IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2020 04789

BEECHAM MOTORS PTY LTD (ACN 010 580 551) Plaintiff

v

GENERAL MOTORS HOLDEN AUSTRALIA NSC PTY LTD (ACN 603 486 933) Defendant

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JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	14 July 2021
DATE OF RULING:	17 December 2021
CASE MAY BE CITED AS:	Beecham Motors Pty Ltd v General Motors Holden Australia NSC Pty Ltd
MEDIUM NEUTRAL CITATION:	[2021] VSC 855

PRACTICE AND PROCEDURE – Group proceedings – Application by defendants that proceeding no longer continue as a group proceeding – Whether group proceeding not an efficient and effective means of dealing with group members' claims – Whether otherwise appropriate to make order sought – Whether in the interests of justice that proceeding no longer continue under Part 4A – Whether application premature – *Supreme Court Act 1986* (Vic) s 33N(1) – *ISG Management Pty Ltd v Mutch* (2020) 385 ALR 146 – *Multiplex Funds Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 – *Bright v Femcare* (2002) 195 ALR 574.

PRACTICE AND PROCEDURE – Strike out application – Term implied by custom or usage – Whether further and better particulars before filing of defence necessary or desirable.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Dr C Parkinson with Mr H Hill-Smith	HWL Ebsworth
For the Defendant	Mr J Giles SC with Ms T Spencer Bruce	Norton Rose Fullbright

HER HONOUR:

Part A: Introduction and Background

1 Beecham Motors Pty Ltd **(Beecham**, or the **plaintiff**) has commenced a group proceeding under Part 4A of the *Supreme Court Act 1986* (Vic) (the **Act**) against General Motors Australia NSC Pty Ltd (**GM Holden**, or the **defendant**) for claims arising out of alleged breaches of dealership agreements for the sale and service of new Holden brand motor vehicles.

2 Beecham has been an authorised dealer of Holden brand vehicles since 1989. GM Holden, a wholly owned subsidiary of General Motors which is based in America, is said to have established a network of Holden dealerships in Australia. Beecham brings this action on behalf of itself and others who entered into dealer agreements with GM Holden commencing on 1 January 2018 for five year terms, for the sale and service of new Holden brand vehicles. The class is closed and comprises the plaintiff and nine other group members who sold and serviced Holden brand vehicles in dealerships located in various Australian States.

3 Beecham claims damages for alleged breaches of its dealership agreement (the **Agreement**), said to flow from GM Holden's failure to supply new Holden vehicles in accordance with the Agreement, following notification of the retirement of the Holden brand in Australia in February 2020. The dealership agreements between the group members and GM Holden are alleged to have been in substantially the same terms as Beecham's dealership agreement.

4 GM Holden has applied for an order under ss 33N(1)(b), (c) or (d) of the Act that the proceeding no longer continue as a group proceeding under Part 4A of the Act. GM Holden has also applied to strike out parts of the plaintiff's statement of claim, and for further particulars of the group members' damages claims.

5 For the reasons that follow:

(a) the application under s 33N is refused;

(b) I will strike out and require the re-pleading of sub-paragraph 11(C) (but in more limited respects than those advanced by the defendant);

(c) I will strike out sub-paragraph 5(f);

(d) I will not require the plaintiff or group members to provide particulars of loss *at this stage* of the proceeding.

Part B: "De-classing" application under s 33N

Governing principles

6 Section 33N is in the following terms:

> **33N Proceeding not to continue under this Part**
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> (1) The Court may, on application by the defendant, order that a proceeding no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because—
>
> (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
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> (b) all the relief sought can be obtained by means of a proceeding other than a group proceeding; or
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> (c) the group proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
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> (d) it is otherwise inappropriate that the claims be pursued by means of a group proceeding.
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> (2) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the defendant except with the leave of the Court.
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> (3) Leave for the purposes of subsection (2) may be granted subject to such conditions as to costs as the Court thinks fit.

7 The principles governing the application of s 33N are well understood.

8 While s 33C of the Act is concerned with the threshold requirements for commencing a group proceeding under Part 4A, s 33N is concerned with the continuation of a

proceeding once it has been commenced.[1] It follows that a proceeding may satisfy the threshold requirements for commencement (including the requirement that the claims of group members give rise to a substantial common issue of law or fact, as required by s 33C(1)(c)), but nevertheless properly attract the exercise of a discretion to order that it not *continue* as a group proceeding.[2]

9 The condition for exercising the discretion conferred by s 33N is that the Court reach a state of satisfaction that it is in the interests of justice to make an order that the proceeding no longer continue under Part 4A, because of one or more of the four reasons set out in sub-sections (a)-(d). The Full Court of the Federal Court has in a recent decision conveniently designated those factors the "costs ground", the "individual proceedings ground", the "efficiency ground" and the "alternative ground".[3]

10 Section 33N calls for an evaluation made on an objective assessment of the facts,[4] and invites consideration of what purpose the representative proceedings might serve.[5] As Kiefel J said in *Bright v Femcare*:[6]

> In general terms the matters listed for the court's consideration under paras (a)-(c) [of s 33N(1)] require consideration as to what would be achieved by a determination of the proceedings in their present form and the costs of doing so. If there is *some real benefit to be gained*, the requirement that the proceedings be seen as an inefficient means of dealing with the claims might not be met. … The inquiry required by the subsection is not whether the continuance of a representative proceeding can be seen to be efficient, but whether the court is satisfied that it is in the interests of justice to order its discontinuance as a proceeding under Part IVA for the reasons listed in paras (a)-(c) of s 33N(1). A court may also order a discontinuance if it thinks it is otherwise inappropriate that the claims to be pursued in that way: para (d).
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> (emphasis added)

11 The statutory text makes clear that the Court must be satisfied not only that one or

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1 *ISG Management Pty Ltd v Mutch* (2020) 385 ALR 146, 149-50, [14] (White, Lee and Derrington JJ).

2 *AS v Minister for Immigration & Ors (Ruling No 7)* [2017] VSC 137 (J Forrest J), [61] (***AS***); *Andrianakis v Uber Technologies (Ruling No 1)* [2019] VSC 850, [157] (Macaulay J) (***Uber Ruling No 1***); *Bright v Femcare Ltd* (2002) 195 ALR 574, 601 [128] (Kiefel J) (***Bright v Femcare***).

3 *ISG Management Pty Ltd v Mutch* (2020) 385 ALR 146, 150, [15] (White, Lee and Derrington JJ).

4 *P Dawson Nominees Pty Ltd v Multiplex Funds Management Ltd* (2007) 242 ALR 111, 116 [21] (Finkelstein J) (***Multiplex (First Instance)***).

5 *Bright v Femcare*, 601 [130] (Kiefel J).

6 *Bright v Femcare*, 601 [128] (Kiefel J).

more of the grounds in sub-sections (a)-(d) is established, but that because of that factor or those factors, it is in the interests of justice to de-class the proceedings. Unless the Court is so satisfied, the proceeding is to continue as a group proceeding.[7] The word "because" points to the need for a causal connection between the specified grounds and the interests of justice.[8] The defendant bears the onus of satisfying the Court that the power under s 33N should be exercised.[9]

12 As Macaulay J said in *Uber Ruling No 1*, the structure of s 33N makes clear that in determining whether an order under s 33N ought be made, the first step is to consider whether one or more of the reasons set out in sub-paragraph (a)-(d) are made out. If so, the power to order de-classification thus enlivened, the second step is to consider whether it is in the interests of justice to so order.[10]

13 Recently, in *ISG Management Pty Ltd v Mutch*,[11] the Full Court of the Federal Court, focussing on the difference between ss 33N(1)(a)-(c) on the one hand and s 33N(1)(d) on the other, described the inquiry required by s 33N as a three step process. As the Full Court described it, the process is to first ask whether any or all of the matters specified in ss 33N(1)(a) to (c) are made out; next, whether there is another *different reason* why it is inappropriate that the claims be pursued by means of a group proceeding, and thirdly, if one or other of the grounds are made out, whether, because of that established ground or grounds, the primary judge should reach a level of satisfaction that it is in the interests of justice to de-class the proceeding.[12] It is unnecessary to decide in this case whether describing the analytical process required by s 33N as involving two steps[13] or three steps expresses a substantive point of difference. If there is one, it will concern the relationship between the "alternative

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7 *Bright v Femcare*, 588 [74] (Lindgren J).

