

DEFENCE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Representative Proceedings
Registry	Sydney
Case number	2023/00124390

TITLE OF PROCEEDINGS

Plaintiff	MARK FAHEY
First Defendant	ANGLICAN COMMUNITY SERVICES TRADING AS ANGLICARE SYDNEY (ABN: 39 922 848 563)
Second Defendant	NEPEAN BLUE MOUNTAINS LOCAL HEALTH DISTRICT

FILING DETAILS

Filed for	Anglican Community Services trading as Anglicare Sydney, First Defendant
Legal representative	Beverley Ruth Newbold
Legal representative reference	1422367
Contact name and telephone	Benjamin Roe, +61 2 9921 4156
Contact email	Benjamin.Roe@minterellison.com

PLEADINGS AND PARTICULARS

1. The First Defendant does not plead to paragraph 1 of the ASOC as it does not contain an allegation against it.
2. The First Defendant admits paragraph 2 of the ASOC.
3. In answer to paragraph 3 of the ASOC, the First Defendant:
 - (a) admits that Ms Ann Fahey entered into a Resident Agreement with Anglican Community Services for the Facility Newmarch House, but says that the date of that Resident Agreement was 11 December 2017;
 - (b) admits subparagraph (b);
 - (c) admits subparagraph (c);
 - (d) does not admit subparagraph (d);
 - (e) says that:
 - (i) on 30 April 2020, Ms Fahey tested positive to COVID-19;

- (ii) during the course of the day on 30 April 2020, Ms Fahey was treated by a Virtual Aged Care Service (**VACS**) nurse practitioner Hailey Carpen as well as Doctors Sharma, Kakkat, Kathiresen, Fox and registered nurses whilst Ms Fahey remained at Newmarch House; and
 - (iii) on 1 May 2020, Ms Fahey was personally attended by a physiotherapist, registered nurse and a locum medical officer whilst Ms Fahey remained at Newmarch House;
 - (iv) on 2 May 2020, Ms Fahey was transferred to Nepean Hospital; and
 - (v) otherwise does not admit the allegations contained in subparagraph (e);
 - (f) admits that Ms Fahey died at the Nepean Hospital on 2 May 2020 from COVID-19 related pneumonia.
4. In answer to paragraph 4 of the ASOC, the First Defendant :
- (a) says that as presently drafted, this paragraph does not appear to contain an allegation against the First Defendant, and the First Defendant therefore does not plead to it;
 - (b) otherwise does not admit the paragraph.
5. In answer to paragraph 5 of the ASOC, the First Defendant:
- (a) admits subparagraph (a);
 - (b) admits subparagraph (b).
 - (c) says that as pleaded the allegation in subparagraph (c) is vague and embarrassing and otherwise says:
 - (i) at all material times, it was the Approved Provider of Aged Care Services, as defined under the *Aged Care Act 1997* (Cth) (**Aged Care Act**), with all of the responsibilities associated with that role, including the responsibilities imposed by section 54-1 of the Aged Care Act;
 - (ii) from 24 March 2020 to 23 June 2020, it acted in accordance with the Public Health (COVID-19 Residential Aged Care Facilities) Order 2020;
 - (iii) from 25 March 2020 to 23 June 2020, it acted in accordance with the Public Health (COVID-19 Self-Isolation) Order 2020;
 - (iv) on and from 11 April 2020 until 19 June 2020, it liaised with, and acted on advice from, the Commonwealth Department of Health, the Aged Care Quality and Safety Commission (**ACQSC**), and New South Wales Health with respect to the control and management of Newmarch House in the context of a COVID-19 outbreak at the facility (the **Outbreak**);
 - (v) on and from 12 April 2020 up until about 15 May 2020, it acted on the advice of Associate Professor James Branley, Head of Infectious Diseases at Nepean Hospital (**Dr Branley**), and other medical practitioners and allied health professionals engaged to provide medical services to the residents of Newmarch House (**Residents**);
 - (vi) on and from 24 April 2020 until 8 May 2020, it acted on the advice of three clinical managers from BaptistCare appointed in accordance with the notice issued by ACQSC pursuant to section 63S of the *Aged Care Quality and Safety Commission Act 2018* (Cth) (**ACQSC Act**) (**Section 63S Notice**), including Tracy Burling, Melanie Dicks and Cheryl Burke;
 - (vii) on and from about 7 May 2020 until about 19 June 2020, it acted on the advice of Mr Andrew Kinkade, as recommended and then directed by ACQSC; and

- (viii) otherwise denies the allegations in subparagraph (c).
6. The First Defendant does not plead to paragraph 6 of the ASOC as it contains no allegations against it.
 7. The First Defendant does not plead to paragraph 7 of the ASOC as it contains no allegations against it.
 8. In answer to paragraph 8 of the ASOC, the First Defendant denies that it owed a duty to Family in the terms pleaded in the ASOC, denies that it breached any duty as pleaded in the ASOC and denies that Group Members have suffered mental harm consisting of a recognised psychiatric illness caused by any breach of duty by the First Defendant, and otherwise does not plead to the remainder of paragraph 8 as it does not contain allegations against the First Defendant.
 9. The First Defendant does not plead to paragraph 9 of the ASOC as it contains no allegations against it.
 10. The First Defendant does not plead to paragraph 10 of the ASOC as it contains no allegations against it and further says that, if paragraph 10 of the ASOC is intended to contain an allegation against it, then as presently pleaded, paragraph 10 is vague and embarrassing such that the First Defendant is unable to plead to paragraph 10.
 - 10A. The First Defendant says that if paragraph 10A of the ASOC is intended to contain an allegation against it, then in the absence of the Plaintiff having identified the alleged Group Members, the First Defendant:
 - (a) does not admit the allegations contained in subparagraph (a);
 - (b) does not admit the allegations contained in subparagraph (b);
 - (c) says that subparagraph (c) does not contain an allegation against the First Defendant, and so the First Defendant does not plead to it;
 - (d) denies the allegations contained in subparagraph (d); and
 - (e) says that subparagraph (e) does not contain an allegation against the First Defendant, and so the First Defendant does not plead to it.
 - 10B. In answer to paragraph 10B of the ASOC, the First Defendant:
 - (a) denies the allegations contained in subparagraph (a);
 - (b) does not plead to subparagraph (b) as it contains no allegations against the First Defendant; and
 - (c) does not admit the allegations contained in subparagraph (c) and otherwise denies the subparagraph.
 11. Paragraph 11 of the ASOC as presently pleaded, is vague and embarrassing, and the First Defendant further says:
 - (a) the ASOC does not identify any proper common questions of law and fact; and
 - (b) it otherwise cannot plead in answer to paragraph 11.
 12. In answer to paragraph 12 of the ASOC, the First Defendant says that, as at 11 April 2020, Newmarch House had 97 care recipients of residential care services and otherwise does not admit the paragraph.
 13. The First Defendant admits paragraph 13 of the ASOC.
 14. In answer to paragraph 14 of the ASOC, the First Defendant:

