

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 16/11/2021 1:07:05 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Originating Application Starting a Representative Proceeding under Part IVA Federal Court of Australia Act 1976 - Form 19 - Rule 9.32
File Number:	VID559/2020
File Title:	EDWARD THOMAS & ANOR v COMMONWEALTH FINANCIAL PLANNING LIMITED & ORS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



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

Dated: 16/11/2021 5:05:17 PM AEDT

Registrar

### Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



**Amended Originating application starting a representative proceeding  
under Part IVA of the Federal Court of Australia Act 1976**

No. \_\_\_\_\_ of 2020

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Edward Thomas** and ~~another~~ others

Applicants

**Commonwealth Financial Planning Limited (ACN 003 900 169)** and others named in the  
schedule

Respondents

To the Respondents

The Applicants apply for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time  
and place stated below. If you or your lawyer do not attend, then the Court may make orders in  
your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or  
taking any other steps in the proceeding.

**Time and date for hearing:** [Registry will insert time and date]

**Place:** Federal Court of Australia, 305 William Street, Melbourne VIC 3000

Date:

.....  
Signed by an officer acting with the authority  
of the District Registrar

.....  
Filed on behalf of (name & role of party) Edward Thomas and Diana Tyrrell, Applicants First, Second  
and Third Applicant  
Prepared by (name of person/lawyer) Craig Allsopp  
Law firm (if applicable) Shine Lawyers  
Tel (02) 8754 7270 Fax (02) 9267 5650  
Email callsopp@shine.com.au  
**Address for service** Level 6, 299 Elizabeth Street  
(include state and postcode) Sydney NSW 2000



## Details of claim

Unless otherwise stated, terms used in the accompanying ~~Concise Statement~~ Second Further Amended Statement of Claim have the same meaning when used in this Amended Application.

On the grounds stated in the accompanying ~~Concise Statement~~ Second Further Amended Statement of Claim, the Applicants claim on their own behalf and on behalf of the Group Members:

### As against CFP and FWL

1. An order that, in the event the Applicants and the Group Members so elect, the First Respondent (CFP) and Second Respondent (FWL) account for and pay to the Applicants and each of the Group Members all benefits, profits and gains made or derived by the ~~Authorised Representatives~~ Advisers by reason of the breaches of fiduciary duties alleged in ~~paragraph 16 of the Concise Statement~~;
2. An order that an enquiry be held to determine the amount payable to the Applicants and each of the Group Members pursuant to the order referred to in paragraph 1 above;
3. In the alternative to the orders referred to paragraphs 1 and 2 above, an order that, in the event the Applicants and Group Members so elect, CFP and FWL pay equitable compensation to the Applicants and each of the Group Members for loss and damage suffered by them by reason of the breaches of fiduciary duty ~~alleged in paragraph 16 of the Concise Statement~~;
4. An order that CFP and FWL pay to the Applicants and each of the Group Members compound interest on monthly rests at the rate of 4% above the cash rate target from time to time set by the Reserve Bank of Australia;
5. In the alternative to the orders referred to in paragraphs 1 to 4 above, an order pursuant to s 961M(2) & (4) of the *Corporations Act 2001* (Cth) (**Corporations Act**) that CFP and FWL pay compensation to the Applicants and each of the Group Members for loss and damage suffered by them because of the contraventions of ss 961B(1), and 961J(1) by the ~~Authorised Representatives~~ Advisers and the contraventions of s 961L by CFP and FWL, including any profits resulting from the contraventions made by CFP and FWL and the ~~Authorised Representatives~~ Advisers;

### As against CommInsure

6. An order that, in the event the Applicants and the Group Members so elect, CommInsure account for and pay to the Applicants and each of the Group Members all



benefits, profits and gains made or derived by Commlnsure by reason of the breaches of fiduciary duties alleged in paragraph 16 of the Concise Statement;

7. An order that an enquiry be held to determine the amount payable to the Applicants and each of the Group Members pursuant to the order referred to in paragraph 6 above;
8. In the alternative to the orders referred to paragraphs 6 and 7 above, an order that, in the event the Applicants and Group Members so elect, Commlnsure pay equitable compensation to the Applicants and each of the Group Members for loss and damage suffered by them by reason of the breaches of fiduciary duty ~~alleged in paragraph 16 of the Concise Statement.~~

### **As against all Respondents**

9. Interest pursuant to s 51A(1) of the *Federal Court Act 1976* (Cth);
10. Costs;
11. Such further or other relief as the Court may deem appropriate.

### **Questions common to claims of group members**

The questions of law or fact common to the claims of the Group Members are:

1. Whether, on or after 21 August 2014, CFP and FWL each maintained an approved product list (APL) which:
  - a. contained a range of life insurance products that the Advisers could recommend to clients; and
  - b. required the Advisers to obtain approval to recommend an insurance product not on the APL?
2. What effect, if any, did the APLs have on the obligations owed by CFP, FWL and the Advisers?
3. Whether, on or after 21 August 2014, CFP and FWL were entitled to receive, and did receive, commissions, where the applicable criteria were met, in relation to the CBA Life Products obtained by the Applicants and Group Members?
4. Whether, on or after 21 August 2014, the Advisers were entitled to be paid, and were paid, the commissions (or part of them) received by CFP and FWL, where the applicable criteria were met, in relation to the sale of CBA Life Products by the Advisers?



