised the plaintiff that:
 - i. if she wanted a million-dollar figure, she would need to go to trial;
 - ii. to claim the full amount for economic loss she would need to go through court. For the purposes of the informal settlement conference, the defendant proposed an amount of \$200,000 would be sought for the impact of the alleged abuse on the plaintiff's work;
 - iii. she would do better if she issued proceedings;
 - b. the plaintiff instructed that she was not sure she could bear a trial. The defendant advised that issuing proceedings did not mean there would be a trial, as there would be other opportunities to resolve the matter.
- ii. In a telephone conference on 14 May 2020, the defendant advised the plaintiff "to go to court" and that her claim had "reasonable prospects". The plaintiff's instructions were to instead accept the most recent offer that had been made by the Redemptorists following the informal settlement conference.

C.7.1 Second and Third Breaches of Plaintiff's Retainer

80. The defendant refers to and repeats paragraph 79 above, and the particulars thereto, and otherwise denies paragraph 80.
81. The defendant refers to and repeats paragraph 77, and otherwise denies paragraph 81.

C.7.2 Second and Third Breaches of WL Duty

82. The defendant refers to and repeats paragraphs 80 and 81, and otherwise denies paragraph 82.

C.8 Settlement of the Redemptorist Abuse Claim

83. In response to paragraph 83, the defendant:
- (a) refers to and repeats paragraph 65 above and its denial of the description of the "Redemptorist Abuse Claim";
 - (b) otherwise admits it provided the services to Ms Jones pleaded at paragraphs 83.1 to 83.3; and
 - (c) says further that it represented Ms Jones in further negotiations and providing further advice after the informal settlement conference.

Particulars to (c)

The defendant refers to:

- i. Discussions at the informal settlement conference on 8 May 2020, and subsequent teleconferences between the defendant and the plaintiff, including on 12, 14 and 20 May 2020, and 2 June 2020;
- ii. Letter dated 20 May 2020 and enclosures including 'Confirmation of Instructions to Settle Claim'.

C.8.1 Fourth and Fifth Breaches of Plaintiff's Retainer and Fourth and Fifth Breaches of WL Duty

84. The defendant refers to and repeats paragraphs 68, 79 and 83 above, and otherwise denies paragraph 84.
85. The defendant refers to and repeats paragraph 84 above, and otherwise denies paragraph 85.

C.8.2 Sixth and Seventh Breaches of Plaintiff's Retainer and Sixth and Seventh Breaches of WL Duty

86. The defendant refers to and repeats paragraph 77 above, and otherwise denies paragraph 86.
87. The defendant refers to and repeats paragraph 86 above, and otherwise denies paragraph 87.

C.9 Misleading or deceptive conduct

C.9.1 First WL Representation and First WL ACL Contravention

88. In response to paragraph 88, the defendant:
- (a) refers to and repeats paragraph 65 above and its denial of the description of the "Redemptorist Abuse Claim";
 - (b) otherwise admits the paragraph.
89. In response to paragraph 89, the defendant refers to and repeats paragraph 88 above, and otherwise admits the paragraph.
90. The defendant denies paragraph 90.
91. The defendant denies paragraph 91.

Particulars

If the First WL Representation is found to have been made and to be a representation as to a future matter, the reasonable grounds upon which the First Representation was made included the following:

- iii. The defendant refers to the particulars to paragraph 29.
 - iv. The defendant did not adopt the practice alleged at paragraph 90 of the 2FASOC.
92. The defendant refers to and repeats paragraphs 3, 65, 73, and 88 to 91 above, and otherwise denies paragraph 92.

C.9.2 Second WL Representation and Second and Third WL Contravention

93. In response to paragraph 93, the defendant:
- (a) refers to and repeats paragraph 65 above and its denial of the description of the "Redemptorist Abuse Claim";

(b) refers to and repeats paragraph 79; and

(c) otherwise admits the paragraph.

94. The defendant refers to and repeats paragraph 93 above, and otherwise admits paragraph 94.

95. The defendant denies paragraph 95.

96. The defendant refers to and repeats paragraphs 3, 65, 73 and 93 to 95 above, and otherwise denies paragraph 96.

97. The defendant refers to and repeats paragraphs 3, 65, 73 and 93 to 95 above, and otherwise denies paragraph 97.

C.10 Causation

C.10.1 First Breach of Plaintiff's Retainer and First Breach of WL Duty

98. If (which is denied) there was the First Breach of Plaintiff's Retainer and/or First Breach of WL Duty, the defendant denies that the breach caused loss.