- (a) says that on 12 April 2020, it participated in a teleconference with the Nepean Public Health Unit of New South Wales Health (**Public Health Unit**) in respect of the strategy to be adopted in response to its staff member testing positive for COVID-19;
 - (b) repeats subparagraphs 5(c)(ii) – 5(c)(viii) of this Defence; and
 - (c) otherwise admits the allegations contained in paragraph 14.
15. The First Defendant admits paragraph 15 of the ASOC.
16. In answer to paragraph 16 of the ASOC the First Defendant:
- (a) says that pursuant to section 16 of the ACQSC Act, the Commissioner (as defined under the ACQSC Act) had, as at 23 April 2020, (and continues to have) functions including to ensure compliance of approved providers with the ACQSC Act and the Aged Care Act;
 - (b) says that on 23 April 2020, it informed the Commissioner that it intended to appoint, by close of business on Friday, 24 April 2020, an adviser and supporting team with recent experience in infection control, as well as the appropriate skills, qualifications and background to assist it to manage the Outbreak;
 - (c) later on 23 April 2020, the Commissioner wrote to the First Defendant to require the appointment of the adviser and supporting staff, as the First Defendant had indicated it would do, by no later than 5.00pm on Friday, 24 April 2020; and
 - (d) otherwise denies the allegations contained in paragraph 16.
17. In answer to paragraph 17 of the ASOC, the First Defendant:
- (a) says that on 6 May 2020, a delegate of the Commissioner gave the First Defendant notice that he required, amongst other things, the First Defendant, pursuant to section 63U of the ACQSC Act, to immediately appoint, at its expense, Andrew Kinkade as an adviser and ensure that any directions and advice given by Mr Kinkade were actioned immediately and without delay (**Section 63U Notice**); and
 - (b) otherwise denies the allegations contained in paragraph 17.
18. The First Defendant does not admit the facts alleged in paragraph 18 and says that the cause of death is currently being determined by the Coroner, save as in the case of Ms Fahey as pleaded in paragraph 3(f) above.
19. In answer to paragraph 19 of the ASOC the First Defendant:
- (a) says that:
 - (i) as presently pleaded, paragraph 19 is vague and embarrassing;
 - (ii) as at 11 April 2020, it was the Approved Provider of Aged Care Services under the Aged Care Act, with all of the responsibilities associated with that role, including the responsibilities imposed by section 54-1 of the Aged Care Act, in respect of 22 residential aged care facilities, including Newmarch House;
 - (b) repeats subparagraphs 5(c)(ii) – 5(c)(viii) above; and
 - (c) otherwise denies the allegations contained in paragraph 19.
20. The First Defendant admits paragraph 20 of the ASOC.
21. The First Defendant admits paragraph 21 of the ASOC.
22. In answer to paragraph 22 of the ASOC, the First Defendant says that:

- (a) on 6 March 2020, it commenced an education program for staff at Newmarch House which included the use of personal protective equipment (**PPE**), handwashing, use of masks and early identification of COVID-19 symptoms;
- (b) on 9 March 2020, an external Aged Care Consultant and an Anglicare Sydney Workplace Trainer conducted staff training at Newmarch House on infection control practices; and
- (c) on 16 March 2020, the then Care Manager of Newmarch House, Leann Hinton, emailed registered nurses at Newmarch House and other frontline staff to provide "*mandatory education tomorrow at 2pm*" in relation to "*Corona Virus*";

Particulars

Email from Leann Hinton to Tegan Dean, Susana Muhi, Roy Agus, Laxmi Sherchan, Luisa Vaikeli, Cheryl Pascual, Melanie Tabuno, Penny Busch and 'newmarch.rn@anglicare.org.au', the latter being a shared email address used by registered nurses who were rostered at Newmarch House on any particular shift, dated 16 March 2020 12.32pm with the subject line "*mandatory education 17/03/20 2pm training room*".

- (d) on 30 March 2020, an email was sent to all staff of the First Defendant requiring them to "*complete the mandatory training for COVID-19 and Infection Control*"; and

Particulars

Email from the email address 'coronavirus.updates@anglicare.org.au' to the email address 'allstaff@anglicare.org.au' dated 30 March 2020 01.54pm signed off by Grant Millard with the subject line "*Message from the CEO*".

- (e) otherwise denies the allegations contained in paragraph 22 of the ASOC.

23. In answer to paragraph 23 of the ASOC, the First Defendant:

- (a) says that:
 - (i) it established a surge workforce in accordance with the Commonwealth's Communicable Diseases Network Australia (**CDNA**) guidelines dated 13 March 2020; and
 - (ii) the First Defendant's surge workforce was established for the purpose of managing a response to a COVID-19 outbreak on reasonable scenarios based on the Commonwealth's CDNA guidelines, which provided that aged care service providers should prepare for a loss of up to 20-30% of their staff in the event of such an outbreak; and
- (b) otherwise denies the allegations contained in subparagraph 23.

24. In answer to paragraph 24 of the ASOC, the First Defendant:

- (a) says that at midnight on 23 March 2020, it placed all its facilities, including Newmarch House, into 'lockdown' in accordance with Public Health (COVID-19 Residential Aged Care Facilities) Order 2020; and
- (b) otherwise denies the allegations contained in paragraph 24.

25. The First Defendant admits paragraph 25 of the ASOC.

26. In answer to paragraph 26 of the ASOC, the First Defendant:

- (a) says that:

- (i) around 10.40pm on 11 April 2020, it was informed that a member of staff had tested positive for COVID-19 and on 12 April 2020 a Resident tested positive for COVID-19;
 - (ii) at about 12.37am on 12 April 2020, the Public Health Unit advised the First Defendant that all Residents in Newmarch House must isolate and stay in their rooms, with no visitors, and the First Defendant acted in accordance with the NSW Health Public Health Unit's advice;
 - (iii) at 11am on 12 April 2020, the First Defendant had a conference with the Commonwealth Department of Health and the Public Health Unit in which it was confirmed that "*all residents are considered close contacts*" of a person who was positive for COVID-19 and were to be confined to their rooms, including at the time of provision of meals, and it acted in accordance with the position as confirmed during that conference; and
- (b) otherwise denies the allegations contained in paragraph 26 of the ASOC.
27. In answer to paragraph 27 of the ASOC, the First Defendant:
- (a) says that:
 - (i) from about 14 April 2020, the question of separating Residents who had tested positive for COVID-19 from those who had not was regularly discussed by representatives of the Commonwealth Department of Health, the Public Health Unit, Nepean Blue Mountains Local Health District clinicians including Dr Branley, representatives of the ACQSC and representatives of the First Defendant;
 - (ii) the ACQSC representative participating in the discussion on or about 16 April 2020 and others discussed the options for effecting a separation, both offsite and internally at Newmarch House, of Residents who had tested positive for COVID-19 from those who had not but the issue was not resolved at this meeting;
 - (iii) at all times, the First Defendant acted in accordance with the position ultimately agreed or determined in the course of the discussions which occurred between the ACQSC, Commonwealth Department of Health, Public Health Unit and Nepean Blue Mountains Local Health District clinicians with respect to the separation of Residents who had tested positive to COVID-19 and those who had not; and
 - (b) otherwise denies the allegations contained in paragraph 27.
28. In answer to paragraph 28 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, paragraph 28 is vague and embarrassing;
 - (b) repeats subparagraph 27(a) of this Defence;
 - (c) does not plead to paragraph 28 as it contains no allegations against it; and
 - (d) further says that if and to the extent that paragraph 28 is intended to include an allegation against the First Defendant, the First Defendant denies the allegations contained in paragraph 28.
29. The First Defendant denies the allegations contained in paragraph 29 of the ASOC.
30. In answer to paragraph 30 of the ASOC, the First Defendant:
- (a) admits that the 19 Residents who contracted COVID-19 during the Outbreak were not transported to hospital on account of being COVID-19 positive;
 - (b) further says that:

- (i) the decision whether to transfer Residents to Nepean Hospital was not made by the First Defendant and was made with the advice of:
 - (A) VACS;
 - (B) in consultation with the Residents and, or their family and not the First Defendant;
 - (ii) two COVID-19 positive Residents were transferred to hospital, being:
 - (A) Shirley Yates on 25 April 2020; and
 - (B) Ann Fahey on 2 May 2020;
 - (iii) eight COVID-19 positive Residents' Advance Care Plans recorded that they did not wish to be transferred to hospital, being Advance Care Plans of:
 - (A) Alice Bacon;
 - (B) Leone Corrigan;
 - (C) Catherine Adam;
 - (D) Raymond Jennings;
 - (E) Roland Farrell;
 - (F) Edith Brownlee;
 - (G) Maria James;
 - (H) Keith Smith;
 - (iv) three COVID-19 positive Residents expressed the wish not to be transferred to hospital, being:
 - (A) Victor Stone;
 - (B) Fay Rendoth;
 - (C) Margaret Brocklehurst; and
 - (v) two COVID-19 positive Residents' families chose not to transfer the Resident to hospital, being the families of:
 - (A) Olive Grego;
 - (B) Blanche Billingham; and
 - (c) otherwise denies the allegations contained in paragraph 30.
31. In answer to paragraph 31 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, paragraph 31 is vague and embarrassing;
 - (b) further says that on 19 April 2020, Mr Jehan's family emailed Newmarch House and, amongst other things, enquired whether – if Mr Jehan remained COVID-19 negative – he would be able to be transferred to different medical premises or taken home noting that there may well be some rationale as to why this could not be done; and
 - (c) otherwise denies the allegations contained in paragraph 31.
32. In answer to paragraph 32 of the ASOC, the First Defendant:
- (a) repeats subparagraph 31(b) of this Defence; and

- (b) otherwise denies the allegations contained in paragraph 32.
33. In answer to paragraph 33 of the ASOC, the First Defendant:
- (a) says that in response to the email from Mr Jehan's family, a representative of the First Defendant stated on 19 April 2020 that the instruction to the First Defendant from the Public Health Unit of New South Wales Health was that no Resident may leave Newmarch House in order to reduce and contain the risk of spread, and that it was the representative's understanding that this was a public health order that may be legally enforceable; and
- (b) otherwise denies the allegations contained in paragraph 33.
34. In answer to paragraph 34 of the ASOC, the First Defendant says that as presently pleaded, paragraph 34 is vague and embarrassing and otherwise denies the allegations contained in paragraph 34.
35. In answer to paragraph 35 of the ASOC, the First Defendant:
- (a) does not admit the substance of any communication between Mr Jehan's family and the Second Defendant; and
- (b) otherwise denies the allegations contained in paragraph 35.
36. In answer to paragraph 36 of the ASOC, the First Defendant:
- (a) does not admit the substance of any communication between Mr Jehan's family and the Second Defendant; and
- (b) otherwise denies the allegations contained in paragraph 36.
37. The First Defendant denies the allegations contained in paragraph 37 of the ASOC.
38. In answer to paragraph 38 of the ASOC, the First Defendant:
- (a) says that:
- (i) during March 2020, it had established a surge workforce in accordance with the Commonwealth's CDNA guidelines;
- (ii) at the beginning of the Outbreak, the First Defendant experienced greater shortages of permanent staff at Newmarch House than anticipated in the Commonwealth's CDNA guidelines by reason of staff testing positive to COVID-19 or being required to self-isolate by reason of exposure to persons who had tested positive to COVID-19;
- (iii) in response to its permanent staff being unavailable, the First Defendant sought to utilise appropriately skilled and qualified staff from agencies authorised by the Commonwealth Department of Health;
- (iv) numerous staff put forward by agencies authorised by the Commonwealth Department of Health were not appropriately skilled and, or, qualified to work at an aged care facility;
- (v) from 23 to 28 April 2020 and from 16 to 19 May 2020, in addition to utilising such agency staff as were suitably qualified and skilled, Newmarch House was attended by nurses from St Vincent's Hospital;
- (b) admits that, from time to time between 12 April 2020 and 20 April 2020, Newmarch House experienced staff shortages; and
- (c) otherwise denies the allegations contained in paragraph 38.
39. In answer to paragraph 39 of the ASOC, the First Defendant:

- (a) says that:
- (i) on 14 April 2020, the Department of Health directed it to one of its authorised agencies, being 'Mable';
 - (ii) on 17 April 2020, the First Defendant and Mable entered into an agreement under which the First Defendant could use the Mable website to source staff; and
- (b) otherwise denies the allegations contained in paragraph 39.
40. The First Defendant admits paragraph 40 of the ASOC.
41. In answer to paragraph 41 of the ASOC, the First Defendant:
- (a) admits that a number of candidates identified by Mable as staff who may be suitable to work at Newmarch House were not suitably skilled or qualified to work in an aged care facility, particularly in the context of the Outbreak, including by reason that they had not worked in aged care before;
 - (b) further says that it identified this issue to Mable, amongst others; and
 - (c) otherwise does not admit the allegations contained in paragraph 41.
42. In answer to paragraph 42 of the ASOC, the First Defendant:
- (a) repeats subparagraphs 38(a) and 38(b) of this Defence; and
 - (b) otherwise denies the allegations contained in paragraph 42.
43. In answer to paragraph 43 of the ASOC, the First Defendant says that:
- (a) on 12 April 2020, Senator the Hon Richard Colbeck, Minister for Aged Care and Senior Australians, released a statement titled *'Contingency measures to ensure continuity of aged care during COVID-19'* which provided that:
 - (i) where an approved aged care provider has *"a COVID-19 outbreak and [has] exhausted their existing resource recruitment channels"*, it may be eligible to access the *"Temporary Surge Workforce Support"* through Mable;
 - (ii) where a residential aged care facility *"does not have the capacity or capability to continue delivering services due to the impact of COVID-19"*, it may be eligible to access the 'Emergency Response Teams' through Aspen;
 - (b) on 14 April 2020, it contacted the Commonwealth Department of Health requesting staffing assistance from Mable;
 - (c) on 16 April 2020, Mable staff commenced at Newmarch House;
 - (d) on 16 April 2020, it was provided with guidance from the Commonwealth Department of Health stating that:
 - (i) it was eligible to access *"Temporary Surge Workforce Support"* through Mable if it has *"one or more COVID-19 infected or isolated residents / clients / staff"* and *"exhausted their existing resource recruitment channels"*;
 - (ii) it would only be eligible to access the 'Emergency Response Teams' through Aspen if it *"was significantly and directly impacted by COVID-19"* and *"no longer [had] capacity or capability to deliver quality care due to COVID-19"*;

Particulars

FAQ document issued by the Commonwealth Department of Health on 16 April 2020 (**FAQ April Document**).

FAQ April Document, which provided the following examples of circumstances where Commonwealth funded approved providers of residential aged care were said to be significantly and directly impacted by COVID-19 making them eligible to access the 'Emergency Response Teams' through Aspen:

- (a) *"a significant proportion of staff (eg. 50%) are infected or isolated due to COVID-19; or"*
 - (b) *"a significant number of residents are infected by COVID-19 or the spread of infection cannot be contained; or"*
 - (c) *"senior management (eg. CEO, Director of Nursing or other senior managers) are infected or isolated due to COVID-19 and are unable to continue to operate or provide quality care to residents."*
- (e) by 17 April 2020, it formed the view that Mable staff were not appropriately qualified to work in a residential aged care facility experiencing a COVID-19 outbreak;
 - (f) on 17 April 2020, James Zehnder, the Executive General Manager of Operational Support at Anglicare, emailed Tania Browne, the Director of Aged Care COVID-19 Implementation and Delivery / Aged Care Regulation & Compliance Division of the Commonwealth Department of Health, requesting its advice as to what other avenues were available to *"source suitable and skilled staff"*;
 - (g) on 20 April 2020, Tania Browne emailed James Zehnder stating that the Commonwealth Department of Health is mobilising Aspen, but requires further information to authorise their deployment;
 - (h) on 20 April 2020, James Zehnder spoke on the phone with Stuart Riley, the Operations Manager – Aged Care of Aspen, where Stuart Riley offered to send a nurse first respondent to take control of the site, and James Zehnder indicated that the First Defendant had managers on site;
 - (i) on 20 April 2020, after speaking with Stuart Riley on the phone as described at paragraph 44(h) above, James Zehnder emailed Stuart Riley requesting Aspen to provide 5 registered nurses and 8 carers for each shift;
 - (j) otherwise denies paragraph 43.
44. In answer to paragraph 44 of the ASOC, the First Defendant:
- (a) repeats subparagraphs 43(a) – 43(j) of this Defence; and
 - (b) otherwise denies the allegations contained in paragraph 44.
45. In answer to paragraph 45 of the ASOC, the First Defendant:
- (a) repeats subparagraphs 38(a) and 38(b) of this Defence; and
 - (b) otherwise denies the allegations contained in paragraph 45.
46. The First Defendant denies the allegations contained in paragraph 46 of the ASOC.
47. In answer to paragraph 47 of the ASOC, the First Defendant:
- (a) admits that from time to time between 11 April 2020 and 20 April 2020, its staff were unable to attend to communications from family members of Residents by reason that available staff was limited and the care of Residents was prioritised;
 - (b) further says that:
 - (i) from 17 April 2020, an offsite communications team was enacted by the First Defendant;

- (ii) from 20 April 2020, the First Defendant adopted a policy of families of COVID-19 positive Residents receiving two phone calls per day by onsite registered nurses, and families of COVID-19 negative Residents receiving one phone call per day from onsite staff;
 - (iii) from 1 May 2020, a Family Support Program was developed and established to facilitate communication with families of Residents;
 - (iv) from about 7 May 2020, the First Defendant appointed Andrew Kinkade as an advisor, including for the purpose of advising on communications, and Mr Kinkade's advice was accepted and implemented by the First Defendant throughout the time of his appointment, as directed by the Section 63U Notice;
 - (v) revision and review of its communication processes occurred throughout the Outbreak; and
- (c) otherwise denies the allegations contained in paragraph 47.
48. In answer to paragraph 48 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, paragraph 48 is vague and embarrassing;
 - (b) further says that:
 - (i) on 22 April 2020, it sent a letter to family of Residents;
 - (ii) on 23 April 2020, it hosted a webinar with the family of Residents;
 - (iii) on 30 April 2020, it hosted a webinar with the family of Residents; and
 - (c) otherwise denies the allegations contained in paragraph 48.
49. In answer to paragraph 49 of the ASOC, the First Defendant:
- (a) says that on 28 April 2020, Mary Watson, Anthony Bowe and Louise Payne wrote to the First Defendant, stating that they did so on behalf of the families and friends of Newmarch House Residents Group, and informed the First Defendant, amongst other things, that they considered that communication from the First Defendant and Newmarch House was far from satisfactory;
 - (b) repeats subparagraphs 47(a) and 47(b) of this Defence; and
 - (c) says that it is unable to plead with greater specificity in answer to paragraph 49 in the absence of:
 - (i) identification of persons said to be Family;
 - (ii) particularisation of the communications with those persons; and
 - (d) otherwise denies the allegations contained in paragraph 49.
50. In answer to paragraph 50, the First Defendant:
- (a) admits that the Family Support Program was established on 30 April 2020;
 - (b) repeats subparagraphs 47(a) and 47(b) of this Defence;
 - (c) says that the establishment of the Family Support Program pre-dated the appointment of Andrew Kinkade as independent adviser on or about 7 May 2020;
 - (d) further says that on 3 May 2020, it announced the start of a comprehensive Family Support Program involving:
 - (i) a dedicated team of registered nurses calling the Resident's nominated representative, which commenced on 5 May 2020;

- (ii) window visits between family and Residents via a booking system;
 - (iii) Residents able to use a mobile phone were provided one solely for their use;
 - (iv) daily email updates to families;
 - (v) webinars for families of Residents;
 - (vi) counselling and chaplaincy services provided to all Residents and families; and
- (e) otherwise denies the allegations contained in paragraph 50.
51. The First Defendant does not plead to paragraph 51 of the ASOC as it contains no allegations against it.
52. In answer to paragraph 52 of the ASOC, the First Defendant:
- (a) says that at all material times, registered nursing staff with infection prevention and control expertise were onsite at Newmarch House;
 - (b) repeats subparagraph 5(c)(ii) – 5(c)(v) of this Defence;
 - (c) further says that:
 - (i) from 13 April 2020 until the end of the Outbreak, Dr Branley was regularly on site at Newmarch House;
 - (ii) from 17 April 2020, Anglicare staff with IPAC expertise in aged care facilities were on site at Newmarch House daily;
 - (iii) from 24 April 2020 until 8 May 2020, three experienced clinical managers from BaptistCare were onsite at Newmarch House in accordance with the Section 63S Notice;
 - (iv) from 1 May 2020, Kathy Dempsey was engaged at Newmarch House;
 - (v) on or about 13 May 2020, Felicity Hill managed the implementation of infection prevention and control measures at Newmarch House, including further initiatives to ensure staff complied with infection prevention and control requirements with the support from the infection control practitioners, Kathy Dempsey and Jo Tallon from Aspen Medical.

Particulars

As part of her responsibility for infection control, Felicity Hill:

- (a) appointed a number of Newmarch House staff as infection prevention control (**IPC**) 'Champions', charged with monitoring infection control process, including proper PPE donning and doffing procedures;
- (b) instructed the IPC Champions to undertake 10 modules of training in infection control;
- (c) developed an Infection Control Action Plan for Newmarch House, which commenced on 18 May 2020;
- (d) implement a step-down process in respect of the requirements for PPE in some of the units, on the advice from Kathy Dempsey; and
- (e) in consultation with Kathy Dempsey, prepared an education plan regarding the new PPE requirements in different units, which was then delivered by the workplace trainers.

- (d) otherwise denies the allegations contained in paragraph 52.
53. In answer to paragraph 53 of the ASOC, the First Defendant:
- (a) does not plead to the allegations concerning the Second Defendant;
 - (b) admits that it did not implement daily testing to screen Residents for COVID-19 at Newmarch House;
 - (c) says that decisions about COVID-19 testing for Residents and staff, including the frequency of testing, were the responsibility of the Public Health Unit; and
 - (d) further says that at all times, it acted in accordance with the advice and requirements of the Public Health Unit.
54. In answer to paragraph 54, the First Defendant:
- (a) does not plead to the allegations concerning the Second Defendant;
 - (b) says that daily PCR testing for staff at Newmarch House commenced on 3 May 2020;
 - (c) further says that:
 - (i) decisions about COVID-19 testing for persons on site at Newmarch House, including the frequency of testing, were the responsibility of the Public Health Unit; and
 - (ii) at all times it acted in accordance with the advice and requirements of the Public Health Unit; and
 - (d) otherwise denies the allegations contained in paragraph 54.
55. In answer to paragraph 55 of the ASOC, the First Defendant:
- (a) does not plead to the allegations concerning the Second Defendant;
 - (b) repeats and relies on matters pleaded in paragraphs 5(c)(iv) – 5(c)(viii) above;
 - (c) says that infection control measures were implemented to restrict the movement of staff, third-party contractors and health agency workers between COVID-19 positive Residents and COVID-19 negative Residents; and

Particulars

Clinical lines were established at the doorway of the rooms of the Residents who have tested positive for COVID-19. When a Resident tested positive, the front door of their room became an effective clinical line. Signs and PRE stations were located at the entrance to the COVID-19 positive Resident's room.

