

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

Not Restricted

S ECI 2020 01834

JAMAL SALEM in her capacity as executor
for the estate of ANWAR SALEM

Plaintiff

v

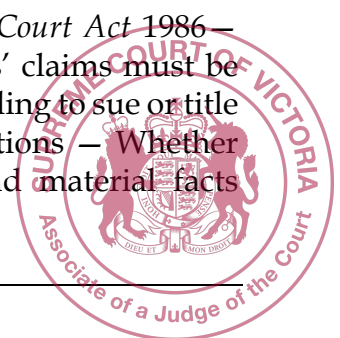
UBER TECHNOLOGIES INCORPORATED
& ORS (in accordance with the schedule)

Defendants

JUDGE: MACAULAY J
WHERE HELD: Melbourne
DATE OF HEARING: 4 September 2020
DATE OF JUDGMENT: 23 December 2020
CASE MAY BE CITED AS: Salem v Uber Technologies Inc & Ors
MEDIUM NEUTRAL CITATION: [2020] VSC 885

CIVIL PROCEDURE – Group proceeding pursuant to Part 4A *Supreme Court Act 1986* – Where pleaded claim for damages consequent upon alleged conspiracy to injure by unlawful means – Where group members’ title to claim is acquired or derived from another person – Application to strike out pleadings for failure to disclose a cause of action – Whether cause of action as pleaded on behalf of group members is manifestly hopeless – Whether claims of assignees of a cause of action are manifestly hopeless without pleading of material facts showing assignee had a pre-existing genuine commercial interest in the enforcement of the claim – Whether claims of beneficiaries who purport to enforce the claim of the trust are manifestly hopeless without pleading of material facts showing special or exceptional circumstances – *Supreme Court (General Civil Procedure) Rules 2015*, r 23.02(a) – *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 207; *WorkCover Queensland v Amaca Pty Ltd* [2012] QCA 240; *Alexander v Perpetual Trustees WA Limited* (2003) 216 CLR 109; *Nolan v Nolan* [2003] VSC 121; *Deutch v Deutch* [2012] VSC 227.

CIVIL PROCEDURE – Group proceeding pursuant to Part 4A *Supreme Court Act 1986* – Extent to which the material facts supporting individual group members’ claims must be pleaded – Whether facts supporting each individual group member’s standing to sue on title to a claim must be specifically pleaded ahead of the trial of common questions – Whether inadequate identification of group members because of failure to plead material facts



supporting individual group members' standing to sue or title to a claim – *Supreme Court Act 1986 s 33H(2)* – *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487; *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; *National Australia Bank Limited v Pathway Investments Pty Ltd* [2012] VSCA 168; *Abbott v Zoetis Australia Pty Ltd (No 2)* (2019) 369 ALR 512.

CIVIL PROCEDURE – Group proceeding pursuant to Part 4A *Supreme Court Act 1986* – Where group members' title to claim is acquired or derived from another person – Where pleaded claim brought on behalf of persons who have had vested in, assigned, devolved or transferred to them the claim of a person who was victim of alleged tort – Application to strike out pleadings because it may embarrass the fair trial of the proceeding – *Supreme Court (General Civil Procedure) Rules 2015, r 23.02(b)* – Words and phrases 'vested in', 'devolved'.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

David Collins SC
with Melanie Szydzik

Maurice Blackburn Lawyers

For the Defendants

Neil J Young QC with
David Sulan and
Madeleine Ellicott

Herbert Smith Freehills



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HIS HONOUR:

A. Introduction

- 1 The Australian defendants to this group proceeding ('the defendants')¹ have applied to strike out one paragraph of the 123 page statement of claim of the plaintiff, Mrs Jamal Salem. If successful, the application would, in effect, significantly reduce the categories of group members. The origin of this proceeding, commenced by Mrs Salem, requires a brief explanation which, in turn, takes us to the commencement of another proceeding.
- 2 In 2014, a ride-sharing service known as UberX became available in several Australian states. UberX is a commercial point-to-point passenger transport service. The impact of the rollout of that service was felt by owners and operators of taxi cabs, limousine-hire services and other similar point-to-point passenger transport service providers already established within the Australian states.
- 3 In 2019, Mr Nicos Andrianakis, a Victorian taxi-cab operator and driver, commenced a group proceeding on behalf of all other Victorian point-to-point passenger transport service owners, operators and drivers and on behalf of similar owners, operators and drivers in New South Wales, Queensland and Western Australia ('the Andrianakis proceeding').² The Andrianakis proceeding was brought against Uber Technologies Inc and six other entities within the Uber group of companies, five of which were incorporated in jurisdictions outside of Australia. The cause of action upon which Mr Andrianakis relies is the tort of conspiracy to injure by unlawful means.
- 4 Mr Andrianakis' pleading substantially survived a strike-out application brought by the Uber companies, although he was required to re-plead a particular element of the unlawful means conspiracy.³ Pursuant to leave given to do so, Mr Andrianakis filed a proposed further amended statement of claim on 28 February 2020 to clarify the issues he was directed to clarify. Shortly before the next scheduled directions hearing,

¹ The fourth and seventh defendants. The remaining defendants, all foreign companies, had not filed unconditional appearances at the date of the hearing (but now have).

² *Andrianakis v Uber Technologies Inc* S ECI 2019 01926.

³ *Andrianakis v Uber Technologies (Ruling No 1)* [2019] VSC 850 (Macaulay J) ('*Andrianakis No 1*'), aff'd *Uber Australia Pty Ltd v Andrianakis* [2020] VSCA 186 (Niall, Hargrave and Emerton JJA).



without leave and without any formal application to do so, Mr Andrianakis presented a further version of his pleading ('18 March FASOC') which he wanted to file and by which he sought to add new categories of group members. Broadly speaking, the new categories of group members were successors and assignees of persons who, but for some event affecting their existence or title to the proceeding, would otherwise have been a group member in the Andrianakis proceeding. The Uber companies opposed leave being given to Mr Andrianakis to file the 18 March FASOC. For reasons published on 1 April 2020 I refused Mr Andrianakis leave to file the 18 March FASOC.⁴

5 Apparently in response to that refusal, on 20 April 2020 Mrs Salem commenced this group proceeding against the same group of Uber companies who are the defendants in the Andrianakis proceeding. Mrs Salem pleads that she is the executor of the estate of Anwar Salem who died on 1 March 2018. Mr Salem was the holder of a Victorian taxi-cab licence within a period defined (relevantly for the claim) as the 'Victorian Claim Period'. In short, but for his death, Mr Salem would have been a group member in the Andrianakis proceeding. However, because of his death, Mrs Salem is the successor to whatever claim Mr Salem had against the Uber defendants as a group member in the Andrianakis proceeding.

6 Mrs Salem's pleading is, for all intents and purposes, the same as Mr Andrianakis' pleading. The cause of action is the same, the defendants are the same and the proceeding concerns owners and operators of point-to-point passenger services in the same four Australian states as in the Andrianakis proceeding.

