

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Membo Finance Pty Limited [2021] FCA 1166

File number: NSD 209 of 2021

Judgment of: **YATES J**

Date of judgment: 27 September 2021

Catchwords: **CORPORATIONS** – application by the respondents seeking to strike out parts of the applicant’s further concise statement pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth) (the **Rules**) – application by the respondents, in the alternative, for an order that the applicant provide the “usual particulars” of the further concise statement pursuant to r 16.45 of the Rules – where applicant seeks relief under the *National Consumer Credit Protection Act 2009* (Cth) and the *Federal Court of Australia Act 1976* (Cth)

Legislation: *Federal Court of Australia Act 1976* (Cth)
National Consumer Credit Protection Act 2009 (Cth) ss 6, 47(1), 64, 72, 87, 88, 169,
National Consumer Credit Protection Regulations 2010 (Cth) reg 36
National Credit Code, Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth)
Federal Court Rules 2011 (Cth) rr 1.32, 16.13(2), 16.21, 16.45

Cases cited: *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284
Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v Cimic Group Ltd [2019] FCA 1480
Olson v Keefe (No 3) [2018] FCA 2001
Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Ltd [2017] NSWSC 1406
Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd [2018] FCA 659

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations
Sub-area: Regulator and Consumer Protection
Number of paragraphs: 44
Date of hearing: 22 September 2021
Counsel for the Applicant: Mr A Harding SC with Ms A Poukchanski
Solicitors for the Applicant: Australian Securities and Investments Commission
Counsel for the Respondents: Mr T Kane
Solicitors for the Respondents: Mackay Chapman Lawyers

ORDERS

NSD 209 of 2021

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Applicant

AND: **MEMBO FINANCE PTY LIMITED (ACN 159 693 464)**
First Respondent

**RICHMOND GROUP FINANCIAL SERVICES PTY
LIMITED ACN 618 935 612**
Second Respondent

ORDER MADE BY: YATES J

DATE OF ORDER: 27 SEPTEMBER 2021

THE COURT ORDERS THAT:

1. The amended interlocutory application dated 22 September 2021 be dismissed.
2. The respondents pay the applicant's costs of and incidental to the amended interlocutory application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

YATES J:

INTRODUCTION

1 In this proceeding, the applicant, the Australian Securities and Investments Commission (ASIC), seeks relief under the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**) and the *Federal Court of Australia Act 1976* (Cth) against the respondents, Membo Finance Pty Limited (**Membo**) and Richmond Group Financial Services Pty Limited (**RGFS**), for alleged contraventions of the NCCP Act and of the National Credit Code (Schedule 1 to the NCCP Act) (the **Code**).

2 ASIC commenced the proceeding by filing an originating application supported by a concise statement dated 15 March 2021. On 14 May 2021, ASIC filed a further concise statement, pursuant to orders made on 12 April 2021. The further concise statement is supported by schedules of particulars (Schedules A to L), in tabular form (174 pages).

3 By an amended interlocutory application dated 22 September 2021, the respondents seek an order pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth) that paragraphs 25, 36, 39, 43, 47, 48, 52, 54 to 56, and 63 of the further concise statement be struck out. Alternatively, they seek an order pursuant to r 16.45 that ASIC provide the “usual particulars” of the allegations made in these paragraphs or that, pursuant to rr 1.32 and 16.13(2), ASIC serve a more detailed concise statement.

THE FURTHER CONCISE STATEMENT

4 The further concise statement alleges the following background facts.

5 Membo is the holder of an Australian credit licence which authorises it to engage in credit activities in relation to credit contracts: s 6, NCCP Act. Since September 2017, RGFS has been authorised as Membo’s credit representative: s 64, NCCP Act. RGFS is Membo’s sole shareholder.