99. In response to paragraph 99, the defendant:

(a) if (which is denied) there was the First Breach of Plaintiff's Retainer and/or First Breach of WL Duty, denies that the breach caused loss; and

(b) otherwise refers to and repeats paragraph 79 and the particulars thereto and says that Ms Jones did not wish to claim the full amount of economic loss, including by commencing proceedings.

C.10.2 Second Breach of Plaintiff's Retainer and Second Breach of WL Duty

100. If (which is denied) there was the Second Breach of Plaintiff's Retainer and/or Second Breach of WL Duty, the defendant denies that the breach caused loss.

101. In response to paragraph 101, the defendant:

(a) if (which is denied) there was the Second Breach of Plaintiff's Retainer and/or Second Breach of WL Duty, denies that the breach caused loss; and

(b) otherwise refers to and repeats paragraph 99(b) above.

C.10.3 Third Breach of Plaintiff's Retainer and Third Breach of WL Duty

102. If (which is denied) there was the Third Breach of Plaintiff's Retainer and/or Third Breach of WL Duty, the defendant denies that the breach caused loss.

103. In response to paragraph 103, the defendant:

(a) if (which is denied) there was the Third Breach of Plaintiff's Retainer and/or Third Breach of WL Duty, denies that the breach caused loss; and

(b) otherwise refers to and repeats paragraph 99(b) above.

C.10.4 Fourth Breach of Plaintiff's Retainer and Fourth Breach of WL Duty

104. If (which is denied) there was the Fourth Breach of Plaintiff's Retainer and/or Fourth Breach of WL Duty, the defendant denies that the breach caused loss.

105. In response to paragraph 105, the defendant:

(a) if (which is denied) there was the Fourth Breach of Plaintiff's Retainer and/or Fourth Breach of WL Duty, the defendant denies that the breach caused loss; and

(b) otherwise refers to and repeats paragraph 99(b) above.

C.10.5 Fifth Breach of Plaintiff's Retainer and Fifth Breach of WL Duty

106. If (which is denied) there was the Fifth Breach of Plaintiff's Retainer and/or Fifth Breach of WL Duty, the defendant denies that the breach caused loss.

107. In response to paragraph 107, the defendant:

(a) if (which is denied) there was the Fifth Breach of Plaintiff's Retainer and/or Fifth Breach of WL Duty, denies that the breach caused loss; and

(b) otherwise refers to and repeats paragraph 99(b) above.

C.10.6 Sixth Breach of Plaintiff's Retainer and Sixth Breach of WL Duty

108. If (which is denied) there was the Sixth Breach of Plaintiff's Retainer and/or Sixth Breach of WL Duty, the defendant denies that the breach caused loss.

109. In response to paragraph 109, the defendant:

- (a) if (which is denied) there was the Sixth Breach of Plaintiff's Retainer and/or Sixth Breach of WL Duty, denies that the breach caused loss; and
- (b) otherwise refers to and repeats paragraph 99(b) above.

C.10.7 Seventh Breach of Plaintiff's Retainer and Seventh Breach of WL Duty

- 110. If (which is denied) there was the Seventh Breach of Plaintiff's Retainer and/or Seventh Breach of WL Duty, the defendant denies that the breach caused loss.
- 111. In response to paragraph 111, the defendant:
 - (a) if (which is denied) there was the Seventh Breach of Plaintiff's Retainer and/or Seventh Breach of WL Duty, denies that the breach caused loss; and
 - (b) otherwise refers to and repeats paragraph 99(b) above.

C.10.8 First WL ACL Contravention

- 112. If (which is denied) there was the First WL ACL Contravention, the defendant denies the contravention caused loss.
- 113. In response to paragraph 113, the defendant:
 - (a) if (which is denied) there was the First WCL ACL Contravention, denies that the contravention caused loss;
 - (b) otherwise refers to and repeats paragraph 79 and the particulars thereto and says that Ms Jones did not wish to claim the full amount of economic loss, including by commencing proceedings.