7 Crucially for the present application, Mrs Salem pleads that, as well as bringing the proceeding for herself, she brings it on behalf of any person who has acquired the claim of a point-to-point passenger transport service owner, operator or driver in any of the four Australian states (referred to, respectively, as a Victorian Industry Member, New South Wales Industry Member, Queensland Industry Member or Western Australian Industry Member) by one of several means. The single paragraph the subject of this application is paragraph 2A of the statement of claim which is in these

⁴ *Andrianakis v Uber Technologies* (Ruling No 2) [2020] VSC 152 (Macaulay J).



terms:

This proceeding is commenced as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) by the Plaintiff on his [sic] own behalf and on behalf of all persons who or which as at the date this proceeding was commenced:

- (a) have had vested in, assigned, devolved or transferred to them the claim for a tort alleged below of a Victorian Industry Member, New South Wales Industry Member, Queensland Industry Member or Western Australian Industry Member; and/or

Particulars

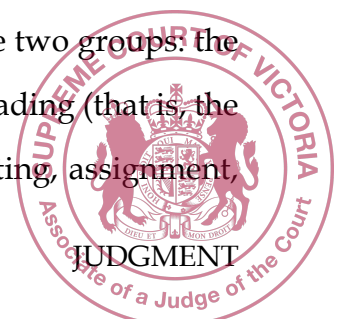
- 1. The circumstances in which a claim for a tort alleged below of a Victorian Industry Member, New South Wales Industry Member, Queensland Industry Member or Western Australian Industry Member has vested in, assigned, devolved or transferred are:
 - a. where the claim for the tort has vested in, assigned, devolved or transferred such that it is no longer the claim of the Industry Member; or
 - b. where the Industry Member was a natural person who has died or was a company which is deregistered.
 - 2. Particulars of the vesting, assignment, devolution or transfer will be provided following the trial of the common questions.
- (b) is the beneficiary of a trust, a former trustee of which was an Industry Member, who is entitled to bring a claim for a tort alleged below because there is no trustee of the trust able to make the claim as the former trustee is a company which is deregistered.

((a) and (b) together, the **Derivative Group Members**).

8 From the outset, a number of things can be noticed about paragraph 2A. First, by reference to its two sub-paragraphs, paragraph 2A purports to describe the persons on whose behalf Mrs Salem brings the proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) ('the Act'). Section 33H(2)(a) of the Act requires that the indorsement on the writ *must*, among other things

... describe or otherwise identify the group members to whom the proceeding relates.

9 Secondly, the two sub-paragraphs of paragraph 2A broadly describe two groups: the first, those to whom a cause of action for the tort described in the pleading (that is, the tort of unlawful means conspiracy) allegedly passed, either by vesting, assignment,



devolution or transfer (paragraph 2A(a)); and the other, any beneficiary of a trust who is entitled to bring such an action after the corporate trustee of the trust to whom the action belonged was deregistered as a company (paragraph 2A(b)).

10 Thirdly, being persons whose title to bring the claim derived by one of the described means from the original holder of the claim, both sub-groups are collectively described as ‘Derivative Group Members’.

11 Fourthly, included among the first sub-group of Derivative Group Members are legal personal representatives, such as Mrs Salem, to whom a claim has devolved in accordance with the laws relating to succession following the death of the person with title to the legal claim. Other categories of persons who are embraced by the words ‘vested in’, ‘assigned’ and ‘transferred’ are less obvious but at least would include a person to whom the title to bring the action has been assigned by some commercial instrument, assuming (which is contested) such claims are legally capable of assignment.

12 Fifthly, the particulars of the first sub-group of Derivative Group Members purport to provide greater detail surrounding the ‘circumstances’ in which the claim for the tort vested in, devolved or was assigned or transferred to the relevant Derivative Group Member. Whether those particulars actually assist in clarifying the identity of those within the first sub-group is a matter of contention. Mrs Salem proposes to provide further particulars of each of these types of derived claims after the trial of the common questions – this is also a matter of contention.

13 Sixthly, there are two references within paragraph 2A to the deregistration of a company: one is contained in particular 1(b) to the first sub-group (paragraph 2A(a)) and the other is an element of the identity of the second sub-group (paragraph 2A(b)). These two references should not be thought of as describing the same set of circumstances.

14 Lastly, by whatever means title to the action is alleged to have passed to the group member, the opening words of paragraph 2A specify that group membership is



confined to those to whom title had passed 'as at the date the proceeding was commenced', namely, 20 April 2020.

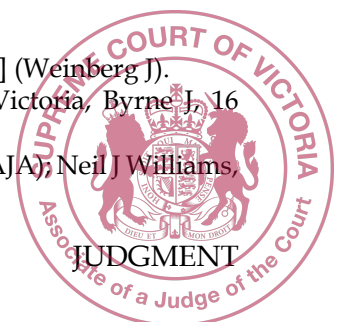
B. The application and the issues

- 15 By their summons, the defendants seek an order that paragraph 2A of the writ and statement of claim be struck out pursuant to r 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic). That rule provides, relevantly, that where an indorsement of claim on a writ or a pleading or any part of an indorsement of claim or pleading (a) does not disclose a cause of action; (b) is scandalous, frivolous or vexatious; (c) may prejudice, embarrass or delay the fair trial of the proceeding; or (d) is otherwise an abuse of process of the court, the court may order that the whole or part of the indorsement or pleading be struck out or amended. In their application, the defendants rely on grounds (a) and (c) – that is, that paragraph 2A does not disclose a cause of action and, or alternatively, is embarrassing.
- 16 For a pleading to be struck out as not disclosing a cause of action, an applicant must persuade the court of one of two things. Either it must show that the pleading omits one or more material facts essential to comprise the cause of action,⁵ or that, assuming the facts as pleaded are established, the claim is so manifestly hopeless that a trial would be a futility.⁶ The power to strike out for failing to disclose a cause of action should be exercised with caution and in the case of doubt its exercise should be refused, particularly when the boundaries of the cause of action are still being developed.⁷
- 17 In this application, for several of the categories represented in paragraph 2A, the defendants rely upon both of these limbs to allege that the statement of claim does not disclose a cause of action. First, they argue that the plaintiff is required, but has failed, to plead the material facts that support the standing of group members (other than those who have acquired their claims by the laws of succession) to sue upon the

⁵ *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409, [21]-[25] (Weinberg J).

⁶ *Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd* (Supreme Court of Victoria, Byrne J, 16 September 1994).

⁷ *EA Negri Pty Ltd v Technip Oceania Pty Ltd* (2010) 27 VR 31, [33] (Weinberg JA, Ross AJA); Neil J Williams, LexisNexis Butterworths, *Civil Procedure: Victoria*, vol 1 [23.02.1].



pleaded cause of action. Interwoven into this first argument is the defendants' submission that, *because* the plaintiff has failed to plead the relevant material facts to establish the standing of the group members to bring claims, she also fails to meet the 'gateway' requirements for the commencement of a group proceeding in s 33C and for the indorsement of the originating process for such a proceeding in s 33H of the Act.

18 Secondly, in respect of two of the classes of Derivative Group Members, the defendants argue that even if the facts which the plaintiff alleges (or it is presumed she will allege) are established, those group members' claims are so manifestly hopeless that it would be futile to allow them to be tried. Into that category the defendants put the claims of the following two sub-groups:

- Any person who claims to have taken an *assignment* of a cause of action from a person who would have been an original group member (a category falling within paragraph 2A(a)); and
- Any beneficiary of a trust who claims to be entitled to litigate the cause of action belonging to the corporate trustee of their trust because the corporate trustee has been deregistered (the whole paragraph 2A(b) sub-group).