8 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 293 [121] (Jacobson J) (***Multiplex (Full Court)***).

9 *Multiplex (Full Court)*, 300 [199]-[200] (Jacobson J); *Mutch v ISG Management Pty Ltd* [2020] FCA 362, [9] (Bromberg J) (***Mutch (First Instance)***).

10 *Uber Ruling No 1*, [158].

11 (2020) 385 ALR 146 (***Mutch***), concerning the Federal analogue of Part 4A, namely Part IVA of the *Federal Court of Australia Act 1976* (Cth) which is in substantively the same terms, and relevantly identical terms for present purposes.

12 *Mutch*, 150-51 [17].

13 See for example *Uber Ruling No 1*; *AS*; *Multiplex (First Instance)*.

ground" and the other grounds.[14] That question might have little practical application in many cases. Each manner of describing the operation of s 33N accepts that once one or more of the grounds in sub-ss (a)-(d) is made out, the next step is to ask the dispositive question: is the court satisfied that it is in the interests of justice to order that the proceeding no longer continue under Part 4A, because of one of the specified reasons. In any event, the issue does not arise in this case. GM Holden relied upon some of the same facts as founding an order under ss 33N(1)(c) and (d), as supported by sub-s (b), and neither party submitted that the analysis or the outcome would differ depending upon whether the considerations were described or understood as involving two or three steps.[15]

14 As Lindgren J said in *Bright v Femcare*, the grounds set out in sub-ss (a)-(d) raise practical questions which require that the representative proceeding be compared with other proceedings that are available to the applicant and group members as a means of resolving their claims.[16] The provision invites a comparison between the pursuit of the group members' claims in the subject representative proceeding, and their pursuit in hypothetical, non-representative proceedings. The comparison is invited explicitly by ss 33N(1)(a) and (b), and implicitly, by ss 33N(1)(c) and (d).[17]

15 There is a divergence in the authorities on the question whether a comparison between the subject proceeding and a hypothetical non-representative proceeding is an available or necessary consideration under ss 33N(1)(c) and (d).[18] It is unnecessary to express a view on the correctness of either approach on this occasion. I am inclined to think however, that the issues for consideration raised by ss 33N(1)(c) and (d) were aptly summarised by Jacobson J in *Multiplex* this way: the question of inefficiency or appropriateness for the purposes of s 33N is to be determined in light of all of the circumstances of the proceeding, including reference to any relevant "comparator"

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14 See *Mutch* at [34].

15 See generally the observations of Beach J in *Stack v AMP Financial Planning Pty Ltd (No 2)* [2021] FCA 1479 at [21] (***Stack***).

16 *Bright v Femcare*, 588-89 [74] (Lindgren J).

17 See for example, *Stack*, [26]; *Multiplex (Full Court)*, 293-4 [127]-[133] (Jacobson J) as cited in *AS* at [53].

18 *Uber Ruling No 1*, [160]; *Multiplex (Full Court)*, 294 [131] (Jacobson J).

proceeding.[19] The arguments advanced on this application supposed the appropriateness of comparing the present proceedings to alternative proceedings, as reflective of the facts in play. It was not put that this is a case where "the inefficiency or inappropriateness of the claims as a representative proceeding [is] so great that the only possible order is to 'de-class' the proceeding".[20]

16 It has been accepted that the implicit focus of s 33N(1)(c) is on the commonality of the issues advanced in the representative proceeding.[21] The relevant considerations informing the establishment of the efficiency ground will depend on the facts in the particular case, but it has been recognised that any additional burden thrown on the plaintiff and group members "by being relegated to ordinary proceedings" is an aspect of the efficiency question.[22] Section 33(1)(d) has been described as being concerned with whether the representative proceeding is an appropriate vehicle to pursue the claims.[23] Section 33N(1)(d) calls for a broad, evaluative judgment.[24]

17 As Jacobson J put it in *Multiplex (Full Court)*:[25]

> Section 33N(1)(c) calls for a consideration of the efficiency and effectiveness of the representative proceeding as a means of dealing with the claims. So too, s 33N(1)(d) calls for consideration of the appropriateness of a "representative proceeding", as a vehicle by which claims are to be pursued.
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> The focus therefore of both of those grounds is "the claims" of the group members. What is required to enliven those grounds is a consideration of the efficiency or appropriateness of the claims in the existing representative proceeding. The enquiry is a wide one as was explained by Kiefel J in *Bright v Femcare*.
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> (citations omitted)

18 I respectfully agree with that analysis. It is important to bear in mind the statutory language, which in both ss 33N(1)(c) and (d) directs attention to the pursuit of the claims of group members by the group proceeding, and which in both cases is

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19 *Multiplex (Full Court)*, 293 [124] (Jacobson J).
20 *Multiplex (Full Court)*, 294 [131] (Jacobson J).
21 *Stack,* [26]; *AS* at [53] and the cases cited there; see also *Bright v Femcare,* 601 [128]-[130] (Kiefel J).
22 *Bright v Femcare*, 576 [5] (Lindgren J).
23 *Stack*, [26].
24 *Multiplex (Full Court)*, 277 [1] (French J).
25 *Multiplex (Full Court)*, 294 [132]-[33] (Jacobson J).

expressed in the negative. To engage the efficiency ground it is necessary to be satisfied the group proceeding *will not* provide an efficient and effective means of dealing with the claims. To engage the alternative ground it is necessary to be satisfied that it is otherwise *inappropriate* that the claims be pursued by means of a group proceeding. The latter criterion "invites a normative judgment made by reference to the scope and purpose of the Act".[26]

19 As to s 33N(1)(b), as the Full Court observed in *Mutch*, that ground is almost always present in a class action.[27]

20 A de-classing order may only be made if the Court is satisfied that it is in the interests of justice to so order. As Beach J recently expressed the proposition in *Stack*, to show the existence of a trigger (one of the grounds in ss (a)-(d)) does not inevitably lead to it being in the interests of justice to de-class.[28] Assessing the interests of justice involves a degree of subjectivity and can broadly be described as a discretionary decision.[29] For the purposes of s 33N the relevant interests of justice have been said to include the public interest of promoting the efficient use of court time and the parties' resources, providing a remedy for those without the resources to bring individual actions, and protecting defendants against multiple suits and the risk of inconsistent findings.[30] The relevant interests of justice should be understood by reference to the language and structure of Part 4A, which is the statutory context within which s 33N sits. The statutory context includes the threshold requirements of s 33C,[31] which are central to the statutory scheme.[32] It also includes the provisions made for the case management of individual issues within the framework of a proceeding commenced within Part 4A.[33]

