Form 33
Rule 16.32

Defence

Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD 937/2014

OZTECH PTY LTD (ACN 005 907 871)

Applicant

THE PUBLIC TRUSTEE OF QUEENSLAND

Respondent

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I. Glossary

Term	Definition
333 Capital	333 Capital Pty Limited
Amending Deed	deed amending the Trust Deed dated 1 December 2006
Anderson, Mr	David Anderson: (a) chief financial officer of the Octaviar group from 2002 to 2 May 2008; and (b) a director of OIN from 11 October 2006 and who remains a director
Applicant	Oztech Pty Ltd
ASIC Act	*Australian Securities and Investment Commission Act 2001* (Cth)
ASX	Australian Stock Exchange
Capital	Capital Finance Australia Limited
Castle	MFS Castle Pty Limited
Challenger	Challenger Management Investment
Challenger proceedings	proceedings 50061/08 commenced in the Supreme Court of New South Wales in or about March 2008 by Challenger against, inter alia, OL and OIB
Corps Act	*Corporations Act 2001* (Cth)
Corps Regs	*Corporations Regulations 2001* (Cth)
Counsel	Queen's Counsel and Junior Counsel collectively
CVC	CVC Asia Pacific
Deed of Accession	deed signed by a Material Subsidiary acceding to the terms of the Guarantee Deed Poll

Term	Definition
Event of Default	has the meaning set out in clause 15.2 of the Terms of Issue
FC Act	*Federal Court of Australia Act 1976* (Cth)
Fortress	Fortress Credit Corporation (Australia) II Pty Limited
Fortress facility	facility agreement between Castle (as borrower), OL and OFS (as guarantors) and Fortress (as lender)
FT Act	*Fair Trading Act 1989* (Qld)
Group Members	the persons referred to in paragraph 19 of the SoC
Guarantee Deed Poll	deed poll by OL dated 2 November 2006 guaranteeing the payment by OIN of moneys payable to Noteholders in respect of a Note
Guarantors	each of OL, OFS, OA and OIB
Hall, Mr	Ian Hall, a partner of PwC and a registered liquidator
Insolvency Event	has the meaning set out in clause 15.2 of the Terms of Issue
Jenkins, Mr	Gareth Jenkins, a partner of Clayton Utz
Kelly, Mr	Ian Kelly of the Respondent
Korda, Mr	Mark Korda, a director of 333 Capital
McLaughlins	McLaughlins Financial Services Limited as Responsible Entity for the MFS Blue Sky Development Trust
Material Subsidiary	has the meaning set out in clause 15.2 of the Terms of Issue
Mentha, Mr	Mark Mentha, a director of 333 Capital
Mirvac	Mirvac Funds Management Limited

Term	Definition
MFS Bale	MFS Bale Resorts Pty Limited as trustee for the MFS Bale Resorts Trust
MPY	MFS Living and Leisure Group
NAB	National Australia Bank
Notes	notes issued by OIN pursuant to the Trust Deed and in accordance with the Terms of Issue
Noteholders	the holders of the Notes
Notice of Default	notice entitled "Notice of Event of Default" issued by the Respondent to OIN on 23 May 2008
Octaviar group	OL and its controlled entities
OIB notes	notes issued by OIB and subscribed for by Challenger
NZX	New Zealand Stock Exchange
OA	Octaviar Administration Pty Ltd (in liq) (formerly MFS Administration Pty Limited)
OFS	Octaviar Financial Services Ltd (in liq) (formerly MFS Financial Services Limited)
OIB	Octaviar Investment Notes Ltd (in liq) (formerly MFS Investment Bonds Limited)
OIN	Octaviar Investment Notes Limited (in liq) (formerly MFS Investment Notes Limited)
OIN 2007 half-year report	OIN's interim financial report issued on or about 14 March 2008 for the half year ended 31 December 2007
OL	Octaviar Limited (Receivers and Managers Appointed) (in liq) (formerly MFS Limited)
OL 2007 Annual	OL's consolidated annual financial report for the year

Term	Definition
Report	ended 30 June 2007
OL 2007 half-year report	OL's consolidated interim financial report issued on 28 April 2008 for the half year ended 31 December 2007
OLNZ	MFS New Zealand Limited (later OPI New Zealand Limited (in liq))
Pacific	MFS Pacific Finance Limited
PT Act	*Public Trustee Act* 1978 (Qld)
PwC	PricewaterhouseCoopers
Quarterly Report	report required pursuant to s283BF of the Corps Act
Respondent	The Public Trustee of Queensland
RFI proceedings	proceedings S2159 of 2008 commenced in the Supreme Court of Queensland by the Respondent on 11 March 2008 against OL and OIN
Roach, Mr	Robert Roach, a partner of PwC and a registered company auditor
Sharry, Mr	Scott Sharry, a solicitor employed by Clayton Utz
SoC	Statement of Claim
Stella	Stella Group business
Stella Holdings	MFS Stella Holdings Pty Limited
Stella Proceeds Deed	deed entered into between OL, OA, OFS, Castle, Stella Holdings and Fortress on or about 29 February 2008
Stella Share Sale Agreement	share sale agreement dated 3 February 2008 entered into by Stella Holdings (as seller), OL and Global Voyager Pty Ltd (as buyer)

Term	Definition
Terms of Issue	Notes terms of issue appearing as Schedule 1 of the Trust Deed (as amended)
TP Act	*Trade Practices Act 1974* (Cth)
Trust	debenture trust constituted by Trust Deed and amended by Amending Deed, to which Respondent was appointed as trustee
Trust Deed	deed constituting the Trust made between OIN, the Respondent and OL on 2 November 2006 entitled "MFS Note Trust"
Update to Creditors	document entitled "Octaviar Limited Group Update to Large Creditors" dated 17 April 2008
Mr Wedge	Patrick Wedge, Acting Public Trustee of Queensland
White, Mr	Craig White: (a) the deputy chief executive officer of the Octaviar group from May 2006 to 21 January 2008; (b) the chief executive officer of the Octaviar group from 21 January 2008 to 2 May 20108; and (c) a director of OIN from 11 October 2006 to 2 May 2008

II. Summary

1. In answer to the allegations in paragraph 1 of the SoC, the Respondent:

    (a) says as pleaded in paragraphs 72, 74, 76, 78 and 96 – 98 below; and

    (b) otherwise does not admit the allegations in paragraph 1 of the SoC.

2. In answer to the allegations in paragraph 2 of the SoC, the Respondent:

(a) admits the allegations therein; and

(b) says as pleaded in paragraphs 76, 78 and 89 – 95 below.

3. In answer to the allegations in paragraph 3 of the SoC, the Respondent:

(a) admits the first sentence of paragraph 3 of the SoC;

(b) says as pleaded in paragraphs 78(c) and 80 – 83 below; and

(c) otherwise does not admit the allegations in paragraph 3 of the SoC.

4. The Respondent does not plead to paragraph 4 of the SoC because it contains no allegations against it.

5. In answer to the allegations in paragraph 5 of the SoC, the Respondent:

(a) says as pleaded in paragraph 105 below; and

(b) otherwise does not admit the allegations therein.

6. In answer to the allegations in paragraph 6 of the SoC, the Respondent:

(a) admits the allegations therein; and

(b) says as pleaded in paragraph 114 below.

7. In answer to the allegations in paragraph 7 of the SoC, the Respondent:

(a) admits that OIN and OL were in financial difficulty by 29 February 2008;

(b) admits and avers that the Respondent knew this fact; and

(c) says further as pleaded in **Part III** below and in paragraphs 138 – 139 below in answer to paragraphs 83 and 84 of the SoC.

8. In answer to the allegations in paragraph 8 of the SoC, the Respondent:

(a) admits the allegations therein; and

(b) says as pleaded in paragraph 128 below.

9. The Respondent admits the allegations in paragraph 9 of the SoC.

10. In answer to the allegations in paragraph 10 of the SoC, the Respondent:

Overview

(a) says that following the collapse in the share price of OL on 18 January 2008 the Respondent promptly sought accounting and legal advice, and acted in good faith in accordance with that advice by diligently seeking information from OL and OIN as to their financial position, including their capacity to pay interest and principal in respect of the Notes, diligently investigated whether there had been an Event of Default under the Terms of Issue permitting the Respondent to take enforcement action, and diligently considered what steps should properly be taken to protect the interests of Noteholders, and for the Respondent to discharge its obligations under the Trust Deed and Chapter 2L of the Corps Act;

(b) says that as at 29 February 2008 the Respondent ought not to have concluded that there had been a default under the Terms of Issue allowing it to accelerate payment of the Notes, and ought not to have served a notice of Event of Default. Nor as at 29 February 2008 ought the Respondent to have commenced proceedings seeking orders winding up OIN, OL or the Guarantors, or freezing orders or other relief described in paragraph 87 of the SoC;

Further detail

(c) says in answer to paragraph 10 as pleaded in **Part III** below, and further as pleaded in paragraphs 138, 139, 142, 145 – 147 below in answer to paragraphs 83, 84, 87, 90 and 91 of the SoC;

SoC, para 10 defective

(d) says that paragraph 10 of the SoC is defective in that it is embarrassing and vexatious, and/or fails to state necessary material facts, and is likely to prejudice and delay the proceedings, within the meaning of Rules 16.02(1)(d), 16.03(1)(b) and 16.02(2) of the Federal Court Rules 2011(Cth) (hereafter "**defective**"), because:

  (i) it contains no allegation that the Respondent should on or before 29 February 2008 have issued a notice of Event of Default to OIN and declared the Notes due and payable or initiated court proceedings to protect the interest of the Group Members;

  (ii) the SoC does not plead facts establishing that the Respondent should have done so;

(iii) the allegation in paragraph 7 of the SoC does not support an assertion that the Respondent should on or before 29 February 2008 have issued a notice of Event of Default to OIN and declared the Notes due and payable, or applied to wind-up OIN or OL, or applied for freezing orders in respect of OIN or OL; and

(iv) the SoC does not identify when, how or to what extent the assets available to OIN had been "substantially dissipated" by "the time the Respondent took action to protect the interests of Group Members", when it is alleged that the Respondent "took action", or why the alleged dissipation would not otherwise have occurred; and

(e) otherwise denies the allegations in paragraph 10 of the SoC.

11. The Respondent admits the allegations in paragraph 11 of the SoC.

12. The Respondent admits the allegations in paragraph 12 of the SoC.

13. The Respondent admits the allegations in paragraph 13 of the SoC.

14. The Respondent admits the allegations in paragraph 14 of the SoC.

15. The Respondent admits the allegations in paragraph 15 of the SoC and does not plead to paragraph 16 of the SoC.

III. The conduct of the Public Trustee of Queensland

16. The case advanced in the SoC is that following the collapse in OL's share price on Friday, 18 January 2008, the Respondent acted too slowly to protect the interests of Noteholders, and that after 18 January 2008 and on or before 29 February 2008, at the latest, the Respondent should have taken the steps pleaded in paragraphs 84, 85, 86, 87 and 89 of the SoC, with the result pleaded in paragraphs 88 of the SoC, and so avoiding the losses pleaded in 91 of the SoC.

17. The course of events between 18 January 2008 and 29 February 2008 and between 1 March 2008 and 4 June 2008 is set out in paragraphs 18 – 71 below. By reason of the matters there pleaded, by 29 February 2008 the Respondent should not and could not have taken any of the steps described in paragraphs 84, 85, 86, 87 and 89 of the SoC. In the premises, the claims made are without foundation and should be dismissed.

January and February 2008

18. On or about 18 January 2008, the Respondent received and reviewed OIN's Quarterly Report dated 16 January 2008 with respect to the quarter ending 31 December 2007, which stated (inter alia) that:

    (a) neither OIN nor any guarantor (as defined in section 9 of the Corps Act) had failed to comply with the Trust Deed, Chapter 2L of the Corps Act or the Terms of Issue;

    (b) no events had happened that caused or could cause any amount deposited or lent under the Notes to become immediately due and payable, the Notes to become immediately enforceable or any other right or remedy under the Terms of Issue or the Trust Deed to become immediately enforceable;

    (c) no circumstances had occurred that materially prejudiced OIN or any of its subsidiaries or any of the Guarantors or any security or charge included in or created by the Notes or the Trust Deed; and

    (d) there were no matters that may materially prejudice any security or the interest of Noteholders.

19. On 18 January 2008, OL made an ASX & Media Announcement concerning its intention to structurally separate and offer for sale shares in Stella. Details of that announcement are pleaded in paragraph 105 below in answer to paragraph 50 of the SoC.

20. By the close of trade on 18 January 2008, OL shares trading on the ASX were listed at 99c per share, having traded at a price of $3.18 per share at the close of trading the previous day.

21. During January and February 2008, the Respondent obtained and reviewed publicly available information on the financial circumstances of the Octaviar group, being:

    (a) ASX & Media Announcements;

    (b) ASX Market Releases;

    (c) Statutory information filed with ASIC and the ASX; and

    (d) Press articles.

<u>*Seeking and obtaining of accounting advice*</u>

22. In about the middle of January 2008, and after 18 January 2008, the Respondent requested that PwC advise it as to the steps which PwC considered the Respondent should take with respect to OL's current situation, including a suggested course of inquiry into the financial position of OL and possible questions for the management of OL.

PARTICULARS

Discussion between Mr Kelly and Mr Hall.

23. On 29 and 31 January 2008, the Respondent received advice from PwC recommending that the Respondent:

(a) seek answers to a number of questions from management of OIN and OL in order to ascertain whether OIN and OL had complied, and would be able to comply, with their obligations in respect of the Notes; and

(b) obtain legal advice to understand the rights and obligations of the Respondent on behalf of the Noteholders and available legal options open to the Respondent to enforce rights and seek information and co-operation from OL.

PARTICULARS

The advice appears in an email of Mr Hall to Mr Kelly dated 29 January 2008, and a report of PwC dated 31 January 2008.

24. The Respondent acted in good faith in accordance with the advice received from PwC by:

(a) on 4 February 2008, engaging Clayton Utz to advise the Respondent and to act on its behalf as pleaded in paragraphs 28 and 29 below; and

(b) instructing Clayton Utz to request information as pleaded in paragraphs 33, 35 and 45 below, and commencing proceedings in the Supreme Court of Queensland as pleaded in paragraph 47 below ("the RFI proceedings"), which requests and proceedings sought from OIN and OL (inter alia) the information recommended by PwC in its advice of 29 and 31 January 2008.

25. The Respondent subsequently sought further advice from PwC, as pleaded in paragraphs 40, 44, 49, 54 and 59 below, and accepted and acted in good faith in accordance with that advice, as pleaded in paragraphs 40 – 65 below.

26. PwC was:

(a) a firm of accountants within the meaning of clause 10.4 of the Trust Deed; and

(b) apparently qualified to provide the advice requested and provided as aforesaid (paragraphs 22, 23 and 25 above).

27. It was appropriate and proper for the Respondent to seek and act upon that advice pleaded above in that, in doing so, the Respondent acted in good faith and for proper purposes, and exercised the care of an ordinary prudent person of business in performing the Trust as pleaded in paragraph 93(a) below (and the term "appropriate and proper" pleaded in paragraphs 31, 38, 138, 139, 142 and 145 below bears the same meaning).

Seeking and obtaining of legal advice

28. On 4 February 2008, the Respondent engaged Clayton Utz to provide advice on the options available to the Respondent to enforce its rights and seek information from OL.

29. Thereafter, Clayton Utz were retained to and did advise the Respondent generally in relation to the performance of its role as trustee of the Notes, including making recommendations as to the course of action that the Respondent should take in order to properly discharge its obligations, and providing advice as to the proper course to be followed.