19 For a pleading to be struck out because it is embarrassing, it must be shown that the pleading fails to achieve the purpose of stating with sufficient clarity the case that must be met. In fulfilling that purpose, explained Mason CJ and Gaudron J in *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd*.⁸

... pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness.⁹

20 The defendants argue that, apart from the category of legal personal representatives to whom the claim of a deceased person devolved according to the laws of succession, the pleading of the claims of the other types of Derivative Group Members described in paragraph 2A(a) is so vague that the defendants cannot know the case they have to

⁸ (1990) 169 CLR 279.

⁹ Ibid 286.



meet. That is so especially (but not only) because the pleading does not allege the material facts by which the relevant persons claim to qualify for inclusion in their respective sub-groups.

21 To a certain extent, the arguments going to the failure to disclose a cause of action also apply to the arguments concerning embarrassment and vice versa.

22 Fundamentally, in answer to both of these criticisms, Mrs Salem submits that the defendants have misapprehended the nature and purpose of the pleading at paragraph 2A. Mrs Salem argues that paragraph 2A is not intended nor required to plead out the causes of action of any group member but, rather, is intended and required only to 'describe or otherwise identify' the persons on whose behalf the proceeding is brought. Mrs Salem does not attempt to justify the paragraph as a pleading of the material facts relevant to the causes of action for the relevant classes of group members. Nevertheless, she addresses various individual criticisms raised by the defendants concerning the form and content of the paragraph.

23 So understood, the debate between the parties commences with a conceptual dispute concerning the nature and purpose of paragraph 2A: the defendants assume that it should contain the material facts which support each group member's (or at least each category of group members') title to their claim, but Mrs Salem argues that it only requires a sufficient description or identification of the group members in accordance with s 33H of the Act. Beyond that conceptual dispute, there are the disputes about whether certain claims could be maintainable for reasons of legal principle, whether parts of paragraph 2A obscure rather than clarify the identification of group members or the nature of their claims and whether Mrs Salem can properly represent each class of group member.

24 Arising from this brief overview, and listing them in the order I propose to discuss them, the following issues may be identified:

- (a) First, are the claims of group members who have taken commercial assignments of an Industry Member's claim, or who are beneficiaries of a trust



- purporting to sue upon the claims that belonged to a deregistered corporate trustee Industry Member, so manifestly hopeless that they should not be permitted to be advanced?
- (b) Secondly, is the plaintiff required to set out the material facts which support the group members' standing to sue?
- (c) Thirdly, is paragraph 2A otherwise embarrassing or does it fail to comply with Part 4A of the Act?

C. Are some claims manifestly hopeless?

Assignees

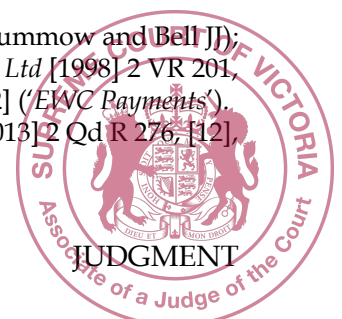
- 25 It is not disputed that, as a general rule, a bare right to sue may not be assigned.¹⁰ Nor is it in dispute, however, that a claim is not a 'bare' right of action if it is annexed or ancillary to contractual or property rights, or is a claim in which the assignee otherwise has a genuine commercial interest in its enforcement. Under those conditions its assignment *may* be legally effective.¹¹
- 26 The circumstances in which a genuine commercial interest may exist are multifarious and cannot readily be categorised or confined. The notion of a genuine commercial interest is not confined to an enforceable legal or equitable right but may be satisfied by a 'financial interest' in the outcome of a claim that exists independently of the assignment itself. Nevertheless, such an interest needs to be more than a mere hope or the interest of a mere intermeddler in the disputes of others.¹²
- 27 After his survey of the authorities on this topic, Elliott J of this Court said in *EWC Payments Pty Ltd v Commonwealth Bank of Australia*:¹³

¹⁰ *Poulton v Commonwealth* (1953) 89 CLR 540, 571 (Fullagar J), 602 (Williams, Webb and Kitto JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, [51] (French CJ, Crennan and Kiefel JJ), [79] (Gummow and Bell JJ) ('*Equuscorp*').

¹¹ *Equuscorp* (2012) 246 CLR 498, [51], [53] (French CJ, Crennan and Kiefel JJ), [79] (Gummow and Bell JJ); *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 703; *Beatty v Brashs Pty Ltd* [1998] 2 VR 201, 214-5; *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 207, [62] ('*EWC Payments*').

¹² *EWC Payments* [2014] VSC 207, [65]-[76]; *WorkCover Queensland v Amaca Pty Ltd* [2013] 2 Qd R 276, [12], [17] (McMurdo P) ('*WorkCover Queensland*').

¹³ [2014] VSC 207.



In summary, for an assignee to be able to rely lawfully upon an assignment of a cause of action, the assignee must have an interest that is pre-existing at the time of the assignment, which interest represents something more than an interest that would be held by a person who is an 'intermeddler' with the disputes of others. Save for looking at decided cases which provide illustrations of genuine commercial interests or otherwise, it is not possible to positively and definitively state the interest necessary to establish a genuine commercial interest. Each case must be considered on its particular facts to ascertain whether the interest alleged is a genuine commercial interest.¹⁴

- 28 With respect, I agree with his Honour's summary of the law. Furthermore, as his Honour also noted,¹⁵ this area of law can fairly be described as a developing area.
- 29 The defendants submit that it is incumbent upon the plaintiff, as a general proposition, to plead the circumstances of each group member who claims to have had the cause of action of an Industry Member assigned to them, in order to demonstrate their 'genuine commercial interest' in the enforcement of the claim. For reasons I explain below, I do not accept that it is necessary for the plaintiff to do so.
- 30 More fundamentally, the defendants also submit that the particular cause of action in this case — the tort of conspiracy to injure by unlawful means — is peculiarly inapt for lawful assignment. First, they contend that the question whether *any* tortious cause of action is capable of assignment is not well established in Australian law. Even if it were possible to assign some tortious claims, a claim of this kind is one in respect of which it will be impossible for a group member to prove a pre-existing genuine commercial interest in its outcome. Such a claim, the defendants submit, is to be equated with purely personal torts such as a claim for personal injury, defamation or wrongful imprisonment, in which only the individual who is the victim of the tort could have any relevant interest.¹⁶
- 31 First, the acceptance of the proposition that a claim in tort may be assigned, assuming the assignee has a genuine commercial interest in its enforcement, appears to be a developing area of the law. Nevertheless, there now exists a firm body of authority in

¹⁴ Ibid [76].

¹⁵ Ibid [62].

¹⁶ The defendants rely upon *South Australian Management Corporation v Sheahan* (1995) 16 ACSR 45, 53-4 (Debelle J) ('*South Australian Management Corporation*'); *Monk v Australia and New Zealand Banking Group Ltd* (1994) 34 NSWLR 148, 153E (Cohen J).