6 At all relevant times, Membo and RGFS (as Membo’s agent) have carried on a credit business in Australia trading as “ClearLoans”, adopting the “guarantor lending” model. This model has the following features:

- (a) The provision of small loans to debtors (\$3,000-\$15,000) for terms of 12 to 60 months at a fixed interest rate (43% per annum) with fixed monthly repayments. Typically, the loans are wholly or predominantly for personal, domestic, or household purposes.
- (b) The loans are secured by a personal guarantee.
- (c) Debtors enter into a credit contract with Membo as the credit provider.
- (d) Guarantors enter into a contract of guarantee with Membo with respect to the debtor's credit contract.
- (e) Debtors make repayments by direct debit or by card payment authority. When a debtor fails to make a monthly repayment, RGFS, as Membo's agent, attempts collection from the guarantor by way of direct debit or card payment, according to an authority previously given by the guarantor.

7 The further concise statement addresses the alleged contraventions by reference to the following conduct:

- (a) Conduct in relation to financial hardship during the COVID-19 pandemic (**hardship claims**). This conduct concerns the giving of 39 hardship notices by debtors, pursuant to s 72(1) of the Code. ASIC alleges that Membo contravened s 72 of the Code by not providing the debtors with a written decision notice conforming with ss 72(4) and (5). ASIC supports these allegations by particulars given in Schedules A and B of the further concise statement. ASIC also alleges that Membo contravened s 47(1)(a) of the NCCP Act in that, in relation to the first-mentioned conduct, Membo did not do all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly. ASIC supports these allegations by the particulars given in Schedules C, D, E, F, G, and H of the further concise statement. ASIC alleges that RGFS was directly or indirectly knowingly concerned in, or party to, Membo's contraventions of s 72 of the Code and s 47(1)(a) of the NCCP Act, and was thus involved in these contraventions within the meaning of s 169 of the NCCP Act.
- (b) Conduct in relation to training and competence (**training claim**). This conduct concerns Membo's alleged failure to ensure that its representatives were adequately trained, and competent, to engage in credit activities authorised by

its licence. ASIC alleges that, in this regard, Membo contravened s 47(1)(g) of the NCCP Act. ASIC supports these allegations by particulars given in Schedule I of the further concise statement. ASIC alleges that RGFS was directly or indirectly knowingly concerned in or party to Membo's contraventions within the meaning of s 169 of the NCCP Act.

- (c) Failure to issue direct debit default notices (**DD default claims**). This conduct concerns Membo's alleged failure, on 112 occasions, to give defaulting debtors and/or their guarantors direct debit default notices (**DD default notices**) complying with s 87(2) of the Code. ASIC alleges that this conduct contravened s 87(1) of the Code. The further concise statement records that 76 DD default notices were not issued in the period 15 December 2017 to 12 March 2019 and that 36 DD default notices were not issued in the period 13 March 2019 to 8 August 2020. The significance of allocating alleged contraventions to one or the other period is that ASIC also alleges that Membo's conduct constituting each contravention of s 87(1) of the Code also contravened s 47(1)(a) of the NCCP Act, which commenced as a civil penalty provision on 13 March 2019. ASIC supports these allegations by particulars given in Schedule J of the further concise statement.
- (d) Commencing proceedings prematurely (**enforcement claims**). This conduct concerns 60 occasions on which Membo (by RGFS acting as its agent) commenced enforcement proceedings against debtors without complying with s 88(1) of the Code, which specifies the steps which must be taken before enforcement proceedings against a debtor in relation to a credit contract are commenced. The further concise statement records that 37 such proceedings were commenced in the period 18 May 2018 to 12 March 2019, and 23 such proceedings were commenced in the period 13 March 2019 to 20 December 2019. ASIC supports these allegations by particulars given in Schedule K.
- (e) Commencing proceedings in the wrong jurisdiction (**jurisdiction claims**). This conduct concerns the commencement of 278 separate proceedings in the Parramatta Local Court to enforce a credit contract and/or guarantee, regulated under the NCCP Act, against 519 debtors and guarantors who did not ordinarily reside in New South Wales at the time the proceedings were commenced. Pursuant to reg 36 of the *National Consumer Credit Protection Regulations*

2010 (Cth) (the **Regulations**), proceedings in relation to a credit contract or a guarantee regulated under the NCCP Act, and involving a debtor or guarantor, must be brought in the State or Territory where the debtor or the guarantor ordinarily resides. ASIC alleges that by commencing these proceedings, Membo contravened s 47(1)(a) and/or s 47(1)(e) of the NCCP Act (the latter provision requiring that a licensee take reasonable steps to ensure that its representatives comply with the credit legislation). The further concise statement records that proceedings were so commenced against 263 debtors and guarantors in the period 11 May 2018 to 12 March 2019, and 256 debtors and guarantors in the period 13 March 2019 to 12 March 2020. ASIC supports these allegations by particulars given in Schedule L.

