IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S ECI 2019 01926

NICOS ANDRIANAKIS — Plaintiff

v

UBER TECHNOLOGIES INC and others
(according to the attached schedule) — Defendants

JUDGE:	MACAULAY J
WHERE HELD:	Melbourne
DATE OF HEARING:	On the papers
DATE OF RULING:	1 April 2020
CASE MAY BE CITED AS:	Andrianakis v Uber Technologies (Ruling No 2)
MEDIUM NEUTRAL CITATION:	[2020] VSC 152

CIVIL PROCEDURE — Group proceeding — Where, having filed a proposed amended statement of claim within time permitted, plaintiff sought leave to file a second version of the amended statement of claim to add a new category of group members — Where new category of group member is one whose claim derives from that of a deceased or deregistered former or potential group member — Matters considered include explanation for lateness of application, significance of amendment, potential limitation of action, legal tenability of assignment or transfer of claim for personal tort, capacity of plaintiff to represent those with derivative claims and absence of formal application — Leave to file second version refused.

CIVIL PROCEDURE — Where leave granted to file amended statement of claim — Whether effective date for that part of the amended claim adding a further category of group member should be the date of filing — *Ethicon Sarl v Gill* (2018) 264 FCR 394 applied.

CIVIL PROCEDURE — Costs — Award of costs where both parties have a measure of success — r 63.04 *Supreme Court (General Civil Procedure) Rules 2015*.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	On the papers	Maurice Blackburn Pty Ltd
For the Defendant	On the papers	Jones Day

HIS HONOUR:

Issues for determination

1 In this ruling I give my reasons for the final orders I made on 31 March 2020 (annexed hereto) arising from three summonses filed by the defendants in 2019.

2 To date, the most current pleading which the plaintiff, Mr Andrianakis, has filed and served on the defendants (comprising the **Australian defendants**[1] and the **Foreign defendants**[2]) is an Amended Statement of Claim filed on 24 July 2019 (**ASOC**). The Australian defendants challenged the ASOC by a summons filed 19 August 2019 (**pleading summons**) and sought security for their costs by a summons filed 7 August 2019 (**security for costs summons**). By an amended summons handed up to the Court on 4 September 2019 and filed on 18 March 2020 (**service-out summons**) the Foreign defendants challenged the service out of the jurisdiction of court process upon them.

3 On 20 December 2019 I made orders on each of the three summonses and published reasons for doing so (**Ruling No 1**):[3]

(a) On the pleading summons, I directed the plaintiff to file and serve a proposed further amended statement of claim, dismissed two of the applications made therein, reserved the costs and adjourned the further hearing of the summons until after a date after the time prescribed for the filing of the proposed amended statement of claim.

(b) Because of its connection to the outcome of the proposed further pleading I adjourned the service-out summons to the further hearing date and reserved the costs.

(c) On the security for costs summons, I ordered the provision of security for the costs of the Australian defendants up until the filing of defences and reserved

1 4th and 7th defendants.

2 1st, 2nd, 3rd, 5th and 6th defendants.

3 *Andrianakis v Uber Technologies (Ruling No 1)* [2019] VSC 850.

the costs.

4 In accordance with those orders Mr Andrianakis provided the security for the costs of the Australian defendants and filed a proposed further amended statement of claim on 28 February 2020 (**the 28 February FASOC**).

5 Shortly before the date for the adjourned further hearing Mr Andrianakis provided to the defendants and the court a *further* proposed amended statement of claim (**the 18 March FASOC**). If permitted to be filed, the 18 March FASOC would admit a new category of group members who, broadly speaking, are successors and assignees of persons who, but for some event affecting their existence, would otherwise have been a group member.

6 The defendants have informed the court that they intend to appeal aspects of Ruling No 1 and some of the orders made pursuant to it. The time by which such an appeal must be brought has been extended twice by consent to enable final orders on the three summonses to be made before the appeal period expires.

7 In accordance with directions given by the court the plaintiff and the defendants filed minutes of the orders which they proposed should be made together with written submissions in support of the contentions.[4] I will set out the position which each party adopts in relation to the orders to be made in respect of the three summonses and any further directions to be given.