5. During the Relevant Period, did the Advisers stand in a fiduciary relationship with the Applicants and Group Members by reason of the fact that the Advisers undertook to provide and did provide personal advice to the Applicant and the Group Members?
6. If the answer to question 5 is “yes”, did the Advisers in such a relationship owe to the Applicants and the Group Members fiduciary duties to:
  - a. not improperly use their position to gain an advantage for themselves and/or CFP and FWL; and
  - b. avoid the real or substantial possibility of conflicts between the interests of the Applicants and Group Members and the interests of the Advisers and/or CFP and FWL?
7. Were CFP and FWL in a position where there was an actual conflict between their interests (and the interests of CommInsure) in obtaining the highest premiums possible, and the interests of Group Members in paying the lowest possible premium for life insurance products that were substantially equivalent or better than the CBA Life Products?
8. Whether CFP and FWL failed to avoid the actual conflict between their interests (and the interests of the Advisers and/or CommInsure) in obtaining the highest premiums possible, and the interests of Group Members in paying the lowest possible premium for life insurance products that were substantially equivalent or better than the CBA Life Products, by advising them to obtain, renew or otherwise retain CBA Life Products?
9. Whether an Adviser’s failure to recommend a substantially equivalent or better insurance product from a third party insurer that was available at a lower price constitutes a breach of either of the duties in question 6?
10. If CFP or FWL are liable for a breach of fiduciary duty to the Applicants and Group Members:
  - a. are CFP or FWL liable to account for profits (and, if so, what is the proper methodology for quantifying those profits)?; and
  - b. what is the proper methodology for assessing equitable compensation?
11. Whether, at the time that CommInsure received the Excess Premiums, it knew:
  - (a) the material facts giving rise to the existence of the fiduciary duty owed by CFP and/ or FWL to the Applicants and Group Members; and



- (b) the material facts giving rise to the breaches of those fiduciary duties; and/or
- (c) of the circumstances that would have indicated to an honest and reasonable person the material facts referred to in (a) and (b) above?
12. Whether each of the CBA Life Products was a financial product within the meaning of s 764A(1) of the Corporations Act?
13. Whether the giving of financial advice in relation to insurance policies constitutes the giving of financial product advice within the meaning of s 766B(1) of the Corporations Act?
14. Whether the Advisers were under an obligation to comply with:
- a. s 961B(1) of the Corporations Act in relation to personal advice; and/or
  - b. s 961J(1) of the Corporations Act when giving personal advice?
15. If the answer to question 14 (a) or (b) is “yes”, what is the scope and content of each of those obligations?
16. Whether ss 961B(1) and 961J(1) require an Adviser giving personal advice to recommend substantially equivalent or better insurance products from a third party insurer if that third party product was available at a lower price?
17. Whether CFP and FWL were under an obligation to comply with s 961L of the Corporations Act to take reasonable steps to ensure the Advisers complied with ss 961B(1) and 961J(1) of the Corporations Act?
18. If the answer to question 17 is “yes”, what is the scope and content of that obligation?
19. Whether CFP and FWL failed to take reasonable steps to ensure that the Advisers complied with ss 961B(1) and 961J(1) of the Corporations Act by:
- a. failing to take reasonable steps to remove (or request CommInsure remove) the incentives created by the Commissions and Incentive Payments;
  - b. failing to take reasonable steps to ensure that there were adequate policies and systems in place designed to safeguard against the Advisers engaging in misconduct; and
  - c. failing to have in place adequate processes and systems to monitor and supervise the Advisers to ensure compliance with ss 961B(1) and 961J(1)?



20. Whether CFP and FWL were the responsible licensee within the meaning of s 961P of the Corporations Act in relation to any contraventions of ss 961B(1) and 961J(1) by their Advisers?
21. If CFP and/or FWL are liable to compensate the Applicants and Group Members under s961M, what is the proper methodology for assessing statutory compensation?
22. What effect did the life insurance scheme under Part 9 of the *Life Insurance Act 1995* (Cth) dated 1 April 2021 have on the liabilities the subject of the allegations pleaded against CommInsure in the Second Further Amended Statement of Claim?
  1. ~~Whether CFP and FWL each maintained an APL which operated as a material constraint on the range of life insurance products that the Authorised Representatives could recommend to clients.~~
  2. ~~Whether, on or after 21 August 2014, CFP and FWL were entitled to receive, and did receive, commissions, in relation to the CBA Life Products obtained by the Applicants and Group Members.~~
  3. ~~Whether, on or after 21 August 2014, the Authorised Representatives were entitled to be paid, and were paid, the commissions (or part of them) received by CFP and FWL in relation to the sale of CBA Life Products by the Authorised Representatives.~~
  4. ~~Whether CFP and FWL owed the Applicants and Group Members the fiduciary duties alleged at paragraph 7 of the Concise Statement.~~
  5. ~~Were CFP and FWL in a position where there was an actual conflict between their interests (and the interests of Comminsure) in obtaining the highest premiums possible, and the interests of clients in paying the lowest possible premium for insurance products that were substantially equivalent or better than the CBA Life Products.~~
  6. ~~Whether CFP and FWL failed to avoid the actual conflict between their interests (and the interests of the Authorised Representatives and/or Comminsure) in obtaining the highest premiums possible and the interests of clients in paying the lowest possible premium for life insurance products that were substantially equivalent or better than the CBA Life Products, by advising them to obtain, renew or otherwise retain CBA Life Products.~~
  7. ~~Whether CFP, FWL or Comminsure benefited financially from Comminsure receiving higher premiums for the issuance, renewal or retention of CBA Life Products.~~