8 ASIC alleges that, by the conduct summarised above, harm was caused to debtors and guarantors. In paragraphs 58 to 62, ASIC describes the nature of this harm. In paragraph 63, it says that public harm (as opposed to the individual harm described in paragraphs 58 to 62) was occasioned by Membo's failure to ensure that its business was carried on efficiently, honestly and fairly, and in accordance with the law.

THE RESPONDENTS' SUBMISSIONS

9 The respondents' submissions are directed to two main alleged pleading deficiencies.

10 First, paragraphs 25(g), 36, 39, and 43 of the further concise statement allege, with respect to the hardship claims, the DD default claims, the enforcement claims, and the jurisdiction claims that Membo failed to maintain systems and procedures to ensure that the identified conduct did not occur. The respondents contend that the further concise statement is wanting because it does not identify the systems and processes which are said to be inadequate, how it is said that those systems and processes *should have* operated, or how those systems and processes *in fact* operated (the **systems and processes pleading deficiency**).

11 Secondly, paragraphs 47, 48, 52, 54 to 56, and 63 of the further concise statement allege or involve an allegation, with respect to the hardship claims, the DD default claims, the enforcement claims, and the jurisdiction claims, that Membo failed to do all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly: s 47(1)(a), NCCP Act. The respondents contend that the further concise statement is wanting because it does not identify the manner in which ASIC alleges this standard was not achieved or explain why it was not achieved (the **EHF pleading deficiency**).

- 12 The systems and processes pleading deficiency and the EHF pleading deficiency are related in that the respective allegations that Membo failed to maintain systems and procedures to ensure that the identified conduct did not occur are an aspect of ASIC’s corresponding allegations that Membo contravened s 47(1)(a) of the NCCP Act by not doing all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly.
- 13 As to the systems and processes pleading deficiency itself, the respondents submit that the relevant paragraphs do not identify with sufficient clarity the case they must meet. The respondents stress the importance of particularity in cases where a respondent party is exposed to civil penalties or declarations of legislative contravention. They complain that the relevant paragraphs rise no higher than an allegation that, because there has been non-compliance with legislative provisions, it must follow that there was a failure of Membo’s systems and processes. In short, the respondents submit that ASIC has pleaded no more than a conclusion.
- 14 In support of these submissions, the respondents draw attention to ASIC’s identification, in certain paragraphs of the further concise statement, of certain of Membo’s written policies, training modules, and training guides which, the respondents say, are part of Membo’s systems and processes. They also point to the relief sought in prayer 32 of the originating process—which is an order that Membo establish and implement a compliance program that secures compliance with, and minimises the future risk of Membo contravening, ss 72, 87, and 88 of the Code and reg 36 of the Regulations (being those provisions involved in the contraventions where it is also alleged that Membo failed to have in place systems and processes to ensure that the contravening conduct did not occur). The respondents’ point is that the relief that ASIC seeks in this regard appears to be directed to policies and procedures which Membo already has in place, without ASIC identifying, with precision, how those policies and procedures are wanting.
- 15 The respondents submit that their complaint as to the deficiencies of the further concise statement in this regard is supported by the following cases: *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd* [2018] FCA 659 (**Zonia**) at [32]; *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v Cimic Group Ltd* [2019] FCA 1480 (**Inabu**) at [19]; and *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Ltd* [2017] NSWSC 1406 (**Smith**) at [139].

