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Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: VID1139/2019
File Title: LESLEY COATMAN v COLONIAL FIRST STATE INVESTMENTS LIMITED & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 18/03/2022 10:26:49 PM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Second Respondent's Second Further Amended Defence

No. VID 1139 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

LESLEY COATMAN

Applicant

COLONIAL FIRST STATE INVESTMENTS LIMITED (ACN 002 348 352)

First Respondent

and another named in the schedule

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PRELIMINARIES

- A. Headings are used in this Second Further Amended Defence for convenience only. They do not form part of the Second Respondent’s response to the Second Further Amended Statement of Claim filed on ~~17 May 2021~~17 March 2022 (**Claim**).
- B. Unless the context requires otherwise, the Second Respondent adopts the defined terms used in the Claim, but does not admit any factual assertions contained in, or in any way implied by, any defined term used in the Claim and repeated in this Second Further Amended Defence.
- C. In this Second Further Amended Defence, the Second Respondent uses “Colonial” to refer to Colonial First Statement Investments Limited (ACN 002 348 352) and “Elkins” to refer to Ms Linda Elkins.

In response to the allegations within the Claim, the Second Respondent says as follows:

A. PARTIES

1. The Second Respondent admits the allegations in paragraph 1 of the Claim.
2. The Second Respondent admits the allegations in paragraph 2 of the Claim.
3. The Second Respondent denies the allegations in paragraph 3 of the Claim.
4. The Second Respondent admits the allegations in paragraph 4 of the Claim.
5. The Second Respondent admits the allegations in paragraph 5 of the Claim.

B. THE COMMONWEALTH BANK OF AUSTRALIA GROUP

6. In answer to paragraph 6 of the Claim, the Second Respondent:
 - (a) in answer to sub-paragraph 6(c)(ii), says that CBA was the Ultimate Holding Company of Count Financial Limited until 1 October 2019;

- (b) in answer to sub-paragraph 6(c)(vii), says that CBA was the Ultimate Holding Company of Colonial First State Managed Infrastructure Limited until 2 August 2019;
- (c) in answer to sub-paragraph 6(c)(viii), says that CBA was the Ultimate Holding Company of Colonial First State Asset Management (Australia) Limited until 2 August 2019;
- (d) in answer to sub-paragraph 6(c)(ix), says that CBA is the Ultimate Holding Company of Realindex Investments Pty Limited until 2 August 2019; and
- (e) ~~in answer to sub-paragraph 6(c)(xii), says that CBA is the Ultimate Holding Company of Colonial First State Investments Limited (not Colonial First Stage Investments Limited); and [Not used]~~
- (f) otherwise admits the allegations in paragraph 6 of the Claim.

C. THE FUNDS

7. The Second Respondent admits the allegations in paragraph 7 of the Claim.

8. In answer to paragraph 8 of the Claim, the Second Respondent:

- (a) says that FirstChoice Personal Super and FirstChoice Pension are not available for, and have been closed to, new superannuation and pension accounts from 13 May 2016; and
- (b) otherwise admits the allegations in paragraph 8 of the Claim.

8A. In answer to paragraph 8A of the Claim, the Second Respondent:

- (a) admits that the First Respondent was part of the Wealth Management division within the CBA Group from at least 30 July 2012 until at least 24 May 2017; and
- (b) otherwise denies the allegations in paragraph 8A of the Claim.

C1. THE NATURE OF AND THE RIGHTS AND OBLIGATIONS RELATING TO AN FCES ADA

8B. In answer to paragraph 8B of the Claim, the Second Respondent:

- (a) says that the FCES ADAs were funded at least in part by contributions made by the FCES ADA Member and/or the FCES ADA Member's employers to the FirstChoice Fund, along with investment returns on those contributions, net of fees, costs and taxes;
 - (b) does not know and therefore cannot admit why the FCES ADA Members and/or the FCES ADA Members' employers made those contributions, save to say that FCES ADA Members' employers were obliged by the *Superannuation Guarantee (Administration) Act 1992* (Cth) to make superannuation contributions of a specified percentage of each FCES ADA Member's "ordinary time earnings"; and
 - (c) otherwise denies the allegations in paragraph 8B of the Claim.
- 8C. The Second Respondent admits the allegations in paragraph 8C of the Claim.
- 8D. The Second Respondent denies the allegations in paragraph 8D of the Claim and further says that if the condition of release that is satisfied by the FCES ADA Member is death, any preserved benefits or restricted non-preserved benefits are not able to be cashed by the FCES ADA Member.
- 8E. In answer to paragraph 8E of the Claim, the Second Respondent:
- (a) admits that where some or all of a FCES ADA was comprised of unrestricted non-preserved benefits, the FCES ADA Member was able to cash that part of the FCES ADA at any time subject to the terms of the Consolidated Deed; and
 - (b) otherwise denies the allegations in paragraph 8E of the Claim.
- 8F. The Second Respondent admits the allegations in paragraph 8F of the Claim but says that an FCES ADA Member did not hold any interest in any particular property, right or income of the FirstChoice Fund.

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [CBA.0517.0173.0001], cl 2.1.
- 8G. In answer to paragraph 8G of the Claim, the Second Respondent:
- (a) will rely on the terms of the Consolidated Deed for their full force and effect;

- (b) in answer to sub-paragraph 8G(c) of the Claim, says that if an amount was subject to a direction from a FCES ADA Member that amount would not be an ADA; and
- (c) otherwise admits the allegations in paragraph 8G of the Claim.