8. ~~Whether CFP and FWL breached their fiduciary duties owed to the Applicants and Group Members.~~
9. ~~Whether CFP and FWL are liable to account for and pay to the Applicants and Group Members all benefits, profits and gains made or derived by the Authorised Representatives and CFP and FWL by reason of the breaches of fiduciary duty.~~
10. ~~Whether CFP and FWL are liable to pay equitable compensation to each of the Applicants and the Group Members.~~
11. ~~Whether, at the time that Comminsure received the Excess Premiums, it knew:
  - (a) ~~the material facts giving rise to the existence of the fiduciary duty owed by CFP and or FWL to the Applicants and Group Members; and~~
  - (b) ~~the material facts giving rise to the breaches of those fiduciary duties; and/or~~
  - (c) ~~of the circumstances that would have indicated to an honest and reasonable person the material facts referred to in (a) and (b) above.~~~~
12. ~~Whether Comminsure is liable to account for and pay to the Applicants and each of the Group Members all benefits, profits and gains made or derived by Comminsure from its receipt and use of the Excess Premiums.~~
13. ~~Whether Comminsure is liable to pay equitable compensation to the Applicants and each of the Group Members for loss or damage suffered by reason of Comminsure knowingly receiving the Excess Premiums in breach of the fiduciary duties by CFP and FWL.~~
14. ~~Whether each the CBA Life Products was a financial product within the meaning of s 764A(1) of the Corporations Act.~~
15. ~~Whether CFP and FWL were under an obligation to take reasonable steps to ensure the Authorised Representatives complied with ss 961B(1) and 961J(1) of the Corporations Act.~~
16. ~~Whether CFP and FWL failed to take reasonable steps to ensure that the Authorised Representatives complied with ss 961B(1) and 961J(1) of the Corporations Act by reason of the matters alleged in paragraph 15 of the Concise Statement.~~





17. ~~Whether CFP and FWL were the responsible licensee within the meaning of s 961P of the Corporations Act in relation to the contraventions of ss 961B(1) and 961J(1) by their Authorised Representatives pleaded at paragraphs 13 and 14 above.~~
18. ~~Whether CFP and FWL are liable to compensate the Applicants and Group Members for such loss or damage, including profits resulting from the alleged contraventions that were made by CFP, FWL and the Authorised Representatives, pursuant to s 961M(2) and (4) of the Corporations Act.~~

### Representative action

The Applicants bring this application as a representative party under Part IVA of the *Federal Court of Australia Act 1976*.

The Group Members to whom this proceeding relates are all persons who on or after 21 August 2014:

- (a) ~~were advised by an Authorised Representative Adviser of CFP or FWL in relation to~~ obtain, renew or otherwise retain (by themselves or through their superannuation funds as members) life cover, including terminal illness total & permanent disability cover; income protection; and trauma cover (CBA Life Products), that was issued by Colonial Mutual Life Assurance Society Limited, (CommInsure);
- (b) ~~on the basis of such advice obtained, renewed or otherwise retained (by themselves or through their superannuation funds as members)~~ CBA Life Products, that were issued by CommInsure; and
- (c) ~~by reason thereof and in paying what are claimed to be any excess premiums on such CBA Life Products (by themselves or through their superannuation funds as members):~~
- (i) suffered loss or damage; or
- (ii) claim an account of profits.
- (d) ~~are not a Justice, Registrar, District Registrar, or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia~~

**Applicants' address**

The Applicants' address for service is:

Place: Level 6, 299 Elizabeth Street, Sydney New South Wales

Email: callsopp@shine.com.au

**Service on the Respondents**

It is intended to serve this application on all Respondents.

Date: ~~21 August 2020~~ 16 November 2021

A handwritten signature in black ink, appearing to read "C Allsopp".

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Signed by Craig Allsopp  
Lawyer for the Applicants

**Schedule**

No.

of 2020

Federal Court of Australia

District Registry: Victoria

Division: General

**Applicants**

Second Applicant: Diana Tyrrell

Third Applicant Carmel Angelilli**Respondents**

Second Respondent Financial Wisdom Limited (ACN 006 646 108)

Third Respondent: Colonial Mutual Life Assurance Society Pty Limited,  
CommInsure (ACN 002 348 352)Fourth Respondent AIA Australia Limited (ACN 004 837 861)Date: ~~21 August 2020~~ 16 November 2021