IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2019 01926

NICOS ANDRIANAKIS — Plaintiff

v

UBER TECHNOLOGIES INC
& Ors (according to the Schedule attached) — Defendants

S ECI 2020 01834

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

v

UBER TECHNOLOGY INC
& Ors (according to the Schedule attached) — Defendants

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	10 February 2023
DATE OF RULING:	20 February 2023
CASE MAY BE CITED AS:	Andrianakis v Uber Technologies Inc (No 4)
MEDIUM NEUTRAL CITATION:	[2023] VSC 56

PRACTICE AND PROCEDURE — Group proceedings — Strike out — Appointment of sample group members — Where plaintiff directed to nominate industry specific sample group members — Where plaintiff has nominated sample group members for each category of industry participants save for one — Whether in the interests of justice to strike out parts of the claim insofar as they concern the those sub-group members for whom a sample group member has not been identified — *Supreme Court Act 1986* (Vic) s 33ZF — Application dismissed

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff in both proceedings	Ms M Szydzik SC Mr T Farhall	Maurice Blackburn Lawyers
For the Defendants in both proceedings	Mr D Sulan SC Ms A Campbell	Herbert Smith Freehills

HER HONOUR:

The issue in dispute

1 In 2014, UberX passenger transport services became available in Australia. The plaintiffs in each of these open class group proceedings contend that **Uber** Technologies Inc and six other entities within the Uber group of companies intended that UberX would be established in Australia by Uber Partners unlawfully competing with existing point to point passenger services,[1] as a result of which owners, operators and drivers who participated in the provision of those services would suffer loss. The plaintiffs allege that the defendants[2] agreed or combined with the common intention of injuring the plaintiffs and group members, committing the tort of conspiracy to injure by unlawful means. The plaintiffs bring these proceedings on behalf taxi licence holders, accredited taxi-cab operators and accredited drivers, private hire car licence holders, private hire car operators and accredited hire car drivers who had operated in the claim period in four Australian states.[3]

2 The parties agreed that group members from different sub-categories of the industry segments comprising the represented group should be nominated as sample group members who would give evidence and whose claims would be determined at trial. The expression "sample group members" is not found in pt 4A of the *Supreme Court Act 1986* (Vic), which governs the conduct of group proceedings in this Court. However, the appointment of group members to give evidence on issues of some commonality, at times by also having their personal claims determined at a trial of the common issues raised by the plaintiff's claim, is a well-established practice.[4] The

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1 The relevant entities are defined in the claim this way: *UberX* is a ride sharing service that was marketed as a low-cost point to point passenger transport service (in which the passenger determines the pickup time, location and destination), available to riders through the Uber app and to Uber Partners through the Uber Partner app. *Uber Partners* are persons who entered into agreements permitting the use of the Uber Partner app to receive and accept requests for the provision of point-to-point passenger transport services, and to provide such services.

2 A reference to the defendants in this context excludes the fifth defendant, Raiser Operations BV.

3 Victoria, New South Wales, Queensland and Western Australia.

4 The relevant principles are summarised in *Andrianakis v Uber Technologies Inc (Ruling No 3)* [2021] VSC 744, [16]–[21] (***Andrianakis (No 3)***). As Macaulay J said (at [16]): "Appointing sample group members to give evidence at [a trial in which common questions are determined] is now a well-established procedure in the management of the trial of group proceedings. It is different to the appointment of a 'sub-group representative party' under s 33Q(2) of the Act, but the power is sometimes sourced in the more general power contained in s 33Q(1) to give directions for the determination of questions not common to all group members, and at other times in the broad general power to make any order to

parties were unable to agree upon the number of sample group members from whom evidence should be called. In November 2021, Macaulay J ordered that Mr Andrianakis[5] notify the defendants of, and file evidence for, sample group members from these industry segments (in addition to those already nominated):

(a) a taxi network provider;

(b) a hire care licence holder;

(c) a hire car operator; and

(d) a hire car driver.[6]

3 Since then, the plaintiff has nominated sample group members and filed outlines of evidence for sample group members in each relevant industry segment, save for **hire car drivers.** It is common ground that despite lengthy extensions of the period for compliance with the **November 2021 Orders** and considerable efforts on the part of the plaintiff's solicitors, they have been unable to identify a hire car driver who is willing to be nominated as a sample group member. The plaintiff has, then, been unable to comply with that aspect of the Orders.

4 The defendants, by summons, seek orders pursuant to s 33ZF of the *Supreme Court Act 1986* (Vic) striking out those parts of the statement of claim in each proceeding that advance a claim for group members who are hire car drivers.[7] The intended consequence of the orders now sought is that no claim be advanced in the proceedings

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ensure that justice is done provided in s 33ZF." See also paragraph [30] of these Reasons.