8H. In answer to paragraph 8H of the Claim, the Second Respondent:

- (a) will rely on the terms of the Consolidated Deed for their full force and effect;
- (b) admits the allegations in sub-paragraph 8H(a) of the Claim;
- (c) admits the allegations in sub-paragraph 8H(b) of the Claim;
- (d) in answer to sub-paragraph 8H(c):
 - (i) says that an FCES ADA Member had a right to apply to Colonial to rollover or transfer their withdrawal benefit to another superannuation fund, approved deposit fund, annuity or retirement savings account, and Colonial was required to comply with the request if the transfer complied with superannuation laws; and
 - (ii) otherwise denies the allegations in sub-paragraph 8H(c);
- (e) in answer to sub-paragraph 8H(d):
 - (i) says that an FCES ADA Member may apply to Colonial to rollover, transfer, or allot an amount of benefits of their spouse, that is equal to an amount of the splittable contributions made by, or on behalf of the FCES ADA Member, in the previous financial year, subject to superannuation laws; and
 - (ii) otherwise denies the allegations in sub-paragraph 8H(d);
- (f) denies the allegations in sub-paragraph 8H(e) of the Claim;
- (g) admits the allegations in sub-paragraph 8H(f) of the Claim and says that Colonial was permitted, but not required to comply with that request; and
- (h) in answer to sub-paragraph 8H(g):

- (i) says that Colonial was entitled to reject a switching request without giving any reason and could impose conditions on a switching request; and
- (ii) otherwise admits the allegations in sub-paragraph 8H(g) of the Claim.

8I. The Second Respondent denies the allegations in paragraph 8I of the Claim and says further that if the condition of release that is satisfied by the FCES ADA Member is death, then the FCES ADA Member did not have a present right to receive payment.

8J. The Second Respondent denies the allegations in paragraph 8J of the Claim.

D. OBLIGATIONS OF COLONIAL AS TRUSTEE

SIS Act Covenants

- 9. The Second Respondent admits the allegations in paragraph 9 of the Claim.
- 10. The Second Respondent admits the allegations in paragraph 10 of the Claim.
- 11. The Second Respondent admits the allegations in paragraph 11 of the Claim.
- 12. The Second Respondent admits the allegations in paragraph 12 of the Claim.
- 13. The Second Respondent admits the allegations in paragraph 13 of the Claim.

Obligations at general law

- 14. In answer to paragraph 14 of the Claim, the Second Respondent:
 - (a) says that at all material times up to 30 June 2013 (inclusive), each of the covenants set out in paragraph 10 of the Claim was an implied term of the Trust Deed; and
 - (b) otherwise admits the allegations in paragraph 14 of the Claim.
- 15. In answer to paragraph 15 of the Claim, the Second Respondent:
 - (a) in answer to sub-paragraph 15(a):
 - (i) says that the Duty to Perform the Trust Terms is subject to the SIS Act, as per s 7 of the SIS Act; and

- (ii) otherwise admits the allegation that the Duty to Perform the Trust Terms applies to Colonial, subject to the terms of the Trust Deed;
- (b) in answer to sub-paragraph 15(b):
 - (i) says that the Best Interests Duty is a duty of a trustee to exercise its powers in relation to the relevant Fund, including its powers of investment, in the best interests of the beneficiaries of the Fund; and
 - (ii) otherwise admits the allegation that the Best Interests Duty applies to Colonial, subject to the terms of the Trust Deed;
- (c) denies the allegations in sub-paragraph 15(c) of the Claim;
- (d) in answer to sub-paragraph 15(d):
 - (i) says that from 1 July 2013, the Trust Deed was taken by the SIS Act to include a duty of priority; and
 - (ii) otherwise admits the allegation that the General Law Conflicts Duty applies to Colonial, subject to the terms of the Trust Deed; and
- (e) in answer to sub-paragraph 15(e):
 - (i) admits the allegation that the General Law Profits Duty applies to profits made by Colonial, subject to the terms of the Trust Deed;
 - (ii) says that the General Law Profits Duty does not apply to profits made by associated third parties; and
 - (iii) otherwise denies the allegations in sub-paragraph 15(e) of the Claim.

E. OBLIGATIONS OF DIRECTORS OF COLONIAL

16. In answer to paragraph 16 of the Claim, the Second Respondent:

- (a) will rely on the terms of ss 52 and 52A of the SIS Act for their full force and effect;
- (b) in answer to sub-paragraph 16(c), says that the Trust Deed was taken by the SIS Act to include a duty of priority; and
- (c) otherwise admits the allegations in paragraph 16 of the Claim.

17. In answer to paragraph 17 of the Claim, the Second Respondent:
- (a) will rely on the terms of s 55 of the SIS Act for their full force and effect; and
 - (b) otherwise admits the allegations in paragraph 17 of the Claim.

F. MYSUPER RIGHTS AND OBLIGATIONS

17A. The Second Respondent admits the allegations in paragraph 17A of the Claim.

18. The Second Respondent admits the allegations in paragraph 18 of the Claim.

18A. The Second Respondent admits the allegations in paragraph 18A of the Claim.

18B. The Second Respondent admits the allegations in paragraph 18B of the Claim.