8 In respect of the **pleading summons** (filed by the Australian defendants only) the plaintiff seeks leave to file the 18 March FASOC. The Australian defendants submit that leave should only be granted to file the 28 February FASOC, along with a further restriction that the amendment effected by paragraph 2(d)(ia), which admits a new group of members, only take effect from the date of filing. Both parties agree

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4 'Plaintiff's Submissions' dated 26 March 2020; Defendants' 'Submissions for the Hearing on 27 March 2020'dated 26 March 2020; 'Plaintiff's Reply Submissions' dated 26 March 2020; and Defendants' 'Submission in Final Response to the Plaintiff's Reply Submission' dated 30 March 2020. It is relevant to record that the timing of the final hearing of the three summonses coincided with the COVID-19 pandemic which impacted the way in which the Supreme Court of Victoria has been able to hear and determine cases. By direction, the 'final hearing' occurred by way of submissions 'on the papers'.

that the pleading summons should otherwise be dismissed. On the question of costs, the plaintiff contends he should get all of his costs of the summons. For their part, the Australian defendants argue that the costs of the summons should be costs in the proceeding or, at best (for the plaintiff), the plaintiff's cost in the proceeding.

9 In respect of the **service-out summons**, (filed by the Foreign defendants only), both parties agree that in light of my ruling and the allowance of (at least) the filing of the 28 February FASOC, the summons should be dismissed. On the question of costs, again the plaintiff says that the Foreign defendants should pay all of his costs of the summons whereas those defendants say that the costs should be costs in the proceeding or, at best (for the plaintiff), the plaintiff's cost in the proceeding.

10 In respect of the **security for costs summons** (filed by the Australian defendants only), the only outstanding issue is the question of costs. The plaintiff submits that the Australian defendants should pay him half the costs of the expert he retained but otherwise each party should bear its own costs. The Australian defendants submit that the plaintiff should pay their costs or, at worst (for them), the Australian defendants' costs of the summons should be their costs in the proceeding.

11 As for other orders, the plaintiff submits that the court should direct as follows:

(a) the defendants file their defences by 24 April 2020;

(b) the plaintiff file a reply by 22 May 2020;

(c) by 8 May 2020 each defendant provide an initial tranche of discovery of all documents of which it or its solicitors are aware without the need to do further searches and which support or are adverse to any party's case.

(d) there be a further directions hearing on 29 May 2020, and

(e) other than those costs specifically ordered, costs be reserved.

12 Given their intention to appeal the orders to be made with respect to the further amended statement of claim and the dismissal of the service-out summons, the

defendants contend that there should be no further orders or directions made with respect to further pleadings or interlocutory steps. Should the court disagree, the defendants submit that the court should go no further than ordering defences and that they should be directed to be filed by 12 June 2020.

Should the plaintiff be permitted to file the 18 March FASOC?

13 In addition to changes already proposed in the 28 February FASOC, by the 18 March FASOC the plaintiff wishes to add, in paragraph 2(e), an additional category of persons on whose behalf he has commenced the group proceeding, namely 'Derivative Group Members'. That category consists of those persons who or which –

> have had a claim of:
>
> (i) a Victorian Group Member, New South Wales Group Member, Queensland Group Member or Western Australian Group Member; or
>
> (ii) a person who has died, or company which has been deregistered, who or which would otherwise have been a Victorian Group Member, New South Wales Group Member, Queensland Group Member or Western Australian Group Member (Former Industry Members);
>
> as alleged below which (sic) vested in or assigned or transferred to them (Derivative Group Members).
>
> Former Industry Members who or which, if they had survived or remained registered, would have been:
>
> (i) Victorian Taxi Group Members are hereinafter referred to as Former Victorian Taxi-cab industry Members;
>
> …
>
> [The same definitional formulation is repeated for each class of State taxi and like driver group members]

14 Throughout other paragraphs of the 18 March FASOC the relevant class of derivative group member is added, along with the existing categories of group member, so as to give rise to a cause of action for the new category. The net result is to extend the benefit of the proceeding to the alleged assignees and successors of those who, but for death (if a natural person) or deregistration (if a corporation), would arguably have been included within the description of group members and

represented by Mr Andrianakis.

15 In his primary written submission, Mr Andrianakis explained the purpose of these further proposed amendments as being to —

> …include as group members persons who have acquired a claim from another person or entity, such as:
>
> (a) the executor or administrator of the estate of a person who would have been a group member had they survived;
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> (b) a person who has received a transfer or assignment of a claim from a company which has been deregistered, or where a valid transfer or assignment has occurred for some other reason; and
>
> (c) replacement trustees who have had vested in them claims which could otherwise have been pursued by the former trustee as a group member.