5 The claims made in the **Andrianakis** and **Salem** proceedings are materially the same. The Salem proceeding is brought on behalf of group members who have derivative claims vested in, assigned, devolved or transferred to them, including by the death or bankruptcy of a person with a claim against the defendants for the tort alleged. The present applications in each proceeding were made on identical materials and submissions. The proceedings have been managed together and will be heard together. It was intended that the sample group members nominated by Mr Andrianakis, would cover the field, as it were, for both proceedings. Accordingly, these Reasons refer to the Andrianakis proceeding for the purpose of determining both applications.

6 The description "hire car driver" is a proxy for the more particular descriptions employed in the claims, namely accredited hire car driver (applicable in Victoria); authorised private hire vehicle driver (New South Wales); authorised limousine driver (Queensland) and omnibus driver (Western Australia).

7 The paragraphs of the claim the subject of the summonses define the represented group as including hire car drivers, and otherwise refer to those group members, but do not advance discrete causes of action or factual allegations in respect of hire car drivers.

for hire car drivers. The defendants propose that a final opportunity be afforded to the plaintiff to comply with the November 2021 Orders, by providing that any order striking out the relevant parts of the claim not take effect until 45 days after the Court's determination of this application.

The parties' submissions

5 The defendants submit in substance that:

(a) In order to establish that the Uber defendants engaged in the tort of conspiracy (which is the gravamen of the case) the plaintiff seeks to prove that the defendants agreed or combined with the common intention of injuring the plaintiff and group members by establishing, promoting and operating UberX in the relevant States by competing with the plaintiff and group members unlawfully.

(b) The plaintiff's claim itself differentiates between "taxi group members" and "hire car group members" for each State and, at its most granular, distinguishes between taxi-cab licence holders, operators and drivers, and also between hire car licence holders, hire care operators and hire car drivers. The plaintiff seeks to have the defendants' intention with respect to all industry segments determined as a common question.[8] However, the pleading of common intention in fact raises different questions with respect to different industry sub-groups, such as how its participants made money and how they are said to have been affected by Uber's "products". It does not follow that if, for example, the plaintiff can establish that UberX defendants intended UberX Partners to compete with taxi drivers, that they also intended it to complete with hire car drivers. Those submissions were made in support of the application to appoint sample group members and were accepted.

(c) In reasons supporting the November 2021 Orders, Macaulay J said that he was particularly influenced by the consideration that the markets for those industry

[8] The question is presently articulated as whether the Uber entities shared a common intention to injure the plaintiff and group members as alleged in the Statement of Claim.

sub-groups are likely to be distinct from the markets for taxi licence holders, operators and drivers[9] such that the nature of competition in the former markets could be materially different from the latter. His Honour went on to say that an analysis of the nature of those different markets might lead to different conclusions about the impact on market participants, of the introduction of UberX and the availability of Uber Black; and that[10]

> those different conclusions about the predictable impact of competition within those different markets might in turn lead to different inferences being drawn about the probable intentions of the defendants toward the relevant market participants when establishing UberX in the four Australian states.

(d) It follows that in order to properly analyse the common intention case, specific consideration of the industry sub-group hire car drivers is required, and the Court should be apprised of the facts as to the operation of the industry segments in order to adjudicate on the alleged common intention. As Macaulay J put it, determining the claims of sample group members (including a hire car driver) would provide a concrete or realistic focus for consideration of the issues of common intention and the causation of loss.

(e) It is far from obvious that there is a cogent basis on which a hire car driver would claim loss or damage. That is because (as Macaulay J recognised[11]) the Uber defendants also offered the product Uber Black, by which hire car drivers would earn income by obtaining bookings. It appears that rather than intending to compete with and cause harm to hire car drivers, the defendants introduced that product to benefit them by providing additional income streams. It was submitted that this was made clear by the evidence that the defendants intend to adduce at trial. They have filed an outline of evidence from a hire car driver who will say that he was better off after the introduction of UberX and Uber Black, which offered him flexibility and a good income. The

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9 Those reasons can be read as equally applicable to hire care licence holders, operators and drivers.
10 *Andrianakis (No 3)* [2021] VSC 744, [35]–[36].
11 Ibid [36].

plaintiff is not presently intending to call any evidence from any hire car driver.

(f) In the circumstances in which there is no witness through whom it is intended to say how that part of the industry was affected by the introduction of UberX, the plaintiff's case is lacking in coherence. The defendants are left to guess at the case they are being asked to meet with respect to intention and loss.

(g) The plaintiff has been unable to comply with the November 2021 Orders over a period of 15 months. It cannot be realistically assumed that a group member who is a hire car driver and who is prepared to act as a sample group member will emerge. The plaintiff's continuing non-compliance should result in a consequence.