18C. In answer to paragraph 18C of the Claim, the Second Respondent:

- (a) says that at all material times, in respect of a MySuper product, an RSE Licensee (as a trustee of an RSE) was entitled to charge one or more of the following kinds of fees in relation to that product:

- (i) an administration fee;

- (ii) an investment fee;

- (iii) a buy-sell spread;

- (iv) a switching fee;

- (v) an exit fee;

- (vi) an activity fee;

- (vii) an advice fee;

- (viii) an insurance fee;

- (b) says that if an RSE Licensee (as a trustee of an RSE) charged an activity fee or an insurance fee to a member in relation to a MySuper product, the fee must be no more than it would be if it were charged on a cost recovery basis;

- (c) says that if an RSE Licensee (as a trustee of an RSE) charged an investment fee to a member that fee was not required to be charged on a cost recovery basis; and
- (d) otherwise denies the allegations in paragraph 18C of the Claim.

18E. In answer to paragraph 18E of the Claim, the Second Respondent:

- (a) says that pursuant to s 29VD of the SIS Act, where fees were payable to an investment manager by reference to the performance of investments made by the investment manager on behalf of the RSE Licensee (as a trustee of an RSE), the RSE Licensee was required to ensure that:
 - (i) if, under the arrangement, a fee is or fees are payable to the investment manager in addition to the performance-based fee, the other fee or fees must be set or adjusted so that they are lower than they would be if the arrangement did not include the performance-based fee;
 - (ii) the period over which entitlement to the performance-based fee is determined under the arrangement must be appropriate to the kinds of investment to which the performance-based fee relates;
 - (iii) under the arrangement, the performance of the investment must be measured by comparison with the performance of investments of a similar kind;
 - (iv) for the purposes of working out the performance-based fee payable under the arrangement, the performance of the investment must be determined on an after-costs and, where possible, an after-tax basis;
 - (v) under the arrangement, the performance-based fee must be calculated in a way that includes disincentives for poorly performing investments; and
- (b) otherwise denies the allegations in paragraph 18E of the Claim.

18F. In answer to paragraph 18F of the Claim, the Second Respondent:

- (a) says that until 5 April 2019, pursuant to s 29VN of the SIS Act, an RSE Licensee (as a trustee of an RSE) was required to:

- (i) promote the financial interests of the beneficiaries of the fund who hold a MySuper product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes); and
 - (ii) determine on an annual basis whether the beneficiaries of the fund who hold the MySuper product are disadvantaged, in comparison to the beneficiaries of other funds who hold a MySuper product within those other funds, and to include such determination in the investment strategy for the fund; and
 - (b) otherwise denies the allegations in paragraph 18F of the Claim.
19. In answer to paragraph 19 of the Claim, the Second Respondent:
- (a) will rely on the terms of SPS 410 for their full force and effect;
 - (b) in answer to sub-paragraph 19(c), says that SPS 410 required the identification of all members holding an ADA, and the value of that ADA, in each Registrable Superannuation Entity within its business operations by no later than 30 September 2013 and quarterly thereafter;
 - (c) denies the allegations in sub-paragraph 19(f) of the Claim; and
 - (d) otherwise admits the allegations in paragraph 19 of the Claim.
20. The Second Respondent admits the allegations in paragraph 20 of the Claim.
- 20A. The Second Respondent denies the allegations in paragraph 20A of the Claim and says that regulation 9.46A(3) of the SIS Regulations required Colonial, from the date of making the ADA Transfer Election, to provide the Applicant and Group Members with periodic notices in writing setting out:
- (a) Colonial's obligation to move the accrued default amount by 30 June 2017;
 - (b) Colonial's obligation to promote the financial interests of the member in relation to a MySuper product held by the member;
 - (c) the accrued default amount; and
 - (d) if Colonial had identified a MySuper product to which Colonial proposed to move the ADA, the name of the MySuper product, and when the proposed move would occur.

G. DEFAULT INVESTMENT OPTIONS IN FCES

21. The Second Respondent admits the allegations in paragraph 21 of the Claim.
22. The Second Respondent admits the allegations in paragraph 22 of the Claim.
23. The Second Respondent admits the allegations in paragraph 23 of the Claim.
24. In answer to paragraph 24, the Second Respondent:
- (a) says that Conflicted Remuneration was not paid to Financial Services Licensees in respect of every member of FCES at all material times;
 - (b) says that Colonial ceased paying Conflicted Remuneration in respect of balances that were the subject of ADA Transfers after those FCES ADAs were transferred in accordance with one of the procedures set out at paragraph 23(a)(ii) or (b) of the Claim; and
 - (c) otherwise denies the allegations in paragraph 24 of the Claim.

Particulars

- i. Page 11 of the FirstChoice Employer Super Product Disclosure Statement dated 28 May 2012 [CFS.002.659.7137].
25. In answer to paragraph 25 of the Claim, the Second Respondent:
- (a) repeats paragraph 24 above; and
 - (b) otherwise admits the allegations in paragraph 25 of the Claim.
26. In answer to paragraph 26 of the Claim, the Second Respondent:
- (a) repeats paragraph 24 above;
 - (b) says that Conflicted Remuneration is paid out of general revenue of Colonial, one source of which is fees paid by members; and
 - (c) otherwise denies the allegations in paragraph 26 of the Claim.
- 26A. The Second Respondent denies the allegations in paragraph 26A of the Claim.
- 26B. The Second Respondent denies the allegations in paragraph 26B of the Claim.

26C. The Second Respondent denies the allegations in paragraph 26C of the Claim.

26D. The Second Respondent denies the allegations in paragraph 26D of the Claim.