30. The Respondent acted in good faith in accordance with the advice received from Clayton Utz, and its conduct from 4 February 2008 onwards, in and about the performance of its role as debenture trustee, was undertaken after seeking, receiving and considering advice from Clayton Utz, and in accordance with the advice received, as pleaded in paragraphs 32 – 71 below.

31. Clayton Utz were apparently qualified to provide the advice requested and provided as aforesaid (paragraphs 28 and 29 above) and it was appropriate and proper for the Respondent to seek and act upon that advice.

32. On 14 February 2008, the Respondent received advice from Clayton Utz detailing its rights and obligations under the Trust Deed and Terms of Issue, including its rights to obtain information from OL and OIN to permit it to ascertain whether OIN and OL had complied, and would be able to comply, with their obligations in respect of the Notes.

Information requests by Clayton Utz to OIN and OL in February 2008

33. The Respondent acted in good faith in accordance with the advice referred to in the previous paragraph by instructing Clayton Utz to request information from OL and OIN on

14 February 2008, 20 February 2008 and 21 February 2008 concerning the financial position of the Octaviar group and the ability of OIN and OL to comply with the Terms of Issue and the Trust Deed and to pay the amounts due on the Notes. Those requests for information are further pleaded in paragraph 119 below.

34. OL responded to the information requests referred to in the previous paragraph by emails of its chief financial officer, Mr Anderson, to Clayton Utz dated and sent on Tuesday, 26 February 2008 and Wednesday, 27 February 2008 which are pleaded in more detail in paragraph 119 below.

35. By letter dated and sent on Wednesday, 27 February 2008, Clayton Utz wrote to OL and stated that the Respondent did not consider the information provided in the emails referred to in the previous paragraph satisfactorily complied with its requests. Clayton Utz sought further information and undertakings by Friday, 29 February 2008 in the absence of which the Respondent would take such steps as it was advised without further notice. The letter from Clayton Utz dated 27 February 2008 is pleaded in more detail in paragraph 119 below.

Retaining of Counsel

36. On Friday, 29 February 2008, the Respondent retained Queen's Counsel (Walter Sofronoff QC) and Junior Counsel (Dominic O'Sullivan of counsel) to provide advice, inter alia, as to the obligations of the Respondent and the steps the Respondent ought take to enforce its rights in obtaining information from OL and OIN, and subsequently sought and obtained further advice from those Counsel, as pleaded in paragraphs 39 – 65 below.

37. The Respondent accepted and acted in good faith in accordance with that advice, as pleaded in paragraphs 40 – 71 below.

38. Counsel were apparently qualified to provide the advice requested and provided as aforesaid (paragraph 36 above) and it was appropriate and proper for the Respondent to seek and act upon that advice.

March 2008

39. On Sunday, 2 March 2008 and Monday, 3 March 2008, the Respondent received written advice from Counsel to the effect that:

    (a) the material left it unclear whether there had been an Event of Default under the Trust Deed or the Terms of Issue, however, there were justifiable concerns about the solvency of OL;

(b) the Respondent should exercise its powers under section 283BB(c) and section 283CB(b) of the Corps Act to appoint an auditor and inspect the financial and other records of OIN and OL;

(c) in the event of undue delay by OIN and OL to comply (more than 24 hours), consideration should be given to an urgent interlocutory injunction; and

(d) no application should yet be made to the Courts.

40. On Monday, 3 March 2008, the Respondent requested that PwC make available a registered company auditor to assist in identifying and inspecting financial and other information that should be obtained and reviewed, and to identify what financial and other information should be obtained and inspected as a priority, for the purpose of understanding and assessing the true financial position of OIN and OL, and:

(a) on 3 March 2008, PwC provided a list of priority material which it recommended should be inspected;

(b) on or about 3 March 2008, PwC made available a registered company auditor, Mr Roach, to provide the assistance pleaded above, and the Respondent appointed Mr Roach to do so.

PARTICULARS

1) Telephone conference between Mr Hall and Mr Jenkins and Mr Sharry on 3 March 2008.

2) Email of Mr Hall to Mr Jenkins and Mr Sharry dated 3 March 2008.

41. On Tuesday, 4 March 2008, Clayton Utz wrote to OL and OIN by letter and email stating that:

(a) (by letter) on 5 March 2008 at 9.00am a representative of the Respondent, Mr Hall and a registered company auditor appointed by the Respondent, Mr Roach, would be attending the offices of OL for the inspection of records and information identified in the letter and requiring OL and OIN to provide information, explanation and assistance about matters relating to those records; and

(b) the remaining documents and information set out in the letters of Clayton Utz of 14 and 27 February 2008 were to be produced by no later than 9.00am, 7 March 2008; and

(c) (by email) the information provided to date did not allow the Respondent to form a view as to the solvency of OIN or OL, the asset and liability position of OL, and whether OL had current assets of $280m as required by the Terms of Issue.

42. In accordance with the letter sent on 4 March 2008 as pleaded in paragraph 41(a) above, on Wednesday, 5 March 2008, Mr Roach, Mr Hall and Mr Kelly attended the offices of OL but were informed by Mr Anderson that no records would be produced until 9.00am, 7 March 2008.

43. On Friday, 7 March 2008, OL and OIN produced certain documents in response to Clayton Utz's letter of 4 March 2008, including (inter alia):

(a) OL management accounts as follows:

(i) a consolidated balance sheet for OL as at 31 August 2007 showing assets of $3,759,020,000, liabilities of $2,238,703,000 and net assets of $1,520,317,000;

(ii) a consolidated balance sheet for OL as at 30 September 2007 showing assets of $3,865,747,000, liabilities of $2,359,612,000 and net assets of $1,506, 135,000;

(iii) a consolidated balance sheet for OL as at 31 October 2007 showing assets of $3,821,378,000, liabilities of $2,365,742,000 and net assets of $1,455,636,000;

(iv) a consolidated balance sheet for OL as at 30 November 2007 showing assets of $3,899,861,000, liabilities of $2,420,470,000 and net assets of $1,479,391,000;

(v) a consolidated balance sheet for OL as at 31 December 2007 showing assets of $4,271,952,000, liabilities of $2,799,774,000 and net assets of $1,472,178,000;

(b) minutes of meetings of the board of directors of OL as follows:

(i) board minutes of a meeting held on 22 January 2008 where Mr Mentha advised the board of OL that in his opinion assets exceeded liabilities;

(ii) board minutes of a meeting held on 25 January 2008 where Mr Korda advised the board that assets exceed liabilities on a preliminary view;

(iii) board minutes of a meeting held on 29 January 2008 where Mr Korda advised that OL had positive net assets;

(iv) board minutes of a meeting held on 1 February 2008 where Mr Korda advised that cashflow forecasts were reviewed and updated daily and the company was able to go on paying its creditors as they fall due;

(v) board minutes of a meeting held on 13 February 2008 where the board of OL concluded that the company was solvent and able to pay its debts as they become due and payable;

(vi) board minutes of a meeting held on 29 February 2008 where the board of OL resolved to instruct Stella Holdings to provide the certificate referred to in sub-paragraph (d) below

(c) the "Fundamental Warranties" that formed part of the Stella Share Sale Agreement, including clause 17.6 thereof which stated that entry into, and completion of, the Stella Share Sale Agreement would not cause OL or OA to become insolvent;

(d) a "Fundamental Warranty certificate" dated 29 February 2008 signed by, inter alia, Mr Anderson that stated that as at 29 February 2008 there were no breaches of any Fundamental Warranties and that there had been no previous breaches of any Fundamental Warranties; and

(e) a document prepared by Grant Samuel titled "Indicative value of MFS' interest in Stella in June 2010" dated 6 March 2008, which stated that based on management's expectations of Stella's financial position as at 30 June 2010, the implied value of MFS' 35% interest in Stella was approximately $740m – $820m.

44. On Friday, 7 March 2008, PwC reviewed the documents provided by OIN and OL on 7 March 2008.

45. On Saturday, 8 March 2008, Clayton Utz sent an email to Mr Anderson which:

(a) stated to the effect that the responses to the Respondent's requests for information had been inadequate or evasive in a number of identified respects;

(b) stated to the effect that the information and records supplied to date had not been sufficient to determine whether OIN or OL were solvent;

(c) required the production of the information relied on by the directors of OL and OIN to declare that OL and OIN were solvent as part of the Stella Sale Agreement, or, if that information was insufficient, the information that would normally be relied on by an auditor to assess the solvency of a company;

(d) required certification by the directors of OL and OIN to the effect that OL had net assets in excess of $280 million, that OL and OIN and any Material Subsidiaries were solvent and that OL and OIN were not in default of any obligations under any agreements under which they had borrowed funds; and

(e) required the production of the documents and information set out in the email by 2.00pm, 10 March 2008, in the absence of which an application would be made to Court for the production of the documents and information.

46. Between Friday, 7 March and Monday, 10 March 2008, PwC advised the Respondent that it was not possible to form a view on solvency with the information that was available to PwC, and which was the information available to the Respondent.

PARTICULARS

1) Discussions and emails between Mr Sharry and Mr Hall between 7 and 10 March 2008.

2) PwC's advice that it was not possible to form a view on solvency on the available information was subsequently recorded in the affidavit of Mr Hall dated 11 March 2008 filed in the RFI proceedings, as pleaded in paragraph 49 below.

3) The advice that it was not possible to form a view on solvency was also communicated in the email sent on 8 March 2008 to Mr Anderson, pleaded in paragraph 45 above, and again in a letter from Clayton Utz to Freehills, solicitors for OL and OIN, dated and sent on 10 March 2008.

47. On 11 March 2008, the Respondent commenced the RFI proceedings in the Supreme Court of Queensland, requiring the production of the information and records specified in the originating application pursuant to section 283BB(c), section 283CB(b) and section 283HB(1) of the Corps Act and clauses 5.4, 6.2, 6.6 and 7.3 of the Trust Deed by 12.00pm, 14 March 2008.

48. Prior to the commencement of the RFI proceedings, between 2 March 2008 and 10 March 2008 inclusive, the Respondent received advice from Counsel and Clayton Utz in relation to the form of the originating application that should be filed. This advice:

(a) included a consideration of whether the originating application should include the seeking of an order that the proceeds of sale of Stella be retained in a dedicated bank account pending agreement with the Respondent as to the distribution of those proceeds or further order of the Court; and

(b) was to the effect that the originating application should be in the form filed in the RFI proceedings on 11 March 2008.

PARTICULARS

1) The advice that the originating application should be in the form filed in the RFI proceedings on 11 March 2008 was provided orally in conference.

2) The consideration of whether the application should include the seeking of an order that the proceeds of sale of Stella be retained in a dedicated bank account occurred in conference and also in email correspondence between Clayton Utz and Counsel between 2 and 10 March 2008.

49. The Respondent's application in the RFI proceedings was supported, inter alia, by an affidavit of Mr Hall sworn on 11 March 2008 stating to the effect that he had been asked by the Respondent to make an assessment of the solvency of OL and OIN, that there were reasons to be concerned about solvency, but the documents produced by OIN and OL had been inadequate to permit him to form a concluded view as to solvency.

50. On 14 March 2008, de Jersey CJ made orders in the RFI proceedings to the effect:

(a) requiring the production of certain records verifying the current net assets of OL by (variously) 5.00pm, 18 March 2008 and midnight, 20 March 2008, including a consolidated balance sheet as at 29 February 2008 showing the assets and liabilities of OL and its subsidiaries;

(b) requiring the production of any forecast profit and loss statements, balance sheets and cash flow statements for OL that currently existed plus working papers supporting the assumptions made in those documents by 5.00pm, 17 March 2008;

(c) requiring the production of a statement signed on behalf of the directors of OIN and OL as to whether or not, in their opinion, there were reasonable grounds that OL and OIN would be able to pay their debts as and when they became due and payable by 5.00pm, 17 March 2008; and

(d) requiring the production of further specified information and documents by (variously) 5.00pm, 14 March 2008, 5.00pm, 18 March 2008, 5.00pm, 20 March 2008 and 5.00pm, 28 March 2008.

51. On or about 14 March 2008, the Respondent was provided with a copy of the OIN 2007 half-year report which contained a director's declaration which stated (inter alia) that there were reasonable grounds to believe that OIN would be able to pay its debts as and when they became due and payable.

52. On 17 March 2008, pursuant to the orders of de Jersey CJ of 14 March 2008 in the RFI proceedings, the Respondent:

(a) received a statement signed on behalf of the directors of OL and OIN stating that in their opinion, as at the date of the statement, there were reasonable grounds to believe that OL and OIN would be able to pay their debts as and when they fell due; and

(b) a spreadsheet entitled "MFS Limited FY 08 forecast" for the Octaviar consolidated group forecasting (on the summary balance sheet appearing at page 3) net assets as at December 2007 of $1,557,640,000.

53. Between 17 March 2008 and 28 March 2008 and at various other times during April 2008, OL and OIN produced documents in accordance with the orders of de Jersey CJ on 14 March 2008 in the RFI proceedings, including on 20 March 2008, a consolidated balance sheet of OL as at 29 February 2008 disclosing net assets of $696,490,000.

54. By letter from Clayton Utz dated 18 March 2008, PwC was requested to:

(a) review the statement of solvency of OL and OIN referred to in paragraph 52(a) above, and provide an opinion as to whether or not the documents said to be relied upon by the directors of those companies were sufficient for the directors, or a reasonable person in their position, to make the statement of solvency; and

(b) review the valuation of Grant Samuel pleaded in paragraph 43(e) above and advise as to whether that valuation appeared to be reasonable and based upon orthodox valuation methodology.

55. On 31 March 2008, PwC advised by an email of that date that the Octaviar group was a complex web of inter-related entities and it was not possible to provide an in depth analysis of its solvency position based on the available information.

April and May 2008

56. On 2 April 2008, PwC provided a draft written report to the Respondent which advised to the effect that:

(a) they had excluded from the scope of their work an opinion on whether the documents said to be relied upon by the directors of those companies were sufficient for the directors, or a reasonable person in their position, to make the statement of solvency, because the complexity of the Octaviar group prevented them forming a view on that issue based on the information available;

(b) by implication, the documents and information provided did not enable PwC to form an opinion on whether OL and OIN were solvent; and

(c) the Grant Samuel valuation methodology appeared reasonable and, after applying a discount for the fact that OL did not have a controlling interest in Stella, the value of the remaining 35% interest in Stella could range between $170m – $200m.

57. On 15 April 2008, Clayton Utz briefed Counsel to confer and advise on (inter alia) whether the available information justified the issue of a default notice under the Trust Deed.

PARTICULARS

Email of Mr Jenkins to Queen's Counsel and Junior Counsel dated 15 April 2008.

58. On 18 April 2008, Queen's Counsel advised in conference to the effect that:

(a) the net asset position of the Octaviar group appeared to be below $280m, although the issue as to whether this constituted an Event of Default was problematic as the Terms of Issue referred to the asset position as at 31 December and 30 June of any given year, and it was not therefore a preferred option for contending a default;

(b) the question whether the Octaviar group is able to pay its debts as and when they fall due was also problematic due to the issue being complicated by factual

questions, accounting issues and legal questions as to what actually constitutes an inability to pay debts as and when they fall due, such that proof of insolvency at that time may be difficult;

(c) OL and OIN were likely to be in breach of the covenant in clause 7.2(b) of the Trust Deed to ensure that all information provided to the Respondent was true and correct and not misleading, particularly in relation to the response given by Mr Anderson on 27 February 2008 to Clayton Utz's letter of 14 February 2008, as referred to in paragraph 119 below; and

(d) the Respondent should prepare a statement of contentions that set out each of the matters which it was contended give rise to a default under the Trust Deed, and a final view would be given on whether there had been a default once that material was analysed together with an advice on the options available to the Respondent.