- 16 As to the EHF pleading deficiency, the respondents submit, firstly, that, as the contraventions of s 47(1)(a) of the NCCP Act pleaded in paragraphs 47, 52, 54, and 55 of the further concise statement are said to follow from, and are reliant upon, Membo’s alleged failure to maintain systems and processes, those paragraphs should be struck out if the Court accepts that there is a systems and processes pleading deficiency, as they contend.
- 17 Secondly, the respondents submit that paragraphs 52, 54, and 55 of the further concise statement appear to allege that simply because a provision of the Code or Regulations was not complied with, it must follow that there was also a contravention of the “efficiently, honestly and fairly” standard. The respondents contend that ASIC should not be permitted to plead in this way because it has not articulated why conduct, which amounts to a contravention of a non-penalty provision of the Code or Regulations, should also amount to a contravention of a penalty provision (s 47(1)(a) of the NCCP Act), without further explaining why the “efficiently, honestly and fairly standard” has not been met.
- 18 Thirdly, the respondents submit that paragraph 47 of the further concise statement, which identifies certain alleged practices and conduct by reference to paragraph 25 of the further concise statement, does not articulate why these matters contravened the “efficiently, honestly and fairly” standard.
- 19 The respondents’ second and third submissions are really aspects of a broader complaint that, generally, ASIC has not properly articulated why, in each case, the standard set by s 47(1)(a) of the NCCP Act has been contravened. In support of this broader complaint, the respondents call in aid Allsop CJ’s observations in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284 (*ASIC v ANZ*) at [2] – [4]:

2 ... The question whether a body of conduct has in all the circumstances been unconscionable in the statutory sense or amounts to the provision of services otherwise than efficiently, honestly and fairly, is not amenable to pleading a “cause of action” constituted by “material facts”, with some distinction between them and mere “particulars” of such. Rather, the better approach is to understand what the plaintiff says are the “connected circumstances that ought to influence the determination of the case”.

3 As in a bill in equity, the plaintiff should set out a well-drafted narrative of the facts and circumstances and of the wrong or grievance that constitutes the real substance of the complaint. The statement, concisely but fully expressed, should contain all the facts to be proved at the appropriate level of generality or specificity, without prolixity, as to make meaningful the grievance. This may make relevant and reasonable a distinction between stated or narrated fact

and evidence, but that will be a matter of degree and context, not a matter of definition based on categories or taxonomies such as material fact, particular, or evidence, decided *a priori*.

- 4 In a coherent way, anchored in the facts, the plaintiff should explain why the facts stated lead to the conclusion contended for. This may require a degree of reasoned or argued articulation. This process may throw up facts, circumstances or context of which the plaintiff is unaware which may then require the need for some interrogation by written or oral questioning to understand the full factual context.

20 The respondents also call in aid Bromwich J’s observations in *Olson v Keefe (No 3)* [2018] FCA 2001 (*Olson*) at [22] – [32] with respect to pleading a case of statutory unconscionability.

21 Fourthly, the respondents complain that ASIC has purported to bifurcate its case in paragraphs 52, 54, and 55 of the further concise statement into two distinct time periods, based only on when s 47(1)(a) became a civil penalty provision, and not by reference to the actual nature of any of the alleged conduct said to constitute the contraventions. The respondents submit that it is impermissible to bifurcate conduct in this way, without attempting to explain precisely how the conduct can be bifurcated, including where, in each of these cases, the conduct allegedly constituting the contraventions includes alleged systems and processes inadequacies that span the date when s 47(1)(a) became a civil penalty provision. The respondents submit that, for this reason, paragraph 56 of the further concise statement, which is ancillary to paragraphs 52, 54, and 55, should also be struck out.

22 The respondents raise other, related pleading deficiencies. Paragraph 55 of the further concise statement pleads, additionally or alternatively, a contravention of s 47(1)(e) of the NCCP Act. This provision imposes on a licensee the obligation to take reasonable steps to ensure that its representatives comply with the credit legislation. ASIC alleges in paragraph 55 of the further concise statement that the conduct involved in the jurisdiction claims also constitutes a contravention of s 47(1)(e). The respondents submit that paragraph 55 should be struck out because it fails to identify the steps that Membo should have taken to comply with this standard, compared to the steps that it did, in fact, take. This complaint is based on a contention that is similar to the one made in respect of the systems and processes pleading deficiency—namely, that the fact that a contravention has occurred does not mean, necessarily, that Membo failed to take “reasonable steps” in breach of s 47(1)(e).

