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

Not Restricted

S ECI 2020 03282

SEBASTIAN AGNELLO — Plaintiff

v

HERITAGE CARE PTY LTD (ACN 106 873 796) — Defendant

S ECI 2020 03339

EFSTATHIA (EFFIE) FOTIADIS — Plaintiff

v

ST. BASIL'S HOMES FOR THE AGED IN VICTORIA (ACN 070 511 616) — Defendant

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JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	13 July 2021
DATE OF JUDGMENT:	16 December 2021
CASE MAY BE CITED AS:	Agnello v Heritage Care Pty Ltd; Fotiadis v St Basil's Homes for the Aged in Victoria
MEDIUM NEUTRAL CITATION:	[2021] VSC 838

PRACTICE AND PROCEDURE – Group proceedings – Commencement - Whether claims of all group members are in respect of, or arise out of, same, similar or related circumstances – Whether claims give rise to a substantial common question of law or fact – *Supreme Court Act 1986* (Vic) ss 33C(1)(b), (c).

PRACTICE AND PROCEDURE – Group proceedings – Whether in the interests of justice that parts of the proceeding should no longer continue as representative proceeding – insufficient evidence that cost or efficiency worse in group proceeding than in hundreds of separate individual claims – Unnecessary to determine whether court may de-class or discontinue only part of proceeding using 'gap-filling' power – *Supreme Court Act 1986* (Vic)

ss 33N, 33ZF.

PRACTICE AND PROCEDURE – Group proceedings – Approval of discontinuance of part of proceeding – Claims by employees, residents and their families against aged care facilities for injuries or death arising from sub-standard provision of care services, particularly during the COVID-19 outbreak – Whether to grant approval of discontinuance of claims for employees and parents as no prospects of success – Where approved notice of proposed discontinuance not given to group members – *Supreme Court Act 1986* (Vic) ss 33V, 33X.

PRACTICE AND PROCEDURE – Application to strike out certain paragraphs of the statement of claim – Whether pleading or any part thereof fails to disclose a cause of action, or is scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the proceeding – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 23.02.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs Sebastian Agnello and Efstathia (Effie) Fotiadis	Mr A Broadfoot QC with Mr D Dealehr and Ms S Brenker	Carbone Lawyers
For the Defendant Heritage Care Pty Ltd	Mr C Caleo QC with Mr J Page	Arnold Bloch Leibler
For the Defendant St Basil's Homes for the Aged in Victoria	Mr P Over of Counsel	Arnold Bloch Leibler

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HIS HONOUR:

Agnello v Heritage Care Pty Ltd

A. Strike out application

Introduction

1 The defendant, Heritage Care Pty Ltd ('**Heritage Care**'), applied by summons for orders that the plaintiff's amended statement of claim ('**ASOC**') dated 12 May 2021 be struck out or, alternatively, that particular identified paragraphs of it be struck out.

2 The grounds for the application are:

(a) this proceeding was not properly commenced under Part 4A of the *Supreme Court Act 1986* (Vic) ('**Act**') because ss 33C(1)(b) and/or (c) and/or 33H(2)(c) of the Act have not been complied with ('**Section 33C issue**');

(b) that it is not in the interests of justice for the ASOC to survive in its current form given that it pleads two conceptually distinct claims on behalf of group members. For this reason, a strike out order should be made under s 33ZF of the Act ('**Section 33ZF issue**'); and

(c) that certain paragraphs of the ASOC ought to be struck out pursuant to r 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('**Rules**') because they do not disclose a cause of action, or they are scandalous, frivolous or vexatious, or they may prejudice, embarrass or delay the fair trial of the proceeding ('**Strike out issue**').

3 For the reasons that follow the defendant has not made out either the Section 33C ground or the Section 33ZF ground and I have not been persuaded that the nominated paragraphs of the ASOC ought to be struck-out. The defendant's summons will be dismissed.

Summary of pleading

4 To understand the submissions, I will first summarise the pleading.

5 The plaintiff, Sebastian Agnello ('**Mr Agnello**'), is the child and legal personal representative of Mrs Carmela Agnello ('**Mrs Agnello**'), who received accommodation and Residential Care Services[1] from 26 September 2018 at the defendant's aged care facility ('**Epping Gardens**') pursuant to a written 'resident agreement'.

6 On or prior to 20 July 2020, a resident and a staff member of Epping Gardens tested positive for COVID-19 and between that date and 9 September 2020, 103 residents and 86 staff members at Epping Gardens tested positive to COVID-19. In all, 38 residents, including Mrs Agnello, died from COVID-19.

7 The proceeding is a group proceeding pursuant to Part 4A of the Act. The group members are persons who were resident at Epping Gardens at any time in the period 26 February 2020 to 9 September 2020 ('**the Period**') and their families – defined as partners, sons-in-law or daughters-in-law, siblings, children, grandchildren, cousins, nieces or nephews of a resident – who suffered loss or damage as a result of the defendant's conduct. Loss or damage means any one or more of personal injury or death, pain and suffering, mental or nervous shock, disappointment and distress, injured feelings, funeral expenses, medical and like expenses, or other economic loss consequent on personal injury or death. Group members fall into three sub-groups, the Resident Sub-Group Members, the Family Sub-Group Members, and the Representee Sub-Group Members. The last sub-group comprises residents and family who received documents in which the defendant made representations concerning the services to be, or being, provided by it.

8 It is unnecessary for present purposes to set out the statutory and regulatory context in which the defendant operated Epping Gardens, which is alleged in the ASOC in detail, nor to describe the chronology of the COVID-19 outbreak both generally and

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1 A term defined with reference to 'residential care' services as contemplated under the *Aged Care Act 1997* (Cth) and *Quality of Care Principles 2014* (Cth). This includes personal care and nursing care provided to a person in a residential facility in which that person is also provided with accommodation, that includes appropriate staffing to meet the nursing and personal care needs of the person; meals and cleaning services; furnishing, furniture and equipment for the provision of that care and accommodation: *Aged Care Act 1997* (Cth) s 41-3.

affecting Epping Gardens as it is pleaded. Detailed allegations of fact about the manner in which Epping Gardens operated are also pleaded including as to conditions at the facility in the months preceding, and following, the COVID-19 outbreak.

9 On 25 July 2020, Mrs Agnello suffered a fall and was taken to hospital, where she was found to be infected with COVID-19, along with dehydration, fluid in her lungs, heart problems, a cough and a fever. Mrs Agnello died on 28 July 2020.

10 The ASOC pleads a number of different causes of action:

(a) Contractual breach;

(b) Breach of statutory consumer guarantees;

(c) Negligence claims; and

(d) Misleading and deceptive conduct.

Contractual breach

11 The plaintiff alleges that the defendant breached a resident agreement it entered into with Mrs Agnello and Resident Sub-Group Members, causing the plaintiff and sub-group members to suffer loss and damage.

Breach of consumer guarantees

12 The plaintiff alleges that in supplying Residential Care Services to Mrs Agnello and Resident Sub-Group Members, the defendant breached the statutory guarantees to render its services with due care and skill, and that its services would be reasonably fit for purpose and might reasonably be expected to achieve the expected result, pursuant to ss 60 and 61 of the *Australian Consumer Law*.

13 The plaintiff alleges these guarantees were contravened and could not be remedied, and were a major failure within the meaning of ss 267(3) and 268 of the *Australian Consumer Law*, causing loss and damage.

Negligence

(i) Resident Duty of Care

14 The plaintiff further alleges that the defendant had a direct and non-delegable duty to take reasonable care in the provision of the Residential Care Services to Resident Sub-Group Members and in the implementation of Infection Control Measures,[2] including by any third party engaged by or on behalf of the defendant, to avoid or minimise two species of risk of harm, the 'Care Risk of Harm' and the 'Infection Risk of Harm'.

(a) The Care Risk of Harm was a risk of loss or damage arising from neglect, infection, disease, malnutrition, dehydration, choking, failure to be given the correct medication or any at all, or any other failure by the defendant to provide the Residential Care Services with reasonable care or at all.

(b) The Infection Risk of Harm was a risk of becoming infected with and dying of causes relating to COVID-19. As it is pleaded, the Infection Risk of Harm is a specific form of the Care Risk of Harm arising from a failure to exercise reasonable care and skill in the implementation of Infection Control Measures during the Period. Although the Infection Control Measures are pleaded specifically with an identifiable content that was contributed to by guidelines published as part of Commonwealth government regulation of aged care after the pandemic began, such measures are also pleaded as a requirement of the provision of Residential Care Services.

15 The plaintiff alleges a specific identifiable content to the Resident Duty of Care and that the defendant did not exercise reasonable care and skill during the Period, particularising different categories of breach: care breaches, training breaches and infection breaches, that are collectively referred to in the pleading as 'Breaches of Resident Duty'.

16 The plaintiff alleges that by reason of the Breaches of Resident Duty, COVID-19 was

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[2] A term defined with reference to the measures appearing in the Australian Guidelines for the Prevention and Control of Infection in Health Care and the Communicable Diseases Network Australia National Guidelines.

not promptly detected in family and other visitors, residents or staff at Epping Gardens and spread quickly to all areas of the facility. Resident Sub-Group Members were neglected by the defendant's failure to exercise reasonable care and skill in providing the Residential Care Services. These breaches resulted in the Care Risk of Harm and the Infection Risk of Harm materialising and to the Resident Sub-Group Members suffering loss and damage.

(ii) Family Duty of Care

17 The plaintiff alleges a second duty of care, described as the Family Duty of Care that the defendant owed to each of the Family Sub-Group Members to take reasonable care to avoid the materialisation of the 'Family Risk of Harm'. In the alternative, this duty of care was owed to those Family Sub-Group Members who were partners, siblings, children or grandchildren of Resident Sub-Group Members. The Family Risk of Harm was a risk that exposing family to distressing circumstances arising from the death of or injury to their resident at Epping Gardens by the defendant's conduct would cause loss or damage to the family of those residents. The pleading identifies the salient features by reference to which it is said that this duty of care arises.

18 The pleading alleges the particular content of this duty of care and the circumstance in which it was breached. But for those breaches, Family Sub-Group Members would not have been exposed to distressing circumstances as to be likely to cause psychiatric harm. The plaintiff and other Family Sub-Group Members suffered loss and damage in the form of psychological reaction marked by depression and anxiety, personal injury, pain and suffering, nervous shock, economic loss and medical and or like expenses.

Misleading and deceptive conduct

19 Next, the plaintiff advances a claim for loss and damage caused by misleading or deceptive conduct in breach of the *Australian Consumer Law*. This cause of action is based upon representations contained in a handbook that was provided to the plaintiff and the other Representee Sub-Group Members, which induced them to admit residents into the Epping Gardens facility. Further representations were alleged to be

made in other communications.

20 The plaintiff and other Representee Sub-Group Members were induced by and relied on these representations in admitting residents into the facility and in deciding not to withdraw those residents from the facility prior to the COVID-19 outbreak.

21 By reason of the misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law*, the plaintiff and other Representee Sub-Group Members suffered loss and damage, being psychological reaction marked by depression and anxiety, mental or nervous shock, medical and like expenses, disappointment and distress, injured feelings, or disappointment, anger and mental stress and other personal injury or economic loss.

22 The plaintiff contended that the following common issues of fact and law are raised by his claim.

(a) Did the events surrounding the COVID-19 Outbreak pleaded in Sections A.3 and C take place (ASOC, paragraph 139(a))?

(b) Did the defendant have the obligations, responsibilities and/or duties pleaded in section B and D.1 (ASOC, paragraph 139(b))?

(c) Did the defendant owe the Resident Duty of Care and/or the Family Duty of Care (ASOC, paragraph 139(c))?

(d) Did the acts and omissions of the defendant in Sections A, C to H occur and if so, was the defendant in breach of contract; in contravention of ss 60 and/or 61 of the *Australian Consumer Law*; negligent or otherwise in breach of the Resident Duty of Care and/or the Family Duty of Care and/or in contravention of s 18 of the *Australian Consumer Law* (ASOC, paragraph 139(d))?

(e) Did the plaintiff and the Group Members suffer loss by reason of the defendant's Breaches of Contract, Breaches of Consumer Guarantees, Breaches of Resident Duty, Breaches of Family Duty and/or s 18 Contraventions (ASOC,

paragraph 139(e))?

B. The Section 33C issue

23 Section 33C states:

> **33C Commencement of proceeding**
>
> (1) Subject to this Part, if—
>
> (a) seven or more persons have claims against the same person; and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all those persons give rise to a substantial common question of law or fact—
>
> a proceeding may be commenced by one or more of those persons as representing some or all of them.
>
> (2) A group proceeding may be commenced—
>
> (a) whether or not the relief sought—
>
> (i) is, or includes, equitable relief; or
>
> (ii) consists of, or includes, damages; or
>
> (iii) includes claims for damages that would require individual assessment; or
>
> (iv) is the same for each person represented; and
>
> (b) whether or not the proceeding—
>
> (i) is concerned with separate contracts or transactions between the defendant and individual group members; or
>
> (ii) involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

Principles applying to s 33C(1)(b)

24 Since *Wong v Silkfield Pty Ltd* (‘***Wong***’), it has been accepted that each of the three threshold requirements set out in s 33C(1) must be satisfied, by reference to the plaintiff’s pleading,[3] in order for a representative proceeding to have been validly

[3] *Bright v Femcare* (2002) 195 ALR 574, 600 [124]-[126] (‘***Bright***’).

commenced under Part 4A of the Act.[4]

25 The defendant's submission was directed to the second and third requirements that focus on the claims of the persons comprising the purported class.[5]

26 In *Timbercorp Finance Pty Ltd (in liq) v Collins ('**Timbercorp**')*, Gordon J described the effect of s 33C(1) to be that a proceeding can only be said to be representative to the extent of the commonality of a question of law or fact, while the individuality of claims is expressly contemplated in the provision.[6] What must be present is a common interest of group members in the resolution of a substantial common question of law or fact in claims that arise out of the same, similar or related circumstances.[7]

27 In *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* ('***Zhang***'), French J identified the widening ambit (that is circumstances that are the 'same', 'similar' or 'related') that s 33C(1)(b) contemplates, about the relationship between the circumstances of each group member.[8] There is a 'threshold judgment' to be made as to whether the similarities or relationships between the circumstances giving rise to each claim are sufficient to merit their grouping as a representative proceeding. There is 'room for considerable diversity in circumstances which might support individual claims'.[9]

28 In *ISG Management Pty Ltd v Mutch ('**Mutch**')*, the Full Court of the Federal Court observed that the third threshold requirement requires identification of only one substantial common issue and that the determination of that issue need not resolve, to any significant degree, the claims of all group members.[10] The question as to whether the class action was validly commenced is a binary assessment and does not call for the exercise of any discretion.