16 The defendants oppose these proposed amendments on both substantive and discretionary grounds, submitting that:

- they are fundamental changes to the Group Member definition for which no formal application (by summons) has been made, nor any explanation given for making the amendment late;
- the phraseology "have had a claim" has both grammatical and legal difficulty, and only those who presently have a claim should be permitted to be a Group Member;
- a "deregistered company" does not exist and cannot have a cause of action;
- it is not possible in law or equity to validly transfer or assign a personal tort, thus the assumption underlying the inclusion of assignees is legally untenable;
- no detail of any assignments or transfers have been pleaded so it is not possible to test whether they are valid;
- Mr Andrianakis would not be an appropriate representative of the derivative group members because he has a direct cause of action, so there is no means by which to test the proposition that the alleged causes of action of derivative group members exist; and

- the extent to which Mr Andrianakis was capable of representing categories of group members was fully argued at the hearing of the pleading summons which was the appropriate occasion to consider his capacity to represent derivative group members.

17 In attempting to meet these objections the plaintiff first attempted to explain the lateness of the amendment through the filing (by leave) of a further affidavit made by one of his legal representatives, Ms Elizabeth O'Shea.[5] Ms O'Shea explained that it was in 'late 2019' that the solicitors for the plaintiff began an investigation to 'ensure that the claims of all group members were protected' in light of the fact that some might become statute barred commencing in April 2020. That investigation revealed that some former industry participants had died (in the case of natural persons) or been deregistered (in the case of companies) in each case needing some sort of 'administrative action'. Collecting the results of that investigation, contacting registered group members and drafting the necessary amendments took until mid-March 2020.

18 With respect to the more substantive objections to the 18 March FASOC, Mr Andrianakis submitted that:

- the defendants have misunderstood the identity of the proposed new class of group member – he seeks to add the *presently existing* assignee or successor, not the no-longer-surviving former industry participant;
- it is an overstatement to say that it is not legally possible to assign a cause of action based upon a personal wrong — although it is generally the position that such a cause of action may not be assignable, the rule is not absolute and there are recognised categories in which it may be displaced;
- the argument about the plaintiff not being able to represent derivative group members is addressed by the arguments he put against similar submissions made by the defendants at the hearing of the pleading summons; and
- the criticism that the capacity of Mr Andrianakis to represent derivative

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[5] Affidavit of Elizabeth O'Shea affirmed 26 March 2020.

group members should have being raised during the hearing of the pleading summons is addressed by the explanation given for the lateness of the amendment.

19 I think that the defendants raise a number of real concerns about this late-proposed further amendment. First, for context, it is important to observe that this proceeding has now been on foot since May 2019 with still only a statement of claim having been served. A two-day hearing on a range of important issues took place in September 2019; those issues were mostly determined in December 2019 by accordance Ruling No 1. At the end of March 2020 I am only now called upon to determine whether the further amended statement of claim to be filed should be the version filed in compliance with my 20 December 2019 orders, consequent upon Ruling No 1, or a last-minute version.

20 On top of that, due to no party's fault, the Australian legal system has been impacted by the COVID-19 pandemic, reducing the court's agility in dealing with matters.

21 Against that background, I am not impressed by the degree of transparency (or lack thereof) provided by the plaintiff in explaining the lateness of his proposed 18 March FASOC. His explanation appears to be a euphemism for having overlooked problems that might arise for certain group members with the approach of the expiry of a limitation period.

22 The issue concerning the admission of a potential new class of group member, and the capacity of Mr Andrianakis to represent them, should have been argued at the September hearing and determined along with his capacity to represent other group members. I accept the defendants' submission that the question whether Mr Andrianakis is a proper representative for *derivative group members* may well raise different issues to the question whether he can properly represent other persons with the same or similar *direct* causes of action as his, albeit situated in other states, which was the subject of decision in Ruling No 1. I have not had the benefit of full argument on this new point, nor have the defendants have proper opportunity to address it. They would have been able to do so had the issue been raised before last

September.

23 Additionally, no examples of any *actual* assignments or transfers have been pleaded, let alone illustrated by any form of evidence. The plaintiff accepts that, as a general rule, a cause of action for a personal wrong cannot be assigned and that any such assignments would (at least) need to be brought within a particular category of exception to the general rule in order to be recognised as legally valid.[6] In the absence of any detail or examples, it is not possible to determine whether this new proposed category of group member, or at least some sub-parts of it, is any more than a hypothetical class. For that reason (among others) it is difficult if not impossible to assess the significance (if any) of the approaching expiry of a limitation period, on a component of a claim of a potential group member, which claim would only be admitted by the allowance of this recently proposed category.