23 Finally, the respondents submit that paragraph 63 of the further concise statement, which alleges “public harm” arising from Membo’s contraventions of s 47(1)(a), has not been

explained. The respondents also contended that, as the paragraph is also based on the EHF pleading deficiency, it should be struck out for this reason alone.

ANALYSIS

24 I am not persuaded that the further concise statement has the deficiencies which the respondents claim.

25 The systems and processes pleading deficiency misunderstands the case that ASIC brings. It should be appreciated that ASIC does not allege, for example, that Membo adopted or implemented systems or processes that mandated, or resulted in, particular actions or outcomes that contravened the relevant legislation. Rather, in respect of the hardship claims, the DD default claims, the enforcement claims, and the jurisdiction claims, ASIC's case, with respect to systems and processes, is expressed as a negative. Put simply, Membo did not have systems or processes in place that ensured that specifically identified conduct did not take place. In other words, whatever systems or processes it had, those systems or processes did not operate to ensure that Membo complied with the NCCP Act, the Code, or the Regulations in the particular respects identified in the further concise statement. In these circumstances, it is not for ASIC to plead the systems and processes that Membo should have had in place or how those systems and processes should have operated, beyond the fact that they should not have failed, which is, essentially, what ASIC has already alleged.

26 Further, it is not the point that, in other parts of the further concise statement, ASIC has relied on some of Membo's policy and procedure documents, including training manuals. For example, in relation to the training claim, which does not involve an allegation that Membo failed to have in place systems and processes to ensure that certain conduct did not occur, ASIC relies on the fact that Membo did not adhere to its own training policy (paragraphs 28 to 31) and the fact that a particular training guide misstated the threshold requirements for giving a hardship notice (paragraph 32). These allegations of contravention are of an entirely different character to the allegations that are said to suffer from the systems and processes pleading deficiency. They rely for their success on particular features of Membo's policy and procedure documents.

27 I accept that, as pleaded in the further concise statement, the respective allegations that Membo failed to have in place systems and processes to ensure that certain conduct did not occur, proceed from ASIC's allegations of other contraventions under the Act. The case that ASIC seeks to bring is that, if its pleaded contraventions are established, then its allegations about

the failure to have in place systems and processes to ensure that the particular contraventions did not occur, is axiomatically true. Whether that case (which is arguable) is correct and accepted at trial is one thing. Whether that case is clear, is another. For present purposes, we are concerned with the latter.

28 As to the respondents' reliance on ASIC's claim for relief in prayer 32 of the originating application, the question of what relief (if any), and in what form it should be given, is one that must await the Court's ultimate findings on liability.

29 I am not persuaded that the cases on which the respondents rely to establish the systems and processes pleading deficiency are apposite. The pleading deficiency identified in *Zonia* arose in a particular context—namely, allegations of systems deficiencies made in a “non-disclosure” case. As I explained in that case (at [23] – [24]):

23 It is convenient to commence an analysis of para 46 by reference to the role that this allegation plays in the applicant's case. The applicant says that the allegation is informed by the particulars that have been given. So understood, para 46, in substance, contains a number of different allegations concerning deficiencies in CBA's systems for assessing, monitoring and managing ML/TF Risk, and for reporting transactions which may be affected by ML/TF Risk.

24 The respondent emphasised, and the applicant did not doubt, that the specification of the information of which, it is said, CBA was aware is critically important in a “non-disclosure” case. Thus, it is important that the pleading identify this information with appropriate precision because it is the starting point for determining whether, in light of its nature and character, each element was information that a reasonable person would expect to have a material effect on the price or value of CBA shares (within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act), such that CBA came under an obligation to disclose it to the market.

30 I later held with respect to paragraph 46 of that pleading (at [32]):

32 The particulars in para (ii) point to certain alleged deficiencies but, in general, do not go far enough to illuminate why it is said that the identified matters constituted deficiencies throughout the Relevant Period. This may be a simple matter to do—but it should, nonetheless, be done. The identified matters are not necessarily self-evident “deficiencies” in the relevant systems and a reader of the pleading should not be left to speculate why each identified matter was a “deficiency”. I accept CBA's submission that, in the circumstances of the present case, it is necessary for the applicant to identify the relevant respects in which CBA's systems for assessing, monitoring and managing ML/TF Risk or, as the case might be, its systems for reporting transactions that may be affected by ML/TF Risk, should have operated; how these systems in relevant respects in fact operated; and thus how or why there was a “deficiency”. *This is critical to determining whether there was a “deficiency”; whether CBA was aware (in the relevant sense) of the “deficiency”; and, if so, whether that information was such that a reasonable person would expect it to have a material effect on the price of CBA shares.*

(Emphasis added.)