(h) The Court is empowered under s 33ZF to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding. It is in the interests of justice to strike out the relevant parts of the claim. It is apparent that no hire car driver wishes to have their individual claim determined. If no hire car driver has to date been willing to take an active step in order to pursue a claim, it cannot be assumed that group members in that category will at a later stage want to pursue compensation even if the common questions are resolved favourably to hire car driver group members. It follows that there will be no efficiencies gained by facilitating the determination of claims for these group, by these proceedings. It also follows that the risk of any real prejudice to group members is very low. Any such prejudice will be ameliorated by the provision of a further brief period for compliance with the November 2021 Orders.

(i) Turning to the defendant's interests, it is unfair to the defendants to be required waste time and resources defending a complex claim in which no group member is interested, and in circumstances where they do not have and will not have the benefit of evidence from a group member that will properly crystalise and make concrete the claims insofar as they concern hire car drivers. Relatedly, it would be wasteful of Court resources. Balancing the interests in

issue, the appropriate order is to not permit that part of the claim that concerns hire car drivers to continue.[12]

6 The plaintiff submitted, in substance, that far from being appropriate or necessary to ensure that justice is done in the proceeding (as required for an exercise of power under s 33ZF), the proposed orders would prevent the efficient resolution of group members' claims and prejudice group members by preventing their claims from being heard and determined in the proceeding. That result would occur because of an inability to comply with the case management order and not because of any underlying deficiency in the claim. More specifically the plaintiff said that:

(a) The defendants' application ought be assessed in the context of the reasons for the November 2021 Orders, which were made as a matter of case management and to assist in the efficient conduct of the proceeding. Justice Macaulay did not hold that the appointment of any sample group member (a hire car driver or otherwise) was *necessary*, whether to enable the defendant to understand the case they had to meet, to facilitate the resolution of any issue in the proceeding or to ensure that justice was done in the proceeding. To the contrary, his Honour held that the decision to appoint or not appoint a sample group member was a matter of judgment and unlikely to be 'wrong', but his Honour was satisfied that *the efficient conduct of the group proceeding would be enhanced* if the Court were able to make findings in respect of the claims of group members from each relevant industry segment, particularly given that the markets for those industry sub-groups were likely to be sufficiently distinct from one another. His Honour rejected the defendants' submission that sample group members were necessary to avoid the Court being required to answer hypothetical or advisory questions. To the contrary, his Honour accepted that evidence of the defendants' intentions might be drawn from other evidence and

12 Until the application came on for hearing, the defendants also sought relief also under r 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) on the grounds that pursuit of the relevant part of the claim was an abuse of process, and under s 33N of the *Supreme Court Act 1986* (Vic), that the proceeding no longer continue under pt 4A of the Act insofar as it concerns the claims of hire car drivers. Neither of those grounds was pressed.

the fact that there is evidence that members of the so-called unrepresented industry sub-groups exist would probably mean that any determination on issues common to those sub-groups would be neither hypothetical nor merely advisory. His Honour made the orders in respect of sample group members because it would afford the trial process a concrete focus on the nuances and characteristics of those group members' claims.

(b) The power conferred by s 33ZF is wide, but not unlimited, and an order under that provision may only be made where it is necessary or appropriate to *ensure that justice is done in a proceeding*. While the provision would empower a court to strike out part of a pleading in some circumstances, such an order would not meet the criterion for the exercise of the power in this case.

(c) Mr Andrianakis has complied in respect of seven of the eight categories of sample group members required. Despite significant efforts to comply, he has been unable to nominate an eighth sample group member. The evidence is that none were presently able and willing to be nominated. The willingness of an eligible hire car driver group member to be nominated as a sample group member is outside the plaintiff's control. There is no suggestion that the present inability to comply with that order is attributable to any default or negligence of the plaintiff.

(d) The evidence of a hire car sample group member would necessarily be concerned with their individual circumstances and would not establish how participants in that industry segment made money and how they are said to have been affected by Uber's products and nor would it establish the state of the market and competition with respect to hire car drivers, which are the matters the defendant contends ought be the subject of evidence. At best, that evidence would be an illustrative example and helpful, rather than necessary, in providing a 'concrete focus' to those group members' claims.

(e) Such evidence is not necessary for the defendants to understand the claim

against them, and nor do the defendants identify any specific evidence that they require that could be led by a single hire car driver sample group member. To the extent that the defendants submit that evidence of a hire car sample group member is necessary to adjudicate on the alleged common intention, it rests on a mischaracterisation of the significance of such evidence (of its nature being illustrative only) and is inconsistent with Macaulay J's ruling that calling an individual hire car operator to give evidence about their individual experiences will not, of itself, produce evidence about the intention of the defendants when entering a particular market. Rather, evidence relevant to intention will come from discovery, expert evidence and the defendants' witnesses. Further, the Court will hear from two individual hire car drivers with driving experience in two different States.

(f) The uncontested evidence is that group members do wish to have their claims prosecuted. That a person is not presently willing to act as a sample group member does not establish that they do not wish to have their claims prosecuted, nor that they would decline to establish loss consequent upon a positive determination of relevant common questions. The orthodox position is that group members are entitled to expect, in the usual course, that the plaintiff will be responsible for the carriage of the proceeding and group members will not be required to participate.