21 Finally, it has been accepted that the fact that a group proceeding has a small number

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26 *Multiplex (Full Court)*, 292-3 [120] (Jacobson J).
27 *Mutch*, 150 [16].
28 *Stack*, [37].
29 *Mutch,* 151 [21] and the authorities there cited.
30 *Uber Ruling No 1*, [162]; *Bright v Femcare,* 605-6 [152] (Finkelstein J).
31 *Multiplex (Full Court)*, 299 [191] (Jacobson J).
32 *Timbercorp Finance Pty Ltd v Collins* (2016) 259 CLR 212, 246 [104]-[105] (Gordon J); *AS*, [40].
33 See for example, *Bright v Femcare* at 581 [21] (Lindgren J).

of group members is not itself a basis for making a de-classing order,[34] and that there is no prescribed time at which an application may be made under s 33N,[35] although it is important that the Court be in a position to assess circumstances informing the application of the provision. It is common practice to consider a de-classing action after pleadings have closed or at a later time, including after the preparation of evidence.[36]

The pleaded case

22 The application has been brought at a very early stage in the proceedings. A defence has not yet been filed.

23 The pleaded case is relatively simple in that the plaintiff alleges for itself and all group members a single cause of action, namely breach of contract. As noted, the contracts between the defendant and the plaintiff and the defendant and each group member are said to have been in substantially the same terms. The elements of the pleaded case can be summarised in this way:

(a) Context concerning the GM Holden network of dealerships and the retirement of the Holden brand in 2020 is alleged;

(b) GM Holden entered into agreements with the plaintiff and each of the group members which were each dated 1 January 2018, pursuant to which the defendant appointed the plaintiff and each group member as an authorised dealer to sell and service new motor vehicles under the Holden brand until 31 December 2022;

(c) The agreements (in each case) were partly written and partly to be implied. The written terms were contained in documents that were materially the same in each case. They are said to have included written terms that purchase orders

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34 See for example, *Brisbane Broncos Leagues Club v Alleasing Finance Australia Pty Ltd* [2011] FCA 106, [88]-[89] (Jacobson J).

35 *AS* at [67]-[70], citing *AS v Minister for Immigration and Border Protection* [2014] VSC 593 (Kaye J).

36 *AS*, [67]; *Bright v Femcare*, 580 [18] (Lindgren J); cf *McLean v Nicholson* (2002) 172 FLR 90, where Bongiorno J granted an application pursuant to s 33N prior to the filing of a defence.

received by GM Holden would be considered to be bonda fide and non-cancellable except as otherwise specified; that GM Holden would endeavour to supply dealers with sufficient quantity of vehicles that would allow achievement of a "sales evaluation guide" or reasonably meet anticipated demand, and that GM Holden would deliver new vehicles to dealers in a time scale which satisfies both dealers and customers subject to capacity and logistic constraints;

(d) The agreements were each said to contain an implied term that GM Holden would ensure the availability of supply of new Holden brand motor vehicles or a substitute thereto. The term is said to have been implied on the basis that it is necessary to give business efficacy to the contract, or on the basis of custom or usage in the Australian car dealership industry. The implication by custom or usage (an implication in fact) is the subject of the strike out application which is considered later in these reasons;

(e) The circumstances concerning the winding down of the Holden brand in Australia leading to the cancellation of orders and non-acceptance of new orders is alleged;

(f) The defendant breached the agreements including by failing to ensure the availability for supply of new Holden brand motor vehicles or a substitute thereto (a breach of the implied term), by failing in fact to supply any, or any sufficient supply of, motor vehicles at all or in the manner required by the agreements. In respect of the alleged breaches it is said that the supply of vehicles to the plaintiff and each group member was inadequate from 4 March 2020 or shortly thereafter, and by August 2020 the defendant had ceased to supply any new vehicles to the plaintiff and group members;

(g) In respect of the plaintiff and each group member the claim sets out what is said to be reasonably anticipated demand for particular models of Holden motor vehicles (by number of vehicles over the relevant period which is

precisely specified and which is the same in each case), and the share of the vehicle build or allocation in fact received over the relevant period;

(h) The plaintiff and each group member claims damages for breach of contract.

24 It is apparent then that the question of continuity of supply of Holden vehicles (as it concerns the nature of the contractual obligations and whether or not they were fulfilled) is at the centre of the case.

The common questions

25 It is convenient to mention the common questions at this point. Although s 33H of the Act requires that the questions of fact or law common to the claims of the plaintiff and group members be specified in the originating process, it is common and accepted practice for the parties to refine the expression of the questions as the proceeding progresses (and for Courts to require as much), including before the commencement of a trial at which the common questions will be determined.[37]

26 It was accepted in argument that the expression of the questions as they appear in the statement of claim may be refined. Presently, the common questions are said to be whether the dealer agreements contained the alleged implied term that the defendant would ensure the availability for supply of new Holden brand motor vehicles or substitutes thereto for the duration of the term of each dealer agreement, and whether the defendant breached the implied term, or one or other of five express terms.

27 The plaintiff submitted that the issues in the case, apart from damages, were largely common issues. That proposition was contested in the defendants' written submissions, by which is was said that the common issues are "necessarily limited to contractual construction and potentially some aspects of the question of breach". It was said that those issues could be expected to require limited evidence whereas a far greater proportion of any trial time would be required to address individual issues. It was also said that the "bifurcated process" which will be necessary to resolve the

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37 *Mutch*, 154 [29].

claims of group members if the Part 4A proceeding is maintained, may not be required if each group member is named as an individual plaintiff in a differently constituted proceeding. I will say more of the alternative form of proceeding later, but the point that the common issues would require little attention, relatively speaking, was not pressed (or at best, pressed only faintly) on the application. The contention was sparsely elaborated, and no evidence was led in support of it. Had the point been pressed I would have accepted the plaintiff's submission that it was brought prematurely in circumstances where no defence has been filed.[38]

28 As discussed below, the defendant rested its application (including as to efficiency) on other grounds. It is necessary however, to consider what may be advanced by the common issues shared between the plaintiff and group members in the group proceeding. That inquiry informs the assessment of the defendant's application.

29 The defendant accepted in argument for the purposes of the application that the existence or otherwise of the alleged implied term raises true common questions of fact and law, and that other questions as to the existence of terms in the agreements (construction questions) would also arise.

30 The defendant accepted that the issue of breach of the implied term, and probably also breach of other alleged terms, would give rise to common questions.

31 To state the obvious, evidence establishing a failure by the defendant to supply vehicles to one dealer would not, as a matter fact, establish a failure of supply in respect of any other dealer, and a legal conclusion that an agreement between the defendant and one group member had been breached would not stand as a conclusion in respect of any other agreement. However, on the subject of breaches of the agreements, the starting point is that the terms of the agreements are alleged (and accepted for present purposes) to have been common. In that context, it appears from the statement of claim that the cessation of the supply of new vehicles affected the plaintiff and group members at the same point in time and arose out of a series of

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38 See for example *Bright v Femcare*, 580 [18] (Lindgren J), 605 [149] (Finkelstein J); *AS*, [69] citing Kaye J in *AS v Minister for Immigration and Border Protection* [2014] VSC 593 at [64]-[65].

events that was common to group members, in that the winding down of the Holden brand in Australia was effected in relation to the dealership network generally. It is said that GM Holden issued a notification to its network of authorised dealers on 26 February 2020 that it would cancel and remove "un-referenced" orders for new Holden brand vehicles in its ordering system and not accept any orders for additional vehicles after 3 March 2020, but would offer an equitable share of remaining stock, and from that date it acted in accordance with that notice by taking the specific steps set out in the claim. In that way, although the supply of Holden vehicles to dealers necessarily entailed individual transactions, the defendant sensibly accepted that aspects of the breach case would give rise to common questions.