31 In *Inabu*, also a “non-disclosure” case, Jagot J considered that the impugned pleading before her was substantively different from the particular pleading considered in *Zonia*. Her Honour noted that when the pleading before her alleged systems deficiencies, it did so by reference to other paragraphs which identified, with precision, what the deficiency was. Her Honour reasoned (at [19]):

19 I consider the pleading in the present case to be different from that considered in *Zonia*. It may be accepted that the mere fact that something went wrong is generally insufficient to prove a systemic deficiency. In the present case, however, paragraph 41 identifies with precision what the alleged deficiency is by the cross-references to paragraphs 39 and 40. One pleaded fact is that despite what they knew or ought to have been aware of (as pleaded), neither David Stewart nor David Savage took steps on or reasonably promptly after 23 November 2010 to report to Leighton’s Ethics and Compliance Committee the matters the subject of the Stewart Memo (a defined term) or what they knew or ought to have been aware of (as pleaded): paragraph 39. The other pleaded fact is also that Leighton’s internal ethics compliance systems did not otherwise at any time prior to November 2011 detect and report to appropriate law enforcement authorities the matters the subject of the Stewart Memo or what Senior Leighton Executives knew or ought reasonably to have been aware of as pleaded: paragraph 40. The deficiencies, accordingly, are that the relevant systems enabled those pleaded facts to arise. This is a sufficiently clear pleading to ensure that the problem identified in *Zonia* does not arise in the present case.

32 The reasoning in *Inabu* does not assist the respondents. If anything, it supports ASIC’s pleading because, in the present case, the deficiencies relied on are no more than the alleged facts that the failures to prevent, by systems and processes, occurred.

33 *Smith* was an auditor’s negligence claim which was based on the auditor’s failure to identify a shortfall in assets. It was alleged that it should be inferred from the magnitude of the shortfall that the auditor did not take steps that a competent auditor, exercising reasonable care, would have taken. The pleading was held to be deficient:

139 Relevantly, AET does not point to any identified aspect of a relevant audit standard, does not allege what a reasonably competent auditor in the position of PwC would have done in compliance with that aspect of the relevant audit standard, and does not allege what PwC failed to do by reference to the standard of the reasonably competent auditor in that regard. No material facts are alleged engaging with the relevant standards and then identifying what a reasonably competent auditor would have done in relation to the requirements of such standards. As a result, the allegations fail to articulate, with specificity and in relation to any given complaint as to the conduct of the audit, what a reasonably competent auditor should have done and how the audit work performed by PwC departed from that standard. PwC’s complaint as to the adequacy of the particulars of breach (even if they can be treated as pleadings

of material fact) to be well founded. The pleading of causation suffers from the defect that it does not articulate the link between particular alleged breaches and the loss said to have been caused by those breaches.

34 Pleading a case in negligence is far removed from the present case. The pleading in *Smith* does not provide an informative or helpful analogue.

35 It follows from these conclusions that the first basis on which the respondents advance the EHF pleading deficiency ([16] above), cannot succeed. There is no systems or processes pleading deficiency.

36 The second basis on which the respondents advance the EHF pleading deficiency ([17] above), cannot be sustained. First, ASIC does not simply plead that the fact that a provision of the Code has been contravened, or that a provision of the Regulations has not been complied with, means that s 47(1)(a) of the NCCP Act has been contravened. Rather, ASIC relies on the conduct giving rise to the alleged contraventions or failures to comply, taken with Membo's failure to have systems and processes in place, *and* the fact of contravention, as constituting the reasons why Membo has not done all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly. Secondly, and in any event, there is no reason why particular conduct cannot constitute a contravention of more than one legislative provision.

