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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: 11/10/2021 3:52:19 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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First Respondent's **Further** Amended Defence

No. VID1139 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 Amended Defence for convenience only. They do not form part of the First Respondent’s response to the Amended Statement of Claim filed on 17 May 2021 (**Claim**).
- B. Unless the context requires otherwise, the First 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 Amended Defence.
- C. In this Amended Defence, the First Respondent uses “Colonial” to refer to Colonial First State Investments Limited (ACN 002 348 352) and “Elkins” to refer to Ms Linda Elkins.

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

A. PARTIES

1. The First Respondent admits the allegations in paragraph 1 of the Claim.
2. The First Respondent admits the allegations in paragraph 2 of the Claim.
3. The First Respondent denies the allegations in paragraph 3 of the Claim.
4. The First Respondent admits the allegations in paragraph 4 of the Claim.
5. The First 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 First 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 was the Ultimate Holding Company of Realindex Investments Pty Limited until 2 August 2019;
- (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
- (f) otherwise admits the allegations in paragraph 6 of the Claim.

C. THE FUNDS

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

8. In answer to paragraph 8 of the Claim, the First 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 First 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 First 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 FCS 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 First Respondent admits the allegations in paragraph 8C of the Claim.
- 8D. The First 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 First 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 First 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 First 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 First 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

~~(d)(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

~~(e)(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 ~~it~~ 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 First 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 First Respondent denies the allegations in paragraph 8J of the Claim .

D. OBLIGATIONS OF COLONIAL AS TRUSTEE

SIS Act Covenants

9. The First Respondent admits the allegations in paragraph 9 of the Claim.

10. The First Respondent admits the allegations in paragraph 10 of the Claim.

11. The First Respondent admits the allegations in paragraph 11 of the Claim.

12. The First Respondent admits the allegations in paragraph 12 of the Claim.

13. The First Respondent admits the allegations in paragraph 13 of the Claim.

Obligations at general law

14. In answer to paragraph 14 of the Claim, the First 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 First 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. The First Respondent does not plead to paragraph 16 of the Claim, which does not contain any allegations against it.
17. The First Respondent does not plead to paragraph 17 of the Claim, which does not contain any allegations against it.

F. MYSUPER RIGHTS AND OBLIGATIONS

- 17A. The First Respondent admits the allegations in paragraph 17A of the Claim.
18. The First Respondent admits the allegations in paragraph 18 of the Claim.
- 18A. The First Respondent admits the allegations in paragraph 18A of the Claim.

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

18C. In answer to paragraph 18C of the Claim, the First 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 First 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. says that the period over which entitlement to the performance-based fee was determined under the arrangement must be appropriate to the kinds of investment to which the performance-based fee related;

- (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; and
- (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 First 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 First 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 First Respondent admits the allegations in paragraph 20 of the Claim.
- 20A. The First 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 First Respondent admits the allegations in paragraph 21 of the Claim.
22. The First Respondent admits the allegations in paragraph 22 of the Claim.
23. The First Respondent admits the allegations in paragraph 23 of the Claim.
24. In answer to paragraph 24, the First Respondent:
- (a) says that Conflicted Remuneration was not paid to Financial Services Licensees in respect of every member of FCES at all material times; and

- (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 First Respondent:
 - (a) repeats paragraph 24 above;
 - (b) otherwise admits the allegations in paragraph 25 of the Claim.
- 26. In answer to paragraph 26 of the Claim, the First 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 First Respondent denies the allegations in paragraph 26A of the Claim.
- 26B. The First Respondent denies the allegations in paragraph 26B of the Claim.
- 26C. The First Respondent denies the allegations in paragraph 26C of the Claim.
- 26D. The First Respondent denies the allegations in paragraph 26D of the Claim.
- 27. [Not used]

H. COLONIAL'S MYSUPER PRODUCT IN THE FIRSTCHOICE FUND

- 28. The First Respondent admits the allegations in paragraph 28 of the Claim.
- 29. The First Respondent admits the allegations in paragraph 29 of the Claim.

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

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

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

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

I. COLONIAL'S MYSUPER PRODUCT MONITORING

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

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

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

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

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

38A. In answer to paragraph 38A of the Claim, the First 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.

J. FCPS ADA TRANSFERS

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

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

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

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

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

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

44. In answer to paragraph 44 of the Claim, the First 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 First Respondent admits the allegations in paragraph 44A of the Claim.