(g) Granting the strikeout application would cause significant prejudice to hire car driver group members and would not facilitate the efficient determination of their claims: it would prevent them from having their claims heard and determined in this proceeding. Those claims must either be heard and determined separately despite the obvious inefficiencies that would entail or would never be heard at all. Furthermore, that effect would be amplified in circumstances where opt-out notification has not yet occurred.

(h) The defendants' focus on there being some consequence for the plaintiff's non-compliance with one aspect of the November 2021 Orders is misdirected – they

do not provide any principled reason why adverse consequence should in effect be visited upon absent group members.

(i) The appropriate order is that order 2(d) of the November 2021 Orders (which directs the appointment of a hire care driver sample group member) be vacated.

Analysis

7 For the reasons that follow, the appropriate course is to dismiss the defendants' summons in each proceeding and to vacate order 2(d) of the orders of 30 November 2021. In short, I accept, largely for the reasons advanced in the plaintiff's submissions, that striking out those parts of the claim made on behalf of hire car drivers would not be an order that is appropriate or necessary to ensure that justice is done in the proceeding.[13]

8 There is sufficient evidence that group members who are hire car drivers do exist and do wish to have their claims prosecuted in this proceeding. The evidence of the plaintiff's solicitor Mr Michael Donelly, a principal of Maurice Blackburn and an experienced class actions practitioner, was relevantly that:

(a) Maurice Blackburn has communicated with 667 registered group members about whether they would be willing to be sample group members representing hire car drivers. Of those, 236 had registered their claims with Maurice Blackburn as hire car drivers and 404 had registered claims as hire car operators or hire car licence owners (or both). During those conversations, a small number of group members gave instructions that they had not suffered loss in their capacities as hire car drivers but as operators or licence holders. Their registration status was updated accordingly.

(b) At the time of this application there are approximately 260 group members who Maurice Blackburn have assessed as being hire car driver group members, who have taken the positive step of registering their claims with Maurice Blackburn

13 There was no issue as to the scope of the power conferred by s 33ZF; as to which, see *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469, 479–80 [33] (***Earglow***).

and wish to have their claims determined in the proceeding.

(c) No eligible hire car driver group member has provided instructions to permit their nomination as a sample group member. Those group members have, between them, conveyed various reasons for their unwillingness to act in that role, including work and caring responsibilities, poor mental or physical health and anxiety about giving evidence at trial.

9 The defendants submitted that I should place little or no weight on the reasons provided for the group members' unwillingness to act as sample group members, although they said that it was unnecessary to determine the admissibility of those parts of Mr Donelly's evidence. They also submitted that it was unclear what was meant by the proposition that some group members wish to have their claims advanced in the proceeding, when it was not known what their claims were, because no details of their claims were given.

10 It should be recalled that the proceedings have been issued on an open basis. A date by which group members may opt out of the proceedings is yet to be fixed, and there has been no requirement for group members to register a claim. Notices in respect of opting out will be published in May 2023.

11 I can comfortably conclude that there are 260 hire car driver group members who the plaintiff's solicitors have assessed as meeting the pleaded criteria for group membership, who have taken the positive step of registering their claims, thereby expressing a desire to have their claims determined in the proceeding. What that means is that the claims alleged on their behalf by the plaintiff are being pursued in this proceeding, in the first instance by the plaintiff advancing questions that are alleged to be common to those group members, and other group members. The scope of the findings and determinations made at trial, and the question of who should be bound by them, is a question for another time. The fact that particulars of the hire car driver group members' claims have not been described in the evidence in response to this application (or otherwise provided to the defendants) does not have the

consequence that the claims of hire car driver group members are not being advanced in the proceeding.

12 Mr Donelly's evidence was that, in the ordinary course, the distribution of an opt-out and registration notice in a class action prompts a substantial number of new registrations from group members, and accordingly his expectation is that the number of hire car drivers who register a claim in the proceeding will increase. The defendants relied upon uncontested evidence that substantial publicity concerning the proceedings has already occurred. At this point, it cannot be concluded that the size of the hire car driver cohort will not increase, although nothing more particular can be said.

13 As to the reasons for group member unwillingness to be nominated as sample group members, although the evidence on that question on this interlocutory application was hearsay and untested, what I can conclude is that group members have told Maurice Blackburn that they are unwilling to so act, including for the reasons identified, but that they nevertheless wish to continue to have their claims advanced in the proceeding. Contrary to the defendants' submission, it does not follow from the fact that group members have not been willing to be nominated as sample group members, that they do not wish to advance their claims in these proceedings. Nor does the evidence establish that hire car driver group members would decline to establish their loss if common issues are resolved in their favour. Acting as a sample group member involves additional and more public undertakings, including giving evidence at trial, than the usual requirements of establishing loss in an individual case.