Australia to suggest that such a cause of action is assignable.¹⁷

- 32 In their survey of the law, the learned authors of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* said of the impact of the decision in *Trendtex Trading Corporation v Credit Suisse*:¹⁸

The general acceptance of this side steps much of the traditional law. For now all choses in action arising out of a contract are seen as proprietary and hence assignable, and the same is true of many, perhaps most, causes of action in tort.¹⁹

- 33 On an application of this kind I am only concerned with what is arguable. I am well satisfied that it is at least arguable that a cause of action in tort is capable of valid assignment assuming the assignee can establish a genuine commercial interest in its enforcement.
- 34 Secondly, as to the argument that this *particular* tort is unassignable, in my view it is debatable whether, as the defendants submit, conspiracy to injure by unlawful means is properly grouped with 'personal torts' such as personal injury, defamation and wrongful imprisonment. As a broad observation, the damage inflicted by those torts primarily affects the person – either bodily or as to their individual reputation. In the case of the tort alleged in this action, although the target of the intention to injure must be the relevant Industry Member, the nature of the injury inflicted is essentially of an economic or financial nature.
- 35 Without wishing to pre-empt any decision in this matter, it strikes me as arguable, for example, that a director or shareholder of a company whose taxi-cab licence and income was economically impacted by the alleged tort might have a pre-existing genuine financial interest in the enforcement of the company's claim. The same may be said of a unit holder in a trust which operated a taxi-cab business. An assignment of the cause of action to the director, shareholder or unit holder may arguably be valid.

¹⁷ *South Australian Management Corporation* (1995) 16 ACSR 45, 53-4; *Equuscorp* (2012) 246 CLR 498, [51]; *EWC Payments* [2014] VSC 207, [59]; *WorkCover Queensland* [2013] 2 Qd R 276, [7]-[17], [60], [64], [74].

¹⁸ [1982] AC 679.

¹⁹ JD Heydon et al, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) [6.470].



36 Even so-called personal torts may be assignable in some circumstances, as illustrated by the decision in *WorkCover Queensland v Amaca Pty Ltd*.²⁰ There, the Queensland Court of Appeal overturned the trial judge's refusal to recognise the assignment of a personal injury action to an insurer which had previously paid compensation to the injured person. Subrogation was not available. In her judgment, McMurdo P said:

The common law rule remains that ordinarily causes of action in tort based on a personal wrong such as personal injury are not assignable. There are still sound policy considerations for this general rule. But as this case demonstrates, even causes of action for personal injury may be assigned in unusual cases like the present where the assignee has a pre-existing legitimate commercial interest in the enforcement of the claim so that the assignee is not acting against the interests of justice as an officious intermeddler guilty of maintenance or champerty.²¹

37 It remains to be seen what particular commercial interests are advanced by individual group members who claim to have taken an assignment of the pleaded cause of action from an Industry Member. Now is not the time to insist upon the particularisation of such individual interests.²² But, as a legal proposition, I reject the submission that it is not possible for genuine commercial interests to exist such as would support the valid assignment of an Industry Member's claim to a group member in this proceeding.

38 For these reasons, I would not strike out the claims of the assignee sub-group described in paragraph 2A(a) on the asserted basis that their claims must be manifestly hopeless.

Beneficiaries

39 The category of group members represented in paragraph 2A(b) is of a particularly narrow kind. As defined, this sub-group arises in the following circumstances:

- (a) An Industry Member was the trustee of a trust and (presumably) held a relevant licence and/or conducted a relevant business as trustee for the trust;

²⁰ [2013] 2 Qd R 276.

²¹ Ibid [17].

²² See section D of these reasons, below.



- (b) The Industry Member was a company;
- (c) Prior to the commencement of the proceeding the company was deregistered; and
- (d) A beneficiary of the trust wishes to enforce the claim pleaded in the statement of claim that the Industry Member would have had but for its deregistration.

40 Pursuant to Part 5A.1 of the *Corporations Act 2001* (Cth) (*'Corporations Act'*), a company may be deregistered voluntarily²³ or at the initiation of ASIC.²⁴ If initiated by ASIC, the grounds for deregistration include: the company's failure to lodge certain prescribed documents within a particular time, its failure to pay certain fees or levies or, where it is being wound up, that it appears the liquidator is no longer acting.²⁵

41 The effect of deregistration is that the company ceases to exist²⁶ and all property held on trust vests in the Commonwealth.²⁷ If so vested, the Commonwealth takes only the same property rights that the company itself had.²⁸ The Commonwealth may continue to act as trustee or apply to the Court for a new trustee.²⁹ If it continues to act as trustee, the Commonwealth may sell or dispose of property as it thinks fit.³⁰

42 ASIC or the Court may reinstate a deregistered company.³¹ ASIC may do so if satisfied the company should not have been deregistered and the Court may do so if satisfied that it is just that the company's registration be reinstated. If the company is reinstated, it is taken to have continued in existence as if it had not been deregistered. All property vested in the Commonwealth re-vests in the company.³²

43 In this case, the relevant property of the trust is a chose in action, namely the claim for damages for the tort alleged in the statement of claim held by the trustee. Prima facie,

²³ *Corporations Act 2001* (Cth) s 601AA.

²⁴ *Ibid* s 601AB.

²⁵ *Ibid*.

²⁶ *Ibid* s 601AD(1).

²⁷ *Ibid* s 601AD(1A).

²⁸ *Ibid* s 601AD(3).

²⁹ *Ibid* s 601AE.

³⁰ *Ibid* s 601AE(1A).

³¹ *Ibid* ss 601AH(1), (2).

³² *Ibid* s 601AH(5).



it is the trustee Industry Member who has standing to sue for the relief so claimed.

44 In exceptional circumstances, a beneficiary of a trust may bring a claim in their own name to protect their beneficial interest in the trust property or right.³³ Such special circumstances have been held to exist where there is a substantial impediment to the trustee prosecuting the proceeding.³⁴

45 Some statements of principle have confined the types of claim for which a beneficiary may be given leave to bring, in special circumstances, to those brought in the equitable jurisdiction of the court, thus excluding common law claims.³⁵ However, other judges have queried why such a limitation should be imposed in a *Judicature Act 1873* (UK) system such as exists in Victoria.³⁶

46 Here, the defendants correctly contend that each beneficiary will be required to demonstrate special or exceptional circumstances to justify why they should be permitted to bring the trustee's right of action against the defendants. First, they submit, it is not clear that the exception for special circumstances applies to a common law claim such as the one brought in this proceeding. While that may be so, on the state of the authorities it is at least arguable that the exception exists for common law claims so I would not strike this sub-group's claim out on that basis.

47 Next, the defendants argue that, in any event, there can be no substantial impediment to a trustee bringing its claim, and thus no special circumstance, because there are procedures available to reinstate the company in which case the trustee's own claim will revive. The plaintiff has urged that the substantial impediment arises because the trustee, in the case of deregistration, no longer exists so it must follow that there is a substantial impediment to it bringing the claim.

³³ *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109, [55]; *Highland v Labraga (No 2)* [2005] NSWSC 1212, [16] ('*Highland v Labraga*'); *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560, 563 ('*Lidden v Composite Buyers*'); *Nolan v Nolan* (2003) 10 VR 626, [114] ('*Nolan*'); *Deutsch v Deutsch* [2012] VSC 227, [40] ('*Deutsch*').

³⁴ *Highland v Labraga* [2005] NSWSC 1212, [15]; *Deutsch* [2012] VSC 227, [40(3)].

³⁵ See, eg, *Ramage v Waclaw* (1988) 12 NSWLR 84.