Staff break areas and toilets were segregated into COVID-19 attending and non-COVID-19 attending teams.

The First Defendant sourced more cleaning staff to ensure that cleaning staff does not travel between COVID-19 positive and COVID-19 negative Residents.

As the outbreak progressed, clinical zones were marked using brightly coloured tape (mostly yellow).

- (d) otherwise denies the allegations contained in paragraph 55.
56. In answer to paragraph 56 of the ASOC, the First Defendant:
- (a) does not plead to the allegations concerning the Second Defendant;

- (b) says that as presently pleaded, paragraph 56 is vague and embarrassing;
 - (c) repeats subparagraphs 5(c)(iv) – 5(c)(viii) of this Defence;
 - (d) further says that
 - (i) at all times during the course of the Outbreak, it took reasonable steps to implement the advice provided to it by the Commonwealth Department of Health, the Public Health Unit and medical and allied health experts, including Dr Branley;
 - (ii) throughout the Outbreak, Residents were housed in individual rooms with individual bathrooms; and
 - (e) otherwise denies the allegations contained in paragraph 56.
57. In answer to paragraph 57 of the ASOC, the First Defendant:
- (a) does not plead to the allegations concerning the Second Defendant;
 - (b) says that the allegations as pleaded are vague and embarrassing, including because the Plaintiff has not identified what is meant by the term 'cohorting' in paragraph 57 of the ASOC with specificity but rather asserts multiple, inconsistent, definitions apply;
 - (c) further says that:
 - (i) on and from 12 April 2020, all Residents were confined to their rooms;
 - (ii) at all times, the First Defendant implemented the advice of the Commonwealth Department of Health, the Public Health Unit and medical practitioners and allied health care workers who were working with it to manage the Outbreak including by:
 - (A) moving Residents in the Wentworth wing of Newmarch House who were positive to COVID-19 to either the Blaxland wing or the Lawson wing of Newmarch House to reduce the potential for COVID-19 transmission;
 - (B) working with Dr Branley to create a 'clean zone' within the Wentworth wing of Newmarch House;
 - (C) by 1 May 2020, some Residents were moved on the basis of advice received from the Clinical Excellence Commission, which involved relocating Residents to consolidate cases and better contain infections based on the location of Residents, reducing overall distance of cases and controls for cross transmission; and
 - (d) otherwise denies the allegations contained in paragraph 57.
58. The First Defendant denies the allegations against it contained in paragraph 58 of the ASOC and otherwise does not plead to paragraph 58.
59. The First Defendant denies the allegations against it contained in paragraph 59 of the ASOC and otherwise does not plead to paragraph 59.
60. The First Defendant does not plead to paragraph 60 of the ASOC as it does not contain any allegations against it.
61. The First Defendant does not plead to paragraph 61 of the ASOC as it does not contain any allegations against it.
62. The First Defendant does not plead to paragraph 62 of the ASOC as it does not contain any allegations against it.

63. The First Defendant does not plead to paragraph 63 of the ASOC as it contains no allegations against it.
64. In answer to paragraph 64 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, paragraph 64 of the ASOC is vague and embarrassing including by reason that allegations as to an “*obligation to provide clear leadership*” does not form any part of the elements of the cause of action apparently pleaded by the Plaintiff;
 - (b) further says that:
 - (i) throughout the Outbreak, it owed a duty to Residents to take reasonable care in providing aged care services at Newmarch House including in the implementation of infection control measures;
 - (ii) it complied with that duty; and
 - (c) otherwise denies the allegations contained in paragraph 64.
65. In answer to paragraph 65 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, paragraph 65 of the ASOC is vague and embarrassing including by reason that the allegations as put at paragraph 65 do not form any part of the elements of the cause of action apparently pleaded by the Plaintiff;
 - (b) repeats subparagraph 64(b); and
 - (c) otherwise denies the allegations contained in paragraph 65.
66. In answer to paragraph 66 of the ASOC, the First Defendant:
- (a) says that on 17 April 2020, the ‘Hospital in the Home’ program (**HITH**) was implemented at Newmarch House on the advice of the Public Health Unit and Dr Branley;
 - (b) further says that Dr Branley advised that residents who tested positive to COVID-19 were admitted as patients of Nepean Blue Mountains Hospital;
 - (c) denies the allegations made against it in paragraph 66; and
 - (d) otherwise does not plead to the allegations contained in paragraph 66 of the ASOC.
67. In answer to paragraph 67 of the ASOC, the First Defendant:
- (a) denies the allegations made against it; and
 - (b) otherwise does not plead to the paragraph.
68. The First Defendant does not plead to paragraph 68 of the ASOC as it does not contain any allegations against it.
69. The First Defendant does not plead to paragraph 69 of the ASOC as it does not contain any allegations against it.
70. In answer to paragraph 70 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, the allegation in paragraph 70 made against it is embarrassing;
 - (b) further says that it had no power, authority or ability to appoint a lead clinician in respect of the HITH or VACS models of care; and
 - (c) otherwise does not plead to paragraph 70 insofar as it does not contain any allegations against it.

71. In answer to paragraph 71 of the ASOC, the First Defendant:
- (a) says that on or about 14 April 2020, VACS commenced providing clinical care and services at Newmarch House in responding to the COVID-19 Outbreak; and
 - (b) otherwise does not admit paragraph 71.
72. The First Defendant does not plead to paragraph 72 of the ASOC as it contains no allegations against it.
73. The First Defendant does not plead to paragraph 73 of the ASOC as it contains no allegations against it.
74. The First Defendant does not plead to paragraph 74 of the ASOC as it contains no allegations against it.
75. In answer to paragraph 75 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, paragraph 75 of the ASOC is vague and embarrassing including by reason that it fails to identify who is alleged to have breached the HITH Guideline and HITH Policy and the nature of the care provided to the Residents;
 - (b) repeats paragraph 67; and
 - (c) otherwise does not plead to paragraph 75 as it contains no allegations against it.
76. The First Defendant does not plead to paragraph 76 of the ASOC as it contains no allegations against it.
77. The First Defendant does not plead to paragraph 77 of the ASOC as it contains no allegations against it.
78. In answer to paragraph 78 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, paragraph 78 of the ASOC is vague and embarrassing including by reason that it fails to identify who is alleged to have breached the terms of the Flow chart; and
 - (b) does not plead to paragraph 78 as it contains no allegations against it.
79. The First Defendant does not plead to paragraph 79 of the ASOC as it contains no allegations against it.
80. The First Defendant does not plead to paragraph 80 of the ASOC as it contains no allegations against it.
81. In answer to paragraph 81 of the ASOC, the First Defendant:
- (a) says that as presently pleaded, paragraph 81 of the ASOC is vague and embarrassing including by reason that it fails to identify who is alleged to have breached the terms of the Step-Up Plan; and
 - (b) does not plead to paragraph 81 as it contains no allegations against it.
82. In answer to paragraph 82, the First Defendant:
- (a) admits that Newmarch House was not a hospital: and
 - (b) otherwise denies the allegations contained in paragraph 82.
83. The First Defendant does not plead to paragraph 83 of the ASOC as it contains no allegations against it.
84. The First Defendant does not plead to paragraph 84 of the ASOC as it contains no allegations against it.