14 I accept that striking out those parts of the proceeding would cause real prejudice to hire car driver group members and would not facilitate the efficient determination of their claims: it would prevent them from having their claims heard and determined in this proceeding. Those claims would either have to be heard and determined separately despite the obvious inefficiencies that that would entail, or would never be heard at all.

15 In pressing the utility of evidence from sample group members the defendants submitted that group members were *not entitled to be passive*. The plaintiff said that, on the contrary, the orthodox position is that group members are entitled to expect, in the usual course, that the plaintiff will be responsible for the carriage of the proceeding and group members will not be required to participate. Broadly, the plaintiff is correct,[14] and if the defendants intended to submit generally that group members who are unprepared to give evidence at the trial of a class action proceeding ought not be entitled to have their claims determined in it, I cannot accept that submission. However, broad propositions concerned with the essential roles of plaintiff and group member within the statutory regime are not of great assistance in determining the appropriate approach to case management, in particular the making of directions for the filing of evidence from group members in this case. Framing the argument by reference to the *entitlements* of group members (or absence thereof) did not usefully advance the issue.

16 I am satisfied on the evidence, which is unnecessary to set out here, that the failure to comply with the November 2021 Orders has not been for lack of trying. The plaintiff has made substantial efforts to comply. Lack of diligence or negligence was not suggested. In those circumstances, the defendants' contention that the plaintiff was failing to prosecute the part of the proceeding concerning hire car drivers was inapt.

17 Those considerations must be assessed in light of the interest of the defendants in meeting a focused, concretely defined case.

18 I accept that the plaintiff's case is pleaded at a relatively high level of generality. The pleading makes clear that it is the plaintiff's case that the defendants shared a common intention to unlawfully compete against group members in *all* of the industry sub-groups identified and as a result, to injure them. It is said, with respect to *all* group

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14 See *Mobil Oil Australia Pty Ltd v The State of Victoria* (2002) 211 CLR 1, [38]–[40] (Gaudron, Gummow and Hayne JJ); *Timbercorp Finance Pty Ltd v Collins* (2016) 216 CLR 212, [44] (French J), [124]–[132] (Gordon J); *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168, [50] (Bell AJA, Bongiorno and Harper JJA agreeing). See also *Thomas v Powercor Australia Ltd (Ruling No 1)* [2010] VSC 489, [30]–[31] (J Forrest J); *Abbott v Zoetis Australia Pty Ltd (No 2)* (2019) 369 ALR 512, 523 [35] (Lee J).

members, that they were entitled to the advantage of being the providers and facilitators of point to point passenger transport services without unlawful competition, and that the absence of unlawful competition from competitors operating without the costs and limitations imposed by the regulatory requirements and barriers to entry for those services, was critical to the maintenance of the incomes and the value of licences and authorities held by group members. Differently put, unlawful competition would (relevantly to hire car drivers) reduce their incomes.[15] Upon reading the claim, questions naturally arise as to how it was, more specifically, that the introduction of UberX affected particular providers and facilitators of point-to-point passenger services. It is unsurprising that the defendants submit (and Macaulay J accepted) that evidence from group members from the identified industry sub-groups could provide a concrete focus to the issued raised by the claim, including in ways that might inform the question of common intention.

19 However, the fact that such evidence might prove helpful in providing focus to the issues and might reasonably be expected to put flesh on the bones of the plaintiff's case, as it were, does not establish that the absence of such evidence has the consequence that the case is not sufficiently well understood such that it can be concluded that the defendants do not have proper opportunity to defend it. Nor does it permit me to conclude, at this time, that the Court cannot properly decide the issues raised by the pleaded case.

20 Although the defendants submitted on this application that, "the Uber defendants are left to guess as to the case they are being asked to meet regarding hire car drivers, particularly with respect to intention and alleged loss", they made clear that they were not seeking to strike out parts of the case on ground that they could not understand the pleading and respond to it (noting that they have filed their defences and their lay evidence) or that the pleading did not disclose a cause of action. Similarly, although they submitted that, "it is far from obvious that there is a cogent basis by which a hire car driver could claim loss or damage" and that it was necessary in order to properly

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15 Second Further Amended Statement of Claim, [57A]–[57B].

analyse the common intention case to have evidence from a hire car sample group member, they did not pursue a summary judgment application; it was not contended that the claim in respect of hire car drivers was bound to fail or had no real prospects of success.