32 As I have said, a defence has not yet been filed, but from the statement of claim it is apparent that the proceeding will require consideration of least the following issues:

(a) The terms of the dealer agreements, including the implied term. It was apparent from the argument on the adequacy of that aspect of the pleading that the implication, by custom or usage, of the term concerning continuity of supply, will be the subject of evidence and is expected to be contentious. In other words, it is a term said to have been implied in fact and gives rise to factual questions, not just questions of construction. Indeed, those issues are at the centre of the dispute;

(b) The circumstances concerning the winding down of the Holden brand in Australia and the cessation of the supply to dealers of new vehicles, which are said and which appear to be accepted to be common at least in some respects, with the caveat that the supply of vehicles to each dealer entails the submission of purchase orders by that dealer;

(c) Breach of the implied term, which is accepted to involve common questions of fact;

(d) Breach of various express terms which, for the reasons discussed, were accepted to involve at least some common questions of fact;

(e) Quantification and proof of damages, which are individual questions.

33 I have addressed the common issues and the matters likely to arise in the proceedings at a high level of generality and by reference to the statement of claim, because that is how the issue was presented on the application, reflecting the early stage to which the proceeding has progressed.

Circumstances in which the proceeding is brought

34 The defendant relied on the circumstances in which the proceeding has been brought, which are said to give rise to its two-fold concerns that unless the proceeding is de-classed and reconstituted in some other form, the defendant risks being exposed to other claims by the group members that are not alleged in this proceeding, and that it will remain deprived of the benefit of the ability to make offers of compromise to group members under Order 26 rule 2 of the *Supreme Court (General Civil Procedure) Rules 2015* (the **Rules**). The circumstances established by the evidence are relevantly as follows:

(a) The plaintiffs' solicitors (HWL Ebsworth, or **HWLE**) have in recent times acted for the dealers who comprise the entire new car Holden dealer network in Australia, which comprised 185 dealers. That cohort included the plaintiff and group members.

(b) Following its wind-down announcement in February 2020, HWLE wrote to GM Holden stating that the dealers were in dispute with both GM Holden and the General Motors Company in relation to the wind-down. It was said that the dispute included claims that GM Holden and General Motors had been engaged or involved in misleading or deceptive and unconscionable conduct. HWLE's letter of 16 March 2020 set out details of the alleged contraventions. It was said that GM Holden and General Motors had made representations to dealers to the effect that Holden was staying in Australia long term and would continue to sell motor vehicles. Six instances of representations were set out. It was said that the five year term of the dealership agreement was

unconscionable, including because GM Holden encouraged or acquiesced in the sale of dealerships when it knew that a dealer could not recoup its investment within that timeframe. The letter sought to reserve HWLE's clients' rights in respect of contractual remedies. It was said that if the dispute could not be resolved, legal proceedings would be commenced in Australia against GM Holden and General Motors. In May 2020 HWLE sent to GM Holden a notice of dispute under the *Competition and Consumer (Industry Codes – Franchising Regulation) Code 2014* and dispute resolution provisions of the dealer agreements, on behalf of the dealer cohort whose 185 members were named in an attached schedule. The notice sought resolution of the dispute by the payment by GM Holden of compensation to the dealers. It attached a position paper. The paper repeated and elaborated upon the substance of the matters that had been set out in HWLE's 16 March 2020 letter. It was marked "without prejudice".[39] It added that GM Holden had repudiated the dealer agreements. The paper set out a formula for the calculation of compensation sought by the dealers and responded to an offer that had evidently been made by GM Holden, setting out why the offer was said to be inadequate.

(c) In June 2020 GM Holden and the 185 dealers participated in a 2 day settlement conference. GM Holden made open offers to each of the dealers. It has subsequently settled its dispute with the dealers other than the plaintiff and group members and two other dealers.

(d) The plaintiff and group members are located in different states of Australia. Although this was not specifically the subject of an affidavit, it was not contested that only one group member is located in Victoria.

35 The parties were not at odds in relation to the facts, but in relation to what could be drawn from those facts for the purposes of this application.

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39 No point was taken in relation to any privilege attaching to evidence of settlement negotiations.

Parties' submissions

36 The defendant's application principally rested on two propositions which were said to be relevant to each of ss 33N(1)(b), (c) and (d).

37 First, that there was a "real risk" that the defendant would face additional claims by the group members that might be advanced in other proceedings, particularly if this proceeding were unsuccessful. In particular, in accordance with the principle established in ***Timbercorp*** *Finance Pty Ltd v Collins*,[40] the defendant would not have the benefit of an *Anshun* estoppel against group members in respect of non-common issues, more specifically un-pleaded claims that the defendant fears may be brought at a later time. That disadvantage to the defendant would not arise were the proceeding de-classed and group members required to issue individual claims or be joined as plaintiffs in a single proceeding (or some combination thereof) (**the estoppel point**). The subsequent pursuit of additional claims by the same group members was put as a "real risk". The defendant said it could not put it any higher than that, but because the group members had in fact asserted other claims in the context set out above through their lawyers, that risk ought not be regarded as merely speculative.

38 The defendant submitted that it is in in the interests of justice that the Court make an order under s 33N(1) because the public policy objectives of Part 4A are not met by this matter continuing as a group proceeding. The continuation of the proceeding does not promote efficient use of court time or the parties' resources because it poses a spectre of multiplicity by reason of subsequent proceedings. That risk arises in circumstances in which a group proceeding is unnecessary to provide a remedy for group members who could achieve the same relief if each was named a plaintiff. This is not a claim on behalf of a large number of group members but a small number, who are known, and commonly represented. Finally, an assessment of the interests of justice must include consideration of the interests of the defendant, including the need to protect GM Holden from a multiplicity of suits arising from the same facts. Such protection is a key policy objective of the group proceeding regime and the use of a

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40 (2016) 259 CLR 212 (***Timbercorp***).

group proceeding in this case "actively thwarts" that objective.

39 Secondly, the defendant maintained that the representative proceeding has created a barrier to effective settlement, because the defendant may only make offers of compromise under Order 26 rule 2 to a party, and group members are not parties. Once again, that impediment would not exist were the group members made parties to an alternate proceeding (**the Order 26 point**). While acknowledging that it could make offers in a different form (a *Calderbank* offer, for example), other forms of offer could not deliver the same costs incentives. The refusal of *Calderbank* offers would not expose group members to adverse costs consequences. This meant that the defendant was left without a mechanism to "seriously encourage" group members to consider any settlement offer, particularly in circumstances where it had already made what it considered fair and genuine offers.

40 The plaintiff submitted that the defendant has not discharged the onus of establishing either the efficiency ground or the alternative ground, or that it is in the interests of justice that the proceeding be de-classed on those grounds. More specifically and in summary, the plaintiff said that:

(a) The application is premature. Save in an exceptional case the assessments required on an application made under s 33N cannot be sensibly undertaken at such an early stage. In this case, no defence nor any evidence has been filed.[41]

(b) Part 4A of the Act, by design, contemplates multiple actions.[42] The circumstance that group members may bring subsequent cases on non-common issues exists in relation to all representative proceedings because it was the legislature's intention.[43] Accordingly, the fact that the group members may have other claims that do not form part of the subject matter of the group proceeding will rarely if ever, satisfy the requirements of s 33N(1)(c), that the

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41 *Jenkings v Northern Territory of Australia* [2017] FCA 1263, [95] (White J); *The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 3)* [2020] FCA 748, [258] (Wigney J); *Mutch (First Instance)*, [13] (Bromberg J); *Rickhuss v The Cosmetic Institute Pty Ltd* [2018] NSWSC 1848, [80]-[87] (Garling J).