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Conference between Mr Jenkins and Queen's Counsel on 18 April 2008, confirmed in an email of Mr Jenkins to the Respondent dated 18 April 2008.

59. On 22 April 2008, the Respondent requested PwC to review the financial information that had been provided by OIN and OL pursuant to the orders made on 14 March 2008, together with the half-yearly accounts of OL which were shortly due to be released, to determine what assumptions had been made by management, whether the basis of those assumptions was transparent, and what further information PwC would require to conduct an audit of this information to verify the reasonableness of the assumptions. PwC were requested to do so for the purpose of determining whether OL had met its obligations to maintain net assets of $280m as at 31 December and 30 June of each year and whether it was solvent.

PARTICULARS

Email of Mr Sharry to Mr Hall dated 22 April 2008.

60. On 24 April 2008, Clayton Utz informed Counsel that the statement of contentions was almost complete and that PwC had been engaged to conduct a further audit to establish the reasonableness of the assumptions underpinning the balance sheets and cash flow waterfall, and that they would like to confer in order to review the issue of the breach of the Trust Deed and provide the Respondent with advice as to whether there were grounds

for issuing a notice of default, the strategic pros and cons of taking such a step and what the likely consequences may be.

PARTICULARS

Email of Mr Jenkins to Queen's Counsel and Junior Counsel dated on 24 April 2008.

61. On 28 April 2008, OL issued the OL 2007 half-year report which:

    (a) stated to the effect that the Octaviar group needed to reach an accommodation with its large unsecured creditors, including the Respondent, to continue as a going concern;

    (b) disclosed that there was material uncertainty as to the Octaviar group continuing as a going concern; and

    (c) included a disclaimer from its auditors, KPMG, dated 28 April 2008 to the effect that they were unable to and did not form a conclusion as to whether the OL 2007 half-year report was in accordance with the Corps Act, including as to whether it:

        (i) gave a true and fair view of the Octaviar group's financial position as at 31 December 2007 and of its performance for the half year ended on that date; and

        (ii) complied with Australian Accounting Standards and the Corps Regs.

62. On 28 April 2008, Clayton Utz briefed Counsel with the OL 2007 half-year report released that day.

PARTICULARS

Email of Mr Sharry to Queen's Counsel and Junior Counsel dated 28 April 2008.

63. On 29 April 2008, Queen's Counsel advised in conference (inter alia) to the effect that based on the then available information:

    (a) OL was insolvent;

    (b) OL and OIN had provided misleading information; and

    (c) Clayton Utz should further brief Counsel.

64. On 3 May 2008, Queen's Counsel and Junior Counsel were briefed to advise as follows:

(a) whether there had been an Event of Default under the terms of the Trust Deed and Terms of Issue;

(b) if the answer to (a) was yes, did this allow the Respondent to assert that an Event of Default had occurred and trigger circumstances which would:

(i) support the delivery of a notice demanding immediate payment of all monies owing under the Trust Deed;

(ii) entitle the Respondent to commence proceedings to wind up OL and OIN and appoint a liquidator or provisional liquidator; and

(c) if the answer to (a) was yes, what was the best method by which the Respondent could proceed in order to enforce its rights.

65. On 8 May 2008, the Respondent received written advice from Queen's Counsel and Junior Counsel to the effect that:

(a) on the assumption that they had correctly interpreted the accounting materials with which they were briefed, OL and OIN were insolvent and thus an Event of Default had occurred under the Trust Deed and the Terms of Issue;

(b) a suitably qualified expert should be retained to review Counsel's interpretation of the accounting materials briefed and provide an independent opinion on whether the Octaviar group was insolvent, and noting that expert evidence would be required to support any winding-up application;

(c) subject to that confirmation, the Respondent should recommend to Noteholders that he enforce the Trust Deed by requiring early repayment of the Notes by issuing a notice of Event of Default under clause 5 of the Terms of Issue and apply for a winding up of OL and OIN on the grounds of insolvency; and

(d) the notice of Event of Default should rely both on insolvency and on the provision of misleading information by OL in breach of clauses 6.5(a) and 7.2(b) of the Trust Deed.

66. On 9 May 2008, an informal meeting of Noteholders was held at which no Noteholder expressed the view that a notice of default and subsequent winding up application should not be issued by the Respondent and several Noteholders expressed the view that the appointment of a liquidator was in the interests of Noteholders.

67. On 16 May 2008, the Respondent obtained an independent report of Professor Stephen Gray of Strategic Finance Group which concluded that OL and OIN were insolvent.

68. On 17 May 2008, Clayton Utz wrote to the Respondent, enclosing the report of Professor Gray, and recommended that the Respondent provide instructions to (inter alia):

    (a) prepare a notice of Event of Default under the Terms of Issue alleging default by reason of insolvency and also the provision of misleading information in breach of clauses 6.5(a) and 7.2(b) of the Trust Deed; and

    (b) prepare an application to wind up OL and OIN on the ground of insolvency and take such steps as were necessary to expeditiously prosecute that application.

69. The Respondent accepted and acted in good faith in accordance with that advice.

70. On 23 May 2008:

    (a) the Respondent served a Notice of Default on OIN as pleaded in further detail in paragraph 128 below; and

    (b) Mr Wedge swore an affidavit filed in the Supreme Court of Queensland in which he deposed, inter alia, that the Respondent did not intend to enter into any form of standstill agreement with OL or OIN.

PARTICULARS

1) The prospect of OL putting forward a standstill agreement for consideration by the Respondent was communicated by Mr Korda to Mr Kelly and Mr Jenkins in a meeting in Sydney on 19 February 2008, being the meeting pleaded in paragraph 116 below.

2) Thereafter:

    a. The Respondent requested details of the proposed standstill agreement, including in letters from Clayton Utz dated 21 February 2008 and 10 March 2008;

    b. OL outlined the terms of a possible standstill agreement in the Update to Creditors, at page 6.

c. Pursuant to the orders of the Supreme Court of Queensland made on 14 March 2008, by email sent on 18 March 2008, OL provided to the Respondent a draft Standstill Deed, on the condition that the document was to be treated as confidential and not provided to any other party.

3) The Respondent considered, and obtained advice as to, the proposed standstill agreement, and determined in good faith that it should not enter into any standstill agreement with OL, and that action should instead be taken to wind-up OL.

71. On 4 June 2008, the Respondent filed an application to wind up, inter alia, OL and OIN on the grounds of insolvency, and thereafter prosecuted those winding-up applications, against opposition from OL and OIN.

IV. The Parties

The Applicant and Group Members (SoC, paras 17 – 20)

72. The Respondent admits the allegations in paragraph 17 of the SoC.

73. In answer to the allegations in paragraph 18 of the SoC, the Respondent:

(a) admits that the proceedings are brought by the Applicant as representative proceedings pursuant to Part IVA of the FC Act; and

(b) otherwise does not admit paragraph 18 of the SoC.

74. In answer to the allegations in paragraph 19 of the SoC, the Respondent:

(a) admits that the Group Members are described as appears in paragraph 19 of the SoC;

(b) denies that any Noteholder has suffered loss or damage by reason of any acts or omissions of the Respondent and says that in the premises there do not exist any Group Members; and

(c) otherwise does not admit paragraph 19 of the SoC.

75. In answer to paragraph 20 of the SoC, the Respondent:

(a) repeats the matters in paragraphs 74(a) – (b) above;

(b) admits that there are at least seven persons alleged to be in the group on whose behalf the Applicant has purported to bring these proceedings under Part IVA of the FC Act; and

(c) denies that there exist any Noteholders who have claims against the Respondent arising out of the conduct alleged in paragraphs 21 to 91 of the SoC.

The Respondent (SoC, paras 21 – 22)

76. In answer to paragraph 21 of the SoC, the Respondent:

(a) as to the allegations in paragraph 21.1 of the SoC;

(i) admits that the Respondent is a corporation and able to sue and be sued;

(ii) says that the Respondent is not a corporation pursuant to section 8 of the PT Act because the Respondent is a corporation created pursuant to section 9(1) of the *Public Curator Act* 1915 (Qld);

(iii) says that the Respondent is not able to sue and be sued pursuant to section 8 of the PT Act because its capacity to sue and be sued derives from its status as a corporation sole; and

(iv) otherwise denies the allegations therein;

(b) as to paragraph 21.2 of the SoC:

(i) admits that the Respondent was appointed trustee of the Trust constituted by the Trust Deed, as amended by the Amending Deed, with OIN and OL;

(ii) admits that it held on trust for Noteholders the rights, powers and property identified in clause 2.2 of the Trust Deed and Amending Deed, on and subject to the terms of the Trust Deed, Amending Deed, Terms of Issue and Guarantee Deed Poll;

(iii) denies that it is a trustee for the Group Members because:

A. Group Members are defined in the SoC as persons who held Notes as at 25 February 2008 and who suffered losses or damage by or resulting from the acts and omissions of the Respondent as pleaded in the SoC, but no Noteholder has suffered loss or damage from the acts and omissions of the Respondent pleaded in the SoC;

B. some of the Noteholders as at 25 February 2008 have since sold their Notes and are no longer Noteholders;

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The Respondent is aware of 5 Noteholders as at 25 February 2008 that have since sold their Notes and ceased to be Noteholders.

C. clause 2.2 of the Trust Deed does not make the Respondent trustee for the Group Members as alleged; and

(iv) otherwise does not admit paragraph 21 of the SoC.

77. In answer to paragraph 22 of the SoC, the Respondent:

(a) says that it owed to Noteholders the duties pleaded in paragraphs 92 and 93 below;

(b) repeats the matters pleaded in paragraph 76(b)(iii) above; and

(c) otherwise denies paragraph 22 of the SoC.

V. The Trust Deed, Amending Deed, Terms of Issue, Guarantee Deed Poll and Deeds of Accession

Instruments of Trust and Notes (SoC, para 23)

78. In answer to paragraph 23 of the SoC, the Respondent:

(a) says that pursuant to the Trust Deed, OIN would issue unsecured Notes with a face value of $100 each in accordance with the Notes Terms of Issue;

(b) says that pursuant to the Trust Deed, OIN was required to make payment of amounts within the definition of "Moneys Owing" in the Trust Deed (including the face value of the Notes and interest payable on them) to Noteholders directly in accordance with the Terms of Issue;

(c) says that pursuant to the Terms of Issue and the Guarantee Deed Poll, OL unconditionally and irrevocably guaranteed the payment by OIN of all moneys becoming due and payable by OIN to Noteholders in respect of a Note;

(d) says that pursuant to the Terms of Issue, the obligations of OIN under the Notes were to be guaranteed by Material Subsidiaries;

(e) as to paragraph 23.3 of the SoC, denies that pursuant to the Trust Deed and Amending Deed it was agreed that the obligations of OIN under the Notes would be guaranteed by the Guarantors, because:

(i) the SoC defines "the Guarantors" as OL, OFS, OA and OIB;

(ii) the Trust Deed and Amending Deed do not provide that a guarantee shall be given by those entities; and

(iii) OIB was incorporated after the Amending Deed was executed and the Notes issued;

(f) otherwise does not admit the allegations in paragraph 23 of the SoC.

The Notes Trust (SoC, para 24)

79. In answer to paragraph 24 of the SoC, the Respondent:

(a) says that pursuant to clause 2.2 of the Trust Deed, the Respondent entered into the Trust Deed as trustee for the Noteholders and held the benefit of:

(i) the Trust Deed;

(ii) the right to enforce OIN's duty to repay the Notes;

(iii) the right to enforce the Guarantee Deed Poll against OL;

(iv) the right to enforce all other duties of OIN under the Terms of Issue, the Trust Deed and Part 2L of the Corps Act; and

(v) any other right, power, authority, discretion or remedy conferred on the Respondent by the Trust Deed or by law and any other property which the Respondent may receive or which may be vested in the Respondent,

in trust for the Noteholders subject to and in accordance with the Trust Deed, the Guarantee Deed Poll and the Terms of Issue;

(b) denies that section 283AB of the Corps Act had the effect pleaded because that provision identifies the terms of a conforming trust deed and does not purport to impose a trust; and

(c) otherwise does not admit the allegations in paragraph 24 of the SoC.

Guarantee Deed Poll (SoC, para 25)

80. In answer to paragraph 25 of the SoC, the Respondent:

(a) says that pursuant to the Guarantee Deed Poll, OL unconditionally and irrevocably guaranteed the payment by OIN of all moneys becoming due and payable by OIN to Noteholders in respect of a Note; and

(b) does not admit that the Guarantee Deed Poll was "in favour of the Respondent" as alleged, because:

(i) that expression is vague and ambiguous; and

(ii) the Guarantee Deed Poll was:

A. also "in favour of" OIN; and

B. enforceable by whoever occupied the office of trustee of the Trust from time to time.

OFS Deed of Accession (SoC, para 26)

81. In answer to paragraph 26 of the SoC, the Respondent:

(a) says that on or about 5 January 2007, OFS executed a Deed of Accession by which OFS:

(i) was recited to be a Material Subsidiary of OL pursuant to the Terms of Issue; and

(ii) undertook for the benefit of the Noteholders (and not Group Members as alleged) and the Respondent to be bound by OL's duties and obligations under the Guarantee Deed Poll for so long as it remained a Material Subsidiary as if it was a party to the Guarantee Deed Poll; and

(b) otherwise denies paragraph 26 of the SoC.

OA Deed of Accession (SoC, para 27)

82. In answer to paragraph 27 of the SoC, the Respondent:

(a) says that on or about 5 January 2007, OA executed a Deed of Accession by which OA was:

(i) recited to be a Material Subsidiary of OL pursuant to the Terms of Issue; and

(ii) undertook for the benefit of the Noteholders (and not Group Members as alleged) and the Respondent to be bound by OL's duties and obligations under the Guarantee Deed Poll for so long as it remained a Material Subsidiary as if it was a party to the Guarantee Deed Poll; and

(b) otherwise denies paragraph 27 of the SoC.

OIB Deed of Accession (SoC, para 28)

83. In answer to paragraph 28 of the SoC, the Respondent:

(a) says that on or about 7 February 2008, OIB executed a Deed of Accession by which OIB was:

(i) recited to be a Material Subsidiary of OL pursuant to the Terms of Issue; and

(ii) undertook for the benefit of the Noteholders (and not Group Members as alleged) and the Respondent to be bound by OL's duties and obligations under the Guarantee Deed Poll for so long as it remained a Material Subsidiary as if it was a party to the Guarantee Deed Poll; and

(b) otherwise denies paragraph 28 of the SoC.