27. [Not used]

H. COLONIAL'S MYSUPER PRODUCT IN THE FIRSTCHOICE FUND

28. The Second Respondent admits the allegations in paragraph 28 of the Claim.

29. The Second Respondent admits the allegations in paragraph 29 of the Claim.

30. The Second Respondent admits the allegations in paragraph 30 of the Claim.

31. The Second Respondent admits the allegations in paragraph 31 of the Claim.

32. The Second Respondent admits the allegations in paragraph 32 of the Claim.

33. The Second Respondent admits the allegations in paragraph 33 of the Claim.

I. COLONIAL'S MYSUPER PRODUCT MONITORING

34. The Second Respondent admits the allegations in paragraph 34 of the Claim.

35. The Second Respondent admits the allegations in paragraph 35 of the Claim.

36. The Second Respondent admits the allegations in paragraph 36 of the Claim.

37. The Second Respondent admits the allegations in paragraph 37 of the Claim.

38. The Second Respondent admits the allegations in paragraph 38 of the Claim.

J. FCPS ADA TRANSFERS

38A. In answer to paragraph 38A of the Claim, the Second Respondent:

(a) admits the allegations in sub-paragraph 38A(a) of the Claim; and

(b) in answer to sub-paragraph 38A(b):

(i) says that the First Respondent's systems were not able to identify whether an investment direction in the form contemplated by section 29WA of the SIS Act had been provided to Colonial in respect of

members who were transferred into FCPS either as a result of a successor fund transfer or due to the operation of an 'automatic' transfer from FCES into FCPS on cessation of employment; and

(ii) otherwise denies sub-paragraph 38A(b) of the Claim.

39. The Second Respondent admits the allegations in paragraph 39 of the Claim.

40. The Second Respondent admits the allegations in paragraph 40 of the Claim.

40A. The Second Respondent admits the allegations in paragraph 40A of the Claim.

41. The Second Respondent admits the allegations in paragraph 41 of the Claim.

K. COLONIAL'S MYSUPER TRANSITION PLANNING FOR FCES ADAS

42. In answer to paragraph 42 of the Claim, the Second Respondent:

- (a) says that the draft Transition Plan submitted to Colonial's Board on 3 December 2012 identified the estimated accrued default amounts in all Registrable Superannuation Entities for which Colonial was trustee as at May 2012; and
- (b) otherwise denies the allegations in paragraph 42 of the Claim.

Particulars

- i. Minutes of the Colonial Board Meeting dated 3 December 2012.

42A. The Second Respondent denies the allegations in paragraph 42A of the Claim.

43. The Second Respondent admits the allegations in paragraph 43 of the Claim.

43A. The Second Respondent denies the allegations in paragraph 43A of the Claim.

44. In answer to paragraph 44 of the Claim, the Second Respondent:

- (a) says that within 28 calendar days after 30 September 2013, Colonial had reported to APRA its calculations as to the number of members with ADAs in the FirstChoice Fund and the value of their aggregate ADAs as known to Colonial at 30 September 2013; and

- (b) otherwise admits the allegations in paragraph 44 of the Claim.
- 44A. The Second Respondent admits the allegations in paragraph 44A of the Claim.
- 44B. The Second Respondent denies the allegations in paragraph 44B of the Claim.
- 44C. The Second Respondent admits the allegations in paragraph 44C of the Claim.
- 44D. The Second Respondent denies the allegations in paragraph 44D of the Claim.
45. The Second Respondent admits the allegations in paragraph 45 of the Claim.
46. The Second Respondent admits the allegations in paragraph 46 of the Claim.
- 46A. The Second Respondent denies the allegations in paragraph 46A of the Claim.
- 46B. The Second Respondent admits the allegations in paragraph 46B of the Claim.
- 46C. In answer to paragraph 46C of the Claim, the Second Respondent:
- (a) says that on or around 29 March 2016, Colonial estimated that the average fees paid by FCES ADA Members would reduce from \$420 per annum to \$283 per annum following the ADA Transfers; and
 - (b) otherwise denies the allegations in paragraph 46C of the Claim.
47. In answer to paragraph 47 of the Claim, the Second Respondent:
- (a) admits the allegations in paragraph 47(a); and
 - (b) in answer to sub-paragraph 47(b):
 - (i) says that Attachment 2 to Paper No. CFSIL 08 for the Colonial Board Meeting dated 10 June 2016 states that “91% of members will experience an overall reduction in fees/premiums”; and
 - (ii) otherwise denies the allegations in sub-paragraph 47(b) of the Claim.
48. In answer to paragraph 48 of the Claim, the Second Respondent:
- (a) repeats paragraph 47 above;
 - (b) admits that the Colonial Board made a Suitability Determination and a Promotion of Financial Interests Determination; and

- (c) otherwise denies the allegations in paragraph 48 of the Claim.

L. FCES ADA TRANSFERS

48A. In answer to paragraph 48A of the Claim, the Second Respondent:

- (a) admits the allegations in sub-paragraph 48A(a); and
- (b) in answer to sub-paragraph 48A(b):
- (i) says that the reason those FCES ADA Members had not been identified as having ADAs was due to the way these members were migrated into FCES via successor fund transfers; and
- (ii) otherwise denies the allegations in sub-paragraph 48A(b) of the Claim.

49. The Second Respondent admits the allegations in paragraph 49 of the Claim.

50. The Second Respondent admits the allegations in paragraph 50 of the Claim.

51. The Second Respondent admits the allegations in paragraph 51 of the Claim.

52. The Second Respondent admits the allegations in paragraph 52 of the Claim.

M. CONFLICTING INTERESTS

Member fees and Colonial revenue

53. The Second Respondent admits the allegations in paragraph 53 of the Claim.

53A. The Second Respondent denies the allegations in paragraph 53A of the Claim.