44B. The First Respondent denies the allegations in paragraph 44B of the Claim.

44C. The First Respondent admits the allegations in paragraph 44C of the Claim.

44D. The First Respondent denies the allegations in paragraph 44D of the Claim.

45. The First Respondent admits the allegations in paragraph 45 of the Claim.

46. The First Respondent admits the allegations in paragraph 46 of the Claim.

- 46A. The First Respondent denies the allegations in paragraph 46A of the Claim.
- 46B. The First Respondent admits the allegations in paragraph 46B of the Claim.
- 46C. In answer to paragraph 46C of the Claim, the First 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 First 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 First 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.
- 48A. In answer to paragraph 48A of the Claim, the First 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.

L. FCES ADA TRANSFERS

- 49. The First Respondent admits the allegations in paragraph 49 of the Claim.
- 50. The First Respondent admits the allegations in paragraph 50 of the Claim.
- 51. The First Respondent admits the allegations in paragraph 51 of the Claim.
- 52. The First Respondent admits the allegations in paragraph 52 of the Claim.

M. CONFLICTING INTERESTS

Member fees and Colonial revenue

- 53. The First Respondent admits the allegations in paragraph 53 of the Claim.
- 53A. The First Respondent denies the allegations in paragraph 53A of the Claim.
- 54. The First 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 First 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 First 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 First 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 First 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 First 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

~~Further particulars will be provided following evidence.~~

i. Affidavit of Linda Maree Elkins dated 27 August 2021.

ii. Affidavit of Daniela McLellan dated 1 September 2021.

60. The First 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 First Respondent denies the allegations in paragraph 61 of the Claim and repeats paragraph 59 above.

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

Contraventions of Best Interests Covenants

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

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

Contraventions of No Conflicts Covenant

67. The First Respondent denies the allegations in paragraph 67 of the Claim and repeats paragraph 54 above.

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

69. The First Respondent denies the allegations in paragraph 69 of the Claim and repeats paragraph 57 above.

70. The First Respondent denies the allegations in paragraph 70 of the Claim and repeats paragraphs 67 and 68 above.
71. The First Respondent denies the allegations in paragraph 71 of the Claim and repeats paragraph 67 above.
72. The First Respondent denies the allegations in paragraph 72 of the Claim.
73. The First Respondent denies the allegations in paragraph 73 of the Claim and repeats paragraph 68 above.
74. The First 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 First Respondent:
- (a) in answer to sub-paragraph 75(a), repeats paragraph 14 above;
 - (b) in answer to sub-paragraphs 75(~~aa~~~~b~~) 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. In answer to paragraphs 76 to 81 of the Claim, the First Respondent refers to and repeats paragraphs 76 to 81 of the Second Respondent's amended defence to the Claim.

Q. CONTRAVENTIONS OF DIRECTOR'S COVENANTS

Contraventions of Director's Care and Skill Covenant

77. In answer to paragraphs 82 to 87 of the Claim, the First Respondent refers to and repeats paragraphs 82 to 87 of the Second Respondent's amended defence to the Claim.

Contraventions of Director's Best Interests Covenant

78. In answer to paragraphs 88 to 91 of the Claim, the First Respondent refers to and repeats paragraphs 88 to 91 of the Second Respondent's amended defence to the Claim.

Contraventions of Director's No Conflicts Covenant

79. In answer to paragraphs 82 to 97 of the Claim, the First Respondent refers to and repeats paragraphs 92 to 97 of the Second Respondent's amended defence to the Claim.

Contravention of Director's Diligence Covenant

80. In answer to paragraphs 98 to 101 of the Claim, the First Respondent refers to and repeats paragraphs 98 to 101 of the Second Respondent's amended defence to the Claim.

Q1. CAUSATION OF LOSS AND DAMAGE

80A. In answer to the allegations in paragraph 101A of the Claim, the First Respondent:

(a) repeats paragraphs 8G and 8H above; ~~and~~

(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

~~(b)(c)~~ otherwise denies the allegations in paragraph 101A of the Claim.

80B. In answer to the allegations in paragraph 101B of the Claim, the First Respondent:

(a) repeats paragraphs 18A to 18E above;

(b) otherwise denies the allegations in paragraph 101B of the Claim.

80C. In answer to the allegations in paragraph 101C of the Claim, the First Respondent:

(a) repeats paragraphs 18A to 18E above; and

(b) otherwise denies the allegations in paragraph 101C of the Claim.