29 While s 33C(1) is critical to the underlying purpose of Part 4A – to provide a

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4 (1999) 199 CLR 255, 266 [26] ('***Wong***'), referring to the *Supreme Court Act 1986* (Vic) ss 33C(1)(a)-(c).
5 *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150, 159 [43]-[44] ('***Dillon***').
6 (2016) 259 CLR 212, 246 [103]-[104] ('***Timbercorp***').
7 Ibid.
8 (1993) 45 FCR 384, 404-5 ('***Zhang***').
9 Ibid.
10 *ISG Management Pty Ltd v Mutch* (2020) 385 ALR 146, 148 [4].

mechanism to avoid multiplicity of actions and to provide a means by which multiple claims may be dealt with together consistently with the requirements of fairness and individual justice[11] – satisfying the requirements of ss 33C(1)(b) and (c) is not a demanding exercise.[12]

30 Courts have adopted a reasonably liberal construction of ss 33C(1)(b) and (c) of the Act,[13] which is consistent with the objectives and purposes of Part 4A.

31 A purported group proceeding that does not satisfy the requirements of s 33C(1) is not properly commenced and is liable to be dismissed or the pleading struck out.[14]

32 The parties' submissions direct attention to the concept of 'claims' in s 33C(1).

33 The Court of Appeal in *Uber Australia Pty Ltd v Andrianakis* ('***Uber***') endorsed the explanation of Finkelstein J of 'claims', when considering the identically worded Federal provision, in *Bray v F Hoffman-La Roche Ltd*,[15] and explained the relationship between the term and ss 33C(1)(b)-(c) as follows:

> The word 'claims' refers to the facts which constitute the causes of action of the plaintiff and the other group members, as well as the legal basis of those causes of action. It is those facts, or those legal principles, which are 'required to be in respect of, or arise out of, similar or related circumstances and give rise to one substantial common issue of law or fact'. A claim will be sufficiently closely connected either if the underlying facts or the underlying legal principles raised by the facts are sufficiently closely connected.[16]

34 Accordingly, 'claim' is not the cause of action pleaded. 'Claims' have an existence independent of, and antecedent to, the commencement of the proceeding.[17] It is a term to be given a wide meaning and need not be based on the same conduct and may arise out of quite disparate transactions.[18]

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11 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 24 [12]; *Gill v Ethicon Sàrl (No 3)* (2019) 369 ALR 175, 176 [3] ('***Gill***').

12 *Zhang* (1993) 45 FCR 384, 404-5; *AS v Minister for Immigration* [2014] VSC 593, [55] ('***AS***'); *Uber Australia Pty Ltd v Andrianakis* (2020) 61 VR 580, 608-9 [79] ('***Uber***').

13 *Uber* (2020) 61 VR 580, 608 [79(1)], citing *AS* [2014] VSC 593, [55].

14 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, 514 [125].

15 (2003) 130 FCR 317, 372 [245].

16 *Uber* (2020) 61 VR 580, 609 [79(4)] (citations omitted).

17 *King v GIO Australia Holding Ltd* (2000) 100 FCR 209, 219 [23]-[24], [34]-[35]. That part of Moore J's judgment was not challenged: see *King v GIO Australia Holdings Ltd* (2000) 174 ALR 715.

18 *Dillon* (2017) 252 FCR 150, 159 [43]-[44], cited in *Uber* (2020) 61 VR 580, 607 [75].

35 The Court of Appeal in *Uber* confirmed that the concept of 'claims' in s 33C(1) was not limited to the material facts (or legal principles) necessary to constitute the cause of action alleged by the plaintiff in a group proceeding.[19]

36 Next, the parties raised 'systems' or 'course of conduct' cases as relevant to this question. A course of conduct or systems case is recognised as a form of representative proceeding that will satisfy s 33C(1).

37 The parties cited *Jenkings v Northern Territory of Australia ('**Jenkings**')*, a class action where each group member was a detainee in a youth detention centre in the Northern Territory.[20] White J found 'sufficient relatedness of circumstances' where the claims were based on conduct such as allegations of assaults/batteries and restraints by youth justice officers perpetrated against individual detainees:

> The present case may well be towards the centre of the spectrum to which French J referred in *Zhang*. Nevertheless, I consider that the matters to which the Applicants refer do indicate a sufficient relatedness of circumstances. Those matters include:
>
> (a) all Group Members were youths who had been detained in youth detention centres in the Territory;
>
> (b) common legislative and regulatory provisions applied to the youth detention centres and to the conduct of officers and staff members in those centres. The fact that the relevant provisions of the YJ Act had been amended with effect from 9 September 2014 and again from 1 August 2016 and that some detention centres had their own rules does not alter this circumstance because it seems that there is an underlying core of common regulatory provisions;
>
> (c) the conduct said to constitute the false imprisonment, assault or battery and other forms of adverse action are said to be incidents in a form of systemic conduct by officers or staff members;
>
> (d) the conduct is said to constitute a form of racial discrimination.
>
> In short, I am not satisfied that the potential for there to be significant differences between the claims of individual Group Members has the consequence that they cannot be regarded as being in respect of, or arising out of, related circumstances. This part of the Territory's application fails.[21]

38 The defendant sought to distinguish this case, on the basis that the circumstances in

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19 *Uber* (2020) 61 VR 580, 611 [85]-[86].
20 [2017] FCA 1263 ('***Jenkings***').
21 Ibid [45]-[46].

Jenkings were much more closely related to one another than the allegations comprising, what it calls, the 'Neglect claim', in the present case. This submission was unpersuasive. The plaintiff submitted that the analogy between the facts of *Jenkings* and the present case was helpful. I agree.

39 In an earlier decision, *Guglielmin v Trescowthick (No 2)*, Mansfield J said:

> In any representative proceeding there may well be differences between the positions of the various group members in respect of their claims against the respondents. That is likely to be the case whenever a complex representative action is instituted, that is a representative action involving a course of conduct rather than one transaction or piece of conduct or a representative action involving a large number of respondents. With an active mind, one could find a plethora of differences in any such representative proceeding. It is the nature of such proceedings that there are differences between the positions of the parties. That is why there is needed a relatedness of circumstances, rather than exactly the same circumstances, in the claims of the group members. Representative proceedings are not intended only to be available in the more straightforward of circumstances where the conduct of one respondent on one occasion is alleged to have resulted in loss to a number of persons.[22]

40 In *Giles v The Commonwealth*, the plaintiff, and group members, claimed that the defendant was legally liable in damages to them for the harm, physical and psychological, which they suffered from systemic physical and sexual abuse perpetrated over a period of about 34 years at 'Fairbridge Farm School' by a significant number of staff and others.[23] The plaintiffs alleged three causes of action – negligence for breach of a non-delegable duty, negligence for institutional failings, and vicarious liability – but the nature and content of the duties alleged were largely similar.[24]

41 Garling J permitted a representative proceeding, noting that '[i]t is inevitable, when dealing with claims by multiple plaintiffs for damages for personal injury based on causes of action in tort, that there will be elements of those claims which are not common'.[25] Differences in the claims was not sufficient, without more, to order that the proceeding not continue as a representative proceeding.[26]

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22 (2005) 220 ALR 515, 526 [48] ('***Guglielmin***'), quoted in *Jenkings* [2017] FCA 1263, [41] (emphasis in *Jenkings*). See also *Jenkings* [2017] FCA 1263, [43].
23 [2014] NSWSC 83.
24 Ibid [20]-[23].
25 Ibid [109].
26 Ibid [120]-[124], [142].

42 *Uber* is another case where systemic processes were relevant to assessing compliance with s 33C(1)(b).

43 The defendant contended that a common thread runs through the reasoning in both *Jenkings* and *Uber*, which is the need to identify a course of conduct amounting to an established system or process capable of being defined with a relatively high degree of particularity. This submission cannot be sustained on a fair reading of those judgments. The common thread is that the issue is fact-sensitive,[27] requiring identification of whether the pleaded circumstances satisfy the statutory language, that is whether the circumstances fall on the spectrum described by French J in *Zhang*, bearing in mind that 'related' is a broad, readily satisfied standard.

44 In summary, s 33C(1)(b) requires first that the claims must be 'in respect of' or 'arise out of' the relevant circumstances and second, that the circumstances of the claims must be 'the same, similar or related'. The inquiry is whether the pleading raises the appropriate factual inquiry for trial. It is not the claims themselves that must be the same, similar or related: only the circumstances from which they arise or which they concern must have that character.[28] The sub-section employs a spectrum of connectivity. The word 'related' suggests a connection wider than identity or similarity. The successively broadening notion of connectivity emphasises the breadth in the requirement in s 33C(1)(b).

45 In each case there is a threshold judgment as to whether the similarities or relationship between circumstances are sufficient to merit the grouping of the claims by way of a representative proceeding. In cases at the margins, the court must exercise 'practical judgments informed by the policy and purpose of the legislation'.[29] That is, the provision of 'an efficient and effective procedure to do with multiple claims'.[30]

The defendant's contentions

46 The defendant submitted that the plaintiff's claims relating to COVID-19 are unrelated

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27 *Uber* (2020) 61 VR 580, 612-13 [89]-[94].
28 *Jenkings* [2017] FCA 1263, [44].
29 *Zhang* (1993) 45 FCR 384, 405.
30 *Jenkings* [2017] FCA 1263, [40].

to the claims that residents were neglected or not properly cared for and that the latter claims are highly individualistic. The claims are not in respect of, nor do they arise out of, the same, similar or related circumstances.

47 Accepting that the practical application of the threshold judgment to group proceedings involving 'course of conduct' type allegations can be difficult given the inevitable differences between individual claims,[31] the defendant contended it is essential to focus on the 'relatedness of circumstances' in the claims of group members, including their differences and similarities as well as their complexity.[32]

48 The defendant submitted that the claims of group members are not sufficiently closely connected to satisfy the threshold requirement of s 33C(1), as the claims of all group members are not in respect of, nor do they arise out of, the same, similar or related circumstances, as:

(a) there is no relationship between the circumstances giving rise to, what it terms, the 'COVID-19 claim' and the 'Neglect claim' other than matters too remote to attract Part 4A, such as, some part of the temporal period and the fact that the allegations relate to the same defendant and the same facility; and

(b) the claims of group members in relation to the Neglect claim are so wide and diverse that it cannot be said that the circumstances underlying each claim are related.

49 This submission turned on the notion that the ASOC advances two conceptually distinct species of 'claim'. The first species of claim relates to the alleged lack of infection control by the defendant at Epping Gardens and the incursion of COVID-19 into that facility (the COVID-19 claim). The second species of claim being advanced relates to alleged breaches by the defendant in relation to patient care more generally (the Neglect claim). The defendant observed, correctly, that this distinction runs throughout the ASOC.

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31 Ibid [43].

32 Ibid [42]-[43], citing, in part, Mansfield J in *Guglielmin* (2005) 220 ALR 515, 526 [48].

50 That two separate species of claim are being advanced was also evident through the factual circumstances relied upon in support of each claim. The Neglect claim relates to matters that are not relied on in the COVID-19 claim such as:

(a) the cleanliness of residents and their rooms and surrounds, including in relation to inadequate bathing of residents, and the upkeep of residents' rooms and amenities;

(b) residents' dietary requirements, including matters relating to the hydration of residents and residents not being fed or given the correct meals or sufficient fresh fruit;

(c) residents' medical requirements, including matters relating to individual resident's medication regimes and the treatment of minor wounds; and

(d) the timely availability of assistance to residents from care providers or nurses and the ability of residents to summon care when required through residents' buzzers and sensors.

51 The Family Sub-Group claim relies on alleged breaches by the defendant, including:

(a) failing to promptly notify Family Sub-Group Members of deterioration in residents' mental or physical condition (non-COVID-19 related);

(b) ignoring complaints made by Family Sub-Group Members about, amongst other things, 'the quality of care'; and

(c) Family Sub-Group Members being required to care for, clean or feed residents.

52 The defendant contended that none of these circumstances bear any apparent relationship to the COVID-19-related claims, which, as pleaded, pertain largely to the implementation of infection control measures. That conduct, the defendant contended, 'entailed completely different considerations to the care/neglect claims, which revolve around the specifics of residents' care' as just noted.

53 A further example of the distinction between the two categories of claims is said to be the plaintiff's allegation that at all times during the Period, the defendant owed the Resident Duty of Care to avoid or minimise each of the Care Risk of Harm and the Infection Risk of Harm. The Resident Duty of Care required that, during the Period, the defendant take various steps with respect to:

(a) the provision of Residential Care Services (such as maintaining an adequate number of appropriately skilled staff, ensuring that furniture, fittings and equipment was safe, clean, well-maintained and comfortable, ensuring that residents' personal hygiene was maintained and providing sufficient and appropriate meals to residents, etc);

(b) providing face-to-face training to staff on infection control measures before 20 July 2020 (being the approximate date of the first positive COVID-19 result);

(c) minimising infection-related risks through implementing infection control measures to prevent and control infection at Epping Gardens.

54 The defendant contended that sub-paragraphs (b) and (c) relate to the COVID-19 claim and sub-paragraph (a) relates to the Neglect claim, which are fundamentally different claims, with fundamentally different factual substrata. This point, the defendant contended, is reinforced by the observation that both the Neglect claim and the COVID-19 claim could exist independently of one another and the pleading has not drawn an express connection between them. The court must conclude that these two claims are not in respect of, nor do they arise out of, the same, similar or even related circumstances.

55 The defendant developed this submission by noting that the different time periods relied upon by the plaintiff demonstrated that there was a four-month period, at least, between the start of the period where actionable loss and damage is said to have been suffered (February 2020) and the first positive COVID-19 case at Epping Gardens (June/July 2020), submitting this demonstrated the lack of connection between the claims. Without a clear link beyond some temporal coincidence, the defendant

contended that the claims of all persons in the group are not in respect of nor do they arise out of related circumstances. The only nexus, a common defendant and a common location, is not sufficient. This is especially so where there is likely at different times to be a variety of prevailing circumstances, particularly in relation to the nature of the Neglect claims.

56 The defendant submitted the Neglect claims of individual group members are so diverse that the underlying circumstances of all group member claims do not arise out of the same, similar or related circumstances. Taking the alleged breaches relating to 'cleanliness', the defendant noted the range of conduct alleged, from residents not being sufficiently bathed, to residents not being sufficiently fed or given the correct meals. With respect to meals, the specific examples particularised (one relating to a resident's weight loss, another relating to a resident with diabetes being given sugary food and another relating to a resident being given solid foods instead of pureed meals as provided for in his care plan) stood alone as unique. The Neglect claims will require review of a range of separate records in respect of the 189 residents at Epping Gardens during the relevant period, including but not limited to care records, menus and maintenance requests.

57 The defendant sought to meet the plaintiff's contention that the claims were sufficiently closely connected because they arose out of a single system of care in a defined period, a contention that was not founded in the pleading but made in submissions. The circumstances in *Jenkings*, and the commonality thereof, are far removed, it submitted, from the present pleading in relation to the Neglect claims in particular; those circumstances were much more closely related to one another than the allegations comprising the Neglect claims in this proceeding. The ASOC does not identify a course of conduct amounting to an established system or process capable of being defined with a relatively high degree of particularity for the obvious reason that the process of providing general residential care and the process of managing infection control in a pandemic are very different processes. There is no common system to be found.