³⁶ *Lidden v Composite Buyers* (1996) 67 FCR 560, 564D; *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432, 436; *Nolan* (2003) 10 VR 626, [116]-[117].

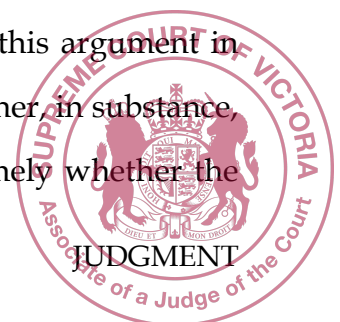


48 At this stage, I am not prepared to hold that there could be no combination of circumstances affecting a trustee and the beneficiary that might constitute the special circumstances required to move a court to allow the beneficiary to bring the trustee's claim. As I explain in the next section of these reasons, now is not the time to require the particulars of those circumstances to be pleaded for each individual member. The circumstances in which a company has been deregistered could vary widely. There are also a variety of types of trusts, each of which may have different trust provisions. The nature of a beneficiary's interest will differ depending upon the nature of the trust and its terms. Further, other surrounding circumstances may combine with those variations to give rise to a wide range of differing impediments to the reinstatement of the company.

49 If a company was reinstated, the effect of the legislation is that the company will be taken to have continued in existence from the date of its deregistration, possessed of its alleged claim against the defendants. By reason of that effect, if reinstated the deregistered trustee company would automatically fall back into the class of Industry Members within the Andrianakis proceeding.

50 At present, it appears to me that there is a powerful argument that mere deregistration would not, of itself, constitute a special circumstance to justify a beneficiary being permitted to enforce the claim of the trust. However, there are simply too many variables that may surround that simple scenario – some combination of which may very well give rise to a more compelling case of special circumstances – for me to safely conclude that this kind of group member, as a class, must have a manifestly hopeless claim.

51 The final argument put by the defendants is that the beneficiary's claim is manifestly hopeless because the claim no longer rests in the company, but resides in the Commonwealth. So, the argument goes, the claim is no longer that of the trust upon which the beneficiary can sue. Not a lot of attention was paid to this argument in submissions and I am not confident it has been fully explored. Further, in substance, it addresses much the same debate as the previous argument, namely whether the



existence of a simple cure for the problem, reinstatement, is enough to deprive the situation of having the quality of a special circumstance.

52 I note that the Act makes provision for the Commonwealth to provide its consent to being a group member in any group proceeding.³⁷ I am working on the assumption that the Commonwealth has not given any such consent in respect of the claims of any of the alleged, deregistered trustee Industry Members. In my view, the legal consequence that the claim presently resides in the Commonwealth does not take the matter any further. Either there are special circumstances which would justify the Court permitting the beneficiary to enforce the claim, or there are no such special circumstances. The fact that the former claim of the trustee is presently vested in the Commonwealth is unlikely to alter the analysis, nor the outcome consequent upon that analysis.

53 In the result, I would not strike out paragraph 2A(b) on the asserted basis that the claims of the sub-group which it describes must be manifestly hopeless.

D. Must the plaintiff plead the material facts for group members' standing to sue?

54 Alternatively to their submission that the claims of assignees and of beneficiaries wishing to enforce the claim of the trust are legally untenable, the defendants submit that the plaintiff must plead the material facts said to establish each group member's alleged entitlement to sue upon such a claim.

55 First, it is useful to clarify to whom this second argument applies.

56 It now appears to be common ground that, to the extent that paragraph 2A(a) refers to claims having 'devolved' to group members, that description is intended to apply only to those who have acquired their claims by succession from a deceased Industry Member. So understood, the defendants accept that the acquisition of a claim by this means is tenable and they do not seek any further articulation of that method of transmission (other than confirmation in the pleading that acquisition by succession from a deceased person is the *only* means to which the word 'devolved' applies).

³⁷ *Supreme Court Act 1986* (Vic) s 33E(2)(a).



There is also no dispute that there are at least seven such group members who meet that description, thereby satisfying the requirement in s 33C(1)(a) of the Act for this proceeding to be validly commenced as a group proceeding, whatever should be the fate of the balance of paragraph 2A.

57 That leaves the categories of Derivative Group Members intended to be captured by the expressions 'vested in' or 'transferred to' (to the extent that phrase is not synonymous with 'assigned to'). The argument concerning the need to plead out the material facts by which Derivative Group Members acquired their claims was not specifically directed to these categories. I will assume, however, that the defendants' submission that material facts should be alleged to establish group members' standing applies to all Derivative Group Members except those to whom the claims have devolved by the laws of succession.

58 In short, this second argument is the defendants' 'fall-back position' in respect of the categories of assignees and beneficiaries as well as a general argument about the need to establish standing for all categories of Derivative Group Members other than the successors to a deceased person's claim.

Defendants' submission

59 The defendants' submission varied somewhat between their initial written submissions, written reply and oral submissions. As finally put, and particularly by reference to the category of assignees, the defendants submit that each group member's standing (or title) to sue upon the cause of action pleaded in the statement of claim must itself be fully pleaded out.

60 The first step in the argument was the proposition that the acquisition of another person's claim goes to the root of the derivative group member's title to sue and the very existence of the claim which that group member proposes to litigate. According to the defendants' submission, the means by which a group member acquires the cause of action of an Industry Member is an issue that is separate from and anterior to the cause of action itself.



- 61 Further, because a group proceeding can only be conducted on behalf of persons who have ‘claims’ in respect of or arising out of the same or similar or related circumstances, giving rise to substantial common questions of law or fact,³⁸ the defendants argue that it is essential that the group member’s title to the cause of action is established (and thus pleaded) in order to assess whether purported group members have qualifying claims within the proceeding.
- 62 By reference to the claims of assignees, the defendants rely upon the arguments outlined in the previous section of these reasons; *prima facie*, a bare right to sue is not assignable and an exception to that prohibition only exists if the right to sue upon another person’s cause of action is ancillary to some contractual or proprietary right held by the assignee or is supported by a genuine commercial interest in the enforcement of the cause of action. Thus, so the argument goes, absent the pleading of material facts which establish the accompanying contractual or proprietary right or some genuine commercial interest, there would simply be no basis for the purported assignee to have title to the claim.
- 63 In summary, the defendants’ submission is that, in the case of assignment, paragraph 2A implies no more than that a bare right to litigate a personal tort has (or might have) been transferred or assigned in some unidentified fashion, at some unidentified point in time, without any basis alleged for overcoming the *prima facie* prohibition against such an assignment. Thus, they submit, it does not disclose any standing to sue, any cause of action in the group member, or any basis for regarding the assignee as a group member.
- 64 A similar point was made by reference to the claims of Derivative Group Members described in paragraph 2A(b), namely beneficiaries of trusts whose corporate trustee has been deregistered. Once again, drawing upon their arguments set out in the previous section of these reasons, the defendants highlight the general prohibition against a beneficiary suing on a cause of action that belongs to the trustee and the requirement that special or exceptional circumstances be established before a court

³⁸ Ibid s 33C.



would grant leave to a beneficiary to enforce the claim of the trust. Absent the pleading of the material facts that establish those special circumstances, the defendants submit that the would-be beneficiary group member has no standing to sue on the cause of action pleaded, and thus no 'claim' in the group proceeding to qualify them as a group member.