21 I accept, as Macaulay J said, that an analysis of the different segments of the point to point passenger service industry and the markets within that industry might lead to different conclusions about the impact on market participants of the introduction of UberX and the availability of Uber Black which might, for reasons Macaulay J explained, be relevant to the drawing of inferences about the defendants' intentions.[16] However, significantly, as Macaulay J concluded, evidence going to those issues might be given by sources other than sample group members. Having decided that the efficient conduct of the proceeding would be enhanced by the Court making findings in respect of the proposed sample group members, Macaulay J went on to say that,

> [37] I accept that calling individual hire car operators[17] to give evidence about their individual experiences will not, of itself, produce evidence about the intention of the defendants when entering any particular market. I even accept that an industry expert may be able to give an opinion about the impact of the entry of UberX into a market to facilitate the drawing of inferences (if any may be drawn) as to the defendants' intentions at the relevant time. Further, the fact that there is evidence that members of the so-called Unrepresented Industry Subgroups actually exist would probably mean that any determinations made by the Court on issues common to those subgroup members would not be either hypothetical or merely advisory.[18]

22 At this stage of the proceeding, I cannot conclude otherwise, and the defendants did not identify any basis upon which I could do so.

23 The plaintiff submitted that evidence from sample group members would only ever be illustrative of their personal circumstances. That characterisation is overly narrow. Personal circumstances can illustrate, and make more particular, general contentions

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16 *Andrianakis (No 3)* [2021] VSC 744, [36]

17 This reasoning applies equally to hire car drivers.

18 *Andrianakis (No 3)* [2021] VSC 744, [37]. As noted, Macaulay J went on to decide that it would nevertheless assist the trial process to have claims for those categories of group members determined at the trial.

about the impact of the introduction of competition upon providers and facilitators of point-to-point passenger transport services. They went on to submit that even so, the plaintiff and the defendants each intend to call evidence from witnesses who worked as hire car drivers although those witnesses do not make claims in that capacity. The plaintiff's intended witness includes a sample group member representing hire car licence holders and hire car operators, who worked throughout the claim period as a hire car driver but who did not himself draw a wage for that work. As noted earlier, the defendants themselves intend to call evidence from a hire car driver, for whom they have filed an outline of evidence. From that evidence, it may be possible to find certain facts about how the introduction of UberX and Uber Black affected the income streams available to hire car drivers, but no more specific proposition can be formulated at this juncture.

24 The plaintiff emphasised that if in fact there is a gap in the case concerning common intention, the evidence of sample group members would not fill it. As Macaulay J said, evidence from sample group members would not, of itself, establish the defendants' intention when entering any particular market, although (to summarise) it could be relevant to the inferences about it. The plaintiff's more fundamental point was that no "gap" of real significance has been identified. The defendant did not point to any particular evidence that can reasonably be expected to be given by a hire car driver sample group member, without which the defendants cannot understand the case, or without which the common question of intention cannot be decided. I accept that submission, notwithstanding that I agree that the claim is put at a high level of generality.

25 As the case progresses, including by the filing of proposed expert evidence and the identification of the propositions said to be established by documents upon which the parties rely, the issues, including as they concern the defendants' alleged common intention, will crystalise. However, I cannot conclude, at this time, on the submissions made, that without the evidence of a hire car such evidence, the question of common intention could not be properly addressed at trial.

26 The plaintiff emphasised that the question of whether any particular group member has suffered compensable loss[19] is an individual issue. That is undoubtedly correct,[20] and was not in contest. The plaintiff's claim nominates as a common question, "what are the principles for identifying and measuring losses suffered by the plaintiff and group members as a result of the conspiracies alleged in the statement of claim". Such a question might very well be common only to sub-sets of group members. However, the significance to the common intention question, of the absence of hire car driver evidence, was the primary focus of this application.

27 Returning to the passage of Macaulay J's judgment set out at paragraph 21 above, it will be noticed that the observations are expressed in terms of what the evidence *might* show, and his Honour said that the issues would *probably* not be hypothetical. Before Macaulay J, the defendants did not press the case that the absence of sample group members would render the common questions hypothetical. They ultimately submitted that the Court should focus on case management principles so as to avoid the risk that at the trial the Court could not determine such issues in relation to relevant parts of the industry because of an absence of evidence, or the risk that such determinations, if made, would later be considered hypothetical.[21] The plaintiff had submitted in response, that because members within the relevant sub-groups had been shown to exist, findings in respect of those industry sub-groups would not be hypothetical or advisory, it being permissible to make factual determinations which do not squarely arise from the plaintiff's claim.[22]

28 The tenor of the observations in the passage cited, is in keeping with the fact that the question of hypothetical determinations could only be addressed to what the evidence *might* show, and how the issues *might* be crystalised, that evaluation being made at an early stage of the proceedings. The approach required to be taken to an issue of this kind at this stage of the proceeding reflects the fact that a decision to appoint or not

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19 The question whether group members have suffered loss is to be distinguished from the question whether the defendants shared a common intention to unlawfully compete with *and thereby injure* the plaintiff and group members.

20 *Salem v Uber Technologies Inc* [2020] VSC 885, [72]–[74] (Macaulay J).

21 *Andrianakis (No 3)* [2021] VSC 744, [24(c)].