37 I am not persuaded by the third basis on which the respondents advance the EHF pleading deficiency—namely, their contention that ASIC has not sufficiently articulated why, in each case, Membo did not meet the “efficiently, honestly and fairly” standard ([17] – [19] above). As is made clear in *ASIC v ANZ*, conduct which fails to meet a standard requiring an evaluative judgment as to its compliance—such as whether activities are engaged in efficiently, honestly and fairly—may not be amenable to being pleaded by way of a statement of claim. There may be a need, instead, for a less formal articulation of the claim by a narrative that is sufficiently detailed to make meaningful the grievance that is alleged. Where this is so, the level of particularity required will depend on the nature of the grievance and the particular circumstances in which the grievance arises. This is particularly so in cases alleging unconscionability, as explained fully by Bromwich J in *Olson*.

38 Here, ASIC has alleged that Membo has failed to meet various statutory norms, on multiple occasions. These occasions are specifically identified and supported by full particulars. These particulars give colour to the alleged contraventions, beyond what is already apparent from their nature as seen in the context of legislation directed to the protection of consumers in

relation to the provision of consumer credit. What is more, ASIC says that, in the conduct of its business, Membo failed to have systems and processes in place to ensure that the impugned conduct did not occur.

39 I am satisfied, therefore, that the further concise statement makes sufficiently clear ASIC's case that Membo has not done all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly. Further articulation is not required.

40 I am also satisfied that the further concise statement makes sufficiently clear ASIC's case, in relation to the jurisdiction claims, that Membo has not taken reasonable steps to ensure that its representatives comply with the credit legislation. The respondents' complaint is that paragraph 55 of the further concise statement should be struck out because it fails to identify the steps that Membo should have taken to comply with the standard of reasonableness, compared to the steps that it did, in fact, take. As I have noted at [22] above, this complaint is based on a contention that is similar to the one made in respect of the systems and processes pleading deficiency. It is equally answered by the explanation I have given at [25] – [27] above—namely, that this aspect of ASIC's case is based on a negative proposition that Membo did not have systems or processes in place to ensure that the relevant conduct did not occur. This proposition, if accepted, supports ASIC's case that Membo did not take reasonable steps to ensure that its representatives complied with the credit legislation.

41 Whether its case is brought for contravention of s 47(1)(a) of the NCCP Act, or for contravention of s 47(1)(e), the finding that ASIC seeks is one based upon the summation of the pleaded and particularised conduct, including that Membo failed to maintain systems and processes to ensure that the conduct did not occur, and the fact that the conduct also contravened particular provisions of the Code or, in the case of the jurisdiction claims, did not comply with a particular provision of the Regulations.

42 In relation to the fourth basis on which the respondents advance the EHF pleading deficiency ([21] above), I do not accept that ASIC has impermissibly bifurcated its case in paragraphs 52, 54, and 55 of the further concise statement. ASIC's case in this regard is perfectly clear. It is no more than that some contraventions occurred before s 47(1)(a) of the NCCP Act became a civil penalty provision, and that the other contraventions occurred after s 47(1)(a) became a civil penalty provision. ASIC does not contend that the nature of the conduct differed or changed depending on whether it occurred in the earlier period or the later period referred to. What it does contend is that the legal consequences of contravention changed, so that the

contraventions of s 47(1)(a) should be considered by reference to two distinct periods—the contraventions that occurred before 13 March 2019, and the contraventions that occurred on and after that day.

43 I do not accept the respondents’ complaint in respect of paragraph 63 of the further concise statement ([23] above). First, the only point made by that paragraph is that Membo’s failure to ensure that its business was carried out efficiently, honestly and fairly, and in accordance with the law—and RGFS’ involvement in some of Membo’s contraventions—also stand as harm to the public, as distinct from the individual harm referred to in paragraphs 58 to 62 of the further concise statement. That proposition requires no elaboration. Secondly, I am not persuaded that the respondents have established the EHF pleading deficiency in any event.

CONCLUSION AND DISPOSITION

44 Given that I am not persuaded that the further concise statement has the deficiencies which the respondents claim, their interlocutory application will be dismissed, with costs.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates.

Associate: 

Dated: 27 September 2021