65 In aid of this argument, the defendants rely upon the decision of Sifris J in *Randa Lee Investments Pty Ltd v Ballan* ('Randa'),³⁹ where his Honour expressed the view that the issue of a beneficiary's standing to sue upon the trustee's cause of action was 'fundamental and foundational and must or should be addressed first'.⁴⁰ His Honour expressed that view in explaining why he considered it appropriate to strike out the statement of claim which failed to plead any special or exceptional circumstance to justify a unit holder in a trust being permitted to proceed on the trustee's action rather than defer the issue to the trial of the proceeding as contended by the plaintiff.

66 Finally, the defendants argue that the absence of any pleading of material facts to overcome the prima facie prohibition against group members suing upon others' claims also means, consequentially, that the plaintiff has failed to 'identify the group members to whom the pleading relates' or 'specify the nature of the claims made on [their] behalf' as required by s 33H(2)(a) and (b) of the Act.

Plaintiff's submission

67 In response to these arguments, the plaintiff submits that the relevant legal principles in relation to group proceedings do not require the full pleading out of each group member's case. Rather, the appropriate level of generality (or particularity) depends on the circumstances of each case and the requirements of procedural fairness.⁴¹

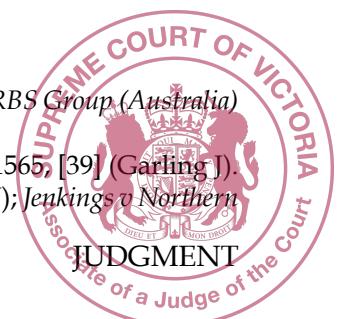
68 The plaintiff submits that the sufficiency of the pleading 'has to be considered in the light of the nature of a representative action and its purpose'.⁴² In fact, to require all

³⁹ [2015] VSC 178.

⁴⁰ Ibid [37].

⁴¹ *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, [136] (Sackville J); *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150, [60] (Lee J).

⁴² *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority* [2014] NSWSC 1565, [39] (Garling J). See also, *Williams v FAI Home Security Pty Ltd (No 2)* [2000] FCA 726, [16] (Goldberg J); *Jenkins v Northern*



the integers of each group member's claim to be pleaded out, she argues, would be contrary to the scheme of group proceedings which is to group claims by reference to common questions of law or fact.

69 According to Mrs Salem, the defendants do not need to respond to the claims of individual group members beyond responding to the matters that give rise to the common questions. How any individual group member acquired their claim is necessarily individual to that person or entity. The role of an individual group member in a group proceeding is necessarily passive, not active, and an individual group member does not need to provide instructions or plead their individual circumstances.⁴³

70 The plaintiff further argues that the defendants' position wrongly merges the task of pleading the representative plaintiff's cause of action – which must be fully pleaded – with the task of that representative plaintiff, pursuant to s 33H of the Act, to identify the group members whom he or she represents. It is this latter task with which paragraph 2A is concerned. Its purpose, she contends, is different to pleading the assignment, transfer or vesting of the causes of action to any particular individual, or even a group of individuals. Its purpose, taken from s 33H, is only to identify the group members and to specify the nature of the claims made on their behalf.

71 Although the defendants complain about the breadth of paragraph 2A, the plaintiff argues that such breadth is necessary and appropriate for the purpose and efficiency of a group proceeding. That is, its purpose is to capture as many persons as possible who have the same claims, to avoid a multiplicity of actions. The concerns about breadth and vagueness can be addressed by case management tools later on after the class has been properly identified.

⁴³ *Territory of Australia* [2017] FCA 1263, [110]-[112] (White J).
Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1, [31]-[32] (Gaudron, Gummow and Hayne JJ);
National Australia Bank Ltd v Pathway Investments Pty Ltd [2012] VSCA 168, [50], [125] (Bell AJA, Bongiorno JA agreeing at [1], Harper JA agreeing at [2]); *Abbott v Zoetis Australia Pty Ltd (No 2)* (2019) 369 ALR 512, [35] (Lee J).



Consideration

- 72 It is plainly correct that a representative plaintiff is not required to plead out all the integers of each and every group member's cause of action to the same extent that the representative plaintiff must plead out their own. I accept the plaintiff's submission that such a requirement would be antithetical to the opt-out group proceeding scheme in Part 4A of the Act and would require each group member to be identified at the outset and play an active (rather than passive) role in the proceeding. The authorities are clear that is not required.
- 73 There are many examples one can think of which illustrate that issues or questions personal to group members, outside of the common issues in the proceeding, are to be heard and determined separately from those common issues. Typically, they are determined after the common issues have been tried and determined.
- 74 A typical example is the issue of causation and quantification of loss suffered by individual group members in consequence of the defendants' tortious conduct. Those matters are commonly heard and determined by a separate process after that tortious conduct has been determined as the common question for the benefit of all group members. The pleading in this case provides a suitable example. In her statement of claim at paragraph 143A, Mrs Salem alleges that she is entitled to recover the loss and damage suffered by her husband, whose claim devolved to her, as a consequence of the defendants' alleged tortious conduct. That loss and damage is particularised by reference to specific sums of money for the diminution in value of Mr Salem's taxi-cab licence and the reduction of monthly income derived from it. Mrs Salem also pleads that the Industry Members whose claims have been vested in, assigned, devolved or transferred to the Derivative Group Members, also suffered loss and damage as a consequence of the alleged tortious conduct of the defendants. However, unsurprisingly, no particulars are given of the loss and damage alleged to be recoverable by the other Derivative Group Members. Particulars relating to those claims are to be given, so the pleading states, 'following the trial of common questions or otherwise as the Court directs'.



- 75 This form of pleading is common and appropriate and there is no challenge to it. The pleading alleges at paragraph 143 that each Industry Member suffered loss and damage from the alleged conspiracy, thus alleging an essential element to complete each group member's cause of action in tort (namely, the sustaining of damage as a consequence of the tortious conduct). But no details are given beyond that general assertion.
- 76 The plaintiff argues that the means by which individual group members acquired their respective causes of action is, similarly, a question that is personal to each of them and should be particularised, heard and determined after the trial of common questions. The defendants argue that the issue of a claimant's acquisition of title to a claim — their standing to sue — is conceptually different to other elements in a cause of action such as, for example, reliance or causation or quantification of loss and damage. According to their submission, the issue of standing is 'anterior' to the cause of action, 'foundational', or an issue that goes to the 'root' or 'existence' of the claim itself. For that reason, they submit, the question of title to sue stands apart from other mere elements of a cause of action, such that the material facts said to establish that title must be alleged for each individual group member.
- 77 I do not accept that the issue of title to sue, or the means by which a person claims to have acquired the claim they seek to enforce, is so radically or fundamentally different to other integers in a cause of action that it must be pleaded out for each group member, either to satisfy the requirements of pleading rules or to meet the requirements of ss 33C or 33H of the Act.
- 78 It may be accepted that the issue is 'fundamental and foundational', as Sifris J said in *Randa*, in the sense that without it being established the plaintiff simply does not have a cause of action. But neither does the victim of a tort have a cause of action without establishing loss and damage caused by the tort. Sifris J's observations were made in the context of an individual claim and an application to amend the statement of claim by adding an assertion that the beneficiary could enforce the claim of a trust. It was entirely understandable in that context, from a procedural management perspective,



that his Honour should insist on facts being alleged, at that point in time, to demonstrate that the claim could proceed rather than leave the issue to trial.⁴⁴

79 But the group proceeding context is very different. As mentioned, this group proceeding is validly constituted by the ‘devolved’ category of Derivative Group Members alone. Further, with respect to the argument about s 33C of the Act, the Derivative Group Members continue to have a ‘claim’ within the meaning of s 33C(1) even though their capacity to individually obtain the relief sought in the proceeding is contingent upon them proving their standing or title to sue and thereby taking the benefit of the decision on the common questions which arise from the cause of action as pleaded.