24 On top of that, I have some difficulty understanding from the terms of the proposed amendment precisely who is to make up the new class or by what means it is to be populated. Although, as a matter of construction, the new class seems to comprise presently-existing assignees or transferees (not the deceased persons or now-defunct companies, as the defendants appear to suggest), nevertheless the language of the amendment obscures how or when the assignment or transfer could have been (or may still be) effected. Are they transfers or assignments which have already been made by persons before they died or by companies before they were deregistered; or might they be effected by operation of law or by some court order still to be made? Does the formulation of the category have some ambulatory or ongoing effect in admitting new members as future transfers or assignments take place?

25 Against these uncertainties and in the face of an inadequate explanation for the lateness of the proposed amendment, I refuse the plaintiff leave to file the 18 March FASOC. I need not base my decision on the absence of any formal application to amend the statement of claim (by summons), but for a matter of such significance

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6 Plaintiff's Reply Submissions, para 1.4. (c) and fn 1.

the absence of proper application and notice would otherwise be a sufficient ground to refuse leave.

26 In order to be fair to the defendants, the alternative to simply refusing leave to file the 18 March FASOC, would be to put over the question of leave to amend for another round of oral submissions. The current COVID–19 crisis makes that step problematic, although not impossible. But doing so would certainly cause yet further delay to an already protracted process. Further delay in progressing the proceeding is highly undesirable. The defendants are poised to appeal important issues decided by Ruling No 1, a step that should proceed as soon as possible. In my view, the proper balancing of the considerations mandated by ss 7 and 8 of the *Civil Procedure Act 2010* (Vic) is to give leave to the plaintiff to file the 28 February FASOC and leave it to him to make any further application to amend his statement of claim in due course.

27 Lastly, there is the question whether, in giving leave to the plaintiff to file the 28 February FASOC, the amendment of the group definition at paragraph 2(d)(ia) and the claims made on behalf of those new group members should be ordered to take effect from the date of amendment, being the date of filing the 28 February FASOC. In my view, I should follow the approach of the Full Federal Court in *Ethicon Sarl v Gill*.[7]

<u>What costs orders should be made?</u>

28 In respect of the **pleading summons**, Mr Andrianakis succeeded on most of the issues raised — the adequacy of the identification of the conspirators and overt acts, and applications made in reliance on Part 4 A of the *Supreme Court Act 1986* (Vic). On the question of the adequacy of the pleading of intention to injure by unlawful means I found there was a "discernible case" but that some premises for the essential allegation were unstated or only implied. On 20 December 2019 I ordered a clearer and more transparent articulation of the intention to harm, an order which led to the

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[7] (2018) 264 FCR 394, [50]-[52].

28 February FASOC.

29 In my view the plaintiff should get most of his costs on the pleading summons. I do not agree with the Australian defendants' proposal that the costs should be costs in the proceeding. Their application to strike out the pleading was a discrete application they chose to bring on which, except for one aspect, they failed. Generally, costs should follow the event. To reflect the Australian defendants' partial success on the issue about the pleading of intention to harm, I think it is appropriate to award the plaintiff only a proportion of his costs of the summons.[8] In my opinion, a fair reflection of each party's measure of success and failure is achieved by ordering that the Australian defendants pay 80% of the plaintiff's costs of the pleading summons.

30 In respect of the **service-out summons**, the Foreign defendants wholly failed. I see no reason why they should not pay the whole of the plaintiff's costs of that summons.

31 Finally, in respect of the security for costs summons, both sides had a measure of success. The only question was the issue of quantum. There was one point of principle on which Mr Andrianakis succeeded: a significant one for the question of quantum. Apart from that issue of principle, for the reasons which I gave in Ruling No 1 I adopted a starting point which was approximately halfway between each side's assessment of the party and party costs incurred for all defendants. In that respect neither side could claim they succeeded.

32 I prefer the plaintiff's proposed order on this issue. The Australian defendants should pay Mr Andrianakis half the costs of the expert he retained but otherwise each party should be bear their own costs of the summons.

<u>What further directions, if any, should be given?</u>

33 The defendants should file their defences. I do not accept that merely because the

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8 Rule 63.04 *Supreme Court (General Civil Procedure) Rules 2015*; *Chen v Chan* [2009] VSCA 233 [10].

defendants intend to appeal Ruling No 1 I should hold off requiring any further interlocutory steps be taken. Well it may be that the Court of Appeal's decision could mean that the cost of preparing defences is partly or wholly wasted. But that is not the outcome I need to assume. There is much benefit in making use of the time pending any Court of Appeal decision by progressing the proceeding. In this case, that benefit outweighs the risk that the costs of doing so might be wasted or need to be duplicated in some degree.