54. The Second Respondent denies the allegations in paragraph 54 of the Claim.

Member fees and grandfathered ~~trailing~~ commissions

55. In answer to paragraph 55 of the Claim, the Second Respondent:

- (a) repeats paragraph 24 above;
- (b) says that Conflicted Remuneration was not paid in respect of balances that were the subject of ADA Transfers; and

(c) otherwise denies the allegations in paragraph 55 of the Claim.

56. In answer to paragraph 56 of the Claim, the Second Respondent:

(a) repeats paragraphs 24 and 26 above; and

(b) otherwise denies the allegations in paragraph 56 of the Claim.

N. CONTRAVENTIONS OF TRUSTEE COVENANTS

Contraventions of Care and Skill Covenants

57. The Second Respondent denies the allegations in paragraph 57 of the Claim and refers to paragraph 59(j) below.

58. In answer to paragraph 58 of the Claim, the Second Respondent:

(a) says that where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members for ADA Transfers to take place as soon as reasonably practicable, a prudent trustee would have made the relevant ADA Transfers as soon as reasonably practicable;

(b) refers to paragraph 59(j) below; and

(c) otherwise denies the allegations in paragraph 58 of the Claim.

59. In answer to paragraph 59 of the Claim, the Second Respondent:

(a) admits the allegations in sub-paragraph 59(a);

(aa) denies the allegations in sub-paragraph 59(aa);

(b) in answer to sub-paragraph 59(b), repeats paragraph 31 above;

(bb) denies the allegations in sub-paragraph 59(bb);

(c) in answer to sub-paragraph 59(c), repeats paragraph 44 above;

(cc) denies the allegations in sub-paragraph 59(cc);

(d) in answer to sub-paragraph 59(d), repeats paragraph 33 above;

(dd) admits the allegations in sub-paragraph 59(dd);

- (ddd) in answer to sub-paragraph 59(ddd), repeats paragraph 38A above and otherwise denies the allegations in sub-paragraph 59(ddd);
- (e) in answer to sub-paragraph 59(e), repeats paragraph 40 above;
- (f) in answer to sub-paragraph 59(f):
 - (i) repeats paragraph 38 above; and
 - (ii) otherwise admits the allegations in sub-paragraph 59(f) of the Claim;
- (ff) denies the allegations in sub-paragraph 59(ff);
- (g) in answer to sub-paragraph 59(g), repeats paragraph 41 above;
- (h) admits the allegations in sub-paragraph 59(h);
- (i) denies the allegations in sub-paragraph 59(i); and
- (j) otherwise denies the allegations in paragraph 59 of the Claim having regard to at least the following matters:
 - (i) the fact that there was a significantly smaller number of FCPS ADAs to be transferred as compared to FCES ADAs, and that the FCPS ADAs were transferred in a number of tranches between September 2014 and August 2016; and
 - (ii) the fact that the asset transfers in respect of the FCPS ADAs were all undertaken by way of transfers of cash, whereas the majority of the asset transfers in respect of the FCES ADAs were undertaken by way of transfers of assets in specie or transfers of units in underlying managed investment schemes, which significantly increased the complexity of the transfer but materially reduced the transaction costs and market risk that otherwise would have been borne by members of FCES in respect of the transfer.

Particulars

- i. Affidavit of Linda Maree Elkins dated 27 August 2021.
- ii. Affidavit of Daniela McLellan dated 1 September 2021.

60. The Second Respondent denies the allegations in paragraph 60 of the Claim and repeats paragraph 59 above.

Particulars

- i. Affidavit of Linda Maree Elkins dated 27 August 2021.
- ii. Affidavit of Daniela McLellan dated 1 September 2021.

61. The Second Respondent denies the allegations in paragraph 61 of the Claim and repeats paragraph 59 above.
62. The Second Respondent denies the allegations in paragraph 62 of the Claim and repeats paragraph 59 above.

Contraventions of Best Interests Covenants

63. The Second Respondent denies the allegations in paragraph 63 of the Claim and repeats paragraph 59(j) above.
64. In answer to paragraph 64 of the Claim, the Second Respondent:
- (a) says that where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members for ADA Transfers to take place as soon as reasonably practicable, a prudent trustee would have made the relevant ADA Transfers as soon as reasonably practicable;
 - (b) repeats paragraph 59(j) above; and
 - (c) otherwise denies the allegations in paragraph 64 of the Claim.

65. The Second Respondent denies the allegations in paragraph 65 of the Claim and repeats paragraph 59 above.

66. The Second Respondent denies the allegations in paragraph 66 of the Claim.

Contraventions of No Conflicts Covenant

67. The Second Respondent denies the allegations in paragraph 67 of the Claim and repeats paragraph 54 above.
68. The Second Respondent denies the allegations in paragraph 68 of the Claim and repeats paragraphs 26, 55 and 56 above.

69. The Second Respondent denies the allegations in paragraph 69 of the Claim and repeats paragraph 57 above.
70. The Second Respondent denies the allegations in paragraph 70 of the Claim and repeats paragraphs 67 and 68 above.
71. The Second Respondent denies the allegations in paragraph 71 of the Claim and repeats paragraph 67 above.
72. The Second Respondent denies the allegations in paragraph 72 of the Claim.
73. The Second Respondent denies the allegations in paragraph 73 of the Claim and repeats paragraph 68 above.
74. The Second Respondent denies the allegations in paragraph 74 of the Claim.