85. The First Defendant does not plead to paragraph 85 of the ASOC as it contains no allegations against it.
86. The First Defendant does not plead to paragraph 86 of the ASOC as it contains no allegations against it.
87. The First Defendant does not plead to paragraph 87 of the ASOC as it contains no allegations against it.
88. The First Defendant does not plead to paragraph 88 of the ASOC as it contains no allegations against it.
89. The First Defendant does not plead to paragraph 89 of the ASOC as it contains no allegations against it.
90. The First Defendant does not plead to paragraph 90 of the ASOC as it contains no allegations against it.
91. The First Defendant does not plead to paragraph 91 of the ASOC as it contains no allegations against it.
92. The First Defendant does not plead to paragraph 92 of the ASOC as it contains no allegations against it.
93. The First Defendant does not plead to paragraph 93 of the ASOC as it contains no allegations against it.
94. The First Defendant does not plead to paragraph 94 of the ASOC as it contains no allegations against it.
95. The First Defendant does not plead to paragraph 95 of the ASOC as it contains no allegations against it.
96. The First Defendant does not plead to paragraph 96 of the ASOC as it contains no allegations against it.
97. In answer to paragraph 97 of the ASOC, the First Defendant:
 - (a) in answer to subparagraph (a), says that:
 - (i) as presently pleaded, subparagraph (a) is vague and embarrassing including because the number of nursing staff and nursing services required for Residents differed depending on the personal health circumstances of each Resident;
 - (ii) during the Outbreak, high quality registered nurses, including staff from St Vincent's Hospital, provided in person care to Residents;
 - (iii) nursing staff also provided care to Residents through VACS; and
 - (iv) denies the allegations in subparagraph (a);
 - (b) in answer to subparagraph (b), says that:
 - (i) as presently pleaded, subparagraph (b) is vague and embarrassing including because the level of observation required for Residents differed depending on the personal health circumstances of each Resident;
 - (ii) observations were taken of Residents regularly throughout the Outbreak; and
 - (iii) denies the allegations in subparagraph (b);
 - (c) says that in the absence of any particularisation of subparagraph (c), it is unable to plead to the subparagraph;

- (d) in answer to subparagraph (d), says that:
 - (i) that the extent to which a Resident required a doctor, and the type of medical practitioner required, differed depending on the needs of each Resident;
 - (ii) doctors were available at Newmarch House throughout the Outbreak, including in person and online or through telehealth services; and
 - (iii) denies the allegations contained in subparagraph (d);
- (e) in answer to subparagraph (e), says that:
 - (i) each Resident within Newmarch House had their own room and their own bathroom;
 - (ii) depending upon the particular hospital and ward, it was unlikely that Residents would be able to be accommodated in their own room and with their own bathroom in a hospital; and
 - (iii) denies the allegations contained in subparagraph (e);
- (f) denies the allegations contained in subparagraph (f);
- (g) denies the allegations contained in subparagraph (g);
- (h) denies the allegations contained in subparagraph (h);
- (i) denies the allegations contained in subparagraph (i);
- (j) repeats subparagraphs (a), (b) and (d) and otherwise denies the allegations contained in subparagraph (j);
- (k) admits subparagraph (k) but says that it worked with the Public Health Unit to obtain pathology services as required throughout the Outbreak;
- (l) says that through the Public Health Unit, HITH and VACS, Residents had access to adequate and appropriate medications throughout the Outbreak and denies the allegations contained in subparagraph (l);
- (m) denies the allegations in subparagraph (m);
- (n) admits subparagraph (n);
- (o) denies the allegations contained in subparagraph (o);
- (p) repeats subparagraph (e) and otherwise denies the allegations contained in subparagraph (p);
- (q) says that the question of whether it was appropriate to conduct an assessment virtually and, or by telehealth appointment is a question for a particular medical practitioner to be determined on the basis of particular circumstances of each Resident and otherwise denies the allegations in subparagraph (q);
- (r) says that review and advice of appropriate health care professionals, including palliative health professionals, was obtained where required and otherwise denies the allegations in subparagraph (r); and
- (s) in further answer to the whole of paragraph 97 says that:
 - (i) prior to the Outbreak, the policy had been adopted at Nepean Hospital to admit all COVID-19 patients to HITH and manage them at home unless they required hospitalisation; and

- (ii) throughout the Outbreak, clinical decisions, including as to whether a Resident ought to be moved to hospital, were made by clinicians, including members of the VACS team, Dr Branley and Dr Kakkat, in conjunction with the Resident and their representative, and not by the First Defendant; and
 - (t) otherwise denies the allegations in paragraph 97.
98. The First Defendant admits paragraph 98 of the ASOC.
99. The First Defendant admits paragraph 99 of the ASOC.
100. In answer to paragraph 100 of the ASOC, the First Defendant says that the Quality of Care Principles 2014 are a legislative instrument made under section 96-1 of the Aged Care Act, and otherwise admits paragraph 100.
101. In answer to paragraph 101 of the ASOC, the First Defendant says that the Quality of Care Principles 2014 are a legislative instrument made under section 96-1 of the Aged Care Act, and otherwise admits paragraph 101.
102. The First Defendant admits paragraph 102 of the ASOC.
103. The First Defendant admits paragraph 103 of the ASOC.
104. The First Defendant admits paragraphs 104 to 107 of the ASOC on the assumption that paragraphs 105 to 107 are intended to be subparagraphs of paragraph 104.
105. Not used in light of paragraph 104 of this Defence.
106. Not used in light of paragraph 104 of this Defence.
107. Not used in light of paragraph 104 of this Defence.
108. The First Defendant admits paragraph 108 of the ASOC.
109. The First Defendant admits paragraph 109 of the ASOC.
110. The First Defendant admits paragraph 110 of the ASOC.
- 110A. The First Defendant admits paragraph 110A of the ASOC.
- 110B. In answer to paragraph 110B of the ASOC, the First Defendant says that in the circumstances of the COVID-19 pandemic, the scope of its duty of care to Residents extended to:
- (a) on and from 12 March 2020, it owed Residents a duty to exercise reasonable care in implementing measures to prepare for a potential outbreak of COVID-19 at Newmarch House in accordance with Commonwealth and NSW Health guidance;
 - (b) on and from 11 April 2020, it owed Residents a duty to exercise reasonable care in implementing:
 - (i) the advice and measures determined by the Public Health Unit, clinicians and allied health professionals treating Residents who were infected with COVID-19; and
 - (ii) the advice and measures determined by the Public Health Unit, clinicians, allied health professionals, the ACQSC and the adviser appointed by the ACQSC who were engaged in advising on minimising the risk of further infection during the course of the Outbreak; and
 - (c) otherwise denies the allegations contained in paragraph 110B.
- 110C. In answer to paragraph 110C, the First Defendant:
- (a) repeats paragraphs 110 to 110B of this Defence; and

- (b) denies the allegations contained in paragraph 110C.
- 110D. In answer to paragraph 110D of the ASOC, the First Defendant:
- (a) repeats paragraphs 110 to 110C of this Defence; and
 - (b) denies the allegations contained in paragraph 110D.
111. The First Defendant denies the allegations contained in paragraph 111 of the ASOC.
112. In answer to paragraph 112 of the ASOC, the First Defendant:
- (a) in answer to subparagraph (a):
 - (i) says that subparagraph (a) as presently pleaded, is impermissibly generalised;
 - (ii) admits that in certain circumstances, there was a risk that a failure to exercise reasonable care and skill in the provision of Residential Care Services at Newmarch House (or any aged care facility) could cause a resident to suffer injury or death; and
 - (iii) otherwise denies the allegations in subparagraph (a);
 - (b) in answer to subparagraph (b):
 - (i) says that subparagraph (a) as presently pleaded, is impermissibly generalised;
 - (ii) admits that in certain circumstances, there was a risk that a failure by persons generally to exercise reasonable care and skill in the prevention, detection, control, management and treatment of COVID-19 infection could result in residents in an aged care facility or persons generally becoming infected with, and dying from, COVID-19; and
 - (iii) otherwise denies the allegations contained in subparagraph (b);
 - (c) in answer to subparagraph (c):
 - (i) says that there was a risk that, if family members who had a close relationship with a resident were exposed to distressing circumstances arising from death of their related resident at Newmarch House as a consequence of contracting COVID-19, that some of them could suffer or were at risk of suffering, significant distress and anguish; and
 - (ii) otherwise denies the allegations contained in subparagraph (c); and
 - (d) otherwise denies the allegations in paragraph 112.
113. In answer to paragraph 113 of the ASOC the First Defendant:
- (a) repeats paragraph 112 of this Defence; and
 - (b) denies the allegations in paragraph 113.
114. In answer to paragraph 114 of the ASOC, the First Defendant:
- (a) repeats paragraphs 112 and 113 of this Defence;
 - (b) says that the risk identified in subparagraph 112(c) was not insignificant; and
 - (c) otherwise denies the allegations contained in paragraph 114.
115. The First Defendant denies the allegations contained in paragraph 115 of the ASOC.
116. In answer to paragraph 116 of the ASOC, the First Defendant:

- (a) admits that its statutory responsibilities as an aged care services provider and guidance and guidelines issues by the Commonwealth and State health and regulatory authorities informed the duty of care it owed to Residents; and
 - (b) otherwise denies the allegations contained in paragraph 116.
117. The First Defendant does not plead to paragraph 117 of the ASOC as it contains no allegations against it.
- 117A. The First Defendant does not plead to paragraph 117A of the ASOC as it contains no allegations against it.
- 117B. The First Defendant does not plead to paragraph 117B of the ASOC as it contains no allegations against it.
- 117C. The First Defendant does not plead to paragraph 117C of the ASOC as it contains no allegations against it.
118. The First Defendant does not plead to paragraph 118 of the ASOC as it contains no allegations against it.
119. The First Defendant does not plead to paragraph 119 of the ASOC as it contains no allegations against it.
120. The First Defendant does not plead to paragraph 120 of the ASOC as it contains no allegations against it.
121. The First Defendant does not plead to paragraph 121 of the ASOC as it contains no allegations against it.
122. The First Defendant does not plead to paragraph 122 of the ASOC as it contains no allegations against it.
123. In answer to paragraph 123 of the ASOC, the First Defendant:
- (a) Says that as presently drafted, this paragraph does not appear to contain an allegation against the First Defendant, and the First Defendant therefore does not plead to it;
 - (b) otherwise does not admit the paragraph.
124. In answer to paragraph 124 of the ASOC, the First Defendant:
- (a) denies the allegations made against it; and
 - (b) otherwise does not plead to paragraph 124.
125. In answer to paragraph 125 of the ASOC, the First Defendant:
- (a) says that as pleaded paragraph 125 is embarrassing;
 - (b) further says that the Statement of Particulars is deficient; and
 - (c) otherwise denies any allegation against it contained in paragraph 125.
126. The First Defendant denies the allegations contained in paragraph 126 of the ASOC.
127. In answer to paragraph 127 of the ASOC, the First Defendant:
- (a) denies the allegations made against it in paragraph 127;
 - (b) says it did not make decisions as to whether to transfer COVID-19 positive Residents to hospital; and
 - (c) otherwise does not plead to paragraph 127.

128. In answer to paragraph 128 of the ASOC, the First Defendant:
- (a) denies the allegations made against it; and
 - (b) says it was not within the First Defendant's authority to decide to utilise the HITH and VACS services; and
 - (c) otherwise does not plead to paragraph 128.
129. In answer to paragraph 129 of the ASOC, the First Defendant:
- (a) repeats subparagraph 27(a) of this Defence;
 - (b) denies the allegations made against it; and
 - (c) otherwise does not plead to paragraph 129.
130. The First Defendant does not plead to paragraph 130 of the ASOC as it contains no allegations against it.
131. The First Defendant denies the allegations contained in paragraph 131 of the ASOC.
132. In answer to paragraph 132 of the ASOC, the First Defendant:
- (a) denies the allegations made against it in paragraph 132; and
 - (b) otherwise does not plead to the paragraph.
- 132A. The First Defendant denies the allegations contained in paragraph 132A of the ASOC.
- 132B. In answer to paragraph 132B of the ASOC, the First Defendant:
- (a) denies the allegations against it; and
 - (b) otherwise does not plead to paragraph 132B.
133. The First Defendant denies the allegations made against it in paragraph 133 of the ASOC and otherwise does not plead to that paragraph.
134. The First Defendant denies the allegations made against it in paragraph 134 of the ASOC and otherwise does not plead to that paragraph.
135. In answer to paragraph 135 of the ASOC, the First Defendant denies that it was negligent and that it is liable for loss or damage, if any, suffered by any Group Member and otherwise does not plead to that paragraph.
136. The First Defendant says that none of the questions as formulated at paragraph 136 of the ASOC are in a proper form to enable any such questions as may be common to be determined by reason of their vague and generalised nature.
137. In further answer to the whole of the Claim, the First Defendant says:
- Resident Agreement terms which inform the scope of the duty of care owed by the First Defendant*
138. The matters which inform the scope of the First Defendant's duty of care to each Resident, and in turn any duty owed by the First Defendant to Group Members (if, which is denied, the First Defendant owed any such duty to Group Members), include the terms of the particular Resident Agreement which the First Defendant entered into with that Resident.
139. The matters which inform the scope of the First Defendant's duty of care to Ms Fahey, and in turn any duty owed by the First Defendant to the Plaintiff (if, which is denied, the First Defendant owed any such duty to the Plaintiff), includes the Resident Agreement which the First Defendant entered into with Ms Fahey on 11 December 2017 (the **Fahey Resident Agreement**).

Particulars

The Fahey Resident Agreement is in writing and was executed by a Residential Care Administrator on behalf of the First Defendant and Ms Fahey, and witnessed by the Plaintiff, on 11 December 2017.

140. Terms of the Fahey Resident Agreement include that:

- (a) The Plaintiff was the Representative of Ms Fahey;

Particulars

Important Information Schedule to the Fahey Resident Agreement.

- (b) As Ms Fahey's Representative, and in undertaking that role, the Plaintiff acknowledged and agreed that any decision as to Ms Fahey's health may be determined by Ms Fahey's enduring attorney;

Particulars

Fahey Resident Agreement clause 5.1(a).

- (c) Under the Fahey Resident Agreement, Accommodation means a room that was allotted to Ms Fahey, being room A27 in the Blaxland wing (**Room**);

Particulars

Fahey Resident Agreement clause 22 and Important Information Schedule.

- (d) The First Defendant would provide Ms Fahey with Accommodation Services as detailed in Schedule 5 to the Fahey Resident Agreement and as prescribed under the Aged Care Act and Aged Care Principles as well as the Quality of Care Principles as applicable from time to time based on Ms Fahey's assessed care needs;

Particulars

Fahey Resident Agreement clauses 8.1 and 22 (as applicable in respect of defined terms).

- (e) Ms Fahey could be moved from her Room non-voluntarily at the instigation of the First Defendant if, relevantly, a move was necessary on genuine medical grounds as assessed by an aged care assessment team or at least two medical or other health practitioners who were independent of the First Defendant and were chosen by Ms Fahey and were competent to assess the aged care needs of Ms Fahey;

Particulars

Fahey Resident Agreement clause 10.2(b).

- (f) Care Services under the Fahey Resident Agreement means those services detailed in Schedule 6 to the agreement and as prescribed under the Aged Care Act and Aged Care Principles as amended from time to time;

Particulars

Fahey Resident Agreement clause 22.

- (g) The First Defendant would provide Care Services in accordance with Ms Fahey's assessed care needs and her care plan;

Particulars

Fahey Resident Agreement clause 13.1.