42 *Wigmans v AMP Ltd* (2021) 388 ALR 272, 293 [82] (Gageler, Gordon and Edelman JJ); *Timbercorp*, 247 [108] (Gordon J); *Timbercorp* 235, [50] (French CJ, Kiefel, Keane and Nettle JJ).

43 See *Timbercorp*, 235 [50] (French CJ, Kiefel, Keane and Nettle JJ).

group proceeding will not provide an efficient and effective means of dealing with the claims of group members, or for that matter, that the group proceeding is otherwise inappropriate as a means of pursuing group members' claims.

(c) The same response may be made to the defendant's Order 26 point. The legislature did not make provision for the service of offers of compromise on group members. It so intended, and that general feature of representative proceedings is not a proper basis for de-classing the proceeding.

(d) The defendant's hypothetical alternative case is speculative and rests on numerous unfounded assumptions. GM Holden assumes that were its application to be granted, all plaintiffs would seek and be granted joinder; that all would plead all possible causes of action; that a single court would case manage all cases to resolution. But in reality each group member would have to consider whether to be joined; whether to commence separate proceedings in this court or another jurisdiction and what claims to bring. The appropriate comparator is that group members would be required to pursue multiple individual actions, noting that they are situated in different states. Simply put, the defendant has identified the wrong counterfactual. Its application would in fact increase the risk of multiplicity, bringing about the very thing it purports to seek to avoid.

Analysis

41 I consider that the defendant has not discharged the onus it bears of establishing that the grounds in ss 33N(1)(c) or (d) are made out, or that by reference to those grounds – individually or in combination, together with the ground in s 33N(1)(b) – that it is in the interests of justice to order that the proceeding no longer continue under Part 4A.

The efficiency ground – s 33N(1)(c)

42 First, to invoke the language of Kiefel J in *Bright v Femcare*, there is a real benefit to be gained by the pursuit of group members' claims in this proceeding.[44] I say that by

[44] *Bright v Femcare*, 601 [128] (Kiefel J).

reference to the analysis of the common issues set out above. Although as I have said, the proceeding is at a very early stage, on the material before me (the pleaded claim) it seems clear and indeed relatively uncontroversial, that the matters central to the dispute are common. Taking a pragmatic view of things on the present material, the determination of the legal and factual issues that are common, will go a substantial way towards resolving the matters central to the parties' dispute. It is theoretically possible that individual issues might be raised in the defence when filed but no more can be said about that at present. *Prima facie*, there is obvious utility in the proceeding continuing and it cannot be said not to provide an efficient and effective means of dealing with the claims of group members.

43 How is that conclusion affected by reference to the risk of group members subsequently pursuing un-pleaded claims? A number of things may be said about the defendant's estoppel point.

44 First, whilst I accept that there is a risk that the group members might later pursue additional claims against the defendant in other proceedings, the prospect of that risk materialising is speculative. The fact that before these proceedings were issued the plaintiff's lawyers wrote to the defendant in the terms they did, stating that their client group had claims of the kind that were not subsequently made in this proceeding, raises the existence of that risk. However, it must be recalled that although the group members were part of the dealer cohort represented by HWLE and on whose behalf HWLE wrote, they were but 9 of 185 dealers then represented. The letter and position paper (described above) were expressed in general terms, in respect of the whole group. Of the matters raised, a claim based on unconscionable conduct would have been generally applicable because it was founded on a standard five year agreement term. However, the threatened misleading conduct claim was said to have been based on particular representations made at particular times. There is nothing (whether in the HWLE letters or position paper or on this application) to suggest whether or not the group members in fact received or relied upon those representations to their detriment. Furthermore and in any event, the fact that those claims were

foreshadowed in that context does not establish beyond the point of speculation, that the group members will, after the conclusion of this proceeding, decide to pursue such claims. As much as it might be speculated that the group members or some of them might in the future form such an intention, it might also be speculated that they, like the plaintiff, have cut their cloth and chosen the claims they wish to bring and have brought them, and do not wish to bring others.

45 Next, the postulation of a hypothetical counterfactual proceeding in which such claims might be pursued, also entails speculation. I accept that it may be feasible for the group members to be joined in a single proceeding and that the present circumstances would be more amenable to a joint proceeding than say, a class action comprising a very large number of group members, and group members who are not known to the plaintiff or its lawyers. It is also possible however, that were the proceeding to be de-classed, individual proceedings would be contemplated. A joint proceeding with group members named as plaintiffs would entail relevant structural differences including exposure to costs and the need for the joint plaintiffs to agree among themselves to jointly conduct the proceedings. I do not regard it as obvious or even likely that the group members would in fact seek to become joint plaintiffs if the Part 4A mechanism were to become unavailable to them by means of de-classing. The counterfactual comparison is of course a hypothetical one. It has been said that in most cases one should compare the group proceeding against the prosecution of individual claims by group members.[45] Statements to that effect do not in my view, express a rule, but that remains a sensible position to adopt because in circumstances in which group members are participating in a group proceeding, what they might otherwise do were that process to become unavailable to them, will commonly be unable to be established to any degree of satisfaction. That is so in this case, notwithstanding that this case presents a set of circumstances that would be more amenable to a proceeding conducted by joint plaintiffs than a group action representing a large number of claimants or an open class.

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45 See for example, *AS*, [65].

46 If the hypothetical alternative to the present proceeding is taken to be a series of individual cases (in which the present group members who become plaintiffs are required to bring all claims that are sufficiently related to the present claims that they would otherwise be estopped from later pursuing) the alternative would be plainly less efficient than the present proceeding. It would increase, not reduce multiplicity, whether in this jurisdiction or in numerous other jurisdictions (noting that group members are represented by HWLE but only one of them is based in Victoria). If in fact the proceeding were de-classed and that outcome were to eventuate, the multiplication of disputes and attendant costs would result.

47 Let it be assumed that the hypothetical alternative proceeding is a joint proceeding involving all group members as plaintiffs. I reject the defendant's submission that because a joint proceeding with all group members as plaintiffs would not involve a "bifurcated" process for determining individual issues it would therefore be more efficient. No analysis was directed to that point. Furthermore, Part 4A contains specific provisions for dealing with individual issues (see in particular ss 33Q, 33R and 33S). Even if the proceeding were to be de-classed under s 33N after the determination of the common questions,[46] it does not follow that the dispute resolution process would, overall, be less efficient than the defendants' vaguely described omnibus proceeding. On this issue I respectfully agree with the observations of the Full Court of the Federal Court in *Mutch*.[47]

48 The gain in efficiency that the defendant would seek by reference to a hypothetical jointly conducted alternative (non-representative) proceeding is in substance the elimination of the possibility that the group members could later bring claims of the kind foreshadowed in pre-litigation correspondence. On this application there was no analysis of specifically how the *Ashun* form of estoppel would apply to those claims. The defendant assumed that such claims would be excluded in that way, if not brought in alternative proceedings issued otherwise than under Part 4A. That

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46 See *Zhang De Young v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 (French J) as cited in *Bright v Femcare*, 601 [129] (Kiefel J).

47 *Mutch,* 156-7 [40]-[1].

assumption might be correct but in the absence of any submission about it no more need be said.

49 Putting the question of speculation to one side, even if the proper comparator is the commencement of a joint proceeding that would ameliorate the prospect of subsequent claims being brought by the same claimants, that such a proceeding might be more efficient does not establish that the existing proceeding will *not provide an efficient and effective means of dealing with the claims of group members*. Given the speculative nature of the defendant's preferred counter-factual and the clear utility of the present proceeding as it appears on the material before me, reference to a comparator proceeding does not establish the efficiency ground, or that an order under s 33N would be in the interests of justice for this reason.