VI. OIN'S Obligations

Trust Deed (SoC, para 29)

84. In answer to paragraph 29 of the SoC, the Respondent:

(a) says that pursuant to clause 5.1 and clause 5.2 of the Trust Deed, OIN was required, within 90 days of the end a financial year and 75 days of the end of the first 6 months of a financial year, to cause a set of accounts for that year or half year (as applicable) as required by and prepared in accordance with Part 2M.3 of the Corps Act, to be made out and lodged with ASIC and with the Respondent;

(b) says that pursuant to clause 5.3 of the Trust Deed, the directors of OIN were required to provide to the Respondent (and lodge with ASIC) within one month of the end of each period of 3 calendar months a report of OIN setting out in detail any matter relating to that quarter adversely affecting the security or the interests of Noteholders and otherwise including the matters referred to in section 283BF of the Corps Act;

(c) says that pursuant to clause 5.4 of the Trust Deed, OIN agreed to provide the Respondent such information as the Respondent reasonably required about OIN and any of its related bodies corporate to enable the Respondent to carry out its duties under the Trust Deed and the Corps Act;

(d) says that pursuant to clause 6.1 of the Trust Deed, OIN had been established for the sole purpose of issuing the Notes and was to carry on and conduct its business in a proper and efficient manner;

(e) says that pursuant to clause 6.2 of the Trust Deed, OIN was required to make available for inspection by the Respondent, or any registered company auditor appointed by the Respondent, the whole of the accounting or other records of OIN and would give to the Respondent such information as it required with respect to all matters relating to the accounting or other records of OIN;

(f) says that pursuant to clause 6.4 of the Trust Deed, OIN was required to duly and punctually observe, fulfil, perform and comply with all the covenants, conditions and obligations imposed upon it by or under the Trust Deed or the Terms of Issue;

(g) says that pursuant to clause 6.5 of the Trust Deed, OIN covenanted to:

(i) perform each of the duties or obligations imposed on it by the Corps Act, including the obligations and duties imposed by Part 2L of the Corps Act, or any other statute from time to time and the ASX Listing Rules; and

(ii) ensure that all information provided to the Respondent was true and correct and was not (by omission or otherwise) misleading;

(h) says that pursuant to clause 6.6 of the Trust Deed, OIN covenanted to:

(i) give to the Respondent any information which it may reasonably require for the purposes of the Trust Deed or the Corps Act;

(ii) immediately advise the Respondent in writing of any default and particulars of such default by OIN under any encumbrance over all or any part of its assets or undertaking or the assets or undertakings of OIN;

(iii) duly and punctually fulfil, perform and comply with all the covenants, terms, conditions and obligations imposed upon it by or under the Trust Deed, Chapter 2L of the Corps Act or the Terms of Issue and notify the Respondent

in writing immediately on becoming aware that any of those covenants, terms, conditions and obligations could not be fulfilled or performed;

(iv) not pay any dividend while any interest on the Notes was overdue and unpaid or while any of the Notes were overdue and unpaid or while any of the Notes which had become payable or redeemable had not been paid or redeemed as a consequence of default by OIN;

(v) not without the prior consent in writing of the Respondent reduce or attempt to reduce the capital of OIN; and

(vi) execute and do all such assurances and things as were reasonably required for giving effect to the Trust Deed and conferring the full benefit of the Trust Deed upon Noteholders (and not Group Members as alleged);

(i) otherwise denies paragraph 29 of the SoC.

Chapter 2L (SoC, para 30)

85. In answer to paragraph 30 of the SoC, the Respondent:

(a) admits the allegations in paragraph 30.1 of the SoC;

(b) says that pursuant to section 283BB(c) of the Corps Act, OIN was required to make all of its financial and other records available for inspection by:

(i) the Respondent;

(ii) an officer or employee of the Respondent authorised by the Respondent to carry out the inspection; or

(iii) a registered company auditor appointed by the Respondent to carry out the inspection; and

give them any information, explanations or other assistance that they required about matters relating to those records;

(c) says that pursuant to section 283BF of the Corps Act, OIN was required within 1 month after the end of each quarter to give the Respondent a report (and lodge a copy with ASIC) setting out the matters in sections 283BF(4), (5) and (6), being in effect (inter alia):

(i) any failure by OIN and each Guarantor to comply with the terms of the Notes or the provisions of the Trust Deed or Chapter 2L of the Corps Act;

(ii) any event that had happened during the quarter that caused or could cause the amount lent under the Notes to become immediately payable, the Notes to become immediately enforceable, or any other right or remedy under the terms of the Notes or provisions of the Trust Deed to become immediately enforceable;

(iii) any circumstances that had occurred during the quarter that materially prejudiced OIN, any of its subsidiaries, or any of the Guarantors or any security or charge included in or created by the Notes or the Trust Deed; and

(iv) any other matters that may materially prejudice any security or the interests of the Noteholders (and not of the Group Members as alleged);

(d) otherwise denies paragraph 30 of the SoC.

VII. The Guarantors' Obligations (SoC, paras 31 – 33)

86. In answer to paragraph 31 of the SoC, the Respondent:

(a) says that pursuant to clause 7.1 of the Trust Deed, OL covenanted to duly and punctually observe, fulfil, perform and comply with all the covenants, conditions and obligations imposed upon it by or under the Trust Deed, the Terms of Issue and the Guarantee Deed Poll;

(b) says that pursuant to clause 7.2 of the Trust Deed, OL covenanted to:

(i) perform each of the duties or obligations imposed on it by the Corps Act, including the obligations and duties imposed by Part 2L of the Corps Act, or any other statute from time to time and the ASX Listing Rules; and

(ii) ensure that all information provided to the Respondent was true and correct and was not (by omission or otherwise) misleading;

(c) says that pursuant to clause 7.3 of the Trust Deed, OL covenanted to:

(i) give the Respondent any information which it may reasonably require for the purposes of the Trust Deed or the Corps Act;

(ii) immediately advise the Respondent in writing of any default and particulars of such default by OL, OIN or any related body corporate under any encumbrance over all or any part of its assets or undertaking or the assets or undertakings of OL, OIN or their related bodies corporate;

(iii) duly and punctually fulfil, perform and comply with all the covenants, terms, conditions and obligations imposed upon it by or under the Trust Deed, Chapter 2L of the Corps Act, the Terms of Issue and the Guarantee Deed Poll and notify the Respondent in writing immediately on becoming aware that any of those covenants, terms, conditions and obligations could not be fulfilled or performed; and

(iv) execute, give all such assurances and do all things as were reasonably required for giving effect to the Trust Deed, the Terms of Issue and the Guarantee Deed Poll as applicable;

(d) as to paragraph 31.7, denies that clause 7.3(d) of the Trust Deed imposed upon OL any obligation in relation to the Group Members as alleged;

(e) denies that clause 12.1 of the Amending Deed imposed a duty on OL to ensure that Material Subsidiaries provide a Guarantee Deed Poll; and

(f) otherwise does not admit paragraph 31 of the SoC.

87. In answer to paragraph 32 of the SoC, the Respondent:

(a) admits that OL had obligations imposed upon it by the Guarantee Deed Poll;

(b) admits that each of OFS, OA and OIB had obligations imposed on them by the Deeds of Accession;

(c) does not admit that OL, OFS, OA and OIB had duties or obligations imposed upon them "at all material times" because that expression is ambiguous and the time period is not defined in the SoC; and

(d) otherwise does not admit the allegations in paragraph 32 of the SoC.

88. In answer to paragraph 33 of the SoC, the Respondent:

(a) admits the allegations in paragraph 33.1 of the SoC;

(b) admits the allegations in paragraphs 33.2 and 33.3 of the SoC and says that pursuant to section 283CB(b) of the Corps Act, OL, OA, OIB and OFS were required to make all of their financial and other records available for inspection by:

(i) the Respondent;

(ii) an officer or employee of the Respondent authorised by the Respondent to carry out the inspection; or

(iii) a registered company auditor appointed by the Respondent to carry out the inspection, and

give them any information, explanations or other assistance that they required about matters relating to those records.

VIII. The Respondent's Obligations

89. The Respondent does not admit the allegations in paragraph 34 of the SoC.

Trust Deed (SoC, para 35)

90. In answer to the allegations in paragraph 35 of the SoC, the Respondent:

(a) says that pursuant to clause 2.2 of the Trust Deed, the Respondent declared that it entered into the Trust Deed as trustee for the Noteholders and held the benefit of:

(i) the Trust Deed;

(ii) the right to enforce OIN's duty to repay the Notes;

(iii) the right to enforce the Guarantee Deed Poll against OL;

(iv) the right to enforce all other duties of OIN under the Terms of Issue, the provisions of the Trust Deed and Part 2L of the Corps Act; and

(v) any other right, power, authority, discretion, or remedy conferred on the Respondent by the Trust Deed or by law and any other property which the Trustee may receive or which may be vested in the Trustee,

in trust for the Noteholders subject to and in accordance with the Trust Deed, the Guarantee Deed Poll and the Terms of Issue; and

(b) otherwise denies the allegations in paragraph 35 of the SoC.

Section 283DA (SoC, para 36)

91. In answer to the allegations in paragraph 36 of the SoC, the Respondent:

(a) does not contest that it was bound by section 283DA of the Corps Act notwithstanding section 8(9) of the PT Act;

(b) says that section 283DA imposed on the Respondent no obligations referrable to Group Members for the reasons pleaded in paragraphs 74(b) and 76(b)(iii) above; and

(c) otherwise does not admit the allegations therein.

Good faith & proper purposes (SoC, para 37)

92. In answer to the allegations in paragraph 37 of SoC, the Respondent:

(a) says that it owed a duty to the Noteholders (and not to Group Members) to act *bona fide* in the interests of Noteholders in the exercise of its powers under the Trust Deed;

(b) says that it owed a duty to the Noteholders not to act for any collateral or improper purpose in the exercise of its powers or discharge of its duties under the Trust Deed;

(c) says that there is no allegation in the SoC that the Respondent exercised its powers and discharged its duties under the Trust Deed or the Amending Deed other than *bona fide* or for any collateral or improper purpose;

(d) says that in its further and better particulars of the SoC dated 23 December 2014, the Applicant confirmed that it does not allege that the Respondent acted for improper purposes and does not allege an absence of *bona fides*; and

(e) otherwise denies paragraph 37 of the SoC.

Duty of care (SoC, para 38)

93. In answer to the allegations in paragraph 38 of the SoC, the Respondent:

(a) says that, subject to the terms of the Trust Deed as amended, the Respondent had a duty:

(i) to observe the terms of the Trust Deed and Amending Deed;

(ii) in exercising its powers and discretions as trustee of the Trust, to exercise the same care as an ordinary, prudent person of business would exercise in the conduct of his or her business as if it was his or her own;

(b) says that pursuant to clause 10.4 of the Trust Deed, the Respondent was entitled to act or decline to act on the advice or opinion or any other information obtained from any barrister, solicitor, accountant, valuer, surveyor, broker, auctioneer or other expert and the Respondent is not responsible or liable for any loss occasioned by its acting or declining to act in good faith on any such advice, opinion or information;

(c) says that pursuant to clause 14.2 of the Trust Deed, the Respondent:

(i) was at liberty to accept and rely on a certificate signed by the chairman or any two directors of OIN as the case may be as to any fact or matter as conclusive evidence thereof, and a like certificate to the effect that any particular dealing or transaction or step or thing is in the opinion of the person so certifying commercially desirable and not detrimental to the interests of the Noteholders as conclusive evidence that it is so;

(ii) was entitled to accept and act on any information, statement, certificate, report, balance sheet or account supplied by OIN or any director, secretary, "Auditor" or duly authorised officer of OIN;

(iii) was entitled to accept and act upon the statements and opinions contained in any statement, certificate, report, balance sheet or account given under the Trust Deed as conclusive evidence of its contents; and

(iv) if it accepted, relied and/or acted upon the matters referred to in sub-paragraphs (i) – (iii) above, was not bound to call for further evidence other than the certificate, statement, report, balance sheet or account or to enquire as to the accuracy or completeness of such a document and would not be responsible for any loss, damage, cost, expense or liability that may be occasioned by relying on such a document;

(d) says further that under the general law, in performing its functions and discharging its duties under the Trust, the Respondent was entitled to seek and act on the basis of legal, accounting and other professional advice;

(e) admits that if the Respondent were to make a decision as trustee of the Trust, it should be satisfied that the decision was rational, and that it was based upon sufficient information;

(f) says further that the SoC does not allege that the Respondent made any decisions that were irrational, or that were based upon insufficient information, or that were not based upon all material information known to the Respondent;

(g) says that the Respondent did not owe the duty described in paragraph 38.2 of the SoC; and

(h) otherwise denies the allegations in paragraph 38 of the SoC.

Fees (SoC, para 39)

94. In answer to the allegations in paragraph 39 of the SoC, the Respondent:

(a) says that pursuant to clause 9.1 of the Trust Deed, OIN was required to pay the Respondent by way of remuneration for its services as trustee the fees set out in that clause; and

(b) otherwise does not admit paragraph 39 of the SoC.

Alleged duties (SoC, para 40)

95. In answer to the allegations in paragraph 40 of the SoC, the Respondent:

(a) admits that the duties of the Respondent when acting as trustee of the Trust extended to taking steps to:

(i) be aware of the matters pleaded in paragraphs 40.3, 40.4 and 40.5 of the SoC;

(ii) as to paragraph 40.14 of the SoC, be aware of the content of and to understand the statutory financial statements of OIN, the section 283BF reports of OIN, and the statutory financial statements of OL;

(iii) obtain the information pleaded in paragraph 40.17 of the SoC; and

(iv) obtain the information pleaded in paragraph 40.18 of the SoC in relation to Guarantors of which it was aware; and

(b) otherwise denies the allegations in paragraph 40 of the SoC.

IX. The Relevant Events (SoC, paras 41 – 77)

96. In answer to the allegations in paragraph 41 of the SoC, the Respondent:

    (a) says that OIN issued 3,486,462 Notes pursuant to the Trust Deed and the Terms of Issue, with a face value of $100 each by way of issues of:

        (i) 1,447,379 Notes on or about 8 January 2007;

        (ii) 19,852 Notes on or about 22 February 2007; and

        (iii) 2,019,231 Notes by 9 March 2007;

    (b) says that on or about 16 July 2007, 250 Notes were redeemed, leaving total Notes of 3,486,212 with a face value of $100; and

    (c) otherwise does not admit paragraph 41 of the SoC.

97. The Respondent does not admit the allegations in paragraph 42 of the SoC.

98. In answer to the allegations in paragraph 43 of the SoC, the Respondent:

    (a) denies that persons within the definition of Group Members in the SoC purchased Notes at various times and in various quantities from OIN as alleged, because the Group Members are defined in the SoC as persons who held Notes as at 25 February 2008 and who suffered losses or damage by or resulting from the acts and omissions of the Respondent as pleaded in the SoC, but no Noteholder has suffered loss or damage from the acts and omissions of the Respondent as pleaded in the SoC; and

    (b) otherwise does not admit paragraph 43 of the SoC.

99. In answer to the allegations in paragraph 44 of the SoC, the Respondent:

    (a) says that on 6 July 2007, the Respondent gave notice pursuant to clause 13.1 of the Trust Deed that it resigned as trustee of the Trust;

    (b) says that pursuant to clause 13.1 of the Trust Deed, that resignation did not take effect until a replacement trustee was appointed in its place;

    (c) says that no replacement trustee to the Trust was ever appointed, with the result that the Respondent's resignation never took effect; and

(d) otherwise denies paragraph 44 of the SoC.

100. In answer to the allegations in paragraph 45 of the SoC, the Respondent:

(a) says that in its Quarterly Report dated 31 July 2007, OIN reported to the Respondent that, in the quarter ending 30 June 2007, OIN had loaned $349,819,946.17 to OA without security; and

(b) otherwise does not admit paragraph 45 of the SoC.

101. In answer to the allegations in paragraph 46 of the SoC, the Respondent:

(a) says that notes 33 and 25 of the notes to the financial statements for the year ended 30 June 2007 in the OL 2007 Annual Report recorded that:

(i) OL had provided Pacific, a New Zealand based associate, with a put option such that it would purchase Pacific's assets at cost in certain circumstances;

(ii) as at the balance date, Pacific had total assets of NZ$397,037,183; and

(iii) OL had made provision of $11.845 million for any expected loss; and

(b) otherwise does not admit paragraph 46 of the SoC.