O. BREACHES OF GENERAL LAW OBLIGATIONS

75. In answer to paragraph 75 of the Claim, the Second Respondent:
- (a) in answer to sub-paragraph 75(a), repeats paragraph 14 above;
 - (b) in answer to sub-paragraphs 75(aa) to 75(e), repeats paragraph 15 above;
 - (c) repeats paragraphs 54 and 59 above; and
 - (d) otherwise denies the allegations in paragraph 75 of the Claim.

P. INVOLVEMENT IN TRUSTEE CONTRAVENTIONS OF COVENANTS

76. The Second Respondent admits the allegations in paragraph 76 of the Claim.
77. In answer to paragraph 77 of the Claim, the Second Respondent:
- (a) says that between on or around 9 August 2012 and 5 September 2016 (inclusive) and between 24 March 2017 and 1 July 2017 (inclusive), the Second Respondent was the executive general manager who, among other things, was responsible for the Colonial First State business which included the FirstChoice Fund and incorporated the following divisions:
 - (i) Product;
 - (ii) Investments;

- (iii) Strategy;
 - (iv) Client Operations;
 - (v) Fund Services;
 - (vi) Marketing; and
 - (vii) Distribution; and
- (b) otherwise denies the allegations in paragraph 77 of the Claim.

77A. In answer to paragraph 77A of the Claim, the Second Respondent:

- (a) in answer to sub-paragraph 77A(a):
- (i) says that the Second Respondent was responsible for preparing some papers for the Colonial Board and managing the preparation by others of papers for the Colonial Board; and
 - (ii) otherwise denies the allegations in sub-paragraph 77A(a) of the Claim; and
- (b) admits the allegations in paragraph 77A(b) of the Claim.

77B. In answer to paragraph 77B of the Claim, the Second Respondent:

- (a) admits that the Second Respondent attended and participated in meetings of the Colonial Board at which papers were presented, in relation to:
- (i) Colonial's intention to seek approval from APRA to offer a MySuper product in FCES from 1 July 2013;
 - (ii) amendments to the Trust Deed necessary to offer a MySuper product in FCES;
 - (iii) documentation required to obtain approval from APRA to offer a MySuper product in FCES, including draft transition plans;
 - (iv) approval of a fee schedule for the MySuper product in FCES;
 - (v) the Promotion of Financial Interests Determination and the Suitability Determination with respect to the transfer of FCPS ADAs to CES;

- (vi) the Colonial Promotion of Financial Interests Determination and the Colonial Suitability Determination; and
 - (vii) annual Adequacy of Scale Determinations in relation to the FCES MySuper product and the CES MySuper product; and
 - (b) otherwise denies the allegations in paragraph 77B of the Claim.
78. In answer to paragraph 78 of the Claim, the Second Respondent:
- (a) says that between at least 17 March 2014 to 5 September 2016 (inclusive) and between 24 March 2017 and 1 July 2017 (inclusive) in the Second Respondent's capacity as a member of the Board Investment Committee, the Second Respondent had knowledge of information relating to:
 - (i) whether the investment objectives of Colonial in respect of the FirstChoice Fund were being met;
 - (ii) the performance of investments in the FirstChoice Fund;
 - (iii) reports prepared for the Colonial Board on issues material to the FirstChoice Fund;
 - (iv) investment options offered in the FirstChoice Fund, including new investment options, changes to existing investment options and removal of investment options;
 - (v) investment strategies adopted in respect of the FirstChoice Fund, including new investment strategies, changes to existing investment strategies and removal of investment strategies; and
 - (vi) management or performance fees in relation to the FirstChoice Fund, including any changes to those fees; and
 - (b) otherwise denies the allegations in paragraph 78 of the Claim.
- 78A. In answer to paragraph 78A of the Claim, the Second Respondent:
- (a) says that, from time to time, the Second Respondent attended meetings of the First Respondent's Regulatory Reform Operational Steering Group; and
 - (b) otherwise denies the allegations in paragraph 78A of the Claim.

78B. In answer to paragraph 78B of the Claim, the Second Respondent:

- (a) says that the First Respondent's Regulatory Reform Operational Steering Group was responsible for:
 - (i) receiving regulatory reform interpretations from the Rules Committee for execution within the First Respondent's business;
 - (ii) assessing the impact and options to meet mandatory regulatory reform requirements affecting the First Respondent's business;
 - (iii) operational decisions, direction and responsibility regarding execution of regulatory reforms in the First Respondent's business;
 - (iv) making recommendations to the Executive Steering Group of the Wealth Management Regulatory Reform Program on issues such as resourcing, processes, trade offs and change management relating to the execution of the regulatory reforms impacting the First Respondent's business;
 - (v) executing certain delivery activities that did not require approval from the Wealth Management Regulatory Reform Executive Steering Group; and
 - (vi) executing project deliverables to meet regulatory reform dates; and
- (b) otherwise denies the allegations in paragraph 78B of the Claim.

78C. In answer to paragraph 78C of the Claim, the Second Respondent:

- (a) says that between 16 November 2012 and 5 September 2016 (inclusive) and between 24 March 2017 and 1 July 2017 (inclusive), in the Second Respondent's capacity as a member of Colonial's Risk Committee, and from attending, from time to time, meetings of Colonial's Board Audit and Risk Committee, the Second Respondent:
 - (i) was involved in approving strategies and policies to identify, understand and manage material risks faced by Colonial and ensuring that such strategies and policies complied with legislative and regulatory obligations;

- (ii) received reports from management in relation to key risks faced by Colonial and reported such risks to the Colonial Board;
 - (iii) was involved in reviewing compliance with laws, regulations, prudential standards, codes of practice and internal policies and standards applicable to Colonial and the FirstChoice Fund;
 - (iv) was involved in reviewing regulator reports in relation to Colonial and ensuring management action in relation to any issues raised;
 - (v) received reports from Colonial's Chief Risk Officer in relation to Colonial's regulatory relations (including significant correspondence with regulators) and reported any significant issues to the Colonial Board;
 - (vi) received management reporting to assist in assessing Colonial's compliance with relevant laws, regulations, license conditions, regulator guidelines, prudential standards and industry standards; and
 - (vii) was involved in reporting any significant breaches or other significant matters to the Colonial Board; and
- (b) otherwise denies the allegations in paragraph 78C of the Claim.