50 Furthermore, the efficiency considerations invoked by the defendant, which rely on the risk of the prosecution of un-pleaded claims, fail to engage with the fact that "efficiency" as it is understood in the context of Part 4A, must comprehend the essential proposition that the Part 4A mechanism is not intended to eliminate individuality of claims, even within a proceeding (as to which, see below, under s 33N(1)(d)).

The alternative ground – s 33N(1)(d)

51 The defendants' case on the alternative ground was put this way: GM Holden is exposed to two risks or detriments it would not otherwise face were the proceeding de-classed and claims brought in a non-representative form (whether individually or in some form of joint proceeding). The risks, as explained, are those of the same group members later bringing different claims related to the same subject matter, and the fact that the defendant cannot employ offers of compromise against the group members. I do not consider that either of those factors or both in combination, establish that it is otherwise inappropriate that the group members' claims be pursued by means of a group proceeding and for that reason it is in the interests of justice to de-class this proceeding.

52 First, to the estoppel point. As the plaintiff submitted, Part 4A by design, contemplates multiple actions.[48] As the plaintiff put it, in the context of a group proceeding the defendant does not get the benefit of an *Anshun* estoppel against group members in respect non-common issues (and by necessary implication, claims that have not been brought by the plaintiff) because that was the legislature's intention.[49]

53 That being so, it is difficult to see how an intended characteristic of all group actions might form the basis of an order disentitling group members to participate in the statutory form of action. Whilst I see no need to propound a generally applicable rule, there is force in the plaintiff's submission that for this reason, the fact that the group members may have other claims that do not form part of the subject matter of the group proceeding will rarely if ever, satisfy the requirements of ss 33N(1)(c) or (d).

54 Furthermore, reflection on the essential structure of Part 4A exposes the point that while the defendant's interests are a relevant consideration for the purposes of determining where the interests of justice lie, seeking to eliminate the prospect of subsequent individual claims in this way fails to read s 33N in its statutory context by failing to have regard to the essential purpose of Part 4A as disclosed by its terms. As Gordon J said in *Timbercorp*:[50]

> Pt 4A expressly contemplates and provides for the individuality of claims within a group proceeding. For example, a group proceeding may be commenced "whether or not the relief sought … is the same for each person represented" and whether or not the proceeding "is concerned with separate contracts or transactions between the defendant and individual group members", or "involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members".
>
> These conditions in s 33C are central to the scheme set out in Pt 4A. The purpose of commencing a group proceeding is so that a substantial common question of law or fact can be decided for at least seven persons whose claims involve the same, similar or related circumstances. Section 33C expressly recognises that each group member may, as an individual, have different claims against the defendant, but the foundation of the group proceeding is that they all have an interest in the resolution of a substantial common question of law or fact.

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48 *Wigmans v AMP Ltd* (2021) 388 ALR 272, 293 [82] (Gageler, Gordon and Edelman JJ); *Timbercorp*, 246 [105] (Gordon J); *Timbercorp* 235, [50] (French CJ, Kiefel, Keane and Nettle JJ).

49 *Timbercorp*, 235 [50] (French CJ, Kiefel, Keane and Nettle JJ).

50 *Timbercorp*, 246 [104]-[106] (Gordon J).

> That the focus of the group proceeding is on answering a common question of law or fact and is representative is reinforced by other provisions in Pt 4A.
>
> (citations omitted)

55 As Finkelstein J said in *Bright v Femcare*, "there will be cases where a representative proceeding will not resolve all issues in dispute".[51]

56 The defendant's submission that its exposure to potential further claims establishes that it is in the interests of justice to disallow the continuance of this claim, is an over-reach and a reading of the "interests of justice" criterion within s 33N which appears to be at odds with the statutory context within which s33N sits, particularly in this case where, *prima facie*, the proceeding appears on the material available at this stage, to have real utility in advancing the common issues, for the reasons discussed.

57 Like observations may be made in respect of the Order 26 point, which is rejected on substantially the same grounds. The legislature did not provide a mechanism by which offers of compromise in that form may be served on group members. The defendant's inability to deploy such offers is, in the broad, evaluative assessment required under s 33N(1)(d), insufficient to establish that in the circumstances, it is inappropriate that the proceeding continue as a group proceeding. Furthermore, as explained at the outset, the focus of both ss 33N(1)(c) and (d) is the claims of the group members. I am not persuaded that the absence of the Order 26 mechanism in Part 4A makes it *inappropriate* that the *group members' claims* be pursued under Part 4A. The defendant's proposition does not sufficiently engage with the statutory language. Finally, as a matter of fact, the defendant's inability to deploy offers of compromise did not establish that it will be practically unable to otherwise advance its interests in pursing settlement.

The individual proceedings ground – s 33N(1)(b)

58 The defendant submitted that there was no suggestion that without a group proceeding the group members would be unable to advance their claims against the defendant. That proposition was not contested. The plaintiff accepted that subsection

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51 *Bright v Femcare*, 606 [153]; see also *AS* at [40], [46].

33N(1)(b) was established, but said that fact did not establish without more, that it was in the interests of justice to make a de-classing order. Those considerations that would constitute something more, have been already addressed. I accept that submission.

59 The two cases upon which the defendant relied as approximating the facts in this case, ***McLean*** *v Nicholson*[52] and *Larsson v Wealthsure Pty Ltd,*[53] cannot be regarded as establishing any particular propositions in respect of group proceedings comprising small, closed classes. The reasoning in each is, with respect, scant, and *McLean* ought be regarded as turning on its very particular facts.

Part C: Statement of Claim – Strike Out Application

Sub-paragraph 5(f)

60 The defendant has applied to strike out sub-paragraph 5(f) of the statement of claim.

61 There, the plaintiff alleges that "General Motors Company, or one of its subsidiaries decided in 2017 to retire the Holden brand". In argument the defendant said that the offending part of the pleading was the reference to the date of the decision.

62 Sub-paragraph 5(f) is one element of a series of facts the plaintiff describes as background comprising a permissible pleading by way of context. The facts set out in paragraph 5 are otherwise uncontentious. They are stated simply and concern the relevant history of the General Motors Company.

63 The sub-paragraph will be struck out for these reasons:

(a) As the plaintiff admits, it alleges a fact that is not a material fact.

(b) A pleading of a non-material fact may be generally permissible by way of context in contemporary pleading, but at the same time, it is recognised that a pleading which contains an unnecessary or irrelevant allegation may be

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52 (2002) 172 FLR 90 (***McLean***).
53 [2013] FCA 926.

embarrassing.[54]

(c) I accept the defendant's submission that the pleading may cause the wastage of time and costs, including because it may found applications for discovery. The substance of the plea is the making of a decision by the defendant to retire the brand at a particular time. The making of that decision is anterior to the conduct the subject of the pleaded cause of action and is accepted not to be relevant to it. At the same time, I accept that the making of the decision may well be an issue of some factual complexity as far as the defendant is concerned.

(d) Although the potential prejudice caused by the presence of the allegation may be mitigated by refusing discovery in respect of it, the better course is not to permit the allegation given that it is not material, and the plaintiff has not demonstrated any reason why it needs to remain in the pleading. The plaintiff may and in fact does otherwise allege that the defendant announced the retirement of the Holden brand and did in fact retire the Holden brand. The omission of reference to the making of the decision to do so may be struck out without prejudice to the plaintiff's claim as otherwise articulated.