102. In answer to the allegations in paragraph 47 of the SoC, the Respondent:

(a) says that in its Quarterly Report dated 29 October 2007, OIN reported to the Respondent that, in the quarter ending 30 September 2007, OIN had loaned $6,626,835.14 to OA, with the result that the balance owing from OA to OIN was $354,082,673.31 without security; and

(b) otherwise does not admit paragraph 47 of the SoC.

103. In answer to the allegations in paragraph 48 of the SoC, the Respondent:

(a) repeats paragraphs 100(a) and 102(a) above; and

(b) otherwise does not admit paragraph 48 of the SoC.

104. The Respondent does not admit the allegations in paragraph 49 of the SoC.

105. In answer to the allegations in paragraph 50 of the SoC, the Respondent:

(a) says that on 18 January 2008, OL made an ASX & Media Announcement which:

(i) confirmed a previously announced intention to separate the Stella business and the MFS financial services business into standalone entities;

(ii) stated that it was expected the separation would be achieved via a scheme of arrangement subject to both OL shareholder and Court approval;

(iii) stated that in conjunction with the separation both Stella and the MFS financial services business would be recapitalised to reduce indebtedness and to achieve capital structures that were appropriate for the different markets and capital requirements of the respective businesses; and

(iv) stated that it was intended to fund the recapitalisations via an approximately $550 million renounceable entitlement offer of shares in Stella; and

(b) otherwise does not admit paragraph 50 of the SoC.

106. In answer to the allegations in paragraph 51 of the SoC, the Respondent:

(a) repeats the matters in paragraphs 105(a)(iii) and (iv) above; and

(b) otherwise does not admit paragraph 51 of the SoC.

107. In answer to the allegations in paragraph 52 of the SoC, the Respondent:

(a) says that on 17 January 2008, OL shares trading on the ASX closed at a price of $3.18 per share and at the close of trade on 18 January 2008, were 99c per share; and

(b) otherwise does not admit paragraph 52 of the SoC.

108. In answer to the allegations in paragraph 53 of the SoC, the Respondent:

(a) says that on or about 21 January 2008, Fortress sent a letter to Castle in which Fortress stated to the effect that:

(i) by reason of the movements in OL's share price in the five day period ending on 18 January 2008, an event of default had occurred under the Fortress facility; and

(ii) Fortress waived its rights in respect of any event of default or potential event of default which subsisted in connection thereto until 4 February 2008, but thereafter reserved its rights; and

(b) otherwise does not admit paragraph 53 of the SoC.

109. In answer to the allegations in paragraph 54 of the SoC, the Respondent:

(a) says that on 21 January 2008, OL requested that the ASX grant a trading halt of all OL's securities with immediate effect on the basis that OL was considering unsolicited proposals received the previous evening from a number of parties in relation to the purchase of a majority interest in Stella as well as a change in the chief executive officer of OL;

(b) says that on 21 January 2008, the ASX issued a Market Release entitled "MFS Limited Trading Halt" announcing that the securities of OL would be placed in pre-open at the request of OL and would remain so until the earlier of the commencement of trading on 23 January 2008 or the making of an announcement by OL;

(c) says that on 21 January 2008, City Pacific Limited announced that it had informed OL that it intended to withdraw its merger proposal, while maintaining an interest in either the business or assets of the MFS financial services division;

(d) says that on 21 January 2008, OL issued an ASX & Media Announcement entitled "Appointment of New Chief Executive Officer" which announced that OL chief executive officer, Mr Michael King, had resigned with immediate effect as chief executive officer and a director of OL and was to be replaced as chief executive officer by Mr White; and

(e) otherwise does not admit paragraph 54 of the SoC.

110. In answer to the allegations in paragraph 55 of the SoC, the Respondent:

(a) says that on 23 January 2008, OL issued an ASX & Media Announcement entitled "MFS Limited – Shareholder Update" which stated the net debt of the OL Group as $1,551 million and that the vast majority of this debt was not required to be repaid or refinanced until after 31 December 2010; and

(b) otherwise does not admit paragraph 55 of the SoC.

111. In answer to paragraph 56 of the SoC, the Respondent:

(a) says that on 31 January 2008, the NZX made a Regulation Announcement entitled "MFS New Zealand Limited Trading Halt of Securities";

(b) says that in its announcement of 31 January 2008, the NZX advised that a trading halt had been placed on the securities of OLNZ at the request of OLNZ due to the uncertainty concerning OL and how that uncertainty affected OLNZ, which halt was anticipated to remain in place for two days; and

(c) otherwise does not admit paragraph 56 of the SoC.

112. In answer to paragraph 57 of the SoC, the Respondent:

(a) says that on or about 4 February 2008, Mirvac issued to McLaughlins a notice entitled "Notice of Event of Default";

(b) says that the notice referred to in the preceding sub-paragraph stated to the effect that interest payable by McLaughlins to Mirvac under a "Mezzanine Purchase Deed" on 1 February 2008 had not been paid, which failure to pay interest was an event of default;

(c) says that on or about 4 February 2008, Capital issued a notice entitled "Notice of Default and Demand" to MFS Bale stating that an event of default had occurred under a facility agreement between Capital, on the one hand, and McLaughlins and MFS Bale, on the other, and demanding payment of the sum of $293,318.95; and

(d) otherwise does not admit paragraph 57 of the SoC.

113. In answer to the allegations in paragraph 58 of the SoC, the Respondent:

(a) says that on 1 February 2008, OLNZ made an announcement entitled "MFN: Market Update" which stated to the effect that:

(i) as detailed in various public announcements that had been made, OL had agreed to provide Pacific with financial support including the provision of funding required by Pacific to make payments to its investors as they fell due; and

(ii) late on 30 January 2008, the directors of Pacific and OLNZ were advised by OL that it would not immediately be making any funds available to Pacific and as a result Pacific had been unable to make payments due to investors on 31 January; and

(b) otherwise does not admit paragraph 58 of the SoC.

114. In answer to the allegations in paragraph 59 of the SoC, the Respondent:

(a) says that on 4 February 2008, OL issued an ASX & Media Announcement entitled "Sale of 65% of Stella Group" which stated that:

(i) OL had entered into binding agreements in relation to the sale of a 65% shareholding in Stella to funds advised by CVC;

(ii) OL would receive cash proceeds of just over $409 million and would retain a 35% shareholding and economic interest in Stella;

(iii) the proceeds from the transaction would enable OL to repay its short term debt obligations and at the same time provide it with flexibility to manage its commitments into the future; and

(iv) OL had retained external advisers to assist it to undertake and complete a strategic review of its financial services business, including a review of its operating and financing structure. Until the strategic review was completed, the board of OL had requested the ASX to continue the voluntary suspension of OL securities; and

(b) otherwise does not admit paragraph 59 of the SoC.

115. In answer to the allegations in paragraph 60 of the SoC, the Respondent:

(a) says in answer to the allegations in paragraph 60.1 of the SoC, that on 12 February 2008 OL issued an ASX & Media Announcement entitled "Business Update" which stated:

(i) the directors of Pacific had advised OL that it had embarked on the steps necessary to seek its investors' approval of a Moratorium Agreement (**Moratorium**);

(ii) the Moratorium would allow Pacific to conduct an orderly realisation of its loans and investments but would be subject to approval by investors and to obtaining any other necessary regulatory approvals; and

(iii) a critical component of the Moratorium would be an agreement with OL around its future funding of Pacific which would include an initial cash payment from OL to Pacific upon the completion of the sale of 65% of Stella. The amount of the initial payment and process for subsequent payments was currently being negotiated and would be detailed in the Moratorium documentation provided to investors;

(b) says in answer to the allegations in paragraph 60.2 of the SoC, that on 12 February 2008 MPY issued an ASX / NZX & Media Announcement which stated (inter alia) to the effect that:

(i) MPY's borrowings comprised a senior secured facility and a subordinated unsecured facility totalling approximately $180 million;

(ii) following a request from its senior secured lender to bring forward the maturity of its senior lending facilities, MPY's senior facilities matured on 30 May 2008; and

(iii) MPY's unsecured facilities also matured on 30 May 2008;

(c) otherwise does not admit paragraph 60 of the SoC.

116. In answer to the allegations in paragraph 61 of the SoC, the Respondent:

(a) says that on 19 February 2008, representatives of the Respondent met with Mr Korda of 333 Capital, which had been engaged as an adviser of OL;

(b) otherwise does not admit paragraph 61 of the SoC.

117. The Respondent admits the allegations in paragraph 62 of the SoC.

118. In answer to the allegations in paragraph 63 of the SoC, the Respondent:

(a) says that on 29 February 2008, OL issued an ASX & Media Announcement entitled "Business Update" which stated:

(i) Funds advised by CVC had completed the $409.2 million purchase of 65% of Stella from OL; and

(ii) OL received $406 million on completion of the transaction with a further $3.2 million to be received within 12 months; and

(b) otherwise does not admit paragraph 63 of the SoC.

119. In answer to the allegations in paragraph 64 of the SoC, the Respondent:

(a) says that:

(i) on 14 February 2008, Clayton Utz wrote to OIN and OL requiring the production from OIN, OL and any Material Subsidiaries (collectively defined as "**the Parties**") of the information set out in the letter;

(ii) the letter of 14 February 2008 (inter alia):

A. at paragraphs 2.1 – 2.4, sought information as to the financial position, debts and encumbrances of the Parties, including whether they or any of their related bodies corporate were in default of any financial obligation and, if so, the details of such default;

B. at paragraph 2.5, asked whether in the opinion of the Parties they were in breach of any provisions of the Trust Deed, the Terms of Issue or Chapter 2L of the Corps Act;

C. at paragraph 2.6, asked whether the Parties were aware of any covenants, terms and conditions and obligations under the Trust Deed, Terms of Issue or Chapter 2L of the Corps Act that could not be fulfilled or performed;

D. at paragraph 2.8, asked whether, since the provision of the last Quarterly Report, an event had happened which had caused or could cause (inter alia) any circumstances which could materially prejudice the Parties' ability to comply with the terms of the Trust Deed or the Terms of Issue;

E. at paragraph 2.12, asked whether there were any matters that may materially prejudice the interests of the Respondent, or the Noteholders under the Trust Deed;

F. at paragraph 2.19, asked whether in the opinion of the Parties the business of the Parties would be sustainable into the future;

G. at paragraphs 3.1 – 3.6, asked information relating to the sale of Stella, any conditions attaching to its sale, the proposed completion date and the proposed use of the funds; and

H. at paragraphs 4.1 – 4.2, asked whether the Parties would be in a position to meet their obligations under the terms of the Trust Deed and

the Terms of Issue relating to the payment of interest and repayment of principal on the Notes;

(b) says that on 20 February 2008, Clayton Utz wrote to OL confirming that the Respondent required the information requested in the letter of 14 February 2008, indicating that the Respondent would be willing to receive that information in tranches and seeking an update as to the proposed timetable for the delivery of that information;

(c) says that on 21 February 2008, Clayton Utz wrote a letter to OL, OIN and 333 Capital in which they:

(i) confirmed that the Respondent required all the information requested in the letter of 14 February 2008;

(ii) identified certain information which was required as a priority, including:

A. a current asset and liability statement for OIN and OL, including a list of assets with liabilities attaching to those particular assets duly indicated;

B. a clear statement of any defaults by OIN or OL under the terms of any facilities under which they received any advance of funds, including but not limited to the facility with Fortress;

C. a clear statement of any arrangements or compromises entered into by OIN or OL with their creditors (including contingent creditors), including but not limited to arrangements or compromises with OL New Zealand entities and Fortress; and

D. a list of all “Material Subsidiaries” as defined in the Terms of Issue;

(d) says that OIN and OL responded to Clayton Utz’s letters of 14 February 2008, 20 February 2008 and 21 February 2008 by emails of 26 February 2008 and 27 February 2008;

(e) says that in the email of 26 February 2008, OIN and OL:

(i) stated to the effect that the only asset of OIN was an intercompany loan arising from the passing of the funds from the issue of the Notes to OL and its only liabilities were the liabilities arising from the issue of the Notes and a contingent liability in relation to bonds issued by OIB;

(ii) stated to the effect that OL's assets consisted of shares in subsidiaries and intercompany loans and its only secured creditor was Fortress who held a charge in support of the Fortress facility;

(iii) stated to the effect that neither OIN nor OL had defaulted under the terms of any facilities under which they had received an advance of funds;

(iv) stated to the effect that neither OIN nor OL had entered into any arrangements or compromises with any of their respective creditors; and

(v) provided the information referred to in paragraph 134(a) below;

(f) says that in the email of 27 February 2008, OIN and OL (inter alia):

(i) stated to the effect that none of the Parties (as that term was defined in the letter of 14 February 2008) or their related bodies corporate were in default under any financial obligation;

(ii) answered the question at paragraph 2.5 of the letter of 14 February 2008 by saying "No, they are not";

(iii) answered the question at paragraph 2.6 of the letter of 14 February 2008 by saying "No they are not";

(iv) answered the question at paragraph 2.8 of the letter of 14 February 2008 by saying "Not to the Parties knowledge"; and

(v) answered the question at paragraph 2.19 of the letter of 14 February 2008 by saying "Yes";

(g) says that on 27 February 2008, Clayton Utz wrote to OL:

(i) stating (inter alia) to the effect that the emails of 26 and 27 February 2008 had not satisfactorily complied with the Respondent's requests for information;

(ii) identifying a number of unresponsive or inconsistent answers given in the emails of 26 and 27 February 2008;

(iii) seeking clarification or further information in relation to a number of issues arising from the emails of 26 and 27 February 2008 in order to establish the financial position of OL and to allow the Respondent to consider whether there had been any default under the Trust Deed;

(iv) stating that the information provided by OL did not allow the Respondent to reasonably assess the financial position of OL and requiring information and certification from OL that its net asset position was at least $280 million;

(v) seeking an undertaking that the sale of any assets by companies within the OL group (including the proceeds of the sale of Stella) be held by the entity which owned the assets in a dedicated "Asset Realisation Account" until such time as a proposal could be formulated and agreed to by the creditors of the OL group, or an administrator was appointed to the OL group; and

(vi) stating that unless the information and undertaking sought in the letter of 27 February 2008 was provided by 12.00pm, 29 February 2008, the Respondent would take such steps as it was advised without further notice;

(h) otherwise denies the allegations in paragraph 64 of the SoC.

120. In answer to the allegations in paragraph 65 of the SoC, the Respondent:

(a) says that on or about 29 February 2008, OL, OA, OFS, Castle and Stella Holdings, on the one hand, and Fortress, on the other, entered into the Stella Proceeds Deed which, inter alia, required OL to direct the purchaser of Stella to pay directly to Fortress the proceeds from the sale of Stella to the extent of the amount owing under the Fortress facility;

(b) says that on 3 March 2008, OL issued an ASX & Media Announcement entitled "Business Update" which stated:

(i) as a result of the settlement on Friday, 29 February 2008 of a number of asset sales, including the Stella transaction, OL was in the process of repaying all its short term debt obligations; and

(ii) OL had already paid the $200 million loan facility to Fortress; and

(c) otherwise does not admit paragraph 65 of the SoC.

121. In answer to the allegations in paragraph 66 of the SoC, the Respondent:

(a) says that on 3 March 2008, OL issued an ASX & Media Announcement entitled "Business Update" which stated:

(i) OL had agreed to sell its investments in the property investment and advisory firm, Gersh Investment Partners Ltd;

(ii) to the effect that OL and Pacific were to receive $20 million cash together with other non-cash consideration; and

(iii) the transaction was expected to be completed in mid-April;

(b) otherwise does not admit paragraph 66 of the SoC.