80 The defendants raise certain aspects of practical prejudice which they say they will sustain by not knowing the real dimension of tenable Derivative Group Members beyond those who are executors like Mrs Salem. Those aspects of prejudice include not being able to assess the potential value of group members’ claims for the purposes of settlement negotiations. Such matters are relevant to consider because, as noted above, the appropriate level of particularity or generality of a pleading in a group proceeding is influenced by considerations of procedural fairness. But the defendants’ concern to know the potential number of claimants and likely monetary dimension of claims for, say, settlement purposes, should not override the fundamental, structural design of the group proceeding scheme so as to require personal elements of individual group members’ claims to be pleaded from the outset. Their concerns of this nature may be addressed in other ways by case management tools once the class of group members has been properly settled.

81 All that said, I consider that there is some force in the defendants’ arguments regarding the sufficiency and clarity of paragraph 2A. In my view, the paragraph suffers from three separate but interrelated problems:

(a) First, it fails to allege the facts that give rise to the existence of each category of

⁴⁴ *Randa*, [2015] VSC 178, [44].



group which the paragraph purports to describe collectively as the Derivative Group Members;

- (b) Secondly, it fails to adequately define the occupants of some of the sub-group categories; and
- (c) Thirdly, it contains some elements that confuse rather than clarify the definition of the sub-group categories.

82 I will deal with the third of those issues in the next section of these reasons. For now, I will address the first two.

83 In my opinion, in this particular case there should be an express pleading that the claims of some Industry Members, as pleaded in the statement of claim, were *in fact* vested in, assigned, devolved or transferred to other persons prior to the commencement of the proceeding. That allegation is missing from this statement of claim; it is merely assumed or implied in the text of paragraph 2A which purports to identify the implied recipients of the claims as the group members for the proceeding. Without an allegation that circumstances have actually occurred in some instances to give rise to the existence of potential group members in each sub-group, there remains the possibility that the sub-group is entirely hypothetical. There is no factual basis alleged for the existence of the sub-groups which paragraph 2A purports to describe.

84 Paragraph 2A, as it were, attempts to fulfil two purposes: one, the assertion of the *fact* that claims were vested in, assigned, devolved or transferred to certain persons and that some Industry Members who were corporate trustees were deregistered and, the other, the identification of group members to satisfy s 33H of the Act. The plaintiff's admitted desire to keep the identification of group members as broad as possible to maximise those who are captured within the proceeding, plus the lack of any pleading of the fact of the transmission of the claims by each type of means, combines to create the obscurity of which the defendants complain. In making this observation about this particular pleading, I do not intend to lay down an invariable principle that the assertion of a fact giving rise to the existence of a group of claimants and the

identification of those claimants as group members could never be combined in the one allegation. Nor that factual allegations can never be implicit. But given the nature of this case, those features lead to the unsatisfactory results that are described in these reasons.

85 The adequacy of a pleading may be assessed by reference to procedural fairness considerations but also by reference to the surrounding requirements of Part 4A of the Act. One such requirement is to be found in s 33J which permits group members to opt out of the proceeding. That step presupposes that a person knows that they are within the proceeding. Whilst accepting that the description of a group may be given latitude, and even allow for some possible ambiguity and room for argument, nonetheless it should be sufficient to enable a person, with the assistance of a legal adviser, to ascertain whether he or she is a group member.⁴⁵

86 Another requirement that informs the appropriate level of particularity for identifying the characteristics of group members in the pleading is found in s 33X. That section provides for various occasions when notice must be given to group members. In a case like this such notices are commonly circulated via public media outlets. Again, the efficacy of such notices presupposes sufficient articulation of each category of Derivative Group Members so that readers of notices will understand whether or not their particular circumstances fall within any of the categories.⁴⁶

87 Given the prima facie position that assignees of a bare right to sue cannot litigate the claim and beneficiaries of a trust cannot enforce the trustee's action, the present definition of the group, which purports to include both of these classes as Derivative Group Members, does not provide adequate guideposts to a person, even with a legal adviser, to know whether or not their circumstances fall within the proceeding. Further, there is enough ambiguity in the expressions 'vest', 'devolve' and 'transfer' to make the task of determining whether a particular person has acquired a claim by

⁴⁵ *Petrusevski v Bulldogs Rugby League Ltd* [2003] FCA 61, [23], [30] (Sackville J) (*'Petrusevski'*); *AS v Minister for Immigration and Border Protection* [2014] VSC 593, [48] (Kaye J).

⁴⁶ *Petrusevski* [2003] FCA 61, [22].



one of those means unacceptably difficult.

88 Each of these deficiencies may be ameliorated by the pleading of the *fact* that, prior to the commencement of the proceeding:

- (a) some Industry Members, being natural persons, died, and their estate, including the claim for tort alleged in the statement of claim, devolved by the laws of succession to their respective legal personal representative;
- (b) some Industry Members assigned or transferred their claim for the tort alleged in the statement of claim to a person with a pre-existing genuine commercial interest in the claim;
- (c) some Industry Members, being trustees of a trust, were replaced by another trustee in whom was vested the claim for the tort alleged in the statement of claim; and
- (d) some Industry Members, formerly operating as the trustee of a trust, were deregistered pursuant to Part 5A.1 of the *Corporations Act*, thereby have ceased to exist and for that reason are incapable of pursuing the claim for the tort alleged in the statement of claim, in circumstances in which the beneficiaries of the said trust ought to be permitted to enforce the claim alleged in the statement of claim.

89 These four categories describe who I understand from the submissions put by the plaintiff to be, respectively, the members to whom claims were devolved, the assignee or transferee members, the vested members and the beneficiary members.⁴⁷ But if those descriptions do not adequately capture all of the potential instances of transmission of claim that the plaintiff intends to encompass within the proceeding she will need to expressly articulate any additional means of transmission.

90 To the extent that this level of specificity might inadvertently exclude some means of the acquisition of a claim which has not yet been anticipated, or considered, so be it.

⁴⁷ See [96]-[98] below.



Some level of certainty needs to be achieved for the various purposes discussed above, including the consideration of procedural fairness to the defendants who are entitled to know the scope of the claims alleged against them. At present, the appropriate balance between fairness and certainty, on the one hand, and the desire to avoid multiplicity of actions, on the other, has not been achieved.

91 Such a pleading, however, will not need to identify particular group members, still less allege the material facts said to support any individual transmission of claim. However, a pleading of the kind I have described will enliven, at least generally, issues potentially associated with each particular form of transmission. The defendants, if they wish, may by their defence put into issue any matter which they contend is likely to constitute a defence to some or all parts of the alleged claims pertinent to the different means of acquisition.