34 But I intend to make further interlocutory orders in stages. At this stage I will not make directions beyond the provision of defences and reply and a further directions hearing. I will reassess the question of discovery at the next directions hearing when some information about the progress of the defendants' appeal will be available and when further security for costs, beyond the provision of defences, can be or will have been addressed.

35 As for the date by which defences should be filed Mr Andrianakis suggested it should be by 24 April 2020 whereas the defendants urged me to allow them until 12 June 2020. The plaintiff's date is a little over three weeks away whereas the defendants' date is more than 10 weeks away. I accept that the statement of claim contains many allegations of fact involving events in a number of jurisdictions within Australia. I accept that taking full instructions and drafting appropriate responses will take some time and that the COVID-19 crisis will make that task more challenging than usual.

36 Even allowing for those difficulties, the defendants have had the plaintiff's further amended statement of claim for nine months. I assume that the process of obtaining instructions on those allegations has begun. I will allow a little over eight weeks, until Friday, 29 May 2020 for the filing of defences. That is an unusually generous time, but one that is appropriate in unusual circumstances.

37 I will allow three weeks for a reply, to be filed by 19 June 2020, enabling the next directions hearing to be fixed before the end of Term 2, namely on 26 June 2020.

Orders

38 A copy of the orders made on 31 March 2020 is annexed to these reasons.

IN THE SUPREME COURT OF VICTORIA **S ECI 2019 01926**
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

BETWEEN:

NICOS ANDRIANAKIS

Plaintiff

-and-

UBER TECHNOLOGIES INCORPORATED
and others according to the attached schedule

Defendants

ORDER

JUDGE:	The Honourable Justice Macaulay
DATE MADE:	31 March 2020
ORIGINATING PROCESS:	Writ filed 3 May 2019.
HOW OBTAINED:	The Order is made 'on the papers' pursuant to Rule 59.07 of the *Supreme Court (General Civil Procedure) Rules 2015* ('Rules').
ATTENDANCE:	No appearance, orders made on the papers.
OTHER MATTERS:	This order is signed by the Judge pursuant to rule 60.02(1)(b) of the Rules.

THE COURT ORDERS THAT:

Pleadings

1. The plaintiff has leave, pursuant to rule 36.04 of the Rules and section 33K of the *Supreme Court Act 1986* (Vic), to file and serve a further amended statement of claim in the form of the proposed pleading filed on 28 February 2020 by **4.00pm** on **2 April 2020**.

2. The amendments to the further amended statement of claim to bring claims on behalf of the group members described in paragraph 2(d)(ia) of the further amended statement of claim are to take effect on the date on which the further amended statement of claim is filed.

3. By **4.00pm** on **29 May 2020** the defendants file and serve any defence to the further amended statement of claim.

4. By **4.00pm** on **19 June 2020** the plaintiff file and serve any reply to any defence filed in accordance with the preceding paragraph.

Summonses

5. The applications made in:
   a. paragraph 1 of the amended summons filed 19 August 2019 on behalf of the fourth and seventh defendants (**pleading summons**); and
   b. the amended summons filed 18 March 2020 (but handed up in court on 4 September 2019) on behalf of the first, second, third, fifth and sixth defendants (**service-out summons**)

   are dismissed.

6. The fourth and seventh defendants pay eighty percent (80%) of the plaintiff's costs of the pleading summons.

7. The fourth and seventh defendants pay one half of the costs of the plaintiff's expert report but otherwise each party bear their own costs of the summons filed on behalf of the fourth and seventh defendants on 7 August 2019 (**security for costs summons**).

8. The first, second, third, fifth and sixth defendants pay the plaintiff's costs of the service-out summons.

Other directions

9. The proceedings be listed for directions before the Honourable Justice Macaulay at **9:30am** on **26 June 2020**.

10. Except in accordance with paragraphs 6, 7 and 8 above, costs are reserved.

DATE AUTHENTICATED: 31 MARCH 2020

THE HON. JUSTICE MACAULAY

SCHEDULE OF PARTIES

NICOS ANDRIANAKIS	Plaintiff
- and -	
UBER TECHNOLOGIES INCORPORATED (4849283)	First Defendant
UBER INTERNATIONAL HOLDING B.V. (RSIN 851 929 357)	Second Defendant
UBER B.V. (RSIN 852 071 589)	Third Defendant
UBER AUSTRALIA PTY LTD (ACN 160 299 865)	Fourth Defendant
RASIER OPERATIONS B.V. (RSIN 853 682 318)	Fifth Defendant
UBER PACIFIC HOLDINGS B.V. (RSIN 855 779 330)	Sixth Defendant
UBER PACIFIC HOLDINGS PTY LTD (ACN 609 590 463)	Seventh Defendant