78D. In answer to paragraph 78D of the Claim, the Second Respondent:

- (a) says that the Second Respondent was made aware on 21 June 2012 that APRA had indicated that where it was possible and in the best interests of beneficiaries to do so, APRA expected the movement of ADAs to occur at the earliest opportunity; and
- (b) otherwise denies the allegations in paragraph 78D of the Claim.

79. In answer to paragraph 79 of the Claim, the Second Respondent:

- (a) repeats paragraphs 21 to 50, 52 to 56 and 76 to 78D above;
- (b) says that to the extent that those paragraphs contain admissions, the Second Respondent admits that she knew or ought to have known the matters admitted; and
- (c) otherwise denies the allegations in paragraph 79 of the Claim.

80. The Second Respondent denies the allegations in paragraph 80 of the Claim and repeats paragraphs 59 and 60 above.
81. The Second Respondent denies the allegations in paragraph 81 of the Claim.

Q. CONTRAVENTIONS OF DIRECTOR'S COVENANTS

Contraventions of Director's Care and Skill Covenant

82. The Second Respondent denies the allegations in paragraph 82 of the Claim and repeats paragraph 57 above.
83. The Second Respondent denies the allegations in paragraph 83 of the Claim and repeats paragraph 58 above.
84. The Second Respondent denies the allegations in paragraph 84 of the Claim and repeats paragraph 59 above.
85. The Second Respondent denies the allegations in paragraph 85 of the Claim and repeats paragraph 59 above.
86. The Second Respondent denies the allegations in paragraph 86 of the Claim and repeats paragraph 59 above.
87. The Second Respondent denies the allegations in paragraph 87 of the Claim and repeats paragraph 59 above.

Contraventions of Director's Best Interests Covenant

88. The Second Respondent denies the allegations in paragraph 88 of the Claim and repeats paragraph 63 above.
89. The Second Respondent denies the allegations in paragraph 89 of the Claim and repeats paragraph 64 above.
90. The Second Respondent denies the allegations in paragraph 90 of the Claim and repeats paragraph 59 above.
91. The Second Respondent denies the allegations in paragraph 91 of the Claim.

Contraventions of Director's No Conflicts Covenant

92. The Second Respondent denies the allegations in paragraph 92 of the Claim and repeats paragraph 57 above.
93. The Second Respondent denies the allegations in paragraph 93 of the Claim and repeats paragraphs 67 and 68 above.
94. The Second Respondent denies the allegations in paragraph 94 of the Claim and repeats paragraph 67 above.
95. The Second Respondent denies the allegations in paragraph 95 of the Claim.
96. The Second Respondent denies the allegations in paragraph 96 of the Claim and repeats paragraph 68 above.
97. The Second Respondent denies the allegations in paragraph 97 of the Claim.

Contravention of Director's Diligence Covenant

98. The Second Respondent denies the allegations in paragraph 98 of the Claim and repeats paragraph 57 above.
99. The Second Respondent denies the allegations in paragraph 99 of the Claim and repeats paragraph 58 above.
100. The Second Respondent denies the allegations in paragraph 100 of the Claim and repeats paragraph 59 above.
101. The Second Respondent denies the allegations in paragraph 101 of the Claim and repeats paragraph 59 above.

Q1. CAUSATION OF LOSS AND DAMAGE

- 101A. In answer to the allegations in paragraph 101A of the Claim, the Second Respondent:
 - (a) repeats paragraphs 8G and 8H above;
 - (b) admits that for so long as they remained members of the FirstChoice Fund, FCES ADA Members had the right to the due administration of the FirstChoice Fund in accordance with the Trust Deed and applicable superannuation laws; and

- (c) otherwise denies the allegations in paragraph 101A of the Claim.
- 101B. In answer to the allegations in paragraph 101B of the Claim, the Second Respondent:
- (a) repeats paragraphs 18A to 18E above; and
 - (b) otherwise denies the allegations in paragraph 101B of the Claim.
- 101C. In answer to the allegations in paragraph 101C of the Claim, the Second Respondent:
- (a) repeats paragraphs 18A to 18E above; and
 - (b) otherwise denies the allegations in paragraph 101C of the Claim.
- 101D. The Second Respondent denies the allegations in paragraph 101D of the Claim.
- 101E. The Second Respondent denies the allegations in paragraph 101E of the Claim.
- 101F. The Second Respondent denies the allegations in paragraph 101F of the Claim.
- 101G. The Second Respondent denies the allegations in paragraph 101G of the Claim.
- 101H. The Second Respondent denies the allegations in paragraph 101H of the Claim.
- 101I. The Second Respondent denies the allegations in paragraph 101I of the Claim.
- 101J. The Second Respondent denies the allegations in paragraph 101J of the Claim.
- 101K. The Second Respondent denies the allegations in paragraph 101K of the Claim.
- 101L. The Second Respondent denies the allegations in paragraph 101L of the Claim.
- 101M. The Second Respondent denies the allegations in paragraph 101M of the Claim and says that any interest of an FCES ADA Member in another superannuation fund would be subject to the SIS Regulations and any applicable trust instrument of that fund.
- 101N. The Second Respondent denies the allegations in paragraph 101N of the Claim and repeats paragraph 101M above.
- 101O. The Second Respondent denies the allegations in paragraph 101O of the Claim and repeats paragraph 101M above.
- 101P. The Second Respondent denies the allegations in paragraph 101P of the Claim and repeats paragraphs 101I to 101O above.