22 *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150, 164–5 [67] (***Dillon***).

appoint a sample group member is a judgment to be made at a time when, as Macaulay J emphasised, perfect judgment is impossible. A judgment about how the evidence will assist the proper determination of the issues at trial, and how it will assist the efficient conduct of the proceeding by enhancing the utility of the findings ultimately made, must of necessity be made by reference to *prospective* evidence with a view to it being obtained.

29 It is unsurprising then, that the authorities have consistently described a decision as to whether to appoint sample group members as one concerning case management and involving judgment calls, weighing the possible benefits of evidence that might be called. As Macaulay J said, the November 2021 Orders were made in the exercise of a judicial discretion concerning the management of the trial of this proceeding. His Honour elaborated the point this way:

> [33] In the context of this[23] group proceeding, it is difficult to imagine that any decision to either appoint or not appoint a sample group member – or one batch or another batch of sample group members – could be 'wrong'. The decision will have consequences and an overly cautious decision may be productive of some delay and extra cost, in one direction, or an overly robust decision may be productive of some duplication and extra cost in the other. But any decision will be a matter of value judgment necessarily made at a time when perfect judgment is impossible.
>
> [34] A decision to appoint sample group members ideally should be made at a relatively early stage to enable evidence to be gathered and discovery given in a timely way. The earlier the decision, however, the more difficult it will be to assess whether and to what extent the trial of a particular sample group member's claim will be efficacious in the context of the whole group proceeding. Undoubtedly, such a decision will involve a trade-off: that is, a trade-off between the risk that a trial without the sample group member's evidence might lessen the value of the body of findings made for the benefit of the wider group against the risk that the value of the additional findings will turn out to be low and the cost of obtaining them relatively high.
>
> [35] Acknowledging those factors, I am however reasonably well satisfied that the efficient conduct of this group proceeding will be enhanced if the Court is able to make findings in respect of the claims of a hire car

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[23] During the hearing, counsel for the plaintiff drew my attention to the fact that there were two versions of Macaulay J's ruling available online. The first version, which was the version provided to the parties by his Honour's chambers and subsequently published on Austlii, began at paragraph [33] saying: "In the context of *this* group proceeding …" (emphasis added). The second version, at that same paragraph, began: "In the context of *a* group proceeding …" (emphasis added). Neither party suggested that this discrepancy would affect the outcome of this application either way.

> licence holder, hire car operator, hire car driver and a taxi network provider. In reaching that conclusion, I am particularly influenced by the consideration that the markets for those industry subgroups are likely to be sufficiently distinct from the markets for taxi licence holders, operators and drivers such that the nature of competition in the former markets could be materially different from the latter.

30 Macaulay J's approach to the question reflected the principles set out in his Honour's ruling, which I respectfully adopt.[24] Shortly put, the exercise of the Court's discretion to appoint sample group members and, if so, how many and which ones, turns on case management considerations and the circumstances in each proceeding, and is guided by the object of group proceedings and interests of justice.[25] *Permitting* the plaintiff to call group members as witnesses in order to adduce evidence which is relevant to any issue raised facilitates one of the objects of group proceeding litigation. It does so by enabling the Court to determine as many common issues as practicable and obviating or limiting the need for additional trials, assisting the conduct of the litigation in a practical manner, which will provide group members with the benefit of findings of fact or law to assist them in obtaining relief.[26] The practice of calling evidence from group members enables the Court to make findings and consequent binding determinations in respect of group members' claims where the circumstances relevant to those claims are not covered by the plaintiff's claim.[27] There may be *utility in adopting this expedient* where there are significant differences in the liability cases of individual claimants, aside from causation and damages issues.[28] This approach demonstrates the flexibility which the extensive case management powers in s 33ZF provide so as to facilitate the efficient management of class actions. Courts find it expedient not only to deal with the claim of the representative plaintiff and with common questions properly so called and also questions which have utility in resolving aspects of the claims of a subset of group members, which may be called "issues of commonality"; an individual claim of one or other group member may

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24 See *Andrianakis (No 3)* [2021] VSC 744, [16]–[21].

25 *Andrianakis (No 3)* [2021] VSC 744, [16]; *Dillon* (2017) 252 FCR 150, 164 [66] (Lee J); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2001] VSC 372, [32]–[33] (Gillard J) (***Johnson Tiles (No 3)***).

26 *Andrianakis (No 3)* [2021] VSC 744, [17]–[18]; *Johnson Tiles (No 3)* [2001] VSC 372, [42]–[43], [49]–[51].

27 *Andrianakis (No 3)* [2021] VSC 744, [19]; *Matthews v SPI Electricity Pty Ltd (Ruling No 5)* (2012) 35 VR 616, 617 [4] (J Forrest J).