Finding

58 I am persuaded by the plaintiff's submissions on this issue. The defendant's submission cleaves the plaintiff's claims in two: referred to as the COVID-19 claim and the Neglect claim. This misconceived categorisation infects the defendant's reasoning on both ss 33C(1)(b) and 33C(1)(c)/33H(2)(c). It is an artificial reading of the ASOC, which I reject. It can be misleading to adopt convenient category names as representative of the allegations being made. The word 'claims' in s 33C(1), as already noted, is broad and encompasses both underlying facts and underlying legal principles.

59 Read reasonably and sensibly, the structure and content of the pleading reflects a 'single comprehensive duty'[33] owed by the defendant to residents during the Period: to provide Residential Care Services at its facility taking reasonable care in doing so to avoid the plaintiff and group members suffering loss and damage from the Care Risk of Harm, and/or, as a particular instance, the Infection Risk of Harm. The defendant's breaches of that duty, the harm suffered by the residents and family, and the direct source of that harm, differed. The plaintiff's claims arise out of the defendant's course of conduct or system of care at its aged care facility, which the plaintiff alleges fell short of the requisite standards.

60 The plaintiff referred to four matters from which all claims of both residents and family members arise.

(a) The single system of care provided by the defendant at Epping Gardens during the Period, including the systemic processes, particularly alleged, as forming part of the Residential Care Services provided for residents;

(b) The statutory regime of the *Aged Care Act 1997* (Cth) (which includes the *Quality of Care Principles 2014* (Cth),[34] Aged Care Quality Standards,[35] *User Rights*

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33 To use the words of the High Court in *Wallace v Kam* (2013) 250 CLR 375, 380-1 [8], 'The common law duty of a medical practitioner to a patient is a single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment. A component of that single comprehensive duty is ordinarily to warn the patient of the "material risks" of physical injury inherent in a proposed treatment.'

34 Made under s 96-1 of the *Aged Care Act 1997* (Cth).

35 Found in sch 2 of the *Quality of Care Principles 2014* (Cth).

Principles 2014 (Cth),[36] and Charter of Aged Care Rights[37]) ('**Aged Care legislation**'), supplemented by the directions made pursuant to s 200(1) of the *Public Health and Wellbeing Act 2008* (Vic) which applied to the defendant's aged care facility during the Period;

(c) The standard form resident agreements in two (very similar) forms, as pleaded in the ASOC; and

(d) Certain ongoing representations made by the defendant to both residents and their family regarding the Residential Care Services provided at Epping Gardens.

61 The pleaded allegations of the circumstances underlying the plaintiff's claims all relate to the Residential Care Services provided by the defendant at its aged care facility during the Period. That is a broad base of underlying facts that readily permits the conclusion, for present purposes, that the plaintiff's claims are sufficiently closely connected to satisfy the s 33C(1)(b) test. The claims rely on various causes of action, but what they have in common, why they are related, is that the factual substratum that they all allege is that the actions or omissions of the defendant in providing Residential Care Services, at a specific aged care facility, during an identified period, caused the claimed loss and damage.

62 Naturally the circumstances of each individual resident and their family differ, meaning that there are distinctions between each individual claim, but there are many factors that establish degrees of connectivity sufficient to merit the grouping of the claims by way of a representative proceeding.

63 The claims of group members raise substantial common questions of law or fact (which I will come to) arising out of a single system of care, being the Residential Care Services provide by the defendant to Epping Garden residents. What the defendant has done is group the sources of physical harm faced by residents and their families

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36 Made under s 96-1 of the *Aged Care Act 1997* (Cth).
37 Found in sch 1 of the *User Rights Principles 2014* (Cth).

into 'COVID-19' as a source of harm and 'Neglect' as a compendious descriptor for all other sources of harm, and construct its argument from this distinction. COVID-19 is a disease that the defendant had a duty to protect residents from, but that duty is not defined by the particular disease. The defendant owes a comprehensive duty, as the plaintiff alleges, to take reasonable care to protect the residents from all forms of illness or injury, one component of which is infectious disease and particularly, in this case, COVID-19.

64 The origin of this construct appears to lie in the drafting of the pleading, which sets out a number of breaches of the defendant's duty to exercise reasonable care with respect to residents, by reference to the pleaded causes of action in contract, under the *Australian Consumer Law*, and negligence. Those breaches are grouped into three categories: 'care breaches', 'training breaches' and 'infection breaches'. The plaintiff submitted that those categories are for ease of reference, given the kinds of breaches alleged, which strikes me as an obvious and reasonable reading of the pleading as a whole.

65 The pleaded allegation is that Residential Care Services include infection-control. The plaintiff alleges that under the *Aged Care Act 1997* (Cth), the defendant is required to comply with the 'Aged Care Quality Standards'. Among other requirements, standard 3 requires 'minimisation of infection-related risks through implementing standard and transmission-based precautions to prevent and control infection'. Ensuring cleanliness of the aged care facility, and the personal hygiene of residents, is relevant to both infection control and 'hotel services'. The plaintiff submitted, and I agree, it is remarkable that an aged care facility operator would suggest that infection control entails different considerations to providing care. The statutory regime that the plaintiff alleges contemplates that providing infection control is an aspect of providing Residential Care Services. The Aged Care Quality Standards include infection-control measures. The fact that COVID-19-specific directions and guidelines were made in 2020 does not detract from the fact that infection control is an essential part of providing aged care services generally.

66 The submission that the 'COVID-19 claim' and the 'Neglect claim' are fundamentally different claims, with fundamentally different factual substrata, is rejected. It is fatuous to contend that the defendant's submission is reinforced by the observation that both the Neglect claim and the COVID-19 claim could exist independently of one another and that the plaintiff has not drawn an express connection between them. This observation is entirely beside the point; every single claim by each group member can be prosecuted independently of other claims, if the plaintiff chose to forfeit the procedural advantage of Part 4A. More substantially, as I have noted, the submission misconceives the statement of claim. The Care Risk of Harm relates to harm arising from 'neglect, infection, disease …' The Infection Risk of Harm relates to harm associated with becoming infected with and dying of causes related to COVID-19. When the risk of harm of infection with COVID-19 materialises, the risk of both types of harm materialises, because the latter type of harm is a subset or species of the former.

67 In addition, the Resident Duty of Care required that the defendant take steps to provide Residential Care Services which included having appropriately skilled staff, having a clean environment, maintaining hygiene and, as just noted, infection control measures. Avoiding the risk of COVID-19 infection also required training of staff and infection control measures that involve hygiene. Commonality or relatedness in the circumstances of the claims is evident. These two aspects of the duty are not independent. The connection between the claims of group members is obvious; they all received Residential Care Services from the defendant at Epping Gardens during the Period.

68 Part 4A expressly contemplates individual claims within a group proceeding. Section 33C recognises that each group member may, as an individual, have different claims against the defendant.[38] Section 33C(2) demonstrates that the circumstances giving rise to claims by potential group members do not fall outside the scope of the legislation simply because they involve claims based on separate contracts or

[38] *Timbercorp* (2016) 259 CLR 212, 246 [104]-[105]; *Uber* (2020) 61 VR 580, 607 [74].

transactions, or separate acts or omissions by the defendant.[39] Section 33C(2) emphasises the width of the entitlement conferred by s 33C(1) to commence a representative proceeding.[40]

69 Section 33Q(1) contemplates that individual group members may have different claims. The section provides that where the determination of the common questions of law or fact will not finally resolve the claims of all group members, the court may give directions in relation to the determination of the remaining questions (including, under s 33R, by way of individual questions).

70 I do not accept the defendant's contention that the ASOC does not identify a course of conduct or a system. The plaintiff pleads the systemic processes comprising the defendant's system of residential care at paragraphs 1(c)-(d), 4, 42 to 49, 52, 54 to 58, 60(d), 62 to 73, and 76 to 77 of the ASOC. Nor do I accept the criticism that the period covered by the claims is random. As the plaintiff submitted, the Period reflects just over 6 months during which the plaintiff claims that the defendant's conduct in failing to properly care for its residents was at its most egregious and had the most harmful consequences. The defendant's failure to operate a proper system of care early in 2020 meant that, when the staff shortages occurred and when COVID-19 was introduced into the facility in the middle of 2020, the standard of care at the facility further deteriorated.

71 It is artificial to draw out of the sensible way in which the plaintiff has organised its allegations, the notion that there are two distinct and unrelated claims. On fair reading of the ASOC, this contention must be rejected. I am satisfied that the claims of all the group members, as alleged in the ASOC, are in respect of, or arise out of similar or related circumstances.

72 The defendant next submitted that the pleaded claims do not give rise to a substantial common question of law or fact and common questions have not been adequately

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39 *Zhang* (1993) 45 FCR 384, 404-5; *Uber* (2020) 61 VR 580, 605 [70].
40 *Wong* (1999) 199 CLR 255, 267 [29].

specified in the ASOC.

Principles in applying s 33C(1)(c)

73 Section 33C(1)(c) requires the claims of group members to give rise to at least one substantial common question of law or fact. The reference to 'substantial' should be understood as being a reference to issues which are 'real or of substance' rather than issues which are 'large' or of 'special significance'. Substantiality is a matter of quality, not quantity.[41] It is not necessary that the question will 'have a major impact on the ... litigation' or will be the major or core issue at trial.[42] It is not necessary to show that litigation of the common issue would be likely to resolve wholly, or to any significant degree, the claims of all group members.[43] A common issue can be substantial, sufficient to satisfy s 33C(1)(c), even though individual group members' claims involve other issues of liability and damages unique to each of those claims.[44] A matter which is inconsequential is not substantial.[45]

74 In *Wong*, the High Court said:

> Clearly, the purpose of the enactment of Pt IVA was not to narrow access to the new form of representative proceedings beyond that which applied under regimes considered in cases such as *Carnie*. This suggests that, when used to identify the threshold requirements of s 33C(l), 'substantial' does not indicate that which is 'large' or 'of special significance' or would 'have a major impact on the ... litigation' but, rather, is directed to issues which are 'real or of substance'. [46]

75 In *Green v Barzen Pty Ltd*,[47] group members purchased financial products based on advice from representatives of the respondents. The group members claimed the advice was negligent and misleading or deceptive. Finkelstein J held that:

> The fact that representations and issues of reliance raise questions that are not common does not mean that the misrepresentation case or the action based on negligence is not suited to a representative proceeding. First of all, while there will be some factual variations, it does not follow that s 33C(1)(c) is not

41 *Andrianakis v Uber Technologies Inc (Ruling No 1)* [2019] VSC 850, [140].
42 *Uber* (2020) 61 VR 580, 609 [79(3)], citing *Wong v Silkfield* (1999) 199 CLR 255, 267 [28]-[30] ('***Wong***').
43 *Wong* (1999) 199 CLR 255, 268 [30].
44 *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723, 731-2. See also *Timbercorp* (2016) 259 CLR 212, 235 [50].
45 Ibid.
46 *Wong* (1999) 199 CLR 255, 267 [28] (citations omitted).
47 [2008] FCA 920.

> satisfied. It will be enough if there is at least a common nucleus of operative facts or legal issues. It will also suffice if what is alleged in substance amounts to a common course of conduct directed toward a particular group (for example clients).[48]

76 In *Uber*, the Court of Appeal held that s 33C(1)(c) had been satisfied because:

> the claims in respect of each state will give rise to common questions of fact, or mixed fact and law, as to whether it can be inferred from the similar or related factual circumstances underlying all the claims that: (1) Uber knew that its business strategy necessarily involved the Uber drivers acting unlawfully; and (2) Uber intended to injure the plaintiff and other group members.[49]

77 In *Giles*, Garling J noted that the 'abusive environment' seemed common to a number of the plaintiffs and group members.[50] Some staff members would be the subject of allegations made by more than one of the group members.[51] There were complex questions of law surrounding the existence of a duty of care by each of the defendants, which would require an analysis of the legislation and other documents to enable identification of who was in control of the affairs of the Fairbridge Farm.[52] Further, given that each of the plaintiffs fell within an identified group, namely children who attended the school and were resident on the Fairbridge Farm, the issue of the nature and content of any duty of care on the part of each defendant, and how it arose, was most likely to be identical with respect to each member of that group.[53] That question of duty of care therefore appeared to be a common question which would require findings of fact and determination of questions of law.[54]

78 Section 33H facilitates an assessment of the threshold criteria under s 33C(1)(c).[55] Section 33H(2)(c) requires that the pleading 'specify the questions of law or fact common to the claims of the group members'. As Lee J stated in *Gill v Ethicon Sàrl (No 3)*:

> The importance of s 33H in the statutory scheme is that it provides the basis upon which the court can determine, immediately upon commencement of the

48 Ibid [13].
49 *Uber* (2020) 61 VR 580, 613-14 [93].
50 [2014] NSWSC 83, [118].
51 Ibid [131].
52 Ibid [132].
53 Ibid [133].
54 Ibid [134].
55 *Bright* (2002) 195 ALR 574, 578 [14].

> representative proceeding, whether or not it has been properly constituted as a class action. Put another way, s 33H allows the court to identify whether s 33C (and hence Pt IVA) has been properly engaged.[56]

That assessment is to be made by reference to the documents and, in particular the pleadings, filed by the applicant commencing the proceeding.[57]

Application of the section

79 The questions of law or fact presently alleged to be common are set out above at paragraph [22]. Essentially there are two questions arising about the pleaded common questions. The first is whether the pleading satisfies the statutory criteria and I am satisfied that it does. The second is whether the manner in which the pleading specifies the common questions is appropriate. I consider that the common questions should be repleaded.

80 The claims of the plaintiff and group members give rise to more than one substantial common question of law or fact. The following, at least, appear to me to be common questions of fact or law:

(a) Was the defendant an approved provider of aged care services within the meaning of the *Aged Care Act 1997* (Cth) and *Aged Care Quality and Safety Commission Act 2018* (Cth)?

(b) Did the defendant provide Residential Care Services to the residents between 26 February 2020 and 9 September 2020?

(c) If so, what Residential Care Services did the defendant provide?

(d) Were the Residential Care Services provided under a written 'resident agreement'?

(e) Was the provision of Residential Care Services a supply in trade or commerce by the defendant governed by the *Australian Consumer Law*?

(f) Did the defendant make any, and if so, what representations generally to

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56 *Gill* (2019) 369 ALR 175, 177 [7].
57 *Jenkings* [2017] FCA 1263, [14].

prospective or existing residents relating to the Residential Care Services provided or to be provided at Epping Gardens, in trade or commerce governed by the *Australian Consumer Law*?

(g) Did the defendant owe to Resident Sub-Group members the Resident Duty of Care – a duty to take care in the provision of the Residential Care Services to avoid them, and each of them, suffering loss and damage through materialisation of the Care Risk of Harm?