122. In answer to the allegations in paragraph 67 of the SoC, the Respondent:

(a) says that in or about March 2008, Challenger commenced the Challenger proceedings;

(b) says that the material allegations in the Challenger proceedings were to the following effect:

(i) certain events had occurred which obliged OIB under the terms of the OIB notes to issue a notice to Challenger entitling Challenger to exercise an option to redeem the notes;

(ii) OL had failed to procure its subsidiaries who were "Material Subsidiaries" within the terms of the OIB notes to provide a guarantee of OL's obligations under the notes, as required by the terms of the OIB notes;

(iii) certain representations had been made to Challenger prior to its subscription for the OIB notes – in particular, a representation to the effect that OIB's obligations under the OIB notes had been guaranteed by OL's "Material Subsidiaries" within the meaning of that term in the terms of the OIB notes – which representations were false; and

(iv) on or around 29 February 2008, OL disposed of its interest in Stella, which included its interest in a number of "Material Subsidiaries" within the terms of the OIB notes, with the result that OL was no longer in a position to procure that they provide guarantees in favour of Challenger;

(c) otherwise does not admit paragraph 67 of the SoC.

123. In answer to paragraph 68 of the SoC, the Respondent:

(a) says that on or about 20 March 2008, the NAB issued a demand to OL under a "Deed of Guarantee and Indemnity" between OL and NAB requiring payment of $40,000,000 by 5.00pm on 31 March 2008; and

(b) otherwise does not admit paragraph 68 of the SoC.

124. In answer to paragraph 69 of the SoC, the Respondent:

(a) says that on 28 April 2008, OL issued the OL 2007 half-year report;

(b) says that on page 37 of the OL 2007 half-year report it was stated that on 26 March 2008, IMF (Australia) Limited announced that it proposed to fund claims that it said certain shareholders may have against OL, but no claim had been received by OL at the date of the report; and

(c) otherwise does not admit paragraph 69 of the SoC.

125. In answer to the allegations in paragraph 70 of the SoC, the Respondent:

(a) says that on 17 April 2008, 333 Capital issued the Update to Creditors;

(b) repeats paragraph 101(a) above;

(c) says that in the Update to Creditors, 333 Capital stated to the effect that OL had a potential exposure of $250–$300 million to Pacific under the option referred to in paragraph 101(a)(i) above; and

(d) otherwise does not admit paragraph 70 of the SoC.

126. The Respondent admits the allegations in paragraph 71 of the SoC.

127. The Respondent admits the allegations in paragraph 72 of the SoC.

128. In answer to the allegations in paragraph 73 of the SoC, the Respondent:

(a) says that on 23 May 2008, the Respondent issued to OIN the Notice of Default;

(b) says that the Events of Default, within the meaning of the Trust Deed and the Terms of Issue, referred to in the Notice of Default were that:

(i) OIN and OL were unable to pay their debts as and when they fell due and, accordingly, were insolvent;

(ii) OIN had breached clause 6.5(b) of the Trust Deed by providing misleading information to the Respondent in emails of 26 and 27 February 2008 and the declaration of solvency of 17 March 2008, which breach was considered to be incapable of remedy;

(c) says that in the Notice of Default, in accordance with clause 5.2 of the Terms of Issue, the Respondent declared all the Notes to be due and payable on 5 June 2008;

(d) says that in the Notice of Default, the Respondent demanded payment of $348,621,200 in respect of the Notes and interest in the sum of $2,836,725.93;

(e) says that on 5 June 2008, the solicitors for OL and OIN wrote to the Respondent rejecting the validity of the Notice of Default and asserting that OL and OIN were not insolvent and had not provided misleading information to the Respondent; and

(f) otherwise does not admit paragraph 73 of the SoC.

129. In answer to the allegations in paragraph 74 of the SoC, the Respondent:

(a) says that on 4 June 2008, the Respondent commenced four proceedings in the Supreme Court of Queensland against OIN, OL, OFS and OIB respectively seeking orders (inter alia) that OIN, OL, OFS and OIB be wound up in insolvency under the Corps Act and that a liquidator be appointed to them; and

(b) otherwise does not admit paragraph 74 of the SoC.

130. In answer to the allegations in paragraph 75 of the SoC, the Respondent:

(a) says that on 12 June 2008, Clayton Utz issued demands on OL, OFS and OIB requiring payment by 20 June 2008 of the face value of the Notes plus interest accruing to 19 June 2008, being $348,621,200 in respect of the Notes plus interest of $4,018,695.07; and

(b) otherwise does not admit paragraph 75 of the SoC.

131. The Respondent admits the allegations in paragraph 76 of the SoC.

132. In answer to the allegations in paragraph 77 of the SoC, the Respondent:

(a) says that on 23 July 2008, Clayton Utz wrote to OA demanding payment of $348,621,200 in respect of the Notes plus interest of $7,170,612.76 pursuant to clause 3.1 of the Guarantee Deed Poll and clause 2.2 of the Deed of Accession by OA; and

(b) otherwise does not admit paragraph 77 of the SoC.

X. Alleged Liability of the Respondent (SoC, paras 78 – 92)

133. In answer to the allegations in paragraph 78 of the SoC, the Respondent:

(a) admits that it knew by 29 February 2008 that, pursuant to clause 6.1 of the Trust Deed, OIN had been established for the sole purpose of issuing the Notes;

(b) admits that it knew by 29 February 2008 that, pursuant to clause 5.5 of the Terms of Issue, no Noteholder was entitled to proceed directly against OIN to enforce any right or remedy under or in respect of any Note unless the Noteholder was expressly permitted to do so under the Trust Deed;

(c) admits that it knew by 29 February 2008 that it was an Event of Default, within the meaning of clause 15.2 of the Terms of Issue, if a deed poll on substantially the same terms as the Guarantee Deed Poll was not executed by a Material Subsidiary within 30 days of that entity becoming a Material Subsidiary unless the entry into such a deed poll would give rise to a greater than nominal Tax cost for OL or its Subsidiaries (within the meaning of the Terms of Issue); and

(d) otherwise denies the allegations in paragraph 78 of the SoC.

Respondent's knowledge of guarantees and Material Subsidiaries (SoC, paras 79 – 81)

134. In answer to the allegations in paragraph 79 of the SoC, the Respondent:

(a) says that on 26 February 2008, it was informed by Mr Anderson that currently only OIB satisfied the definition of "Material Subsidiary" in the Terms of Issue, but that OFS and OA had also entered into Accession Deeds in relation to the Notes as they had, at an earlier time, satisfied the definition of "Material Subsidiary", although they did not satisfy that definition now;

(b) says that Mr Anderson was a director of OIN and the chief financial officer of OL at 26 February 2008;

(c) says that the Respondent was, pursuant to clause 14.2 of the Trust Deed, and as pleaded in paragraph 93(c) above, entitled to accept and act upon the statement referred to in sub-paragraph (a) hereof without further inquiry as to its accuracy or completeness; and

(d) otherwise does not admit paragraph 79 of the SoC.

135. In answer to the allegations in paragraph 80 of the SoC, the Respondent:

(a) says that the Respondent did not know that Deeds of Accession had not been executed by the entities referred to in paragraphs 80.1 – 80.5 of the SoC, but says that the information provided to it as pleaded in paragraph 134 above was to the effect that Deeds of Accession had not been executed by the entities referred to in paragraphs 80.1 – 80.5 of the SoC;

(b) says that the SoC contains no allegation that the entities identified in paragraphs 80.1 – 80.5 of the SoC were Material Subsidiaries or that a guarantee should have been provided by those entities; and

(c) otherwise denies the allegations in paragraph 80 of the SoC.

136. In answer to the allegations in paragraph 81 of the SoC, the Respondent:

(a) says that the allegation therein is defective, because it contains no allegation that the entities identified in paragraphs 80.1 – 80.5 of the SoC were Material Subsidiaries, and does not identify the facts said to lead to the conclusion that the Respondent should have known that they were; and

(b) otherwise denies the allegations in paragraph 81 of the SoC.

Matters that the Respondent allegedly should have known by 29 February 2008 (SoC, para 82)

137. In answer to the allegations in paragraph 82 of the SoC, the Respondent:

(a) ***(para 82.1)*** admits that by 29 February 2008, it knew the matters referred to in paragraph 82.1 of the SoC;

(b) ***(paras 82.2 & 82.3)*** in relation to paragraphs 82.2 and 82.3 of the SoC, admits that by 29 February 2008 it knew of the matters pleaded in paragraphs 100 and 102 above (being the contents of the Quarterly Reports dated 31 July 2007 and 29 October 2007);

(c) ***(paras 82.4 & 82.5)*** in relation to paragraphs 82.4 and 82.5 of the SoC, says that by 29 February 2008 it knew that OIN's only asset was the loan referred to in paragraphs 100 and 102 above and its only income was interest payable on that loan;

(d) ***(paras 82.6 & 82.7)*** in relation to paragraphs 82.6 and 82.7 of the SoC, denies that as at 29 February 2008 OA and OIB had no assets or that it knew, or ought to have known, that matter;

(e) ***(para 82.8)*** in relation to paragraph 82.8 of the SoC, admits that the OL 2007 Annual Report disclosed (on page 6) that Stella contributed 47% of OL's consolidated "results" for the financial year ended 30 June 2007 and that by 29 February 2008 the Respondent was aware of that matter;

(f) ***(para 82.9)*** in relation to paragraph 82.9 of the SoC, admits that the OL 2007 Annual Report stated (on page 58) that Stella's assets classified as held for sale were $2,764,463,000 and Stella's liabilities classified as held for sale were $1,330,035 as at 30 June 2007 and that by 29 February 2008 the Respondent was aware of those matters, but denies that OL's auditors had valued Stella as alleged or that it knew this to be the case;

(g) ***(para 82.10)*** in relation to paragraph 82.10 of the SoC, says that by 29 February 2008 the Respondent was aware that OIN had issued 3,486,462 Notes with a face value of $100 each maturing on 30 December 2011 and that in the OIN 2007 Annual Report OIN disclosed a non-current liability for $343,145,000 in respect of those Notes;

(h) ***(para 82.11)*** in relation to paragraph 82.11 of the SoC:

(i) says that it was unable to know, and could not have known, of the matters alleged in paragraphs 66 – 77 of the SoC by 29 February 2008, because the events alleged in those paragraphs are said to have occurred between 3 March 2008 and 23 July 2008;

(ii) says that in the premises, the allegation in paragraph 82.11 of the SoC that the Respondent knew or ought to have known of the matters alleged in paragraphs 66 – 77 of the SoC is a defective pleading;

(iii) as to paragraph 41 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraph 96(a) above;

(iv) as to paragraphs 42 and 43 of the SoC, admits that by no later than 29 February 2008 it knew that various Noteholders acquired Notes at various times and in various quantities and repeats the matters referred to in paragraph 98 above;

(v) as to paragraph 44 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraphs 99(a) – 99(c) above;

(vi) as to paragraph 45 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraph 100(a) above;

(vii) as to paragraph 46 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraph 101(a) above;

(viii) as to paragraph 47 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraph 102(a) above;

(ix) as to paragraph 48 of the SoC, repeats sub-paragraphs (vi) and (viii) above;

(x) as to paragraphs 50 and 51 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraph 105(a) above;

(xi) as to paragraph 52 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraph 107(a) above;

(xii) as to paragraph 53 of the SoC, denies that it knew or ought to have known of that matter by 29 February 2008, and says that OL provided incomplete and misleading information to the Respondent in relation to the matters pleaded in paragraph 108(a) above;

PARTICULARS

1) The incomplete and misleading information is identified in the letter from Clayton Utz to Mr Anderson dated 27 February 2008, at paragraphs 1 – 4 and pleaded in paragraph 119(g) above.

2) Further, an OL ASX and Media Announcement dated 21 February 2008 titled "Business Update" purported to provide an update on the status of the Fortress facility, but made no mention of the facts pleaded in paragraph 108(a) above or paragraph 53 of the SoC.

3) Further, the OL ASX & Media Announcement published on 23 January 2008 titled "MFS Limited – Shareholder Update" purported to "clarify its debt position", but that announcement did not disclose the facts pleaded in paragraph 108(a) above or paragraph 53 of the SoC.

4) Further, the Respondent was first provided with a copy of the letter from Fortress dated 21 January 2008 the subject of paragraph 53

of the SoC when access to certain company documents was provided to it on 7 March 2008, as recorded in an email from Mr Sharry to Mr Anderson sent on 8 March 2008 and pleaded at paragraph 45 above. In that email, Clayton Utz asserted that, having reviewed the letter from Fortress dated 21 January 2008, it was apparent that OL had been evasive in answering the Respondent's questions, and that the information previously provided had been incomplete or misleading.

(xiii) as to paragraph 54 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraphs 109(a) – 109(d) above;

(xiv) as to paragraph 55 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraph 110(a) above;

(xv) as to paragraph 56 of the SoC, admits that it knew by no later than 29 February 2008 that it had been reported in "The Australian" newspaper on 2 February 2008 in an article entitled "MFS's Kiwi arm on brink of collapse after default" that OLNZ had recently entered a trading halt;

(xvi) as to paragraph 57 of the SoC, denies that it knew or ought to have known of the matters pleaded in paragraph 57 of the SoC and paragraph 112 above, and says that OL provided misleading and incomplete information in relation to those matters;

PARTICULARS

The misleading and incomplete information was provided by Mr Anderson in the email of 27 February 2008 referred to in paragraph 119(f)(i) above.

(xvii) as to paragraph 58 of the SoC, admits that it knew by no later than 29 February 2008 that it had been reported in "The Australian" newspaper on 2 February 2008 in an article entitled "MFS's Kiwi arm on brink of collapse after default" that "In a stock exchange announcement, [the Chief Executive of OLNZ] said MFS NZ and MFS Pacific had been advised 'late on January 30' that MFS Limited would 'not immediately be making any funds available to MFS Pacific. As a result, MFS Pacific has been unable to make payments due to its investors on January 31'";

(xviii) as to paragraph 59 of the SoC, admits that by no later than 29 February 2008 it knew the matters pleaded in paragraph 114(a) above;

(xix) as to paragraph 60 of the SoC:

A. admits that by no later than 29 February 2008 it knew the matters referred to in paragraph 115(a) above;

B. denies that by 29 February 2008 it knew or ought to have known of the matters alleged in paragraph 60.2 of the SoC and pleaded in paragraph 115(b) above, and says that OL provided misleading and incomplete information in relation to those matters;

PARTICULARS

The misleading and incomplete information was provided by Mr Anderson in the email of 27 February 2008 referred to in paragraph 119(f)(i) above.