28 *Andrianakis (No 3)* [2021] VSC 744, [20]; *Earglow* (2015) 230 FCR 469, 483–5 [55]–[66].

provide an efficient way of dealing with these issues of commonality. The acceleration of the claim of a group member might not be necessary, depending upon the circumstances.[29]

31 The question requiring resolution on the present application is whether the claims of hire car driver group members may be advanced in the proceeding notwithstanding that none of their number can be identified to give evidence at trial as a sample group member. It has now been determined that the plaintiff cannot comply with the case management order because no relevant sample group member can be identified for the hire car driver sub-group. That circumstance was not known when Macaulay J made the November 2021 Orders. Nevertheless, this application was brought on the same basis as the initial application and was directed to the appropriate balancing of interests between the plaintiff and defendant informing where the interests of justice lie in the management of the proceeding.

32 On this application, the defendants, quite properly, did not seek to challenge any aspect of his Honour's reasoning, but in fact adopted it. Also, quite properly, they did not seek to reargue the case put before Macaulay J. They did not contend that the present application should be decided on any basis other than the appropriate case management orders for the conduct of the trial of the proceeding. They did not contend that the absence of evidence from a hire car driver, whose claim was to be determined in the proceeding, had the consequence that the common intention question would be decided hypothetically.

33 It follows from what is set about above that permitting the claims of hire car drivers to continue, without appointing one of their number as a sample group member, will not be inconsistent with the analysis of the underlying issues set out in the reasons for the November 2021 Orders.

34 Returning to the essential question, namely whether an exercise of power under s 33ZF to make the order sought by the defendants, meets the statutory criterion for

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29 *Andrianakis (No 3)* [2021] VSC 744, [20]; *Dillon* (2017) 252 FCR 150, 164 [66]–[67] (Lee J).

its exercise, I have concluded that it does not. Bringing to an end the prosecution in this proceeding of the claims of hire car driver group members who do exist in not insignificant numbers and who do wish to have their claims determined in the proceeding, in circumstances where the defendants do not say that their claims have no real prospects of success or cannot be understood, is neither appropriate nor necessary to ensure that justice is done in the proceeding. The balancing of the relevant interests does not favour the defendants. It plainly favours the plaintiff, who brings the proceeding on behalf of group members. I reject the defendants' submission that there will be no efficiencies gained by facilitating the determination of claims for these group members by these proceedings, and that the risk of any real prejudice to group members is very low. The proposed order would diminish efficiency by leaving hire car drivers to pursue their claims individually and would cause real prejudice by requiring them to so do so. I accept the submission that that result would occur because of an inability to comply with the case management order and not because of any relevant identified underlying deficiency in the claim.

35 The appropriate analysis of the interests is not altered by the proposal that an order striking out the hire car driver claims not take effect for 45 days, particularly in circumstances where, as the defendants accepted, it cannot be reasonably assumed that a sample group member will emerge.

36 The defendants submitted that if not inclined to grant the application now, I might adjourn it. The better course is to dismiss the application, the basis for it not having been established. If there is a real issue that emerges at a later point after further steps are taken in the proceeding, including one of fairness, the defendants are at liberty to fashion and bring an application tailored to the particular circumstances in issue. The Court has broad case management powers to shape the proceedings and direct steps that parties need to take in order to ensure a fair and efficient disposition of trial of the proceedings. In this case, the defendants' proposed relief is ill-suited to the attainment of greater specificity and elaboration of the plaintiff's case. Ultimately, the defendants' arguments may be issues for trial, depending upon how the evidence is further

prepared and developed. If the evidence that is in fact called at trial is not capable of rising to a sufficient level, the claims will not succeed. That is a matter for another day.

CERTIFICATE

I certify that this and the 21 preceding pages are a true copy of the reasons for ruling of Nichols J of the Supreme Court of Victoria delivered on 20 February 2023.

DATED this twentieth day of February 2023.

Associate

SCHEDULE

S ECI 2019 01926

BETWEEN

NICOS ANDRIANAKIS

Plaintiff

and

UBER TECHNOLOGIES INCORPORATED (4849283)

First Defendant

and

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

Second Defendant

and

UBER B.V. (RSIN 852 071 589)

Third Defendant

and

UBER AUSTRALIA PTY LTD (ACN 160 299 865)

Fourth Defendant

and

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

Fifth Defendant

and

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

Sixth Defendant

and

UBER PACIFIC HOLDINGS PTY LTD (ACN 609 590 463)

Seventh Defendant

S ECI 2020 01834

BETWEEN

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

Plaintiff

and

UBER TECHNOLOGIES INCORPORATED (4849283)

First Defendant

and

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

Second Defendant

and

UBER B.V. (RSIN 852 071 589)

Third Defendant

and

UBER AUSTRALIA PTY LTD (ACN 160 299 865)

Fourth Defendant

and

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

Fifth Defendant

and

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

Sixth Defendant

and

UBER PACIFIC HOLDINGS PTY LTD (ACN 609 590 463)

Seventh Defendant