(h) Alternatively, did the defendant owe to Resident Sub-Group Members the Resident Duty of Care – a duty to take care in the provision of the Residential Care Services to avoid them, and each of them, suffering loss and damage through materialisation of the Infection Risk of Harm?

(i) Further questions would address the Family Duty of Care.

(j) In providing the Residential Care Services, was the defendant subject to the Aged Care legislation?

(k) What standard of aged care was the defendant required to provide?

(l) How did the Aged Care legislation, as supplemented by the directions issued under s 200(1) of the *Public Health and Wellbeing Act 2008* (Vic), affect or inform the standard of aged care the defendant was required to provide?

(m) Did the standard of aged care the defendant was required to provide to avoid the Care Risk of Harm differ from the standard of aged care the defendant was required to provide to avoid the Infection Risk of Harm?

(n) Did the defendant provide the Residential Care Services with reasonable care between 26 February 2020 and 9 September 2020?

(o) Was the Resident Duty of Care breached by any one or more of—

(i) the care breaches;

(ii) the training breaches; or

(iii) the infection breaches.

(p) Was the Family Duty of Care breached by any one or more of—

(i) the care breaches;

(ii) the training breaches; or

(iii) the infection breaches.

(q) Further questions would address the issues of breach in the causes of action under the *Australian Consumer Law*.

(r) Did the defendant's failure to provide the Residential Care Services with reasonable care cause the Resident Sub-Group Members loss and damage?

(s) Did the defendant's failure to provide the Residential Care Services with reasonable care cause the Family Sub-Group Members loss and damage?

(t) Did the defendant's failure to provide the Residential Care Services with reasonable care cause the Representee Sub-Group Members loss and damage?

81 Because Residential Care Services include infection-control, these questions transcend the defendant's artificial distinction between a 'COVID-19 claim' and 'Neglect claim', which I have rejected. Further, given that the family members' causes of action in negligence and the Representee Sub-Group Members' cause of action also involve the defendant's treatment of residents, other questions also transcend any distinction between the claims of Resident and Family Sub-Group Members.

82 The questions are 'real' and of 'substance'. The standard of Residential Care Services provided by the defendant will be the core issue at trial. The allegations that deficient Residential Care Services, including deficient infection-control measures, were provided by the defendant is material to each cause of action, whether in contract, consumer guarantees, negligence or misleading or deceptive conduct.

83 The plaintiff's proceeding satisfies s 33C(1)(c). I have done no more than offer some suggestions as to what appears to be common questions of fact or law arising on the pleading to demonstrate the basis for this finding. That said, it is not the court's role to settle the common questions at this stage, and for the reasons stated, the plaintiff must replead the questions and can do so pleading such questions as he may be advised, consistently with these reasons. I will now deal briefly with the defendant's specific objections.

Defendant's submissions

Question 1

84 The plaintiff's first question was:

> Did the events surrounding the COVID-19 Outbreak pleaded in Sections A.3 and C take place?[58]

85 The defendant's objection was that these events were matter relevant only to the Covid-19 claim and not the Neglect claim. The question therefore did not give rise to a 'common nucleus' of facts.

86 This objection turned on the notion that the ASOC advanced two conceptually distinct species of 'claim', the COVID-19 claim and the Neglect claim. I have rejected the premise of the objection. Beyond that objection, I consider the generality of the factual issues that the plaintiff has swept up in this question tends to lend some support to an objection to the form of the question. However, the defendant's contention was that the circumstances of the Covid-19 claim and the Neglect claim do not intersect, which contention I do not accept. The plaintiff must more carefully consider the significance of the pleaded sub-groups. I propose to order that paragraph 139 of the ASOC be struck out with leave to replead.

Question 2

87 The plaintiff's second question is:

> Did the defendant have the obligations, responsibilities and/or duties pleaded

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58 Agnello plaintiff's amended statement of claim ('**ASOC**') para 139(a).

in section B and D.1?[59]

88 Section B of the ASOC alleges the statutory and regulatory context that operated during the Period as well as the application and operation of the Aged Care legislation. Section B also addresses the operation and application of the various guidelines and directions that were issued by state and federal governments and departments in relation to infection control (relating to COVID-19 and otherwise) commencing in May 2019. Part D.1 sets out the terms of the resident agreements which are relied upon for the breach of contract claim.

89 Again the defendants' objection was that some of these guidelines, principles and regulations pertain to COVID-19 in particular while others to quality of care more generally. This also turned on the notion that the ASOC advanced the COVID-19 claim and the Neglect claim as discrete claims and I have rejected the premise of the objection.

Question 3

90 The plaintiff's third question was:

> Did the defendant owe the Resident Duty of Care and/or the Family Duty of Care?[60]

91 The defendant's objection to this question also falls by reference to the conclusions I have already expressed. The defendant contended that the Resident Duty of Care encompasses two separate duties, relating to two different matters, again drawing on the illusory distinction it contended for between the Neglect and the COVID-19 claim.

92 I have concluded that, properly understood, the ASOC alleges one Resident Duty of Care. The fact that conduct and omissions in breach of that duty have been categorised for an orderly presentation of the allegations in the context of a number of different causes of action, combined with the fact that the forms of loss and damage suffered by group members varies, does not support the conclusion that the defendant contended for: that there are different duties of care and the questions postulated are

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59 ASOC para 139(b).
60 ASOC para 139(c).

not common to the group members.

93 The same reasoning applies, with consequential adjustment, to the Family Duty of Care. The defendant submitted that questions about the existence, nature and scope of the duty of care alleged to be owed to Family Sub-Group Members will likely be dependent on the nature of the precise allegations, particularly those relating to the care deficiencies/neglect, and therefore are likely to be quite separate and distinct for individual Family Sub-Group Members. This submission erroneously conflates breach with duty.

94 That said, this question should be reframed to avoid the rolled up character of two questions and to properly reflect the plaintiff's contentions about the duty of care and the persons to whom it is owed.

Question 4

95 The plaintiff's question is:

> Did the acts and omissions of the defendant in Sections A, C to H occur and if so, was the defendant in breach of contract; in contravention of s 60 and/or 61 of the Australian Consumer Law (ACL); negligent or otherwise in breach of the Resident Duty of Care and/or the Family Duty of Care and/or in contravention of s 18 of the ACL?[61]

96 Question 4 must be reframed. As presently drawn, it is so broad that it is without any utility. Many questions have been rolled into this omnibus. Sections A, C, D, E, F, G and H span over 50 pages of pleading and cover topics including the parties and group members (Section A); the events surrounding the COVID-19 outbreak at Epping Gardens (Section C); the breach of contract claim (Section D); the consumer guarantee claim (Section E); the negligence claim relating to residents (Section F); the negligence claim relating to family (Section G); and the misleading or deceptive conduct claim (Section H).

97 The plaintiff's submission postulates that to respond to the defendant's objection, the question may be split into two parts and then proposes at least four further sub-parts

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61 ASOC para 139(d).

to the question.

98 Having reached this conclusion it is not necessary to consider the defendant's detailed objections or the plaintiff's responses thereto. For reasons already expressed, I am satisfied that substantial common questions of law or fact can be identified. I see no reason to embark on a close analysis of a question that must be broken down and restructured. The plaintiff can amend the common questions as he may be advised and can take into account both these reasons and the defendant's particular objections in doing so.

Question 5

99 The plaintiff's question is:

> Did the plaintiff and the Group Members suffer loss by reason of the defendant's Breaches of Contract, Breaches of Consumer Guarantees, Breaches of Resident Duty, Breaches of Family Duty and/or s 18 Contraventions?[62]

100 This question must also be reframed. It is not clear to me whether or how this question is said to be a common question. Whether the plaintiff suffered loss by reason of the defendant's alleged breaches will turn on individual circumstances. The inclusion of group members in the question hints that the plaintiff may be envisioning a causation question, and the plaintiff submitted that I should read the question in two parts, one part being the issue of causation. It is not the court's task to split up the questions or to speculate as to the allegations being brought to it for resolution.

101 As with question 4, I am satisfied that substantial common questions of law or fact generally can be identified. I see no reason to embark on a close analysis of a question that must be broken down and restructured. The plaintiff can amend the common questions as he may be advised and can take into account both these reasons and the defendant's particular objections in doing so.

102 I am satisfied that the threshold requirements in ss 33C(1)(b) and (c) have been, or can by an appropriate amendment be, satisfied.

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62 ASOC para 139(e).

C. The Section 33ZF issue

Defendant's contention

103 This issue is more accurately described as a s 33N point. In summary, the defendant contended that it is not in the interests of justice for the ASOC to survive in its current form given that it pleads two conceptually distinct claims on behalf of group members. The submission is that the pleading should be struck out, or alternatively, identified paragraphs – the parts of the pleading concerning the 'Neglect claim' – should be struck out under s 33ZF of the Act, functioning to fill a 'gap' in the operation of s 33N.

104 Section 33N provides that the court may, on application by a defendant, order that a proceeding no longer continue as a group proceeding if it is satisfied that it is in the interests of justice to do so, having regard to one of the four matters set out at ss 33N(1)(a)-(d). Although s 33N empowers a court to make an order that a 'proceeding' no longer continue under Part 4A as a group proceeding, it does not appear to empower a court to make an order that parts of a proceeding, or particular claims within a proceeding, no longer continue under Part 4A.[63] The defendant characterises this as a 'gap', a proposition that is disputed by the plaintiff.

105 Briefly, the defendant contended that s 33ZF of the Act provides for a general power of the court to make orders that the court thinks appropriate or necessary to ensure that justice is done in the proceeding. This power has been characterised recently by the High Court of Australia as a 'supplementary'[64] or 'gap-filling'[65] power, although its ambit is still wide. The defendant contended that the power extends to the making of orders as to how an action should proceed in order to do justice as between the parties to the proceeding. Section 33ZF may be used to 'supplement', or 'fill gaps' within, the operation of s 33N of the Act. Accordingly, the court may order the strike out of part of the proceeding, namely the Neglect claim.

106 The plaintiff contended that the passages on which the defendant relied for its submission that the provision was a gap-filling provision, militated against

63 *Community & Public Sector Union v Crown in Right of Victoria* (1999) 90 IR 4, 5-7 [15]-[19].
64 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 605-6 [69]-[70].
65 Ibid.

concluding that s 33N could be deployed in this way. Kiefel CJ, Bell and Keane JJ (the plurality) explained:

> It is reasonably to be expected that legislation intended to enlist the court in a task of this kind would make specific provision in that regard. That it has not done so is itself some contextual indication that the power to make such an order is not to be discerned in 'gap-filling' provisions such as s 33ZF or s 183. It has been accepted, in that regard, that s 33ZF cannot be understood as 'a vehicle for rewriting' Pt IVA of the FCA.
>
> It was submitted on behalf of the first respondent in the BMW appeal that the topics addressed in ss 168, 169, 170 and 177 of the CPA (which are to the same effect as ss 33Q, 33R, 33S and 33Z of the FCA respectively) also fall within the scope of s 183. According to this submission, Pt 10 of the CPA is 'redundant where it is convenient'. That submission is not helpful in seeking to come to grips with the meaning to be given to the words of limitation 'appropriate or necessary to ensure that justice is done in the proceeding'. Further, it exalts the role of s 183 (and s 33ZF) above that of a supplementary or gap-filling provision, to say that it may be relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement. The work which the respondents require s 183 (and s 33ZF) to do is beyond the scope of the other provisions of the scheme. As will be seen, those other provisions are engaged upon a different occasion and address materially different circumstances from those that are involved in the making of a CFO. Section 183 (and s 33ZF) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To accept this submission would be to use s 183 (and s 33ZF) as a vehicle for rewriting the scheme of the legislation.[66]

107 In this regard, the plaintiff submitted that the relief sought by the defendant is specifically contemplated by another provision, s 33KA,[67] or even through a strike out application in respect of the Neglect claim. The defendant cannot seek to circumvent these procedures and their requirements by invoking s 33N as it may then be a 'vehicle for rewriting the scheme of the legislation.'

108 The four matters set out at ss 33N(1)(a)-(d) are—

(a) the costs that would be incurred if the proceeding were to continue as a group proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or

(b) all the relief sought can be obtained by means of a proceeding other than a

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66 Ibid (citations omitted).

67 *Supreme Court Act 1986* (Vic) s 33KA sets out the court's powers concerning group membership, which includes ordering that a person cease to be a group member or not become a group member.

group proceeding; or

(c) the group proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a group proceeding.

109 It is unnecessary to reach a view on this construction of Part 4A, because the issue does not arise on this application. Assuming the submission that the 'gap' in s 33N can be filled by reference to s 33ZF be accepted, there is no need to fill any 'gap' in this case. The defendant did not persuade me that, by reference to any of the four criteria in s 33N(1), it is in the interests of justice that the Neglect claim no longer continue, and only the COVID-19 claim continue as a group proceeding.

Applicable principles

110 The leading authority on the application of the cognate section in the *Federal Court of Australia Act 1976* (Cth) is *Bright v Femcare Limited*.[68] Finkelstein J commenced his judgment with an important observation about s 33N.

> Whether or not it is in the interests of justice to make such an order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure. They are: (1) To promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue; (2) To provide a remedy in favour of persons who may not have the funds to bring a separate action, or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) To protect defendants from multiple suits and the risk of inconsistent findings.[69]

111 As with the present case, Finkelstein J noted that the only foundation for a finding that the costs of many individual actions are likely to be less than the cost of one representative proceeding in that proceeding, was an unsubstantiated assertion by the respondent's solicitor. In that case there were 61 known group members (but likely to be more). Finkelstein J refused to accept, as do I, that one action can cost more than hundreds of actions. That assertion must be supported by compelling reasoning,

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68 (2002) 195 ALR 574.
69 Ibid 605 [152]

because it is inherently improbable. Further, the primary judge in that case appeared to assume that one judge would hear all of the claims, an impractical assumption that, if implemented, would result in what was in effect, but not in name, a representative proceeding.[70]

112 Keifel J, being satisfied that the threshold requirements for the commencement of a representative proceeding had been met, considered the issues raised on the pleadings and addressed the question whether the class action could be considered to provide an inefficient method of determining the group members' claims. Keifel J found that the application was premature and the respondent had failed to establish that an order under s 33N(1) was appropriate.[71]

113 Lindgren J also found the application to be premature, observing:

> In substance, the applicant commenced a representative proceeding which *ex hypothesi*, the legislature intended she be entitled to commence because of the presence of substantial common issues of law and fact, yet the Court was immediately asked to accept that the proceeding would not provide an efficient and effective means of dealing with the claim of the Group Members. I do not mean to suggest that an application under s 33N at such an early stage of a properly commenced representative proceeding would always be premature … But ordinarily one would expect that, in an attempt to give effect to the legislative intention, a means will be sought, by case management techniques, to enable a representative proceeding to continue to the stage of resolution of the substantial common issues on the basis that after that stage is completed, an order under s 33N or directions under s 33Q will be made.[72]

114 Lindgren J considered that orders under s 33N might be called for if a respondent were being unjustly vexed with a representative proceeding over a long period, during which the unmeritorious nature of the claims remained hidden in non-common issues. But the representative proceeding before the court could be managed in such a way that the common issues, which would be answered by the same evidence in respect of all claims, could be resolved so that the determination bound the applicant and group members.[73]

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70 Ibid 606-7 [157].
71 Ibid 605 [149].
72 Ibid 580 [18]
73 Ibid 581 [21].