101Q. The Second Respondent denies the allegations in paragraph 101Q of the Claim.

101R. The Second Respondent denies the allegations in paragraph 101R of the Claim.

101S. The Second Respondent denies the allegations in paragraph 101S of the Claim.

101T. The Second Respondent denies the allegations in paragraph 101T of the Claim.

101U. The Second Respondent denies the allegations in paragraph 101U of the Claim.

R. HARM TO THE APPLICANT AND GROUP MEMBERS

Harm to the Applicant

102. The Second Respondent admits the allegations in paragraph 102 of the Claim.

103. The Second Respondent admits the allegations in paragraph 103 of the Claim.

103A. In answer to the allegations in paragraph 103A, the Second Respondent:

(a) repeats paragraphs 101A and 101B above; and

(b) otherwise denies the allegations in paragraph 103A of the Claim.

103B. The Second Respondent denies the allegations in paragraph 103B of the Claim.

103C. The Second Respondent denies the allegations in paragraph 103C of the Claim.

103D. The Second Respondent denies the allegations in paragraph 103D of the Claim.

103E. The Second Respondent denies the allegations in paragraph 103E of the Claim.

103F. In answer to the allegations in paragraph 103F, the Second Respondent:

(a) admits that, by January 2019, the Applicant had met a Condition of Release of benefits with nil cashing restrictions;

(b) admits that, by January 2019, the Applicant had reached the age of 55;

(c) admits that, by January 2019, the Applicant had an unrestricted non-preserved benefit in the FirstChoice Fund;

(d) admits that, by January 2019, the Applicant had requested a withdrawal of her balance in the FirstChoice Fund, which request was effected by Colonial on 21 January 2019; and

(e) otherwise denies the allegations in paragraph 103F of the Claim.

103G. The Second Respondent denies the allegations in paragraph 103G of the Claim.

104. The Second Respondent denies the allegations in paragraph 104 of the Claim.

105. The Second Respondent denies the allegations in paragraph 105 of the Claim.

105AA. The Second Respondent denies the allegations in paragraph 105AA of the Claim.

Harm to Group Members

105A. The Second Respondent denies the allegations in paragraph 105A of the Claim.

105B. The Second Respondent denies the allegations in paragraph 105B of the Claim.

105C. The Second Respondent denies the allegations in paragraph 105C of the Claim.

105D. The Second Respondent denies the allegations in paragraph 105D of the Claim.

106. The Second Respondent denies the allegations in paragraph 106 of the Claim.

107. The Second Respondent denies the allegations in paragraph 107 of the Claim.

107A. The Second Respondent denies the allegations in paragraph 108 of the Claim.

107B. The Second Respondent denies the allegations in paragraph 109 of the Claim.

107C. In answer to paragraph 110 of the Claim, the Second Respondent:

(a) repeats paragraph 107B above;

(b) says that, in a suit in equity to compel the due administration of the FirstChoice Fund, the Court has jurisdiction to examine whether the First Respondent has breached its general law obligations and, if so (which is denied), whether such breaches have caused loss or damage to the FirstChoice Fund and, if so (which is denied), what relief should flow in respect of such loss; and

(c) otherwise denies paragraph 110 of the Claim.

- 107D. The Second Respondent denies the allegations in paragraph 111 of the Claim.
- 107E. The Second Respondent denies the allegations in paragraph 112 of the Claim.
- 107F. The Second Respondent denies the allegations in paragraph 113 of the Claim.
- 107G. The Second Respondent denies the allegations in paragraph 114 of the Claim.
- 107H. The Second Respondent denies the allegations in paragraph 115 of the Claim.
108. In further answer to the Originating Application and the Claim, the Second Respondent says that any compensation for loss or damage to which the Applicant or a Group Member is entitled (which is denied) does not include loss or damage suffered prior to 19 October 2013.

Particulars

- i. Section 48 of the *Limitation Act 1969* (NSW).
 - ii. Section 55(4) of the SIS Act.
 - iii. Further particulars will be provided after discovery, subpoenas and evidence.
109. In further answer to the Originating Application and the Claim, the Second Respondent says that in the event that it appears to the court that she is or may be liable with respect to any of the matters alleged in the Claim, she has acted honestly having regard to all the circumstances and that she ought fairly to be excused from any liability on such terms as the court thinks fit.

Particulars

- i. Section 1318 of the *Corporations Act 2001* (Cth).
- ii. Affidavit of Linda Maree Elkins dated 27 August 2021.
- iii. Section 310 of the SIS Act.

Date: 18 March 2022



Signed by Cameron Hanson

Lawyer for the Second Respondent

This pleading was prepared by Peter Brereton SC, David Sulan SC and Madeleine Ellicott of counsel and Herbert Smith Freehills.

Schedule

No. VID1139 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

Respondents

Second Respondent: Linda Maree Elkins

Date: 18 March 2022

Certificate of lawyer

I, Cameron Hanson, certify to the Court that, in relation to the defence filed on behalf of the Second Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading;
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 18 March 2022



Signed by Cameron Hanson

Lawyer for the Second Respondent