C.10.9 Second WL ACL Contravention

- 114. If (which is denied) there was the Second WL ACL Contravention, the defendant denies that the contravention caused loss.
- 115. In response to paragraph 115, the defendant:
 - (a) if (which is denied) there was the Second WCL ACL Contravention, denies that the contravention caused loss;
 - (b) otherwise refers to and repeats paragraph 113(b) above.

C.10.10 Third ACL Contravention

116. If (which is denied) there was the Third WL ACL Contravention, the defendant denies that the contravention caused loss.
117. In response to paragraph 117, the defendant:
- (a) if (which is denied) there was the Third WCL ACL Contravention, denies that the contravention caused loss;
 - (b) otherwise refers to and repeats paragraph 113(b) above.

C.11 Loss and damage

118. In response to paragraph 118, the defendant:
- (a) refers to and repeats paragraphs 77, 80, 81, 84, 86, and 98-111 and otherwise denies sub-paragraph 118.1;
 - (b) refers to and repeats paragraphs 78, 82, 85, 87, and 98-111 and otherwise denies sub-paragraph 118.2;
 - (c) refers to and repeats paragraphs 92, 96, 97, and 112-117 and otherwise denies sub-paragraph 118.3;
 - (d) says further that if the plaintiff establishes that she has lost a chance of obtaining damages or greater compensation because of any negligence, breach of retainer or contravention of the ACL by it (which is denied) then, in evaluating the value of that lost chance, regard must be had to the matters pleaded at paragraph 56D(a) to (e) above.

D. COMMON QUESTIONS OF FACT AND LAW

D.1 General

119. The defendant does not plead to paragraph 119 because it contains no allegation against it.
120. The defendant does not plead to paragraph 120 because it contains no allegation against it.
121. The defendant does not plead to paragraph 121 because it contains no allegation against it.

D.2 First Breaches of Retainer and Duty

- 122. The defendant does not plead to paragraph 122 because it contains no allegation against it.
- 123. The defendant does not plead to paragraph 123 because it contains no allegation against it.
- 124. The defendant does not plead to paragraph 124 because it contains no allegation against it.
- 125. The defendant does not plead to paragraph 125 because it contains no allegation against it.

D.3 Second Breaches of Retainer and Duty

- 126. The defendant does not plead to paragraph 126 because it contains no allegation against it.
- 127. The defendant does not plead to paragraph 127 because it contains no allegation against it.
- 128. The defendant does not plead to paragraph 128 because it contains no allegation against it.

D.4 Third Breaches of Retainer and Duty

- 129. The defendant does not plead to paragraph 129 because it contains no allegation against it.
- 130. The defendant does not plead to paragraph 130 because it contains no allegation against it.

D.5 Fourth and Fifth Breaches

- 131. The defendant does not plead to paragraph 131 because it contains no allegation against it.
- 132. The defendant does not plead to paragraph 132 because it contains no allegation against it.
- 133. The defendant does not plead to paragraph 133 because it contains no allegation against it.

134. The defendant does not plead to paragraph 134 because it contains no allegation against it.

D.6 Sixth and Seventh Breaches of Retainer and Duty

135. The defendant does not plead to paragraph 135 because it contains no allegation against it.
136. The defendant does not plead to paragraph 136 because it contains no allegation against it.

D.7 First ACL Contravention of Retainer and Duty

137. The defendant does not plead to paragraph 137 because it contains no allegation against it.
138. The defendant does not plead to paragraph 138 because it contains no allegation against it.
139. The defendant does not plead to paragraph 139 because it contains no allegation against it.
140. The defendant does not plead to paragraph 140 because it contains no allegation against it.
141. The defendant does not plead to paragraph 141 because it contains no allegation against it.
142. The defendant does not plead to paragraph 142 because it contains no allegation against it.
143. The defendant does not plead to paragraph 143 because it contains no allegation against it.

D.8 Second ACL Contravention

144. The defendant does not plead to paragraph 144 because it contains no allegation against it.
145. The defendant does not plead to paragraph 145 because it contains no allegation against it.

- 146. The defendant does not plead to paragraph 146 because it contains no allegation against it.
- 147. The defendant does not plead to paragraph 147 because it contains no allegation against it.
- 148. The defendant does not plead to paragraph 148 because it contains no allegation against it.

Philip Solomon
Patrick Over
Colette Mintz

Counsel for the defendant

Dated: 27 June 2024

Lander & Rogers

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Lander & Rogers
Lawyers for the Defendant