115 Section 33N raised, in his Honour's determination, practical questions that required that the Pt IVA proceeding be compared with other proceedings that are available to the applicant and group members as a means of resolving their claims. Assessing the practicalities in that case, Lindgren J concluded the comparator was between the representative proceeding and individual proceedings in several courts brought by all the group members (numbering at least sixty-one) not necessarily represented by the same solicitors, noting that the court was left to speculate about the likely course and cost of the two kinds of proceeding to be compared, as required by the statutory test. Lindgren J could not conclude that it was in the interests of justice that the representative proceeding should not continue.[74]

116 In *Mutch*, the respondent's submission about utility, directed to the question of the efficiency of the representative proceeding, was that the overall lack of commonality required that the determination of any group member's claim in the class action would take longer and be more expensive.[75] Further, it was argued that inefficiency followed on the bifurcated process of resolving the individual claims in a second stage after determination of common questions.[76] The respondent's application failed as it did not discharge its burden of proving that the representative proceeding would not provide an efficient and effective means of dealing with the claims of group members.[77]

117 Section 33N was recently discussed by Beach J in *Stack v AMP Financial Planning Pty Ltd (No 2)*, a judgment delivered since I reserved my decision.[78] Beach J observed:

> Generally speaking, s 33N(1) requires consideration of the comparator of whether it is in the interests of justice that the proceeding be determined in numerous non-representative proceedings. One compares how the factors specified in ss 33N(1)(a) to 33N(1)(d) would apply to hypothetical non-representative proceedings. Such a comparison is expressed in ss 33N(1)(a) and 33N(1)(b) and implied by ss 33N(1)(c) and 33N(1)(d). The implicit focus in s 33N(1)(c) is on the commonality of issues and whether the representative proceeding is efficient and effective to resolve the common issues, rather than resolution by way of individual proceedings. Section 33N(1)(d) is concerned

74 Ibid 588-90 [74]-[80].
75 (2020) 385 ALR 146, 155 [36].
76 Ibid 155-6 [37].
77 Ibid 157 [42].
78 [2021] FCA 1479.

> with whether the representative proceeding is an appropriate vehicle to pursue the claims. Generally, the focus of ss 33N(1)(c) and 33N(1)(d) is on the efficiency or appropriateness of the group members' claims being pursued in a representative proceeding.
>
> …
>
> Further, it is trite to observe that s 33N(1) is not about the efficiency of a representative proceeding in an absolute sense. Indeed, it is not about whether the continuance of such a proceeding is efficient in an absolute sense. Rather, the ideas embodied in ss 33N(1)(a) to (c) whether explicitly or implicitly are about relative efficiency concerning the particular context and case at hand in terms of a comparison between the representative proceeding on the one hand, and the comparator non-representative proceedings on the other hand.[79]

118 If the defendant can establish one of the matters specified in s 33N(1), the court's power is exercised if it is in the interests of justice to do so. This is a discretionary power. It is not focussed by the statutory language solely on the interests of the defendant. The notion of relative efficiency between representative and individual proceedings also invites consideration, as Finkelstein J noted, of the policy considerations that led to the introduction of Part 4A.

Evidence

119 This submission is advanced on the basis of evidence from Stephen David Lloyd, a practitioner of approximately 10 years standing, and a partner in the solicitor's firm representing the defendant. Mr Lloyd was not cross-examined and no other affidavit contradicting his evidence has been filed. Critical parts of Mr Lloyd's affidavit are deposed to on information supplied by Peter Owens, Chief Information Officer of the defendant, and Alistair Cooray, General Manager of Epping Gardens, that Mr Lloyd believes to be true. In substance, he states—

(a) The claims raised in the ASOC can be broadly separated into those which relate to infection control and COVID-19 at Epping Gardens and those which relate to alleged inadequate care provided by the defendant to residents at Epping Gardens**.** It is the latter Neglect claim with which the defendant takes issue.

(b) The particulars of neglect in the treatment of residents raises a broad range of

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79 Ibid [26]-[28].

issues.

(c) These particulars are relied on to allege that the defendant did not exercise reasonable care and skill in the provision of Residential Care Services, breached the resident agreement and the consumer guarantees.

(d) Epping Gardens specialises in providing care to individuals with high care needs and during the Period there were 189 residents.

(e) The defendant will need to provide, and the solicitors will need to consider, the particulars of the specific care provided to each resident, including care records, dietary records, care and medication plans, hygiene requirements, room maintenance and cleaning records, physical care and assistance records and complaints and incident registers. The solicitors may need to interview employees and former employees.

(f) There are a variety of potential sources for such information, including a software database, residents' efiles and hard copy files, email, daily menus, room maintenance records, cleaning and laundry records, and temperature recording charts used when screening for COVID-19.

(g) Additional records require assessment in relation to the allegations of staff cuts.

(h) The total volume of source materials and the number of persons to be interviewed is difficult to assess and is an ongoing project, but the assessment is made on the basis that records will be extensive and many staff may need to be interviewed.

(i) In relation to legal costs, the usual processes are described, producing an estimate of 611 hours for initial review, a further 48 hours for privilege review for discovery, and 30 hours for interviews.

(j) The estimate excludes costs that would be incurred, or time spent, on these tasks by the defendant's employees, estimated at many hundreds of hours

already.

(k) It will be necessary to engage eDiscovery provider KordaMentha and a 'significant amount' of the documents and data processed will only be relevant to the Neglect claim. Mr Lloyd 'estimates' the proportionate allocation of this disbursement to the Neglect claim at $75,484.80.

(l) The total estimated legal costs and disbursements for the review and collation of source materials responsive to the Neglect claim is $412,791.80 (excluding GST).

120 Mr Lloyd invites me to accept that 'his experience' informs him that the defendant would incur substantially less in costs, if the Neglect claim were to be heard in separate proceedings because there would be specific allegations for each individual plaintiff, and it is unlikely that each resident will ultimately allege that he or she suffered loss in relation to each pleaded Neglect claim. Further, the scope of document review and discovery would be significantly less in an individual proceeding.

121 The crux of the defendant's contention that it is not in the interests of justice for the ASOC to survive in its current form is—

(a) The Neglect claims of the 189 individual residents[80] are highly individualistic, each requiring significant separate preparation.

(b) There is substantial prejudice to the defendant in being required to defend the Neglect claims in the setting of a group proceeding because of the detailed allegations made in respect of the care of each of the 189 residents. In respect of each resident, consideration will have to be given to matters as detailed and nuanced as their bathing routines, their toileting routines, cleaning of their rooms, hydration and eating regimes, wound care and general needs. The task will be very involved because Epping Gardens specialised in residents with

[80] The plaintiff alleges that there were 103 residents and 86 staff members who tested positive for COVID-19.

high care needs.

(c) Such prejudice would be avoided if individual residents were to bring separate actions in respect of alleged deficiencies in their own care because the claims would be confined.

122 Developing the notion of prejudice, the defendant identified four features.

(a) The time (and distraction for employees) that it will take for the defendant itself to locate and collate materials, many of which may well not be relevant to the claims which are ultimately pursued.

(b) The time and (therefore) cost to the defendant of its legal team reviewing and considering such material, estimated to be in the order of $412,791.80 (excluding GST), when the task of collating and reviewing documents for individual, targeted actions would be considerably lower.

(c) The likelihood of a much lower number than 189 residents bringing Neglect claims if their claims were to be brought separately.

(d) The further complication of the privacy of individual residents' care records, and the need to deal with them appropriately.

123 The plaintiff submitted that striking out the 'Neglect claim' would not ensure that justice is done in the proceeding for the following reasons:

(a) it would be artificial to strike out the paragraphs relating to the so-called 'Neglect claim' in circumstances where the exposure of residents to COVID-19 at Epping Gardens is one instance of 'neglect';

(b) both the 'COVID-19 claim' and the 'Neglect claim' arise from the same resident agreement and the same consumer guarantees. If a resident who has both a 'COVID-19 claim' and a 'Neglect claim' is only permitted to proceed in respect of the 'COVID-19 claim', the principles of *Anshun* estoppel may later estop that resident from relitigating the 'Neglect claim' under the same resident

agreement and the same consumer guarantees. That resident (or their estate) will be denied justice because the different form of loss suffered as a result of 'neglect' will not be compensated;

(c) if the 'Neglect claim' were required to proceed as individual claims, such claims would necessitate findings of fact relating to the defendant's system of care at the facility during a common period of time, leading to a risk of inconsistent findings. In addition to *Anshun* estoppel, that consequence would be inconsistent with the objectives of Part 4A, which include increasing the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits.

Consideration

124 Section 33N does not, in terms, identify a focus on prejudice. It speaks of managing costs and of efficiencies. Both of these considerations are relevant to the interests of justice, particularly as the proper administration of justice is directly concerned with ensuring that costs are reasonable and proportionate and that cost is not an impediment to access to justice.[81] So much is reinforced by the provisions of the *Civil Procedure Act 2010* (Vic), which should be taken into account in construing s 33N.

125 That is not to say that notions of prejudice are irrelevant to the interests of justice. Plainly it is not in the interests of justice that a party is prejudiced. That said, the defendant did not identify any prejudice in the relevant sense. Rather, the defendant has advanced arguments relevant to the comparative exercise mandated by the section, but rebranded as prejudice. Taking each matter of alleged prejudice in turn:

(a) Every litigant, whether plaintiff or defendant must devote personal time and resources to litigation which is rarely compensated. If this is relevant prejudice, it is a feature of all litigation. Usually the focus is on exposure to legal costs. The defendant submitted that such efforts may be wasted because some claims may not ultimately be pursued. The plaintiff may be in the like position if there

81 *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666, [1308]-[1324], [1338]-[1342].

are grounds of defence not ultimately pursued. I do not understand this submission. The claims to be pursued are identified by pleadings. If they are abandoned or lost, there are costs consequences, the purpose of which is to remedy prejudice of the type being suggested. The relevant question is whether costs are, for whatever reason, likely to be unjustly inflated in the context of the group proceeding, compared with individual proceedings by all group members.

(b) The second form of prejudice suggested is that the task of collating and reviewing documents for individual, targeted actions will be considerably lower that the estimate of $412,791.80 (excluding GST), for the group proceeding. No like calculation is proffered for the costs of the plaintiff(s) in either scenario. No comparison is possible. That a defendant must incur costs in defending claims is not relevant prejudice, but in any event I am not persuaded that the costs of the parties incurred in 'individual, targeted actions' are likely to be materially lower, when considered collectively, from the costs of the parties in this proceeding. The defendants have no more than Mr Lloyd's conclusory 'opinion' on this point and I am not disposed to exercise a discretion in the interests of justice on that basis.

(c) The third form of prejudice contended for is that the defendant misses the opportunity to face significantly fewer claims if the barrier of requiring individual proceedings is required. It is not easy to understand why this submission was even put, particularly in the context of the proper administration of justice. The submission is inconsistent with the statutory text which requires the court to assume that the comparator is that 'each group member' brings an individual, separate action. This has an important policy rationale, because various group members may indeed not pursue their claims if forced to do so individually, because they may not have the resources to do so, or the costs may be disproportionate to the individual claim. This could never be a reason to de-class the proceeding. If the real issue is that the

defendant does not think all the group members have 'pure' Neglect claims (as distinct from COVID-19 claims), or that they may have peculiar circumstances attendant upon the their particular neglect, this should be narrowed through case management procedures, so that the true common issues and systematic care failures common to all group or sub-group members can be identified and investigated.

(d) Questions of confidentiality of medical records is not relevant prejudice. Such issues arise in courts on a daily basis and competing interests are managed. If the defendant's complaint is that this will be complex when dealing with so many resident records, this would not be different if these were all brought as individual claims.

126 The group members' claims all concern the standard of Residential Care Services provided by the defendant at a single aged care facility during a discrete period of time. It is neither appropriate nor necessary to strike out the entire ASOC or the portions relevant to the Neglect claim. The defendant's contentions are again founded on its artificial construction of the ASOC – that it alleges distinct and discrete duties of care such that the Neglect claim can be considered distinct from the COVID-19 claim. I have rejected this construction of the pleading.

127 As stated above, there are identifiable common questions in the proceeding that traverse this artificial distinction. That being so, the defendant faced a high hurdle on this de-classing application and it has not persuaded me that on a practical consideration of the relevant comparator that the interests of justice favour the relief that it seeks

128 The general nature of Mr Lloyd's evidence, which I accept may be all that he can offer, is unconvincing as a basis for the necessary comparison.

(a) First, it is not possible to evaluate the overlap between the costs that will be incurred by reason of the allegations that the defendant defines as the COVID-19 claim, and the Neglect claim. The COVID-19 claim may comprise a

significant component of the Neglect claim. There is no clear path of reasoning in respect of estimations and allocations of these costs.

(b) Second, despite the uncertainty to which Mr Lloyd alludes, he arrives at a specific and detailed estimate of the likely expense incurred in defending the group proceeding as currently pleaded, yet offers no comparison with the costs likely to be incurred by the residents (or indeed the defendant) should the proceeding be de-classed. Section 33N(1)(a) postulated a comparison between the costs that would be incurred if the proceeding were to continue as a group proceeding and the costs that would be incurred if each group member conducted a separate proceeding. The statutory question is whether the former would exceed the latter such that the interests of justice are engaged.

(c) Third, experience does not bear out the defendant's concerns.

129 Mr Lloyd's affidavit is silent about the defendant's resources, its sources of funding (both generally and as to any funding that might be available specifically for this litigation), and its capacity to obtain additional resources and allocate them to locating and collating materials if necessary. It is not relevant prejudice to assert that a litigant may need to allocate resources to preparing a dispute for a trial. In the absence of such evidence there is no reason to draw any inference adverse to the interests of the plaintiff.

130 The evidence does not permit any comparison, except in a speculative way, of the costs likely to be incurred in the postulated scenarios that would provide a basis for a discretion to be exercised judicially. Leaving aside the absence of evidence touching on the relevant comparator, I do not accept the proposition that the defendant's litigation costs would be higher in a group proceeding. The section postulates the scenario where each group member ran a separate proceeding. I cannot see that the costs that the defendant would face in that scenario would be less than the estimates given, which must include savings through economies of scale. Likewise, there is no basis to infer that there would be any savings for plaintiffs through the alternative of

separate proceedings, the opposite consequence seems certain. The court's facility for case management, once the common questions have been determined, is likely to see appropriate arrangements for the determination of individual claims.