Particulars to paragraph 27

64 The defendant sought further and better particulars of the plaintiff's allegation that it and the group members have suffered loss and damage as a result of the defendant's breaches of contract. The statement of claim does not particularise that loss, but does provide a schedule which sets out for the plaintiff and each group member, the anticipated demand for vehicles over the relevant period and the number of vehicles actually supplied. I accept that the defendants are entitled to particulars of loss, in the first instance in relation to the plaintiff's claim. However, as the defendant accepted in argument, the question is one of timing. I accept the plaintiff's submission that now is not the appropriate time to require that particularisation. The plaintiff has indicated that it expects to prepare expert evidence on the question of its loss. The point at

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54 See for example, *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 2)* [2011] VSC 492, [28]-[31] (Vickery J).

which that evidence is advanced may be an appropriate time to revisit that question. If circumstances change and the defendant can demonstrate that as a matter of practicality it requires particulars in respect of either the plaintiff or group members' losses (for example, in preparation for mediation or trial) the question may be revisited.

Paragraph 11(C) – Term implied by custom or usage

65 As noted earlier, the plaintiff alleges that a term was implied in the dealer agreement, as follows:

> It was a term of the Agreement that the Defendant would ensure the availability for supply of new Holden brand motor vehicles or a substitute thereto for the Term (the **Implied Term**).

66 The term is alleged to have been implied on the basis that it is necessary to give business efficacy to the contract and also (at sub-paragraph 11(C)), implied "*on the basis of custom or usage in the Australian car dealership industry*". The defendant has applied to strike out sub-paragraph 11(C). Objection is taken to the adequacy of the pleading of "custom or usage". The defendant says that:

(a) The implication of a contractual term by custom or usage is a question of fact in respect of which the alleging party bears the onus of proof.[55]

(b) Accordingly, a pleading of a term implied by custom or usage must include the material facts necessary to establish the basis for that allegation, and provide adequate particulars thereto.[56]

(c) Here, the pleading is in effect a bare conclusion from unstated facts and for that reason, is embarrassing.[57] The pleading has significance in the dispute and if not properly particularised has the potential to significantly expand the scope of the factual inquiry in relation to both evidence and discovery. It is important

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55 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226, 236-8 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ) (***Con-Stan***).

56 *Goldie v Getley (No 2)* [2010] WASC 66, [88] (Simmonds J) (and the authorities there cited).

57 *Uber Australia Pty Ltd v Andrianakis* (2020) 61 VR 580, [50] (Niall, Hargrave and Emerton JJA).

to properly define the issues.

67 The basis of the application is then, that the allegation is insufficiently particularised.

68 The propositions stated in sub-paragraphs (a) and (c) above are evidently correct and were not in contest. To those propositions the following may be added, for the purpose of this dispute:

(a) 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;[58]

(b) pleadings, when well-drawn, serve the overarching purpose of the *Civil Procedure Act 2010* (Vic);[59]

(c) every pleading must contain in a summary form a statement of all material facts upon which the party relies, but not the evidence by which the facts are to be proved (r 13.02(1)(a));

(d) particulars are intended 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.[60] An object and function of particulars is to limit the generality of a pleading and thereby limit and define the issues to be tried;[61]

(e) 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;[62]

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58 The function of defining issues for trial is required from an early stage. Otherwise, discovery and other interlocutory process are likely to be misdirected: *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd & Ors* [1996] ATPR 41-522 at 42 (Burchett J).

59 Ibid, [9].

60 *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, 286 (Mason CJ and Gaudron J).

61 *Clarke v Great Southern Finance Pty Ltd* (2010) 243 FLR 451, 455 [9] (Croft J) (***Clarke***).

62 *Clarke,* 456 [11].

(f) Particulars do not contain material facts.[63] They are the pieces of information that are necessary to prove the material facts.[64] Particulars serve a distinct purpose – to clarify and confine the scope of issues, or as Isaacs J put it in *R v Associated Northern Collieries*, to avoid the other party being "surprise[d]".[65] The circumstances in which particulars are required are codified in Rule 13.10 of the Rules:[66]

> 1. Every pleading shall contain the necessary particulars of any fact or matter pleaded.
>
> 2. Without limiting paragraph (1), particulars shall be given if they are necessary:
>
> a. to enable the opposite party to plead;
>
> b. to define the questions for trial; or
>
> c. to avoid surprise at trial.

(g) In considering objections on the ground of embarrassment (as the Victorian Court of Appeal said in *Uber Australia Pty Ltd v Andrianakis*):[67]

> The Court should stand back and consider the pleading as a whole and in that light ask: does the case alleged give clear notice of the case to be met at trial?
>
> This modern approach to applications to strike out pleadings on the ground that they are embarrassing is reflected in this Court's decision in *CA Ballan*, where the Court stated that, while important, pleadings are primarily used 'to help the parties define the real issues in dispute', while bearing in mind that pleadings are 'procedural tools only'.
>
> (citations omitted)

69 The plaintiff submitted that:

(a) First, in order to prove a term implied by custom or usage the plaintiff must establish by evidence that the 'custom or usage' is so well known and acquiesced in that everyone making a contract in those circumstances can

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63 *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473 (Adam J), 476 and the cases cited there; *TPC v David Jones (Aust) P/L* (1985) 7 FCR 109, 113-14 (Fisher J) and the cases cited there.

64 *Bruce v Oldhams Press Ltd* [1936] 1 KB 697, 712-13 (Scott LJ).

65 (1910) 11 CLR 738, 740-41.

66 Rule 13.10(3)-(6) set out specific requirements for certain types of claims, which are not relevant for present purposes.

67 (2020) 61 VR 580 (Niall, Hargrave and Emerton JJA), 600-01 [52]-[53], and the cases cited there.

reasonably be expected to be presumed to have imported that term into the contract.[68]

(b) Secondly, for pleading purposes the plaintiff must allege the term said to have been implied; that the term is implied by custom or usage; and the trade, profession or industry in which the custom or usage exists. The plaintiff has pleaded those matters. There is no authority that suggests that more is required. The 13th Edition of *Bullen & Leake & Jacob's Precedents of Pleading* sets out the requirements for a term implied by custom and usage, consistently with that description.[69]

(c) Thirdly, custom or usage is ordinarily proved by evidence at trial. The plaintiff intends to lead expert evidence from one or more experts.

(d) Fourthly, the defendant's real complaint appears to be that the allegation will expand the scope of the factual inquiry. That is not a basis on which to strike out the allegation.

70 I accept that there is no authority that establishes that for the purposes of establishing the necessary elements of the relevant part of the cause of action (the existence of a contractual term), the plaintiff must plead additional elements going to the basis of the implication of the term. In fact, there is no authority that the parties or my chambers have been able to identify that is of assistance specifically on the question of pleading in this context. I also accept that, subject to one caveat which I will mention shortly in relation to the way that the term has been pleaded, the plaintiff has pleaded the relevant material facts which are that the alleged term was to be implied, and it was to be implied on the basis of custom or usage in the relevant industry.

71 As the propositions set out above indicate, particulars fulfill a different function in a pleading from the purpose served by the requirement to plead material facts. They

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68 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226, 236-8 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ).

69 Jacob and Goldrein (eds), *Bullen & Leake & Jacob's Precedents of Pleadings* (Thomson Sweet & Maxwell, 13th edition), 303.

clarify, confine and define the issues for trial. In contemporary language, they help the parties define the real issues in dispute.

72 Although the plaintiff's pleading in this case is properly directed to the relevant term and the basis for its implication, the factual proposition that it advances, is the existence, in the Australian car dealership industry, of the custom or usage. I accept the defendant's submission that the allegation that the term was implied, "*on the basis of custom or usage in the Australian car dealership industry*" states the relevant fact in what appears to be a conclusionary way. The question is what flows from this.