92 The defendants also raised a concern about being unable to analyse whether the asserted claims are barred by the applicable statutory limitation of action period. I do not accept that that is a difficulty arising from the pleading issues of which they complain. A general plea may be included in the defence raising a limitation of action defence against the claims of any individual group member whose claim was not commenced within the prescribed period. It may then later be applied to the individual circumstances of any group member whose claim, once individually particularised, appears to attract that defence.

E. Is paragraph 2A otherwise embarrassing?

93 Beyond the arguments that I have addressed so far, the defendants complain that paragraph 2A is embarrassing for a number of miscellaneous reasons. Although not specifically raised in the summons, the defendants also argue that the consequence of the vague and unclear nature of the terminology in paragraph 2A is that the pleading of Derivative Group Members as a whole offends aspects of Part 4A of the Act.

94 Specifically, the defendants argue that the words ‘vested in’, ‘devolved’ or ‘transferred’ are too vague for the Court or the defendants to know what are the classes of transaction encompassed by them. That lack of clarity, they say, blurs the



description or identification of the group members to whom the proceeding relates as required by s 33H(2)(a) of the Act. Consequentially, they argue, that lack of clarity undermines an analysis of whether the claims of such persons arise out of the same or similar circumstances or give rise to common questions of law or fact for the purposes of s 33C.

95 I turn to the words and phrases which are criticised.

96 Although the word 'devolved' may potentially have a wider meaning,⁴⁸ the plaintiff confirmed in argument that she only relies upon it as referring to the passing of property to the successor of a deceased estate. Because of the potential for ambiguity, the plaintiff should explicitly limit the use of the term in the pleading to the way she intends it to be understood.

97 Again, in submissions, the only instance given of the claim for the tort having 'vested in' a Derivative Group Member was one in which an Industry Member, being the trustee of a trust, has been replaced by another trustee in whom is vested the claim alleged in the statement of claim. This also should be explicitly clarified in the pleading.

98 The expression 'assigned' does not seem to have given rise to any difficulty, save for the arguments discussed above that an assignment of an Industry Member's cause of action can only be valid if it is ancillary to a contractual or proprietary right or otherwise supported by a pre-existing genuine commercial interest which the assignee has in the enforcement of the claim. The plaintiff gave no different explanation for or example of a 'transferred' claim. It appears to be treated as synonymous with an 'assigned' claim. This also should be explicitly clarified in the pleading.

99 I expect that the more precise definition of each of the forms of transmission intended to be designated by those verbs will be achieved by the plaintiff amending her pleading by adding a pleading of the kind described in [88] and [89] above and, if necessary, making any consequential amendment to paragraph 2A to pick up the sub-

⁴⁸ *O'Brien v Komesaroff* (1982) 150 CLR 310, 320.



group terminology used in that new pleading. In turn, that further clarity should solve the problem that, at present, the pleading does not sufficiently identify group members as required by s 33H(2)(a).

100 In my view, however, there is no real merit in the further complaint that the group member identity issue undermines the analysis of whether the claims of such persons arise out of the same or similar circumstances or give rise to common questions of law or fact. That analysis can be made satisfactorily regardless of the particular means by which any individual claim, as pleaded, was acquired by a given group member or class of group members.

101 The next area of complaint focused on the particulars under paragraph 2A(a). I agree that those particulars are unhelpful for a variety of reasons and should be struck out. In the end, it appeared that the plaintiff did not seek to support them. In brief, particular 1(a) is both circular and merely repeats the text of paragraph 2A(a) itself. Insofar as particular 1(b) refers to a natural person who died, it is superfluous if the word 'devolved' in paragraph 2A(a) is confined to the passing of the claim of a deceased person. Insofar as that particular refers to a company which is deregistered, it is entirely irrelevant and also confusing. It is irrelevant because any vesting, assignment or transfer from a company which was an Industry Member must necessarily have taken place while the company existed, and before the commencement of the proceeding. It is irrelevant what became of that company after the vesting, assignment or transfer. Finally, it is unnecessary to include as particular 2 a statement to the effect that particulars of the vesting, assignment, devolution or transfer will be provided following the trial of the common questions — that statement would now more conveniently be located under the appropriate allegation of fact which is to be made in respect of each form of transmission.

102 One final point needs to be mentioned because it was raised in submissions. The defendants argue that Mrs Salem cannot be representative of persons other than those claiming as successors in title to a deceased person's claim. In my view, this is hardly an argument that goes to the disclosure of a cause of action or any embarrassment



created by the pleading. In any event, I reject it for the same reasons I rejected similar arguments raised in the strike-out application in the Andrianakis proceeding.⁴⁹

F. Conclusion

- 103 In summary, I reject the defendants' submission that the claims of alleged assignees or of beneficiaries who wish to enforce the claim of a deregistered corporate trustee are manifestly hopeless and that paragraph 2A should be struck out to the extent it refers to such claims.
- 104 I also reject the defendants' submission that, except to the extent that it refers to those to whom the claims of deceased Industry Members devolved, paragraph 2A should be struck out because it fails to plead the individual circumstances by which each purported Derivative Group Member has acquired their claim.
- 105 Nonetheless, I find that the pleading of the claims of Derivative Group Members is defective for lack of any allegation of the fact that relevant transmissions of claims from Industry Members to them have occurred. Further, I conclude that there should be clearer definition of the transactions encompassed within some of the terms used in the pleading, namely, 'vested in', 'devolved to', and 'transferred to', and that some aspects of paragraph 2A are embarrassing in that they are superfluous, unclear or irrelevant.
- 106 In my view it is unnecessary, at this stage, to strike out paragraph 2A in its entirety. Amended by the removal of the particulars to sub-paragraph 2A(a), and suitably tied in with the terminology used in the new paragraph which I require to be inserted, paragraph 2A remains appropriate as a description of group members to whom the proceeding relates for the purpose of s 33H(2)(a). If no new paragraph of the kind which I require is in fact inserted, I would strike out paragraph 2A as lacking any supporting allegation of fact.
- 107 Accordingly, I will order that the particulars to paragraph 2A(a) be struck out. I will give leave to the plaintiff to amend her statement of claim by the inclusion of

⁴⁹ *Andrianakis No 1*, [2019] VSC 850, [149]-[152].



allegations of fact substantially of the kind described in paragraph [88], [89] and [99] of these reasons. If the plaintiff fails to amend her statement of claim in the manner I require within the time I will direct, paragraph 2A will be struck out automatically.



CERTIFICATE

I certify that this and the 33 preceding pages are a true copy of the reasons for judgment of Justice Macaulay of the Supreme Court of Victoria delivered on 23 December 2020.

DATED this twenty third day of December 2020.

Maugh V

Associate



SCHEDULE OF PARTIES

JAMAL SALEM in her capacity as executor for the estate
of ANWAR SALEM

Plaintiff

- and -

UBER TECHNOLOGIES INCORPORATED (4849283)

First Defendant

UBER INTERNATIONAL HOLDING B.V. (RSIN 851 929 357)

Second Defendant

UBER B.V. (RSIN 852 071 589)

Third Defendant

UBER AUSTRALIA PTY LTD (ACN 160 299 865)

Fourth Defendant

RASIER OPERATIONS B.V. (RSIN 853 682 318)

Fifth Defendant

UBER PACIFIC HOLDINGS B.V. (RSIN 855 779 330)

Sixth Defendant

UBER PACIFIC HOLDINGS PTY LTD (ACN 609 590 463)

Seventh Defendant