131 To de-class the 'Neglect claim' would put a very large number of the residents and their families out of court at an early stage of the proceeding on the basis of the artificial reading of the pleading that the defendant advances. To do so is not shown to be in the interests of justice.

132 No basis has been shown for any of the considerations identified in ss 33N(1)(a)-(d) to have activated proper consideration of the interests of justice. Assuming I accepted the parties' submissions as to the construction of ss 33N and 33ZF, I would not exercise the discretion to strike out the parts of the pleading concerning the 'Neglect claim'. This ground of challenge to the pleading fails.

D. The pleading strike out issue

Principles

133 Rule 23.02 of the *Rules* empowers the court to order, among other things, the whole or part of a pleading be struck out where the pleading does not disclose a cause of action or may prejudice, embarrass or delay the fair trial of the proceeding.

134 I set out the general principles relating to strike-out in *Wheelahan v City of Casey (No 12)*.[82] The following principles are presently relevant:

> (a) Order 13 of the [*Supreme Court (General Civil Procedure) Rules 2005* (Vic)] set out the relevant requirements of a sufficient pleading, while r 23.02 provides the grounds on which the sufficiency of a pleading may be impugned;
>
> (b) the function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial;
>
> (c) the cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression 'material facts' is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the

82 [2013] VSC 316, [25]. See also *Uber* (2020) 61 VR 580, 599-600 [50].

essential elements of the cause of action;

(d) as a corollary, the pleading must be presented in an intelligible form – it must not be vague or ambiguous or inconsistent. Thus, a pleading is 'embarrassing' within the meaning of r 23.02 when it places the opposite party in the position of not knowing what is alleged;

(e) the fact that a proceeding arises from a complex factual matrix does not detract from the pleading requirements. To the contrary, the requirements become more poignant;

…

(g) a pleading which contains unnecessary or irrelevant allegations may be embarrassing – for example, if it contains a body of material by way of background factual matrix which does not lead to the making out of any defined cause of action (or defence), particularly if the offending paragraphs tend to obfuscate the issues to be determined;

…

(k) particulars are not intended to fill gaps in a deficient pleading. Rather, they are intended to meet a separate requirement – namely, to fill in the picture of the plaintiff's cause of action (or defendant's defence) with information sufficiently detailed to put the other party on guard as to the case that must be met. An object and function of particulars is to limit the generality of a pleading and thereby limit and define the issues to be tried;

…

(n) in an application under r 23.02, the court will only look at the pleading itself and the documents referred to in the pleading; and

(o) the power to strike out a pleading is discretionary. As a rule, the power will be exercised only when there is some substantial objection to the pleading complained of or some real embarrassment is shown.

135 Having regard to these principles, the defendant submitted that the following paragraphs of the ASOC should be struck out pursuant to r 23.02.

Paragraph 97

136 Paragraph 97 alleges breach of the Consumer Guarantees (ie the guarantees under ss 60 and 61 of the *Australian Consumer Law*). The paragraph provides:

> By reason of the matters set out in Sections C.6, C.7 and C.8 above, in contravention of the Purpose Guarantee, the Residential Care Services provided by the defendant were not reasonably fit for the particular purpose for which they were acquired, in that:
>
> (a) during the COVID-19 Period, the Resident Sub-Group Members were not enjoying peace of mind or the experience of being cared for in a safe,

secure and home-like environment; and

(b) despite that circumstance, the defendant failed to improve its quality of care, implement the Infection Control Measures, remedy the Pre-Existing Staff Shortages and/or request assistance prior to 27 July 2020.

137 The defendant submitted that because paragraph 97 asserts that the contravention occurred 'by reason of the matters set out in Sections C.6, C.7 and C.8', the paragraph is vague, does not disclose a cause of action, and it should be struck out. Those sections span paragraphs 42 to 80 of the ASOC, and they contain various allegations pertaining to staff cuts, alleged conditions preceding the COVID-19 outbreak and the outbreak itself. It is not readily apparent from the pleading (at paragraph 97) which of the numerous matters referred to in Sections C.6, C.7 and C.8 are relied upon as constituting the breaches.

138 By way of example, paragraph 72 of the ASOC, which is within Part C.8, asserts that on or about 27 July 2020, Austin Health was requested to provide clinical support to the defendant and the defendant began organising residents, so that residents who tested positive were moved to a different ward to those who tested negative. It is not apparent whether, or how, that paragraph gives rise to a breach of the Consumer Guarantees.

Paragraph 98

139 Paragraph 98 of the ASOC provides:

> By reason of the matters set out in Sections C.6, C.7 and C.8 above, in contravention of the Result Guarantee, the Residential Care Services provided by the defendant were not of such nature and quality as reasonably might be expected to achieve the result the subject of the Result Guarantee, in that:
>
> (a) during the COVID-19 Period, the Resident Sub-Group Members were not enjoying peace of mind or the experience of being cared for in a safe, secure and home-like environment; and
>
> (b) despite that circumstance, the defendant failed to improve its quality of care, implement the Infection Control Measures, remedy the Pre-Existing Staff Shortages and/or request assistance prior to 27 July 2020.

140 The defendant submitted that paragraph 98 is similarly drafted to paragraph 97, and should also be struck out, in that it too links the alleged contravention to 'the matters set out in Sections C.6, C.7 and C.8'.

Sub-paragraph 119(b)

141 Sub-paragraph 119(b) alleges that in breach of the Family Duty of Care, 'the defendant did not promptly notify Family Sub-Group Members of the deterioration of their residents' mental or physical condition, and only notified them if their resident had tested positive to COVID-19.'

142 The defendant submitted that the paragraph contains an extremely wide category of breach – it effectively asserts that the duty was breached on every occasion of any 'deterioration' (a very broad term, in and of itself, and likely to encompass a vast range of situations in aged care) of a resident, where no notification was made 'promptly' (an inexact term which is open to a multitude of meanings).

143 Accordingly, the defendant says, this paragraph should be struck out on the basis that it is scandalous, vexatious or embarrassing.

Sub-paragraph 119(e)(iii)

144 Sub-paragraph 119(e)(iii) contains another allegation of breach of the Family Duty of Care. It is alleged that the defendant breached the Family Duty of Care as 'Family Group Members were exposed to distressing circumstances likely to cause psychiatric harm in that … they observed their residents suffering death or injury during the COVID-19 Period and suffered distress and psychiatric harm as a consequence.'

145 The defendant submitted that the sub-paragraph is vague and discloses no cause of action in that the breach alleged is what the family members are said to have observed – death or injury of their resident – rather than any conduct on the part of the defendant. It is not apparent from that formulation what precise conduct of the defendant, presumably being conduct leading to the particular residents' death or injury, is put as part of that particular allegation.

Sub-paragraph 119(f)

146 Sub-paragraph 119(f) contains a further allegation of breach of the Family Duty of Care. It is alleged that the defendant breached its duty of care to residents' family by the following:

(f) further, Family Sub-Group Members were exposed to a risk of psychiatric injury consequent upon:

(i) suffering distress and regret at deciding to keep their Resident in Epping Gardens during the COVID-19 Period, in reliance on the Handbook Representations (defined below);

(ii) having been reassured by the 17 April Representations and the 23 April Representations and discovering that the 17 April and 23 April Representations were inaccurate (as pleaded below).

147 The defendant submitted that these sub-paragraphs do not contain any allegation of conduct (i.e. any act or omission) on the part of the defendant which is alleged to comprise the breach of duty. Rather, they contain the 'risk of injury'. The factors set out therein do not themselves comprise breaches. Therefore, the sub-paragraph should be struck out as it fails to disclose a cause of action.

Consideration

148 Paragraphs 97 and 98: I am not persuaded that these paragraphs are embarrassing. The defendant has the opportunity to plead to each material allegation of fact made in the references to earlier paragraphs and in that context, there is no embarrassment occasioned to the defendant in responding to paragraphs 97 and 98 of the ASOC. These are at best technical, not substantial, objections and a practical approach is needed. The true nature of the case to be met is clear from reading the pleading as a whole and there is no embarrassment to filing a responsive pleading.

149 Subparagraph 119(b): The allegation that the deterioration of the mental or physical condition of residents in an aged care facility, should promptly have been notified to their family is sufficiently clear to enable the defendant to plead to it. The objection is technical and if genuine difficulties are occasioned in understanding the extent or purport of the allegation, in case management further particulars might be sought to identify specific residents who are the basis of the allegation.

150 Subparagraphs 119(e)(iii) and (f): These subparagraphs must be read with the Family Duty of Care at paragraphs 112 and 115 of the ASOC. The duty was to take reasonable steps not to expose Family Sub-Group Members to distressing circumstances and, in breach, the family were exposed to those distressing circumstances. This objection,

too, is technical. The material allegation is that the sub-group members were exposed to distressing circumstances likely to cause psychiatric harm. Contrary to the defendant's submission, the conduct alleged is that of 'exposing' the family to those circumstances. The sub-paragraph objected to is an allegation of observation by group members of the defendant's conduct in exposing them to a harm. An unobjectionable allegation of the same nature is made in the immediately preceding sub-paragraph (119(e)(ii)). No embarrassment is caused by requiring the defendant to file a defence to these subparagraphs.

E. Costs application

151 I granted leave to the plaintiff to amend the group definition by my order dated 5 May 2021, reserving the costs of that application.

152 The defendant now seeks an order that the plaintiff pay those costs and the plaintiff contended that it would be appropriate for the court not to make any order as to costs.

153 The defendant submitted that in circumstances where:

(a) the plaintiff's originally pleaded group definition was, on its face, hopelessly deficient, meaning that the proceeding was liable to be struck out;

(b) the plaintiff provided three further deficient proposed group definitions, which the defendant was required to consider and respond to; and

(c) the plaintiff did not provide an acceptable group definition until its fifth attempt mid-way through the hearing of its application for leave to amend, in circumstances where it had had the defendant's objections to the group definition for just short of five weeks,

the plaintiff should be ordered to pay the defendant's costs of the plaintiff's application to amend the group definition.

154 Although I am not disposed to accept this submission in its entirety, I am satisfied that the plaintiff sought an indulgence from the court, needing leave to amend a plainly deficient group definition. By doing so, the defendant was put to the expense of

considering, seeking instructions on, preparing written submissions about, and appearing at case management conferences in relation to definitions that were ultimately abandoned.

155 I will order that the plaintiff pay the defendant's costs reserved by my order of 5 May 2021, that is, the costs thrown away by reason of the application to amend the group definition.

F. Application for leave to discontinue

156 Mr Agnello commenced proceeding number S ECI 2020 03282 by writ and statement of claim on 14 August 2020. The original group description included parents of resident group members and -

> d. all employees of the defendant who had worked at Epping Gardens who at any point from February 2020 sustained physical injury, mental or nervous shock in connection with their employment at Epping Gardens and/or were put in danger by acts or omissions of the defendant.

157 The plaintiff seeks approval under s 33V of the Act for the discontinuance of the proceeding in respect of claims by employees and contractors of the defendant ('**Employees**') and parents of resident group members ('**Parents**').[83]

158 The plaintiff submitted that discontinuance in respect of claims by Employees be approved on the basis that those claims would not satisfy ss 33C(1)(b) or (c) of the Act in circumstances where:

(a) any duty owed by the defendant to Employees would not be based on the same type of material facts said to give rise to a duty between residents or family and the defendant;

(b) there may be different duties between Employees and contractors;

(c) the breaches of any such duty or duties to Employees by the defendant would

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83 See *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, [23] ('***Bray***'); *Matthews v SPI Electricity Pty Ltd (Ruling No 16)* [2013] VSC 74, [13]-[14], [23] ('***Matthews***'); *Laine v Thiess Pty Ltd* [2016] VSC 689 ('***Laine***').

not be based on the same type of material facts as those supporting breaches of duties to residents and their families; and

(d) Employees are likely to be subject to the *Workplace Injury Rehabilitation Compensation Act 2013* (Vic), with the effect that they must be granted a 'serious injury' certificate before pursuing any common law claim.

159 If Employees have suffered injury by reason of the defendant's conduct at Epping Gardens, it remains open to Employees to bring an action once the requirements under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) have been met.[84]

160 The discontinuance in respect of claims by Parents is sought on the basis that to the best of the plaintiff's instructors' knowledge, no parents of residents were alive during the period of time that is the subject of the proceeding and, in any event, it is inherently unlikely that parents of residents – who are themselves of advanced age – would have been alive during the relevant period.

161 The defendant does not oppose the discontinuance.

Applicable Principle

162 Section 33V of the Act provides:

> **33V Settlement and discontinuance**
>
> (1) A group proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court.

163 Section 3 of the Act defines 'proceeding' as 'any matter in the court'. By virtue of that broad definition, the requirements of s 33V extend to any substantive claim — each a 'matter in the court' — made in a proceeding. Adopting a literal interpretation of the provision, and reading it as if court approval is only necessary for the compromise of a proceeding in its entirety, would be inconsistent with the court's protective

84 *Bray* [2003] FCA 1505, [37].

jurisdiction to be exercised in favour of group members.[85]

164 The issues for determination on an application to approve a discontinuance in a group proceeding differ to those on approval of a settlement. Some judges have considered whether the discontinuance is fair and reasonable and in the interests of group members,[86] while others posited a test of whether the discontinuance would be unfair, unreasonable or adverse to the interests of group members.[87] That question may involve some focus on the interests of remaining group members as well as on the interests of discontinuing group members.

165 In cases of unilateral discontinuance at an early stage of the proceeding and well in advance of the expiry of limitation periods after discontinuance, I prefer the latter approach.

Notice requirements

166 Section 33X(4) of the Act states that '[u]nless the Court is satisfied that it is just to do so, an application for approval under section 33V must not be determined unless notice has been given to group members'. The plaintiff submitted that it is just for no prior notice to be given to group members of the discontinuance and that the court should dispense with that requirement.

167 In determining whether it is just to dispense with the requirement to give notice to group members under s 33X(4) of the Act, the court seeks to give effect to the overarching purpose of facilitating the just, efficient, timely, and cost effective resolution of the real issues in dispute in the proceeding.[88] In making any order or giving any direction in a civil proceeding, the court is required to further the overarching purpose under the Act by having regard to the matters set out in s 9 of

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85 *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457, [4].

86 *Mercedes Holdings Pty Ltd v Waters* (2010) 77 ACSR 265, 268 [10], 271 [24]; *Tate v Westpac Banking Corporation (No 2)* [2020] FCA 1374, [34]–[38]; *Arthur (Litigation Representative) v Northern Territory (No 2)* [2020] FCA 215, [70]; *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCA 1234, [46], [49]; *AUB19 v Commonwealth* [2019] FCA 1722, [17]; *Adams v Navra Group Pty Ltd* [2019] FCA 1157, [19].

87 *Laine* [2016] VSC 689, [34]; *Babscay Pty Ltd v Pitcher Partners* (2020) 148 ACSR 551, 552 [3], 555 [19]–[23]; *Watson v Maximus Holdings (NSW) Pty Ltd* [2021] FCA 87, [49].