(xx) as to paragraph 61 of the SoC, admits that by no later than 29 February 2008 it knew the matters referred to in paragraph 116(a) above;

(xxi) as to paragraph 62 of the SoC, admits that by no later than 29 February 2008 it knew that the announcement referred to had been made;

(xxii) as to paragraph 63 of the SoC, admits that on or about 3 March 2008 it knew of the matters pleaded in paragraph 118(a) above and denies that it knew, or ought to have known, of those matters or the matters pleaded in paragraph 63 of the SoC by 29 February 2008;

(xxiii) as to paragraph 64 of the SoC:

A. admits that by no later than 29 February 2008 it knew the matters referred to in paragraphs 119(a) – 119(g) above; and

B. otherwise denies the allegation therein, and says that it is not the case that OL declined to confirm to the Respondent that no matters had arisen that could materially prejudice the interests of the Respondent or Noteholders;

(xxiv) as to paragraph 65 of the SoC, admits that by 4 March 2008 it knew of the matters pleaded in paragraph 120(b) above and denies that it knew, or ought

to have known, of those matters or the matters pleaded in paragraph 65 of the SoC by 29 February 2008;

(xxv) otherwise denies that on or prior to 29 February 2009 it knew, or ought to have known of, the matters alleged in paragraphs 41 – 77 of the SoC;

(i) ***(para 82.12)*** in relation to paragraph 82.12 of the SoC:

(i) admits that it knew the matters referred to in paragraph 114(a) above by 29 February 2008 (viz. the contents of the ASX and Media Announcement dated 4 February 2008 concerning the sale of 65% of Stella);

(ii) admits that by 29 February 2008 it knew the matters in paragraph 82.12(a) of the SoC;

(iii) denies paragraph 82.12(b) of the SoC, because the Respondent did not know and ought not to have known by 29 February 2008 that the proposed sale would mean that the remaining 35% shareholding in Stella was unlikely to yield the value reported in the accounts, and says further that:

A. the OL 2007 Annual Report stated (on page 58) that Stella's assets classified as held for sale were $2,764,463,000 and Stella's liabilities classified as held for sale were $1,330,035 as at 30 June 2007;

B. on 19 February 2008, at a meeting in Sydney between Mr Kelly, Mr Jenkins and Mr Sharry on behalf of the Respondent and Mr Korda on behalf of 333 Capital, Mr Korda advised that the remaining 35% shareholding in Stella was worth up to a value of $700m;

C. on 20 February 2008, 333 Capital sent to the Respondent a document prepared by it described as "Cash Flow Waterfall (Version 4)" dated 20 February 2008, which valued the remaining 35% shareholding in Stella at $686m; and

D. on 26 February 2008, Clayton Utz were provided with "Cash Flow Waterfall (Version 5)" prepared by 333 Capital and dated 25 February 2008, which valued the remaining 35% shareholding in Stella at $686m; and

E. the information provided by the Respondent pleaded in paragraph 43(e) above on the date referred to in that paragraph is inconsistent with the

allegation that the Respondent ought to have known by 29 February, 2008 the matter alleged in paragraph 82.12(b) of the SoC;

(iv) denies paragraph 82.12(c) of the SoC, because the Respondent did not know and ought not to have known by 29 February 2008 that the sale of a 65% shareholding in Stella for approximately $409 million would result in a substantial reduction in revenue available to the Octaviar group; and

(v) denies paragraph 82.12(d) of the SoC, because the Respondent did not have available to it guarantees provided by Stella Holdings;

(j) ***(para 82.13)*** denies that by 29 February 2008 it knew the matters alleged in paragraph 82.13 of the SoC and says that it knew that there were 3,486,212 Notes on issue on that date each with a face value of $100;

(k) ***(para 82.14)*** in relation to paragraph 82.14 of the SoC (alleging that the Respondent knew or ought to have known by 29 February 2008 that OL failed to have consolidated net assets of at least $280 million as at 31 December 2007):

(i) denies the allegations therein;

(ii) says as pleaded in paragraphs 119(a) - 119(g) above;

(iii) says further that it did not know and ought not to have known by 29 February 2008 that OL failed to have consolidated net assets of at least $280 million as at 31 December 2007 because:

A. there was no information provided to the Respondent prior to 29 February 2008 which stated that this was the case;

B. the information provided to the Respondent prior to 29 February 2008 contradicted the assertion in paragraph 82.14 of the SoC, as follows:

1) the OL 2007 Annual Report (dated 21 August 2007) reported consolidated net assets of OL of $1,533,419; and

2) the matters set out in the Quarterly Report received on 18 January 2008 pleaded in paragraph 18 above;

C. The information provided to the Respondent between 1 March 2008 and 28 April 2008 also contradicted the assertion that OL failed to have

consolidated net assets of at least $280 million as at 31 December 2007, as follows:

1) the matters pleaded in paragraphs 43(a), 52(b) and 53 above; and

2) the OL 2007 half-year report reported consolidated net assets of OL of $1,223,199,000; and

(iv) says that the allegation in paragraph 82.14 of the SoC is defective, because the SoC pleads no facts that support the assertion that the Respondent knew, or that it ought to have known, by 29 February 2008, that OL did not have consolidated net assets of at least $280 million as at 31 December 2007;

(l) ***(para 82.15)*** in relation to paragraph 82.15 of the SoC (alleging that the Respondent knew or ought to have known by 29 February 2008 that the Octaviar group was presumed to be insolvent under the Corps Act as at 29 February 2008):

(i) denies the allegation therein;

(ii) says that none of the events upon which a presumption of insolvency arises under section 459C(2) of the Corps Act had occurred in relation any member of the Octaviar group as at 29 February 2008;

(iii) repeats the matters pleaded in paragraphs 43(a) – 43(d) and 52 above and says that the information provided by the Respondent on the dates referred to in those paragraphs is inconsistent with the allegation that the Respondent ought to have known, by 29 February 2008, the matter alleged in paragraph 82.15 of the SoC; and

(iv) says that the allegation is defective, because the SoC pleads no facts that support the assertion that the Octaviar group was presumed to be insolvent as at 29 February 2008, or that support the assertion that the Respondent knew or ought to have known this;

(m) ***(para 82.16)*** in relation to paragraph 82.16 of the SoC (alleging that the Respondent knew or ought to have known by 29 February 2008 that "at a minimum there was a substantial risk the Octaviar group was insolvent"):

(i) denies the matters alleged therein;

(ii) says that the OL 2007 Annual Report was prepared on the basis that OL was a going concern and contained a director's declaration that there were reasonable grounds to believe that OL would be able to pay its debts as and when they fell due;

(iii) repeats the matters in paragraphs 119(a) – 119(g) above;

(iv) repeats the matters in paragraphs 18 and 24(b) above

(v) repeats the matters in paragraphs 39, 43(a) – 43(d), 49, 51 and 52 above and says that the matters referred to in those paragraphs is inconsistent with the allegation that the Respondent ought to have known, by 29 February 2008, the matter alleged in paragraph 82.16 of the SoC;

(vi) relies on the matters pleaded in paragraphs 139(b) and 139(c) below; and

(vii) says that the allegation therein is defective, because paragraph 82.16 of the SoC is vague and ambiguous, and the SoC does not identify the facts said to have caused the Respondent to know the matters alleged, or which mean that it ought to have known those matters;

(n) ***(para 82.17)*** in relation to paragraph 82.17 of the SoC, says it knew by 29 February 2008 that the occurrence of an Insolvency Event with respect to OL and OIN was an Event of Default within the meaning of the Terms of Issue; and

(o) otherwise denies paragraph 82 of the SoC.

Assertion that by 29 February 2008 the Respondent should have concluded that it was unlikely assets would be sufficient to repay Notes and that immediate steps were required to protect Noteholders (SoC, para 83)

138. In answer to the allegations in paragraph 83 of the SoC, the Respondent:

(a) denies the first sentence of paragraph 83 of the SoC because the Respondent:

(i) did not know by 29 February 2008 that the assets of OIN and the Guarantors were unlikely to be sufficient to repay the Notes when they become due; and

(ii) should not have formed the view, and had no proper basis for forming the view by 29 February 2008, that the assets of OIN and the Guarantors were unlikely to be sufficient to repay the Notes when they become due;

(b) says that it was apparent to the Respondent from 18 January 2008 onward that the Octaviar group was financially distressed, but the nature and scale of its financial difficulties was unclear in the period to 29 February 2008;

(c) says that after 18 January 2008 the Respondent actively and diligently sought information and advice in order to understand the true financial position of OIN and OL and the Octaviar group, as pleaded in **Part III** above;

(d) says that as pleaded in **Part III** above, after 18 January 2008 the Respondent actively and diligently sought information and advice in order to try to determine:

  (i) whether OIN and OL were solvent or not; and

  (ii) whether there had occurred an Event of Default under the Terms of Issue;

(e) as to the second sentence of paragraph 83 of the SoC, admits that the Respondent knew by no later than 29 February 2008 that immediate steps needed to be taken to protect the interests of Noteholders (but not Group Members for the reasons pleaded in paragraph 76(b)(iii) above), and says that the Respondent did take immediate steps to protect the interests of Noteholders, and that the steps taken were as set out in **Part III** above;

(f) says that the steps taken by the Respondent up to 29 February 2008 to protect the interests of Noteholders and the steps taken immediately thereafter during March and April 2008 to protect the interests of Noteholders, as pleaded in **Part III** above, were appropriate and proper steps to be taken by a prudent trustee; and

(g) otherwise denies paragraph 83 of the SoC.

Assertion that by 29 February 2008 the Respondent should have given notice declaring all Notes to be due and payable (SoC, para 84)

139. In answer to the allegations in paragraph 84 of the SoC, the Respondent:

(a) denies the allegations therein;

(b) says that if by 29 February 2008 the assets of OIN and the Guarantors were unlikely to be sufficient to repay the Notes when they became due in December 2011 then:

  (i) OIN and the Guarantors would not for that reason have been insolvent, because a company is insolvent if, and only if, it is in fact unable to pay its debts as and when they fall due;

(ii) there would have remained a possibility that OIN and the Guarantors were not insolvent;

(iii) issuing a notice under clause 5.2 of the Terms of Issue would have carried the risk (if OIN and the Guarantors were not in fact insolvent) of:

A. causing cross-defaults under other financing arrangements within the Octaviar group, thereby causing OL and OIN to become insolvent;

B. prejudicing the realisable value of Stella, and of other assets of the Octaviar group; and

C. itself causing OL and OIN to become insolvent;

(c) says that in the premises, if the Respondent had formed the views pleaded in paragraph 83 of the SoC, as it is alleged that it should have done:

(i) the Respondent would not for that reason have had a proper or any basis either immediately, or by no later than 29 February 2008, to give notice to OIN declaring all the Notes to be due and payable pursuant to clause 5.2 of the Terms of Issue; and

(ii) it would also have been imprudent to serve a notice on OIN declaring all the Notes to be due and payable pursuant to clause 5.2 of the Terms of Issue, for the reason that this had the potential to harm the interests of Noteholders, because it carried the risks pleaded in the previous sub-paragraph (b)(iii).

(d) says that if the Respondent had formed the views pleaded in paragraph 83 of the SoC it would not for that reason have concluded, and would have had no proper or any basis for concluding, that an Event of Default had occurred, and that a notice under clause 5.2 of the Terms of Issue could be sent;

(e) says further that prior to 29 February 2008, the Respondent:

(i) diligently sought information from the Octaviar group about the financial circumstances of OIN, OL and the Octaviar group, as pleaded in **Part III** and paragraph 119 above and;

(ii) obtained information about the financial circumstances of OIN, OL and the Octaviar group:

A. from publicly available sources, as pleaded in paragraph 21 above; and

B. from the Octaviar group itself, as pleaded in paragraphs 33 – 35 and 119 above;

(iii) diligently sought accounting advice about the financial circumstances of OIN, OL and the Octaviar group, as pleaded in **Part III** above;

(iv) retained, and sought advice from, Clayton Utz, on and from 4 February 2008, which included a request for advice as to the rights of the Respondent, and the obligations of the Respondent on behalf of Noteholders, as pleaded in paragraphs 28 – 32 above;

(v) obtained advice from Clayton Utz up to 29 February 2008 as pleaded in paragraph 32 above, and acted in good faith in accordance with that advice as pleaded in paragraphs 30, 33, 35 and 119 above;

(vi) acted appropriately and properly in accepting and following that advice; and

(vii) in the premises of the previous sub-paragraph, was not advised by Clayton Utz prior to 29 February 2008 that an Event of Default had occurred, or that the Respondent was entitled to give a notice to OIN demanding payment of the Notes pursuant to clause 5.2 of the Notes Terms of Issue;

(f) says that in the premises, prior to 29 February 2008:

(i) the Respondent diligently sought information and accounting and legal advice;

(ii) the advice received was not to the effect pleaded in paragraph 84 of the SoC;

(iii) there was no proper basis for the Respondent to give notice to OIN declaring all the Notes to be due and payable; and

(iv) it would have been improper for the Respondent to have given notice to OIN declaring all the Notes to be due and payable pursuant to clause 5.2 of the Terms of Issue;

(g) says further that immediately after 29 February 2008, during March 2008, the Respondent:

(i) sought advice from Counsel, by causing Queen's Counsel and Junior Counsel to be instructed on 29 February 2008 as pleaded in paragraphs 36 – 38 above;

(ii) received advice in writing from Queen's Counsel and Junior Counsel in the terms pleaded in paragraphs 39 – 65 above;

(iii) in the premises, by 3 March 2008 had been advised by Counsel that it was unclear whether an Event of Default had occurred, that there were justifiable concerns about the solvency of OL, that steps should be taken immediately to obtain further information, and that no application to Court should yet be made;

(iv) accepted and in good faith followed the advice of Counsel provided on 2 and 3 March 2008;

(v) acted appropriately and properly in accepting and following that advice of Counsel;

(vi) received advice from PwC between 7 and 10 March 2008 in the terms pleaded in paragraph 46 above;

(vii) on or about 11 March 2008, reviewed an affidavit sworn by Mr Hall on 11 March 2008 (referred to in paragraph 49 above), in which Mr Hall deposed to having reviewed documents produced by the Octaviar group, and deposed that whilst he had concerns about the solvency of OL and OIN, the documents provided did not enable him to form a concluded view as to whether OL and OIN were solvent; and

(viii) took the further steps during March 2008 pleaded in paragraph 39 – 55 above;

(h) says that in the premises, during March 2008:

(i) the Respondent diligently sought further information and accounting and legal advice;

(ii) the advice received was not to the effect pleaded in paragraph 84 of the SoC;

(iii) there was no proper basis for the Respondent to give notice to OIN declaring all the Notes to be due and payable;

(iv) it would have been improper for the Respondent to give notice to OIN declaring all the Notes to be due and payable pursuant to clause 5.2 of the Terms of Issue during March 2008; and

(i) insofar as alleged, denies that it ought to have formed the views described in paragraph 83 of the SoC, for the reasons pleaded in answer to paragraph 83 of the SoC.

Assertion the Respondent should by 29 February 2008 have given notice of default under clause 5.2 because OL had failed to provide Guarantee Deed Polls from "certain Material Subsidiaries" (SoC, para 85)

140. In answer to the allegations in paragraph 85 of the SoC, the Respondent:

(a) says that the allegation therein is defective, because:

(i) paragraph 85 of the SoC does not allege which companies were "Material Subsidiaries" in respect of which OL failed to provide Guarantee Deed Polls; and

(ii) neither paragraph 81, or paragraph 85, or any other part of the SoC, alleges expressly that there were any companies that were Material Subsidiaries that had failed to provide Guarantee Deed Polls;

(b) insofar as alleged, denies that it ought to have formed the views described in paragraph 83 of the SoC, for the reasons pleaded in answer to paragraph 83 of the SoC; and

(c) otherwise denies the allegations in paragraph 85 of the SoC.

