IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 3365

STEELE LEE CRAWFORD — Plaintiff

v

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) (and others according to the Schedule) — Defendants

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JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF RULING:	3 June 2022 (on the papers)
CASE MAY BE CITED AS:	Crawford v ANZ
MEDIUM NEUTRAL CITATION:	[2022] VSC 297

PRACTICE AND PROCEDURE – Group proceeding – Approval of discontinuance of proceeding – Where plaintiff seeks to discontinue proceeding as against one defendant – Dispensation of requirement of notice to group members – *Supreme Court Act 1986* ss 33V, 33X.

WRITTEN SUBMISSIONS:	Counsel	Solicitors
For the Plaintiff	Jeremy Stoljar with Dion Fahey	Maurice Blackburn

HER HONOUR:

1 Before me is an application by the plaintiff for the discontinuance of this proceeding as against the third defendant, **Macquarie Leasing**. The plaintiff also seeks an order giving leave to file an amended writ and statement of claim deleting reference to Macquarie Leasing, and an order dispensing with the requirement of notice to group members under s 33X of the *Supreme Court Act* (**Act**). He seeks there be no order as to costs.

2 Macquarie Leasing and the second defendant, Macquarie Bank (together the **Macquarie defendants**), for their part, do not oppose the orders being made. However, pursuant to s 33V of the Act, any discontinuance in a representative proceeding requires the approval of the Court. For the reasons that follow, I am satisfied it is appropriate to make the orders sought.

Principles

3 Section 33V governs the discontinuance of representative proceedings commenced under part IVA of the Act. It provides:

> (1) A group proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such an 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.

4 The principles governing an application of this kind are reasonably well-established, having been detailed by, amongst others, Rares J in *Wotton v State of Queensland*,[1] Perram J in *Mercedes Holdings Pty Ltd v Waters*[2] and Annastasiou J in *Babscay Pty Ltd v Pitcher Partners*.[3] Having considered those and other authorities, in *Hassan v Van Diemen*, John Dixon J summarised the position in the following terms:[4]

> (a) A representative proceeding cannot be discontinued without the approval

1 (2009) 109 ALD 534 at 544–5.
2 (2010) 77 ACSR 265, 268.
3 (2020) 148 ACSR 551, 555-558.
4 [2021] VSC 839, [21], citations omitted.

> of the court. Any order that is made must have regard to the interests of the present parties and group members who may be affected by the terms of any grant of leave to discontinue. The order must not have a substantive impact on group members or affect their rights. The court must guard against any injustice that could be done to persons who are not represented in these proceedings and whose rights may be adversely affected by their outcome. The court has an important responsibility of safeguarding the interests of group members as a whole. It must carefully scrutinise the way in which any order is formulated.
>
> (b) Some courts have found that, in approving a discontinuance against certain defendants, the test is the same as a settlement or compromise of a claim, in that the court must assess whether the discontinuance is a fair and reasonable one, in the interests of the group members as a whole, not just the applicant and respondent. The applicant bears the onus to establish this.
>
> (c) Other courts have held that the test is whether the discontinuance will not adversely impact the legal or financial position of any group members, and will not be unfair, unreasonable or adverse to the interests of group members.
>
> (d) 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 this latter approach. The legal effect of a unilateral discontinuance is different to a settlement because in this case, the applicant is free to commence a new proceeding against the same respondent and no res judicata or issue estoppel arises.
>
> (e) An approval for discontinuance of a claim may be brought on the basis that, after further investigation, the plaintiff comes to the conclusion that the cause of action bears slim or no prospect of success, there is a want of economic viability, and there is no res judicata or impending expiry of a limitations period.

5 I would add that I agree with his Honour that in cases of unilateral discontinuance at an early stage of the proceeding, well in advance of the expiry of limitation periods after discontinuance, the approach his Honour preferred is the correct one, namely, that the appropriate test is that the discontinuance not adversely impact the legal or financial position of any group member and will not be unfair, unreasonable, or adverse to the interests of group members.

6 For the reasons set out below, however, and as the plaintiff submits, I would be satisfied on either basis that it is appropriate the order for discontinuance be made.

Basis for the discontinuance application

7 Briefly, the plaintiff brought suit on his own behalf and of all those who entered into a finance agreement for the purchase of a car with the first defendant **ANZ** through

its business known as Esanda, and on which a "flex commission" was paid to the car dealer arranging the agreement. The relevant part of ANZ's Esanda business, including the retail loan portfolio which comprised car loans originated through car dealers, was sold to Macquarie Bank in or around April or May 2016, but the loans were serviceable and interest payable by group members with Macquarie Leasing, at the former's direction.

8 The plaintiff's solicitor gave evidence that, "out of prudence", the plaintiff brought claims against Macquarie Leasing in addition to ANZ and Macquarie Bank, as, understandably, they could not have appreciated the internal organisation of entitlement and liability as between different Macquarie entities in respect of the relevant loans, prior to commencement. Subsequent to the commencement of the proceedings, the solicitors for the Macquarie defendants informed the plaintiff that Macquarie Leasing had no right (and never had a right) to the benefit of the interest payable on the loans, and that, in their view, Macquarie Bank was alone the proper defendant to the proceedings. The Macquarie defendants offered to undertake, if the proceeding as against Macquarie Leasing were discontinued, not to raise any defence in these proceedings that any relief sought against Macquarie Bank was properly to be sought from Macquarie Leasing. The plaintiff has accepted that undertaking.