88 *Civil Procedure Act 2010* (Vic) ss 7-8.

the *Civil Procedure Act*.[89]

168 The plaintiff seeks dispensation with the notice requirement on the following bases:

(a) the proceeding is still at the earliest stage and, since the filing of the original statement of claim, no steps have been taken in the proceeding save for the present applications for discontinuance and for leave to alter the description of the group;

(b) there is a significant prospect that a notice requirement would disrupt the preparation of the case for trial for no good purpose, resulting in an inefficient use of judicial and administrative resources;[90]

(c) many of the group members are elderly and frail residents of aged care homes and further delay of the proceeding would have a detrimental effect on their access to justice;

(d) due to the concurrent application for leave to alter the description of the group, a new summary statement will be published with the new group description and so will indirectly notify group members of the discontinuance;

(e) Employee claims would have no prospect of success[91] where the process under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) has not been followed. For that reason, there is no real prospect that an Employee, acting rationally, would oppose the orders sought; and

(f) no Parents of residents would be alive to receive any notice.

Consideration

169 Without being persuaded of each of these grounds (I say nothing about (b) and (c)), I am persuaded that I ought in the exercise of my discretion dispense with the requirement for notice, principally because I do not consider that any group member,

89 *Matthews* [2013] VSC 74, [31]; *Laine* [2016] VSC 689, [38].
90 *Matthews* [2013] VSC 74, [33].
91 Ibid [32]; *Laine* [2016] VSC 689, [14].

acting rationally, would oppose the discontinuance or withdrawal. The procedural hurdle faced by Employee claims is a complete answer and amendment of the group definition to remove such claims will not be unfair or unreasonable or adverse to the interests of either remaining or discontinuing group members.

170 Further, the extent of communication between Employees and the plaintiff's solicitors was set out on an affidavit sworn on 21 July 2021 by Tony Carbone. Given that the plaintiff's solicitors may have induced some misconception in the minds of Employees, I direct that the plaintiff's solicitors ensure that notice of this order removing Employees from the group proceeding be given via the plaintiff's solicitor's Facebook page and its website.

171 As for Parents of residents, I accept that the plaintiff's solicitors have now correctly realised that these parties are unlikely to be alive to receive any notice.

172 I accept the plaintiff's submissions. There is no basis to contemplate that the discontinuance to be effected by the plaintiff would be unfair, unreasonable or adverse to the interests of group members. I am further satisfied that it is just to approve this amendment to the group definition without prior notice to be given to group members and I dispense with that requirement.

173 I am satisfied that the orders sought by the plaintiff in this regard are appropriate.

Orders

174 The defendant's summons dated 2 June 2021 is dismissed.

175 Paragraph 139 of the ASOC is struck out with leave to the plaintiff to replead the common questions.

176 As there may be special circumstances of which I am not aware, I will receive any further submissions from the parties in writing (4 page limit) in respect of costs, if agreement cannot be reached. Ordinarily, I would order that the costs of the summons follow the event, that is, that the defendant pay the plaintiff's costs of and incidental to the application by summons dated 2 June 2021. Any costs incurred by the defendant

in respect of the repleading of paragraph 139 should fall as determined by the Rules.

177 The plaintiff pay the defendant's costs reserved by my order of 5 May 2021, that is, the costs thrown away by reason of the application to amend the group definition.

178 The requirement of s 33X of the Act, that notice be given to group members of the application for approval of the discontinuance, is dispensed with.

179 The discontinuance of the proceeding in respect of claims by employees and contractors of the defendant, and parents of persons who were resident at the defendant's aged care facility, by the amendment of the group definition, is approved.

180 I direct that the plaintiff's solicitors publish notice of the immediately preceding order on their website and on Facebook.

181 There is no order as to costs of the application for discontinuance and dispensation of notice.

Efstathia (Effie) Fotiadis v St Basil's Homes for the Aged in Victoria

Defendant's application

182 In this proceeding, the plaintiff, represented by the same legal team as Mr Agnello, seeks damages in a representative proceeding from the proprietor of an aged care facility, St Basil's Homes for the Aged in Victoria ('**St Basil's**'). St Basil's is represented by the same solicitors as the defendant in the above proceeding, Heritage Care, who instructed different counsel. The plaintiff, Ms Efstathia Fotiadis ('**Ms Fotiadis**'), has pleaded her claim in substantially the same terms as Mr Agnello.

183 For the record, the defendant seeks orders that the plaintiff's amended statement of claim dated 12 May 2021 (the '**ASOC**') be struck-out or, alternatively, that parts of the ASOC, identified in the summons, be struck out on three grounds:

(a) the proceeding does not satisfy the threshold requirement in one or more of ss 33C(1)(b) and (c), and 33H(2)(c) of the Act and therefore cannot be brought under Part 4A of the Act ('**Section 33C issue**');

(b) the proceeding brings two types of claims – the so called COVID-19 claim and the Neglect claim – that are separate and distinct so that the plaintiff should not be able to bring both of them in the same proceeding, and the Court should make an order under s 33ZF of the Act to excise the Neglect claim from the proceeding ('**Section 33ZF issue**'); and

(c) the ASOC or those parts of it identified in the summons, should be struck out pursuant to r. 23.02 of the Rules ('**Strike out issue**').

184 Given the close correlation between the pleaded claims, the relief sought by Ms Fotiadis and Mr Agnello, and the grounds of strike out in both proceedings, the St Basil's application was heard together with Heritage Care's application. Further, St Basil's adopted Heritage Care's submissions, rather than repeat them, limiting its submissions to the differences between the ASOC in each proceeding and how such differences affect its position. As much, if not all, of my reasoning in Agnello v Heritage Care applies directly to answer St Basil's submissions in this proceeding, my reasons, set out above, must be read together with these reasons. I will avoid repetition and cross reference as appropriate.

The Section 33C issue

Summary of ASOC and the submissions of St Basil's

185 The ASOC alleges claims on behalf of the group members defined in paragraph 8 of the ASOC, which is in the same terms as Mr Agnello's ASOC. The pleading identifies Resident Sub-Group members, Family Sub-Group members and Representee Sub-Group members, defined in the same way set out above at [7]. St Basil's submitted that although there are a multitude of claims being made by different sub-group members, those claims can be categorised by reference to the type of harm or risk of harm that is alleged should not have occurred and for which damages or compensation is being sought. St Basil's, unsurprisingly, reads the Fotiadis ASOC in the same way as Heritage Care reads the Agnello ASOC.

186 St Basil's described the ASOC as alleging claims based on residents having suffered

injury (including death) from having been infected with COVID-19 at St Basil's or having suffered disappointment and distress from having been at risk of such an infection (the '**COVID-19 claim**'). They include the primary claims by residents and, where they have died, by their estates, but also secondary claims by Family Sub-Group Members based on their related resident having been infected with COVID-19, having been at risk of so being infected or having died from such an infection.

187 The second category of alleged claims are also claims based on allegations that the defendant provided sub-standard Residential Care Services to residents during the Period (defined in the ASOC as the period 26 February 2020 to 22 October 2020), leading to injury (other than infection with COVID-19) or disappointment and distress from risk of such injury, for example, from 'neglect, infection, disease, dehydration, choking, failure to be given the correct medication or any at all or any other failure by the Defendant to provide the Residential Care Services with reasonable care or at all' (the '**Neglect claim**'). This includes primary claims by residents alleging injury caused by neglect or risk of neglect and, where they have died, by their estates, but also derivate claims by group members based on their related resident having suffered such injury, having been at risk of so being injured or having died from such injury.

188 St Basil's submitted the most obvious illustration of the two categories of claims is the causes of action in negligence. While this proposition may be doubted, to continue with the submission, St Basil's contended that, like the Agnello ASOC, the Fotiadis ASOC identifies two separate and distinct risks of harm that residents at St Basil's allegedly faced. The Care Risk of Harm was 'the risk that a failure by the defendant to exercise reasonable care and skill in the provision of Residential Care Services during the COVID-19 period would cause the Resident[s] … to suffer loss and damage arising from neglect, infection, disease, dehydration, choking, failure to be given the correct medication or any at all or any other failure by the Defendant to provide the Residential Care Services with reasonable care or at all'. The Infection Risk of Harm was 'a risk that a failure by the defendant to exercise reasonable care and skill in the implementation of Infection Control Measures during the COVID-19 period would

lead to Resident[s] … becoming infected with, and dying of causes relating to COVID-19'.

189 The St Basil's submission continued that the ASOC alleges that St Basil's owed residents a duty to 'take reasonable care in the provision of the Residential Care Services to Resident[s] … and in the implementation of Infection Control Measures,' with the Resident Duty of Care alleged to be a duty to avoid inflicting such harm on the identified group members. The point, it submitted, was that two separate and distinct types or risks of harm were alleged. St Basil's suggested, to reinforce its contention, that the alleged content of the duty also supported this notion. St Basil's contended that the alleged standard of care separated into care measures concerned with the standard of Residential Care Services that should have been provided, and Infection Control Measures. The standard of care is further broken down into the sub-categories of the expected standard of infection prevention and control training for staff, the precautions that should have been taken to prevent and control COVID-19 infection, and the steps that should have been taken to manage the outbreak of COVID-19.

190 As with the Agnello ASOC, the allegations of breaches of the Resident Duty of Care set out four sub-categories of breaches that are said to have occurred during the Period. The first sub-category of breach is the care breaches, allegations that St Basil's provided sub-standard Residential Care Services over the Period. St Basil's submitted that while not exclusively the case, these breaches relate mainly to the Care Risk of Harm. The remaining three sub-categories of breaches mainly relate to the Infection Risk of Harm, being allegations of inadequate infection prevention and control and personal protective equipment training of staff; infection breaches and outbreak management breaches.

191 St Basil's contended that the four sub-categories of breaches are rolled up into the concept of the breaches of Resident Duty of Care and that this 'rolling up' has the effect of obscuring what damage or type of damage is said to have been caused by each individual breach identified. I do not accept this submission as a reasonable

reading of the ASOC.

192 Ms Fotiadis alleges that she and the other Resident Sub-Group Members suffered loss or damage. For Ms Fotiadis, the alleged damage was that Mr Dimitrios Fotiadis ('**Mr Fotiadis**') was infected with COVID-19 leading to death. St Basil's contended that there is no specific allegation in the ASOC that Mr Fotiadis was provided with sub-standard care or that he suffered an injury other than COVID-19 infection and in respect of the other Resident Sub-Group Members, no attempt is made to identify that some base their negligence claim on having suffered injury caused by a COVID-19 infection and some from having suffered injury caused by neglect. These are matters that question the adequacy of the particularisation of the allegations and can be dealt with in case management.

193 St Basil's further contended that the distinction between 'the two categories of claims' is also evident in the other causes of action – the Breach of Contract Claim, the Consumer Guarantee Claims, the Family Breach of Duty, and the Misleading or Deceptive Conduct Claim – where claims are premised on the alleged provision of sub-standard Residential Care Services to a resident causing injury or loss rather than infection with COVID-19.

194 St Basil's submitted that the inclusion of the Neglect claim in the proceeding is an attempt to cobble together two separate and disparate types of claims, and means that threshold requirements in ss 33C(1)(b) and (c) are not met. In stating this, St Basil's acknowledges that if the Neglect claim were excised from the ASOC this requirement would be met.

195 St Basil's accepts that if the group members brought only the COVID-19 claim in the proceeding then the proceeding would satisfy s 33C of the Act and in particular accepts that the COVID-19 claim arises out of similar or related circumstances. In substance this concession means that those claims that arise from 'infection breach' of the Resident Duty of Care, which circumstances include the emerging awareness of the risk posed by COVID 19, the precautions that could or should have been taken in

response to this risk, and the COVID-19 outbreak at St Basil's, would satisfy s 33C of the Act.

196 However, St Basil's then contended that rather than simply bringing a proceeding based on the COVID-19 claim, Ms Fotiadis has sought to bring the Neglect claim in the same proceeding, although those claims do not arise out of the same, similar or related circumstances as the COVID-19 claim. St Basil's sought to develop this submission in this way.

(a) The specific allegations against it of neglect, by failing to provide adequate Residential Care Services are, or seem to be, very limited in the ASOC both in terms of the nature of the neglect, the residents who were neglected, and the period in which it is alleged that it was neglectful, and mostly relate to the period prior to the COVID-19 outbreak;

(b) The ASOC sets out the events surrounding the COVID-19 outbreak at St Basil's. By setting out matters that relate to the awareness of the risk posed by COVID-19, infection prevention and control, and the emergence and spread of COVID-19 at St Basil's, the allegations in Section C of the ASOC mainly go to the COVID-19 claim. However, St Basil's conceded that this description is inaccurate as it identified allegations relating to infection prevention and control relevant to its category of Neglect claim. These allegations include want of cleanliness, inadequate food, inadequate hygiene and failure to respond to family complaints about medical conditions, such as a rash or a bruise. St Basil's point is that allegations relating to the Neglect claim are limited when compared with allegations relating to the COVID-19 claim;

(c) The factual allegations that underpin the Neglect claim are independent of the allegations that underpin the COVID-19 claim in that the two categories of claim could exist without each other;

(d) There is no link between the allegations made in respect of the Neglect claim and the allegations made in respect of the COVID-19 claim. At its highest the

connection is no more than that they arise against the same defendant in respect of the same nursing home;

(e) there is no allegation of any systemic issue connecting the failures said to give rise to the Neglect claim and the COVID-19 claim. No systemic issue sufficiently connects one neglect claim with the other neglect claims;

(f) resolution of the factual allegations that underpin the Neglect claim will be highly specific to an individual group member. To illustrate, the example given of a resident not receiving 'adequate food' will likely depend on the character of the specific food given to the resident and the personal characteristics of the resident rather than any issue that could be said to be common amongst all or some residents. The example also illustrates the lack of any relationship between the perceived neglect and the circumstances underpinning the COVID-19 claim;

(g) in respect of Ms Fotiadis's claims, the damage alleged is that Mr Fotiadis was infected with COVID-19 and died and it is not alleged that Mr Fotiadis received sub-standard care or that he suffered an injury. The plaintiff, as the legal representative of the estate of Mr Fotiadis, may have capacity to represent group members in respect of the COVID-19 claim, but she cannot represent them in respect of the Neglect claim.

(h) No one person could represent the sub-group with the Neglect claim given they will or are likely to raise no issues that are common amongst all of the sub-group members and will turn on individual issues. An appreciation of this fact highlights how distinct and separate the circumstances that give rise to the neglect claims are from those that give rise to the COVID-19 claim.

197 Insofar as the threshold issue is based on the proceeding not satisfying the threshold requirement in s 33H(2)(c) of the Act, the plaintiff's purported common issues of law and fact are set out in identical form and substance to the purported common issues of law and fact in the Heritage Care proceeding.

The plaintiff's reply

198 Ms Fotiadis disputed the so-called 'rolled up' concept of the breaches of the Resident Duty of Care, submitting that it is not a proper criticism, either under s 33C of the Act or otherwise. It is not uncommon for a particular form of damage to be caused by different breaches of a duty of care. The plaintiff's allegations are that the damage pleaded was caused by the breaches pleaded.