73 Implication by custom or usage is in effect a short hand way of describing both a proposition of fact, and a legal conclusion. It is unnecessary to traverse the relevant substantive law on the implication of contractual terms in this way for present purposes, save to note that whilst it is the subject of some uncertainty, the High Court in ***Con-stan*** *Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd*[70] summarised the requirements for establishing (as opposed to pleading) custom or usage as follows:[71]

> (a) The existence of custom or usage that will justify the implication of a term into a contract is a question of fact (**first proposition**).
>
> (b) There must be evidence that the custom [or usage] relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract…In the words of Jessel MR in *Nelson v. Dahl*, approved by Knox CJ in *Thornley v. Tilley*:
>
> > [the custom] must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself.[72]
>
> However, it is not necessary that the custom be universally accepted, for such a requirement would always be defeated by the denial of one litigant of the very matter the other party seeks to prove in the proceedings (**second proposition**).

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70 (1986) 160 CLR 226 (***Con-Stan***).

71 *Con-Stan*, 236-8. As subsequently endorsed by the High Court in *Byrne v Australian Airlines Limited* (1995) 185 CLR 410, 423 (Brennan CJ, Dawson and Toohey JJ), 440 (McHugh and Gummow JJ) (***Byrne***); *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 186 n 90 (French CJ, Bell and Keane JJ).

72 Citing Jessel M.R. in *Nelson v Dahl* (1879) 12 Ch. D 568, 575, as approved by Knox CJ in *Thornley v Tilley* (1925) 36 CLR 1, 8.

(c) A term will not be implied into a contract on the basis of custom [or usage] where it is contrary to the express terms of the agreement (**third proposition**).

(d) A person may be bound by a custom notwithstanding that he had no knowledge of it…nothing turns on the presence or absence of actual knowledge of the custom; that matter will stand or fall with the resolution of the issue of degree of notoriety which the custom has achieved (**fourth proposition**).

(citations omitted)

74 It is instructive for present purposes to pay attention to the High Court's second proposition. What must be established (relevantly) is that the custom or usage – *which is the custom of implying the term* – was "so well-known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract". In essence, it is required to establish notoriety of the practice of implying the term.

75 In the case of ***Majeau Carrying Co*** *Pty Ltd v Coastal Rutile Ltd,*[73] Stephen J endorsed Darley CJ's statement in *Anderson v Wadey* that:[74]

> Seeing that custom is only to be inferred from a large number of individual acts, it is evident that the only proof of the existence of a usage must be by the multiplication or aggregation of a great number of particular instances; but these instances must not be miscellaneous in character, but must have a principle of unity running through their variety and that unity must shew a *certain course of business and an established understanding respecting it*.
>
> (emphasis added).

76 Another way of expressing custom or usage in this context then, is that it is *a course of business and an established understanding in respect it*.

77 If the gravamen of *custom or usage* is a practice or a course of business within a particular industry, of implying a term of a particular kind into contracts of a particular kind and an established understanding or notoriety in respect of that course of business, it can readily be seen that because of the constructs with which it engages, an allegation of custom or usage may be made in both broad and succinct terms.

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73 *Majeau Carrying Co. Pty Ltd v Coastal Rutile Limited* (1973) 129 CLR 48 (Stephen J, Gibbs CJ and Menzies J agreeing) (***Majeau Carrying Co.***).

74 *Majeau Carrying Co.*, 61 (Stephen J) citing *Anderson v Wadey* (1899) 20 LR (NSW) 412, 417-18 (Darley CJ).

78 To illustrate one way of expressing such a pleading, in *Majeau Carrying Co.*, a warehouseman refused to deliver goods stored at its warehouse on the grounds that the customer had significant unpaid sums for storage. The warehouseman claimed that it was entitled to hold the goods on the basis that it had a general lien over them. It said that the lien was a common law right or established by custom or usage. The reported decision did not concern the question of pleading, but the claim was particularised in this way:[75]

> *At all material times in the State of Queensland persons dealing with and engaged in the trade or business of warehousemen recognized and observed the right of a warehouseman*, (in the event of failure of the depositing owner to pay the warehouseman's charges in relation to the storage of goods deposited by him with the warehouseman), to retain the possession of such goods until the payment in full to the warehouseman of all monies owned by the said owner to the warehouseman.

79 The point at which the allegation of primary fact is further elaborated is, in this case, essentially a question of timing and case management. It appears to me that the impediment to particularising the pleading in this context in a manner that does not appear to be conclusionary, is that once one moves beyond asserting the fact that the course of business or custom within the particular industry and geographic location was to recognise the right or term in question, it is likely to become difficult if not impossible to distinguish between particulars and evidence. I make this point not because I wish to emphasise in this context the significance of the technical distinction between particulars and evidence (noting that particulars may be given notwithstanding that they might disclose the parties' evidence), but in recognition of the practical difficulties that I consider are likely to attend the more detailed particularisation of the custom or usage at *a time before the preparation of the evidence* that will support the claim. In response to an allegation that in a particular industry a custom of recognising a right (a contractual term) existed, one is invited to ask, "what was the course of business that established the custom?", and "by whom was it understood, and how?". Questions of that kind might properly be described as requests for evidence.

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75 *Majeau Carrying Co*, 53.

80 In light of those considerations, I consider that the plaintiff's paragraph 11(C) should be re-drawn:

(a) to more directly identify the term, which should be pleaded by reference to the custom or usage in the industry, rather than by reference to the contracts in this case; and

(b) to more particularly define the reach and definition of the industry, in particular to confine, confirm or define its geographic dimensions and to identify whether or not it is intended to include the defendant in that description.

81 I would not expect that those changes would substantially alter the present pleading.

82 It is implicit that I consider that if amended in that way the pleading will sufficiently define the issues for this stage of the proceeding, and put the defendant on notice of the claim to a sufficient extent. Recognising that pleadings are a procedural tool, beyond that, the provision of the plaintiff's evidence is the appropriate means by which the content of the course of dealings which are said to establish the custom or usage will be "filled in". Once the evidence has been prepared, consideration will be given to the need to further particularise the claim to set out the facts underpinning the relevant course of business and its notoriety.

83 This is in my view the most appropriate way to assist the parties to define the real issues in dispute. Requiring the plaintiff to further plead *at this point* would likely lead to wasted costs.

84 There is no suggestion that the defendant cannot plead to the claim (even in its present form). In managing the proceeding, I will allow the defendant sufficient time to put on its evidence on this question, after receipt of the plaintiff's evidence and the provision of any further particulars at that time. That issue can be addressed when it arises.

85 The question of discovery can and will be managed in the context of any particular

request by either party of the other.

86 I consider the course I propose to be consistent with the overarching purpose.[76]

87 It follows that I will strike out paragraph 11(C) but for different and less substantive reasons than those upon which the defendant relies, and will direct the plaintiff to re-plead that part of its claim.

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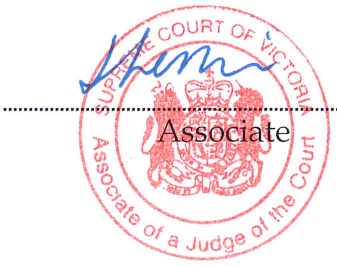
[76] *Civil Procedure Act 2010* (Vic) s 7-9.

CERTIFICATE

I certify that this and the 34 preceding pages are a true copy of the reasons for ruling of Nichols J of the Supreme Court of Victoria delivered on 17 December 2021.

DATED this twenty first day of December 2021.



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Associate