Assertion that the Respondent should have given notice to the Guarantors demanding payment on the guarantee if OIN had failed to meet a demand for early repayment of the Notes (SoC, para 86)

141. In answer to the allegations in paragraph 86 of the SoC, the Respondent:

(a) admits that upon any failure by OIN to comply with a notice declaring all the Notes to be due and payable pursuant to clause 5.2 of the Terms of Issue, it would have given notice to the Guarantors demanding payment of the "Guaranteed Monies" pursuant to clause 12.1 of the Terms of Issue;

(b) insofar as alleged, denies that it ought to have served a notice pursuant to clause 5.2 of the Terms of Issue on or before 29 February 2008, for the reasons pleaded in answer to paragraph 84 of the SoC; and

(c) insofar as alleged, denies that it ought to have formed the views described in paragraph 83 of the SoC, for the reasons pleaded in answer to paragraph 83 of the SoC.

Assertion that the Respondent should have applied to Court by 29 February 2008 for orders that OIN and the Guarantors be wound up and the assets of OIN and the Guarantors "frozen" until determination of the winding-up application (SoC, para 87)

142. In answer to the allegations in paragraph 87 of the SoC, the Respondent:

(a) denies the allegation therein;

(b) says that if it the assets of OIN and the Guarantors were unlikely to be sufficient to repay the Notes when they became due OIN and the Guarantors would not for that reason have been insolvent, and that a company is insolvent if, and only if, it is in fact unable to pay its debts as and when they fall due;

(c) says that if the Respondent had formed the views pleaded in paragraph 83 of the SoC it would neither immediately, or no later than 29 February 2008, have made an application to the court for orders winding up OIN or the Guarantors, or for "freezing" the assets of OIN or the Guarantors, or seeking that an undertaking be given as alleged, and would have had no proper basis for doing any of these things;

(d) says that if the Respondent had formed the views pleaded in paragraph 83 of the SoC, it would have concluded that no Event of Default had yet occurred, that it was not established that the companies were insolvent, and that there was no basis for applying for any of the orders pleaded in paragraph 87 of the SoC;

(e) says that the allegation in paragraph 87 of the SoC is defective, because it fails to plead facts that connect the premise of the allegation (that the Respondent formed the view that the assets of OIN and the Guarantors were unlikely to be sufficient to repay the Notes when they became due) to the allegation sought to be advanced, that the Respondent would in those circumstances have made the applications described;

(f) says that any application for the orders described in paragraph 87 of the SoC on or prior to 29 February 2008 would:

(i) have been opposed by OL, OIN, OA, OFS and OIB, including on the bases articulated in the correspondence of its solicitors dated 5 June 2008 pleaded in paragraph 128(e) above;

(ii) have been opposed by some Noteholders;

(iii) have been unsupported by evidence in the possession of the Respondent demonstrating that OL, OIN, OA, OFS and OIB were insolvent or that an Event of Default had occurred pursuant to the Terms of Issue;

(iv) have been unsupported by evidence in the possession of the Respondent capable of demonstrating that grounds existed for a freezing or other order of the kind pleaded in paragraph 87.2 of the SoC;

(g) says, in the premises of the sub-paragraphs (f)(iii) and (iv) above, that any application for the orders described in paragraph 87 of the SoC brought on or prior to 29 February 2008 would have been improperly commenced by the Respondent, with the result that the Respondent would have:

(i) been entitled to no indemnity from the trust estate in respect of costs, expenses and liabilities incurred in prosecuting the applications brought; and

(ii) incurred a liability to Noteholders for breach of trust;

(h) says further that:

(i) the bringing of the applications identified in paragraphs 87.1 or 87.2 of the SoC would create a real risk that the sale of Stella would not proceed;

(ii) if orders were made in the terms of the applications identified in paragraphs 87.1 or 87.2 of the SoC, they would have resulted in the sale of Stella not proceeding; and

(iii) bringing an application in the terms of paragraph 87.2 of the SoC would have required the Respondent to give an undertaking as to damages which would have included (inter alia) an undertaking to pay damages in respect of all loss suffered by reason of the sale of Stella not proceeding, and there was a real risk that the damages would significantly exceed the trust estate potentially available to provide recoupment or exoneration;

(i) says further that:

(i) between 2 March 2008 and 10 March 2008 the Respondent received advice from Counsel and Clayton Utz as pleaded in paragraph 48 above;

(ii) the Respondent accepted and acted in good faith in accordance with that advice by commencing the RFI proceedings as pleaded in paragraph 47 above;

(iii) it was appropriate and proper for the Respondent to accept and to act in accordance with that advice;

(j) says that the application referred to in paragraph 87 of the SoC:

(i) was not an application a prudent trustee in the position of the Respondent would have made on or prior to 29 February 2008; and

(ii) in the alternative, would not, if made, have resulted in orders that would have prevented any proceeds received from the sale of Stella being paid directly to Fortress to the extent of the amount outstanding under the Fortress facility, pursuant to the Stella Proceeds Deed.

Assertion that the court would have made orders for winding-up OIN and the Guarantors and freezing orders pending the winding-up if the Respondent had made an application before 29 February 2008 (SoC, para 88)

143. In answer to the allegations in paragraph 88 of the SoC, the Respondent:

(a) denies the matters alleged therein; and

(b) says that the allegation is defective because the SoC fails to allege facts or any particulars that support the allegation in paragraph 88 of the SoC.

Assertion that the Respondent would by 28 February 2014 have brought proceedings against directors of OIN and of Guarantors (SoC, para 89)

144. In answer to the allegations in paragraph 89 of the SoC, the Respondent:

(a) denies the allegations therein;

(b) says that the allegation is defective, because it:

(i) pleads no facts that connect the premise of the allegation (that the Respondent formed the view that the assets of OIN and the Guarantors were unlikely to be sufficient to repay the Notes when they became due) to the allegation sought to be advanced, that the Respondent would in those circumstances have commenced the proceedings described;

(ii) contains no particulars of the proceedings that the Applicant says should have been brought;

(iii) does not explain why proceedings should have been brought; and

(iv) does not explain why the Australian Consumer Law had application as alleged;

(c) says that it had and has no standing to bring proceedings against the directors of OL, OIN, OA, OFS and OIB for breach of Part 2D.1 and Part 5.7B of the Corps Act; and

(d) says that it commenced proceedings against Mr Anderson, Mr White and Michael Christodoulou King in the Supreme Court of Queensland on 15 January 2014.

Alleged breaches of duty by the Respondent (SoC, para 90)

145. In answer to the allegations in paragraph 90 of the SoC, the Respondent:

(a) denies that the Respondent breached its obligations under the Trust Deed, Amending Deed, Corps Act, at law, or its duty of care, as described in paragraphs 36 - 38 of the SoC, or at all;

(b) denies paragraph 90.1 of the SoC;

(c) says that the SoC pleads no facts in support of the allegation in paragraph 90.1 of the SoC, alternatively leaves it unclear which of the pleaded facts are sought to be relied upon;

(d) denies that it failed to form the views described in paragraph 83 of the SoC for the reasons pleaded in answer to paragraph 83 of the SoC;

(e) denies paragraph 90.3 of the SoC for the reasons pleaded in answer to paragraphs 84 and 85 of the SoC;

(f) denies paragraph 90.4 of the SoC for the reasons pleaded in answer to paragraph 86 of the SoC;

(g) denies paragraph 90.5 of the SoC for the reasons pleaded in answer to paragraph 87 of the SoC;

(h) denies paragraph 90.6 of the SoC for the reasons pleaded in answer to paragraph 89 of the SoC;

(i) says further that there is no allegation in the SoC that the Respondent exercised its powers and discharged its duties under the Trust Deed or the Amending Deed other than *bona fide* or for any collateral or improper purpose;

(j) says that in its further and better particulars of the SoC dated 23 December 2014, the Applicant confirmed that it does not allege that the Respondent acted for improper purposes and does not allege an absence of *bona fides*;

(k) says that:

(i) the Respondent was active and diligent in seeking relevant information about the circumstances of OIN, OL and the Octaviar group, as pleaded in **Part III** and in paragraph 139 above;

(ii) the Respondent was active and diligent in seeking appropriate professional advice, as pleaded in **Part III** and in paragraph 139 above;

(iii) the Respondent in good faith followed and acted in accordance with the advice provided to it, as pleaded in **Part III** and in paragraph 139 above, and it was appropriate and proper for the Respondent to do so; and

(iv) in the premises of (i) – (iii) above, the Respondent:

A. discharged the duties imposed on it as pleaded in paragraphs 92(a), 92(b) and 93(a) above;

B. did not breach its obligations under the Trust Deed, Amending Deed, Corps Act, at law, or its duty of care, as described in paragraphs 36 – 38 of the SoC, or at all; and

C. is not liable for any loss occasioned to the Applicant and the Group Members (which loss is denied) also by reason of clause 10.4 of the Trust Deed.

146. In further answer to paragraph 90 of the SoC, the Respondent says that:

<u>Reliance on auditor of OIN</u>

(a) at all material times up until 28 April 2008, the Respondent accepted and acted upon the statements and audit opinions of KPMG, the auditor of OIN, as expressed in the OL 2007 Annual Report, the OIN 2007 Annual Report and OIN 2007 half-year report;

(b) pursuant to clause 14.2(b) of the Trust Deed, the Respondent:

(i) was entitled to accept and act on any information, statements, reports, balance sheet and accounts supplied by an "Auditor" of OIN;

(ii) was not bound to call for further evidence or enquire into the accuracy or completeness of the said documents; and

(iii) is not responsible for any loss, damage, cost, expense or liability that may be occasioned by relying thereon; and

(c) in the premises, if (which is denied) the Respondent would otherwise be liable to the Applicant and Group Members, it is not responsible for any loss, damage, cost, expense or liability that may be occasioned by it relying upon information, statements, reports, balance sheet and accounts supplied by KPMG;

Information supplied by OIN and its officers

(d) the Respondent also accepted and acted upon information, statements, reports, balance sheets and accounts supplied by OIN, and officers of OIN, as pleaded in paragraphs 18, 43, 51, 52, 53 and 119 above and:

(i) pursuant to clause 14.2(b) of the Trust Deed, the Respondent:

A. was entitled to accept and act on any information, statements, reports, balance sheets and accounts supplied by OIN or any director, secretary or duly authorised officer of OIN;

B. was not bound to call for further evidence or enquire into the accuracy or completeness of the said documents; and

C. is not responsible for any loss, damage, cost, expense or liability that may be occasioned by relying thereon; and

(ii) in the premises, if (which is denied) the Respondent would otherwise be liable to the Applicant and Group Members, it is not responsible for any loss, damage, cost, expense or liability that may be occasioned by it relying upon the material supplied by OIN and its officers as pleaded herein;

Information given under the Trust Deed

(e) says further that:

(i) the Respondent also accepted and acted upon statements or opinions contained in a statement, certificate, report, balance sheet or account given under the Trust Deed, as pleaded in paragraphs 18, 43, 51 and 119 above;

(ii) pursuant to clause 14.2(c) of the Trust Deed, the Respondent:

A. was entitled to accept and act upon any statement or opinion contained in a statement, certificate, report, balance sheet or account given under the Trust Deed as conclusive evidence of its contents, and which included a statement, certificate, report, balance sheet or account provided pursuant to clause 5 of the Trust Deed;

B. was not bound to call for further evidence or enquire into the accuracy or completeness of the said documents; and

C. is not responsible for any loss, damage, cost, expense or liability that may be occasioned by relying thereon; and

(iii) in the premises, if (which is denied) the Respondent would otherwise be liable to the Applicant and Group Members, it is not responsible for any loss, damage, cost, expense or liability that may be occasioned by it relying upon the material supplied under the Trust Deed, as pleaded in sub-paragraph (i) hereof;

<u>Chapter 2L of the Corps Act</u>

(f) says further that by reason of the matters pleaded in paragraphs 119(a) – (g), 128(a) – (d), 129(a), 130(a), 132(a) and 134(a) above and/or having regard to clauses 10.4 and 14.2 of the Trust Deed pleaded in paragraphs 93(b) and 93(c) above:

(i) it exercised reasonable diligence to ascertain whether the property of OIN, OL, OA, OIB and OFS would be sufficient to repay the amount lent pursuant to the Notes when it became due;

(ii) it exercised reasonable diligence to ascertain whether OIN, OL, OA and OIB and OFS committed any breach of the Terms of Issue and the provisions of the Trust Deed and Chapter 2L of the Corps Act; and

(iii) it did everything in its power to ensure that OIN, OL, OA, OIB and OFS remedied any breach known to the Respondent of the Terms of Issue and the

provisions of the Trust Deed and Chapter 2L of the Corps Act to the extent that the breach would materially prejudice Noteholders' interests or any security for the Notes.

Alleged loss and damage (SoC, para 91)

147. In answer to the allegations in paragraph 91 of the SoC, the Respondent:

(a) denies the allegations therein; and

(b) says that it complied with its obligations under the Trust Deed, the Amending Deed, the Act, at law, and its duty to exercise reasonable care and skill, for the reasons pleaded in answer to paragraph 90 of the SoC.

148. The Respondent denies the allegations in paragraph 92 of the SoC.

Class action (SoC, para 93)

149. In answer to the allegations in paragraph 93 of the SoC, the Respondent:

(a) admits that paragraphs 93.2 – 93.6 of the SoC state questions of fact or law common to the claims of the Group Members; and

(b) does not admit that paragraph 93.1 of the SoC states a question of fact or law common to the claims of the Group Members.

XI. Respondent acted honestly and reasonably and ought to be excused

150. In answer to the whole of the SoC, the Respondent says that if (which is denied) it is liable to the Applicant or Group Members for breach of trust, the Respondent:

(a) repeats the matters in paragraphs 18 - 71, 119 and 138 - 142 above;

(b) says that it acted honestly and reasonably;

(c) says that it ought fairly to be excused; and

(d) in the premises, says that the Court should make an order pursuant to section 76 of the *Trusts Act 1973* (Qld) and/or section 85 of the *Trustee Act 1925* (NSW) relieving it of personal liability for that breach.

XII. LIMITATION DEFENCE

151. The causes of action which the Applicant and Group Members plead in the SoC are subject to a six year limitation period commencing from the date of the accrual of the cause of action.

PARTICULARS

Limitation of Actions Act 1974 (Qld), sections10 and 27; alternatively, *Limitation Act 1965* (NSW), sections 14 and 48; Corps Act, section 283F(2).

152. By written "Standstill Agreement" dated 25 February 2014, and extended on 9 July 2014, the Respondent agreed that the period between 25 February 2014 and 17 September 2014 would not be included in any calculation of the passage of time for the purposes of any statute of limitations defence which the Respondent may have by reason of proceedings not being commenced by Noteholders on or before 25 February 2014 (**Standstill Agreement**).

153. To the extent that the Applicant and Group Members contend that the Respondent breached its duties by failing to take the steps alleged at paragraphs 84 – 87 of the SoC in the period up to and including 24 February 2008:

(a) the Applicant and Group Members' causes of action accrued on or before 24 February 2008; and

(b) the six year limitation period referred to in paragraph 151 above expired on or before 24 February 2014, and before these proceedings were commenced.

154. By reason of the matters referred to in the previous paragraph, to the extent that the Applicant and Group Members contend that the Respondent breached its duties by failing to take the steps alleged at paragraphs 84 – 87 of the SoC in the period prior to and including 24 February 2008:

(a) the Applicant and Group Members' causes of action are statute barred; and

(b) the claims herein should be dismissed.

Date: 27 April 2015

Signed by Mark Stephen Sammut

Lawyer for the Respondent

This pleading was prepared by Dominic O'Sullivan QC, Michael O'Meara of Counsel and Stewart Webster of Counsel, Counsel for the Respondent.

Certificate of lawyer

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

(a) each allegation in the pleading; and

(b) each denial in the pleading; and

(c) each non admission in the pleading.

Date: 27 April 2015

Signed by Mark Stephen Sammut
Lawyer for the Respondent