9 Consequently, the Macquarie defendants informed the plaintiff they would not oppose the discontinuance application, and nor would they oppose the application being granted with no order as to costs.

10 On that basis, the plaintiff submitted, and I accept, that:

(a) the plaintiff now considers, on the basis of its discussion with the Macquarie defendants to the effect that Macquarie Leasing never had any entitlement to moneys paid by group members, that there is no utility in continuing the proceeding as against Macquarie Leasing;

(b) the continuance of the proceeding as against Macquarie Leasing could only be conducive of wasted costs, and productive only of adverse findings against the

plaintiff and group members;

(c) the discontinuance at this early stage leaves group members free to pursue Macquarie Leasing privately, should they be so advised notwithstanding the matters set out above;

(d) the agreement of the parties there be no order as to costs is a material advantage to group members, displacing as it will the usual order pursuant to rr 25.05 and 63.15 of chapter 1 of the *Supreme Court Rules* for the party discontinuing a proceeding to pay the costs of the party to whom the discontinuance relates; and

(e) there is additional benefit in removing from the proceeding a party against whom the plaintiff now considers it has no case.

11 For these reasons, I find the proposed discontinuance will not adversely impact the legal or financial position of any group member and will not be unfair, unreasonable, or adverse to the interests of group members, and will in fact be an appropriate and sensible step in the proceeding. For the same reason, if necessary, I would find that the proposed discontinuance is fair and reasonable, and in the interests of the group members as a whole.

Dispensation with notice to group members

12 Having determined to grant leave to discontinue this proceeding as against Macquarie Leasing, it remains to consider whether the plaintiff should similarly be given leave to dispense with the requirement of notice to group members of that discontinuance.

13 Section 33X(4) of the Act provides that:

> Unless 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.

14 Any such notice required to be given under s 33X(4) must be in a form and given in such manner as approved by the Court pursuant to s 33Y.

15 No notice of the proposed discontinuance has been given in these terms. As the plaintiff submits, the class is an open one, including all those who suffered loss or damage by reason of acquiring a car loan subject to a "flex commission" arrangement. This class is not easily determined without considerable investment. However, the plaintiff's solicitor gave evidence that it had notified the 1,138 *registered* group members of the discontinuance application, from around 26 November 2021, and had received, as of 11 March 2022, no expressions of concern or opposition to the application.

16 The relevant principles in respect of an application to dispense with notice were considered by John Dixon J in *Turner v Bayer Australia Ltd* as follows:[5]

> The discretion of the court to dispense with the notice requirement for a s 33V application needs to take into account the consequences for a group member of being bound by an adverse determination, should the application succeed, of which they have not had prior notice. Factors relevant to the discretion include:
>
> > (a) whether there was any real prospect that a group member, acting rationally, would oppose the orders sought;
> >
> > (b) whether the expense and inconvenience of requiring the notice to be provided to group members would be disproportionate to any benefit that would arise;
> >
> > (c) whether provision of notice will create a risk of confusion or uncertainty on behalf of group members; and
> >
> > (d) the court's statutory obligation, enshrined by s 8 of the *Civil Procedure Act 2010* (Vic), to seek to give effect to the overarching purpose to facilitate the just, efficient, timely, and cost-effective resolution of the real issues in dispute in the proceeding.

17 As the plaintiff submits, the continuation of the proceeding as against Macquarie Leasing serves no utility, effectively having been added as a defendant by way of understandable over-inclusion, prior to discovery. This being the case, it is not likely any group member could be acting rationally to oppose the discontinuance and indeed of 1,138 registered group members informally notified, none have in fact raised any objection. I do not think there is any appreciable risk of confusion or uncertainty in giving a notice, but given such notice would be otherwise entirely inutile, I do not

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5 [2021] VSC 241, [29].

consider this factor weighs against my making the order. For the reasons that have been stated, the dispensation with the notice requirement in s 33X is consistent with the Court's statutory obligations under the *Civil Procedure Act*, in focusing on the real issues in (and parties to) the dispute.

Conclusion and orders

18 For the foregoing reasons, I grant the plaintiff leave to discontinue the proceeding against Macquarie Leasing (with consequential orders to amend the writ and statement of claim deleting reference to Macquarie Leasing), grant leave to dispense with the requirement of formal notice to group members, and make no order as to costs.

CERTIFICATE

I certify that this and the 7 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Nichols of the Supreme Court of Victoria delivered on 3 June 2022.

DATED this third day of June 2022.

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Associate

SCHEDULE OF PARTIES

STEELE LEE CRAWFORD

Plaintiff

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)

First Defendant

MACQUARIE BANK LTD (ACN 008 583 542)

Second Defendant

~~**MACQUARIE LEASING PTY LTD (ACN 002 674 982)**~~

~~Third Defendant~~