199 Responding to the defendant's claims that 'there is no specific allegation made in the ASOC that he was provided with sub-standard care or that he suffered an injury other than COVID-19 infection', Ms Fotiadis submitted that there is no distinction between exposure to COVID-19 and other forms of sub-standard care. It is an instance of sub-standard care through inadequate infection control. Mr Fotiadis was in an environment where St Basil's course of conduct involved inadequate infection control, as a consequence of which Mr Fotiadis was infected with COVID-19.

200 The defendant acknowledged that the so-called 'COVID-19 claim' and the so-called 'Neglect claim' are 'entwined in the ASOC'. They are entwined in the pleading because the claims themselves are entwined.

201 The defendant submitted the proceeding is 'akin to bringing a Part 4A claim against a hospital for all incidents of medical negligence that occurred in the hospital over a period of time'. That analogy is inaccurate and unhelpful. In this proceeding, the damage is alleged to have been caused by the defendant's systemic failures. It is not the equivalent of negligent decisions by individual doctors. As explained in the Agnello v Heritage Care reasons, the systemic failing alleged in this proceeding is the defendant's failure to provide Residential Care Services with reasonable care.

Consideration

202 The underlying proposition that is the foundation of St Basil's submission is misconceived. Its categorisation of harm is an artificial test, attempting to demonstrate that claims arise out of unrelated circumstances because one category of harm is separate and distinct from the other. Adopting a different manner of categorisation shows that the reasoning is unsound. Claims of group members can be understood

as categorised, as is commonly done, by cause of action. Bearing in mind that a claim is a wider concept than a cause of action, the ASOC claims for the purposes of the application of the s 33C test, are more sensibly grouped, if they need to be grouped at all, by reference to -

(a) The resident's agreement;

(b) Statutory consumer guarantees;

(c) Breach of duties of care, the Resident Duty of Care and the Family Duty of Care; and,

(d) Misleading and deceptive conduct.

These causes of action are briefly described in the context of the Agnello ASOC earlier in these reasons. Those descriptions are presently apposite. The fact that the risk of harm relevant to each claim may be categorised separately, contributes little to the exercise on this application of determining whether claims arise out of the same, similar or related circumstances. Whether the claims are the same, similar or related, is not the test. As the analysis in the Agnello reasons above sets out, when viewed in this context the claims, which exhibit individual differences, plainly arise from similar or related circumstances, principally the manner of delivery of Residential Care Services to residents at St Basil's during the Period.

203 In propounding this submission, St Basil's did not acknowledge that suffering loss from becoming infected with, and dying of causes relating to, COVID-19 is wholly encapsulated within the concept of suffering loss from … infection, disease, … or any other failure by the defendant to provide the Residential Care Services with reasonable care or at all. On any reasonable reading of the ASOC, the risk of harm faced by St Basil's residents could be categorised by reference to many factors, including its cause, but such categories are not separate and distinct in a manner that is of any relevance when considering the application of s 33C(1).

204 It is misconceived to contend that the manner in which the content of the Resident

Duty of Care is alleged supports the conclusion that s 33C(1)(b) is not satisfied. The pleading is not, at this point, alleging two separate and distinct types or risks of harm as St Basil's would have it. No support is to be found in the allegations of the standard of care for reading a want of connectivity between the circumstances giving rise to the claims. Rather, the ASOC alleges the standard of the Resident Duty of Care to be comprised by four different requirements or obligations:

(a) seven matters that make up the content of Residential Care Services;

(b) an obligation to provide '[infection prevention and control] training to staff';

(c) eight matters that comprise the obligation to implement infection control measures; and

(d) four matters with respect to managing an outbreak of COVID-19.

205 The interrelationship of the circumstances on which the claims are founded is evident. Infection control and management of a COVID-19 outbreak is alleged to be part of the Resident Duty of Care, which is a duty to avoid inflicting either form of harm. However, the Infection Risk of Harm is clearly part of the Care Risk of Harm. The Residential Care Services included providing safe and effective personal and clinical care, effectively managing high-impact or high-prevalence risks associated with the care of each resident, including the Care Risk of Harm and the Infection Risk of Harm, and recognising and responding in a timely manner to deterioration or change in mental or physical health. Residential Care Services are not limited to matters of accommodation and equipment, personal hygiene, meals, or responding to complaints.

206 St Basil's notion of 'rolled up breach' is a distraction. Ms Fotiadis alleges that the breaches of the Resident Duty of Care, being what St Basil's submitted was a rolled up concept of breaches, led to COVID-19 not being promptly detected in staff and residents at St Basil's and spreading quickly to all areas of St Basil's. This had the further consequence that residents were neglected by the defendant's failure to

provide the Residential Care Services with reasonable care or at all. residents died from 'neglect or COVID-19' during the Period. Had the duty not been breached, at least some of the residents would not have died, residents would not have been infected with COVID-19, or at least only a limited number would have been infected, and residents 'who suffered injury by reason of the care breaches, would not have suffered that injury' or at least some of them would not have suffered that injury. There is no support for the contention that group members' claims do not arise out of the same, similar or related circumstances.

207 The absence of a specific allegation in the ASOC that Mr Fotiadis was provided with sub-standard care, or that he suffered an injury other than COVID-19 infection, and of particulars in respect of any other Resident Sub-Group Members, means that there is no pleading of material fact identifying a basis of having suffered injury caused by neglect, other than through the circumstances of being infected with COVID-19. The adequacy of the particularisation of the allegations can be dealt with in case management. It is not an omission that dictates a conclusion that the claims of group members do not arise out of the same, similar or related circumstances.

208 St Basil's submitted that the inclusion of the Neglect claim in the proceeding means that threshold requirements in s 33C(1)(b) are not met, but accepts that if the Neglect claim were excised pursuant to s 33ZF from the ASOC, this requirement would be met. Tellingly for its submission, St Basil's contended that although the ASOC brings two separate and distinct types of claims – the COVID-19 claim and the Neglect claim – those claims are so entwined in the ASOC that it is difficult to identify how the Neglect claim can be excised from the COVID-19 claim.

209 Ms Fotiadis submitted this concession was fatal for St Basil's s 33C point.

210 The submission that the Neglect claim cannot satisfy s 33C(1)(b) while the COVID-19 claim does meet the test, does not turn on the notion of claims arising out of the same, similar or related circumstances. It is constructed from the artifice that the ASOC alleges two separate and distinct types of claims, by reference to risk categories, and

that the Neglect claim is more limited in scope in this proceeding.

211 I have concluded that this categorisation of the pleading is artificial and leads to error. I reject it. I accept that the ASOC pleads two risks of harm but they are neither separate nor distinct in the sense for which St Basil's contended. Ms Fotiadis alleges one duty of care (putting the Family Duty of Care to one side) and as defined in the pleading, the care breaches, training breaches and infection breaches are categories of breach of the Resident Duty of Care.

212 It is plain from the statutory text that claims do not need to be identical or even to have arisen out of the same circumstances. St Basil's cannot show that the claims of group members do not arise out of related circumstances. That is a proposition which is plainly untenable in the present case.

213 The pleader has organised the allegations of breach into categories. In doing so, when carefully read, the ASOC does not define separate and distinct circumstances leading to the claims that St Basil's seeks to identify. The defendant's categorisation of the allegations is for its own purposes, namely to support this application, and is not a true reading of the ASOC. The reason why St Basil's finds it difficult to identify how its category of Neglect claim can be excised from its category of COVID-19 claim is that the COVID-19 claim is a subset of the Neglect claim arising out of related circumstances, namely the provision by St Basil's of the system of residential care. The COVID-19 claim is founded on the infection breaches and that category of breach has particular content due to the special circumstances of the pandemic and the response of aged care regulation to the perceived risk.

214 However, as with the Agnello ASOC, while there are substantial questions of fact or law common to the Neglect claim and COVID-19 claim, the common questions as pleaded in the Fotiadis ASOC must also be repleaded. It is not the court's role to settle the common questions at this stage, but for the reasons set out above in respect of Agnello, the plaintiff must replead the questions and can do so pleading such questions as she may be advised, consistently with these reasons.

The Section 33ZF issue

215 This is, substantively, the same issue as is discussed above in Agnello. However, it is necessary to note the different evidence.

216 St Basil's relied on affidavits affirmed by John Mitchell, a partner in the law firm representing it. Mr Mitchell deposes to having practised in commercial litigation for approximately 30 years and being experienced in costing large representative proceedings for both applicants and respondents. However, his affidavit is sworn on the basis of information he believes to be true received from Ms Annie Filmer, Facility Manager at St Basil's. Ms Filmer noted that there were 117 residents and approximately 100 staff at St Basil's prior to the outbreak in July 2020. The necessary preparatory work is substantially similar to that described above in Agnello, which Mr Mitchell costed at approximately $110,000 (ex GST).

217 Mr Mitchell's affidavit concluded in a manner that demonstrated that his evidence is too limited and cannot assist the court with the necessary comparator to determine where the interests of justice lie. He said:

> Were the Neglect Claims to be heard separately from this proceeding, I anticipate that St Basil's would incur significantly less costs than if the matter were to continue in its current form. This is because each individual proceeding would likely plead precise Neglect Claims against St Basil's. As a result, and rather than reviewing each individual patient record, St Basil's would be able to conduct a targeted review to ascertain whether the alleged Neglect Claim occurred.

218 My reasoning on this issue in Agnello applies *mutatis mutandis*. No basis has been shown for any of the considerations identified in ss 33N(1)(a)-(d) to have activated proper consideration of the interests of justice. Assuming I accepted the parties' submissions as to the construction of ss 33N and 33ZF, I would not exercise the discretion to strike out the parts of the pleading concerning the 'Neglect claim'. This ground of challenge to the pleading fails.

The pleading strike out issue

219 St Basil's took no issue with the applicable principles as I have identified them and it adopted the Heritage Care submissions. St Basil's submitted that as there is real

difficultly in working out what parts of the ASOC should be struck out, and although the summons seeks to identify the affected parts of the ASOC, it submitted that it would be open for the court to order that the whole of the ASOC be repleaded.

220 In adopting the Heritage Care submissions, St Basil's noted that:

(a) paragraph 97 of the Agnello ASOC is the same as paragraph 86 of the ASOC;

(b) paragraph 98 of the Agnello ASOC is the same as paragraph 87 of the ASOC;

(c) sub-paragraph 119(b) of the Agnello ASOC is similar to but not the same as sub-paragraph 108(b) of the ASOC but the differences do not make a material difference to the submissions; and

(d) sub-paragraphs 119(e)(iii) and (f) of the Agnello ASOC have no equivalent in the ASOC.

221 My ruling, set out above for Agnello, explains my reasons for declining St Basil's application to strike out paragraphs 86, 87 and 108(b).

222 In addition, St Basil's seeks to strike out the parts of the ASOC that relate to the Neglect claim where it is alleged that the breaches or contraventions relevant to these claims took place over the whole of the Period, but the ASOC makes no specific allegations of any failure by St Basil's to provide Residential Care Services for the part of the Period between 26 February and 30 April 2020 and between 1 August and 22 October 2020.

223 St Basil's also seeks to strike out the parts of the ASOC that relate to the COVID-19 claim where it is alleged that the breaches or contraventions relevant to these claims took place over the whole of the Period but the ASOC makes no allegations of any failure by the defendant that could relate to the COVID-19 claim for the part of the Period between 1 August and 22 October 2020.

224 Although St Basil's takes issue with the period of time in which Ms Fotiadis alleges the breaches of duty or contraventions took place, she is alleging that St Basil's did not

provide Residential Care Services with reasonable care during the period 26 February 2020 to 22 October 2020. The defendant's failure extended to failing to put in place an adequate system from 26 February 2020 which would have avoided or minimised the materialisation of the risk of harm to residents and family. St Basil's application fails to acknowledge the implications of the alleged systemic deficiencies in place throughout the whole Period.

225 St Basil's application to strike out these paragraphs of the Fotiadis ASOC is refused.

Costs application

226 St Basil's seeks an order that Ms Fotiadis pays its costs in respect of and related to the plaintiff's summons dated 8 February 2021 (inclusive of the hearing on 28 April 2021) on a standard basis.

227 The underlying issue is the same as that described above in Agnello and arises from the defendant's exposure to costs through the plaintiff's multiple attempts to settle on the proper description of group members. The affidavit of John Mitchell affirmed on 2 June 2021 described the progress of the plaintiff's efforts to arrive at the current group member description.

228 As in Agnello, there is a contest about the precise chronology of events that I see no need to resolve.

229 I am satisfied that the plaintiff sought an indulgence from the court, needing leave to amend a plainly deficient group definition and that the defendant has been put to the expense of considering, seeking instructions on, preparing written submissions about, and appearing at case management conferences in relation to definitions that were ultimately abandoned.

230 I will order that the plaintiff pay the defendant's costs reserved by my order of 5 May 2021, that is, the costs thrown away by reason of the application to amend the group definition.

Discontinuance

231 Ms Fotiadis, as Mr Agnello did, seeks approval under s 33V of the Act for the discontinuance of the proceeding in respect of claims by Employees and Parents (as defined *mutatis mutandis* in Agnello).

232 Ms Fotiadis's grounds for seeking the discontinuance are the same as were put by Mr Agnello, as are the plaintiff's submissions as to why the court ought to dispense with the notice requirements.

233 The defendant, once again, does not oppose the discontinuance.

234 My findings in this regard are the same as in Agnello. I am satisfied that it is just to approve this amendment to the group definition without prior notice to be given to group members and I dispense with that requirement.

Orders

235 The defendant's summons dated 2 June 2021 is dismissed.

236 Paragraph 121 of the ASOC is struck out with leave to the plaintiff to replead the common questions.

237 As there may be special circumstances of which I am not aware, I will receive any further submissions from the parties in writing (4 page limit) in respect of costs, if agreement cannot be reached. Ordinarily, I would order that the costs of the summons follow the event that is, that the defendant pay the plaintiff's costs of and incidental to the application by summons dated 2 June 2021. Any costs incurred by the defendants in respect of the repleading of paragraph 121 should fall as determined by the Rules.

238 The plaintiff pay the defendant's costs reserved by my order of 5 May 2021, that is, the costs thrown away by reason of the application to amend the group definition.

239 The requirement of s 33X of the Act, that notice be given to group members of the application for approval of the discontinuance, is dispensed with.

240 The discontinuance of the proceeding in respect of claims by employees and contractors of the defendant, and parents of persons who were resident at the defendant's aged care facility by the amendment of the group definition, is approved.

241 I direct that the plaintiff's solicitors publish notice of the immediately preceding order on their website and on Facebook.

242 There is no order as to costs of the application for discontinuance and dispensation of notice.

CERTIFICATE

I certify that this and the 70 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 16 December 2021.

DATED this 16th day of December 2021.

Associate