80D. The First Respondent denies the allegations in paragraph 101D of the Claim.

80E. The First Respondent denies the allegations in paragraph 101E of the Claim.

80F. The First Respondent denies the allegations in paragraph 101F of the Claim.

80G. The First Respondent denies the allegations in paragraph 101G of the Claim.

80H. The First Respondent denies the allegations in paragraph 101H of the Claim.

80I. The First Respondent denies the allegations in paragraph 101I of the Claim.

80J. The First Respondent denies the allegations in paragraph 101J of the Claim.

80K. The First Respondent denies the allegations in paragraph 101K of the Claim.

80L. The First Respondent denies the allegations in paragraph 101L of the Claim.

80M. The First 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.

80N. The First Respondent denies the allegations in paragraph 101N of the Claim and repeats paragraph 80M above.

80O. The First Respondent denies the allegations in paragraph 101O of the Claim and repeats paragraph 80M above.

80P. The First Respondent denies the allegations in paragraph 101P of the Claim and repeats paragraphs 80I to 80O above.

80Q. The First Respondent denies the allegations in paragraph 101Q of the Claim.

80R. The First Respondent denies the allegations in paragraph 101R of the Claim.

80S. The First Respondent denies the allegations in paragraph 101S of the Claim.

80T. The First Respondent denies the allegations in paragraph 101T of the Claim.

80U. The First Respondent denies the allegations in paragraph 101U of the Claim.

R. HARM TO THE APPLICANT AND GROUP MEMBERS

Harm to the Applicant

81. The First Respondent admits the allegations in paragraph 102 of the Claim.

82. The First Respondent admits the allegations in paragraph 103 of the Claim.
- 82A. In answer to the allegations in paragraph 103A, the First Respondent:
- (a) repeats paragraphs 80A and 80B above; and
 - (b) otherwise denies the allegations in paragraph 103A of the Claim.
- 82B. The First Respondent denies the allegations in paragraph 103B of the Claim.
- 82C. The First Respondent denies the allegations in paragraph 103C of the Claim.
- 82D. The First Respondent denies the allegations in paragraph 103D of the Claim.
- 82E. The First Respondent denies the allegations in paragraph 103E of the Claim.
- 82F. In answer to the allegations in paragraph 103F, the First 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) ~~The First Respondent admits~~ otherwise denies the allegations in paragraph 103F of the Claim.
- 82G. The First Respondent denies the allegations in paragraph 103G of the Claim.
83. The First Respondent denies the allegations in paragraph 104 of the Claim.
84. The First Respondent denies the allegations in paragraph 105 of the Claim.
- 84AA. The First Respondent denies the allegations in paragraph 105AA of the Claim.

Harm to Group Members

- 84A. The First Respondent denies the allegations in paragraph 105A of the Claim.

84B. The First Respondent denies the allegations in paragraph 105B of the Claim.

84C. The First Respondent denies the allegations in paragraph 105C of the Claim.

84D. The First Respondent denies the allegations in paragraph 105D of the Claim.

85. The First Respondent denies the allegations in paragraph 106 of the Claim.

86. The First Respondent denies the allegations in paragraph 107 of the Claim.

86A. The First Respondent denies the allegations in paragraph 108 of the Claim.

86B. The First Respondent denies the allegations in paragraph 109 of the Claim.

86C. In answer to paragraph 110 of the Claim, the First Respondent:

(a) repeats paragraph 86B 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.

86D. The First Respondent denies the allegations in paragraph 111 of the Claim.

86E. The First Respondent denies the allegations in paragraph 112 of the Claim.

86F. The First Respondent denies the allegations in paragraph 113 of the Claim.

86G. The First Respondent denies the allegations in paragraph 114 of the Claim.

86H. The First Respondent denies the allegations in paragraph 115 of the Claim.

87. In further answer to the Originating Application and the Claim, the First 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.

~~10 June~~ 5 October 2021



Signed by Cameron Hanson

Lawyer for the First Respondent

This pleading was prepared by Peter Brereton SC, David Sulan SC and Tom O'Brien 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: 5 October 2021

Certificate of lawyer

I, Cameron Hanson, certify to the Court that, in relation to the defence filed on behalf of the First 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: 5 October 2021



Signed by Cameron Hanson

Lawyer for the First Respondent