- (h) Relevantly, the Care Services to be provided by the First Defendant to Ms Fahey included:
- (i) treatments and procedures that were to be carried out according to the instructions of a health professional or a person responsible for assessing Ms Fahey's personal care needs, including supervision and physical assistance with taking medications, and ordering and reordering medications, subject to the requirements of State or Territory Law;
 - (ii) assistance in obtaining health practitioner services by providing arrangements for community health, medical and other health practitioners to visit Ms Fahey, whether those arrangements were made by Ms Fahey, her relatives or other persons representing the interests of Ms Fahey or were made direct with a health practitioner; and
 - (iii) nursing Services by way of:
 - (A) initial assessment and care planning carried out by a nurse practitioner or registered nurse, and ongoing management and evaluation carried out by a nurse practitioner, registered nurse or enrolled nurse, acting in accordance with the scope of practice; and
 - (B) nursing services carried out by a nurse practitioner, registered nurse or enrolled nurse, or other professional appropriate to the service acting within the scope of practice.

Particulars

Fahey Resident Agreement Schedule 6.

141. The services that the First Defendant was required to, and did, provide to Residents generally and Ms Fahey in particular did not include:
- (a) providing personal medical advice (whether general or specialist medical advice), including medical advice as to the treatment to be provided to a Resident in the event that a Resident contracted a disease, including the coronavirus disease; and, or
 - (b) providing advice as to matters properly the subject of public health policy.
- Lack of Foreseeability*
142. If, which is denied, it is found that the First Defendant experienced staff shortages throughout the COVID -19 Outbreak at Newmarch House:
- (a) it was not foreseeable to an aged care services provider in the position of the First Defendant that there was a risk that compliance with Commonwealth surge workforce guidelines for aged care services providers would not be sufficient to ensure workforce support in the event of a Covid outbreak at Newmarch House; and, or
 - (b) the First Defendant ought not to have foreseen that the risk identified in subparagraph (a) might result in a person of normal fortitude in the position of Mr Fahey, or a Group Member, suffering a recognised psychiatric harm.
143. If, which is denied, it is found that the First Defendant was responsible for, or a party to, the decision not to 'cohort' Residents during the Outbreak at Newmarch House:
- (a) it was not foreseeable to an aged care services provider in the position of the First Defendant that there was a risk that a decision to implement the recommendations of the Public Health Unit and, or, Dr Branley with respect to 'cohorting' would not be sufficient performance of any obligation it owed to Residents in relation to that issue; and

- (b) the First Defendant ought not to have foreseen that the risk identified in subparagraph (a) might result in a person of normal fortitude in the position of Mr Fahey, or a Group Member, suffering a recognised psychiatric harm.

The First Defendant's alleged conduct did not affect the outcome for Residents who contracted Covid 19 prior to 11 April 2020

144. Further, if (which is denied) the First Defendant did owe a duty to the Plaintiff and Group Members and contravened that duty as alleged in the Amended Statement of Claim, of the 37 Residents who contracted COVID-19, a number of residents had contracted COVID-19 prior to 11 April 2020 such that 'cohorting' of Residents would not have affected the outcome of those cases.

Statutory limits on the availability of damages

145. If, which is denied, the First Defendant owed a duty to the Plaintiff and Group Members and breached that duty as alleged by the Plaintiff, then the First Defendant relies upon Part 2 of the *Civil Liability Act 2002* (NSW) in respect of the Plaintiff's and each Group Member's claim for damages generally and, in respect of those matters identified in the Amended Statement of Claim in relation to damages in particular further says as follows.
146. If, which is denied, the First Defendant owed a duty of care to the Plaintiff and Group Members and breached that duty as alleged by the Plaintiff, then pursuant to section 31 of the *Civil Liability Act 2002* (NSW), the Plaintiff and each Group Member is not permitted an award of damages for pure mental harm unless they establish that they have suffered a recognised psychiatric illness.
147. If, which is denied, the First Defendant owed a duty of care to the Plaintiff and Group Members and breached that duty as alleged by the Plaintiff, then pursuant to section 33 of the *Civil Liability Act 2002* (NSW), the Plaintiff and each Group Member is not permitted an award of damages for economic loss for consequential mental harm unless they establish that they have suffered a recognised psychiatric illness.
148. If, which is denied, the First Defendant owed a duty of care to the Plaintiff and Group Members and breached that duty as alleged by the Plaintiff, then pursuant to section 12 of the *Civil Liability Act 2002* (NSW), the Plaintiff and each Group Member cannot be awarded damages for past or future economic loss due to loss of earnings or the deprivation or impairment of earning capacity in an amount that exceeds 3 times the amount of average weekly earnings as at the date of the award.
149. If, which is denied, the First Defendant owed a duty of care to the Plaintiff and Group Members and breached that duty as alleged by the Plaintiff such as to result in any future economic loss, then:
- (a) pursuant to section 13 of the *Civil Liability Act 2002* (NSW):
- (i) the Plaintiff and each Group Member who claims such loss must satisfy the Court that the assumptions about future earning capacity or other events on which the award is to be based accord with their most likely future circumstances but for the injury; and
- (ii) any such future economic loss found by the Court on those assumptions is to be adjusted to an amount of damages for future economic loss that would have been sustained by reference to the percentage possibility that the events might have occurred but for the injury; and
- (b) pursuant to section 14(2)(b) of the *Civil Liability Act 2002* (NSW), any lump sum award of damages for future economic loss to the Plaintiff and each Group Member must be discounted by at least 5%.
150. If, which is denied, the First Defendant owed a duty of care to the Plaintiff and Group Members and breached that duty as alleged by the Plaintiff, then pursuant to section 16 of the *Civil Liability Act 2002* (NSW), the Plaintiff and each Group Member cannot be awarded damages

for non-economic loss unless they establish that the severity of the non-economic loss they claim to have suffered is at least 15% of the most extreme case.

151. If, which is denied, the First Defendant owed a duty of care to the Plaintiff and Group Members and breached that duty as alleged by the Plaintiff and damages for gratuitous attendant care services are claimed, then pursuant to section 15(2) of the *Civil Liability Act 2002* (NSW), no damages for gratuitous attendant care services may be awarded to the Plaintiff or any Group Member unless the court is satisfied that:
- (a) there is or was a reasonable need for the services to be provided; and
 - (b) the need has arisen or arose solely because of the injury to which the damages relate; and
 - (c) the services would not be provided to the claimant but for the injury.
152. Further, if, which is denied, the First Defendant owed a duty of care to the Plaintiff and Group Members and breached that duty as alleged by the Plaintiff and damages for gratuitous attendant care services are claimed, then:
- (a) pursuant to section 15(3) of the *Civil Liability Act 2002* (NSW), no damages for gratuitous attendant care services may be awarded to the Plaintiff or a Group Member unless the services are provided or to be provided for at least 6 hours per week and for a period of at least 6 consecutive months.
 - (b) pursuant to section 15(4) of the *Civil Liability Act 2002* (NSW), if gratuitous attendant care services are to be provided for not less than 40 hours per week, the amount of damages awarded to the Plaintiff or each Group Member must not exceed the amount per week estimated as the average weekly total earnings of all employees in New South Wales.
 - (c) pursuant to section 15(5) of the *Civil Liability Act 2002* (NSW), if gratuitous attendant care services are to be provided for less than 40 hours per week, the amount of those damages to the Plaintiff or a Group Member must not exceed the amount calculated at an hourly rate of one-fortieth of the amount per week estimated as the average weekly total earnings of all employees in New South Wales.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the [Legal Profession Uniform Law Application Act 2014](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

Solicitor on record

Date of signature

1 December 2023