

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

Not Restricted

S ECI 2024 02663

Debra Gaye-Ann Dawson

First Plaintiff

Angela Susan Williams

Second Plaintiff

v

Insurance Australia Limited  
(ACN 000 016 722)

First Defendant

Insurance Manufacturers of Australia Pty Ltd  
(ACN 004 208 084)

Second Defendant

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JUDGE: Nichols J

WHERE HELD: Melbourne

DATE OF HEARING: On the papers, submissions dated 21 February 2025

DATE OF JUDGMENT: 11 March 2025

CASE MAY BE CITED AS: Dawson v Insurance Australia Limited

MEDIUM NEUTRAL CITATION: [2025] VSC 92

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GROUP PROCEEDINGS - Consolidation - Application to consolidate two proceedings - *Supreme Court (General Civil Procedure Rules) 2015 (Vic)* r 9.12(1) - Judicial discretion - Factors to be taken into account in determining whether it is appropriate to order consolidation - Legal and factual allegations made in each proceeding substantially the same - Causes of action relied upon substantially the same - Relief claimed substantially the same - Alleged contravening conduct substantially the same - Common questions of law and fact - *Civil Procedure Act 2010 (Vic)* s 7 - Factors for consolidation considered in the context of the overarching purpose - Application granted.

GROUP PROCEEDINGS - Consolidation - *Civil Procedure Act 2010 (Vic)* s 26 - Use of documents produced and discovered in legacy proceeding in consolidated proceeding - Order sought by plaintiffs that documents produced in legacy proceeding be documents in the consolidated proceeding - Documents order contested by defendants - Defendants did not identify basis for objection to documents order - Obligation not to make collateral use of documents disclosed on discovery - *Hearne v Street* (2008) 235 CLR 125 - No proper basis to

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defer the orderly management of the consolidated proceeding – No prejudice identified – Facilitation of the orderly and efficient conduct of the proceeding - Order made permitting the use of documents in the consolidated proceeding.

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| <u>APPEARANCES:</u> | <u>Counsel</u>                             | <u>Solicitors</u>       |
|---------------------|--|-------------------------|
| For the Plaintiffs  | K Burke SC<br>J Page                       | Slater & Gordon         |
| For the Defendants  | Nicholas De Young KC<br>Madeleine Salinger | Herbert Smith Freehills |

HER HONOUR:

- 1 Insurance Australia Limited (IAL) and Insurance Manufacturers Australia Pty Limited (IMA) are insurers who relevantly provide home and contents insurance products. Debra Dawson and Angela Williams have commenced a group proceeding against IAL and IMA concerning insurance policies issued under the State Government Insurance Office (SGIO), State Government Insurance Commission (SGIC) and RACV brands. Andrew Inglis has commenced a separate proceeding against IAL concerning policies issued by it under the NRMA brand.
- 2 The allegations made in each proceeding are substantially the same. In each case it is alleged that in the course of offering insurance policies to existing policy holders, the defendants offered 'loyalty discounts', representing that the premium payable on renewed policies would be discounted based upon the number of policies held or the length of time the consumer had insured with the defendants. It is alleged that in fact, the purportedly discounted premiums were calculated by algorithmic modelling that caused them to be higher or at least not less expensive than they would otherwise have been. Each defendant is alleged to have engaged in misleading or deceptive conduct and unconscionable conduct in the circumstances.
- 3 The parties in both proceedings seek orders consolidating the proceedings with the three plaintiffs remaining as joint plaintiffs in the consolidated proceeding. I agree that consolidation is appropriate, for the following reasons:
  - (a) The power to consolidate proceedings found in r 9.12(1) of *the Supreme Court (General Civil Procedure Rules) 2015* (Vic) may be exercised relevantly where some common question of law or fact arises in both proceedings and for 'any other reason it is desirable to make an order under' r 9.12(1). The factors that may be taken into account in determining whether it is appropriate to order consolidation are not confined, but have been understood to include whether the proceedings are broadly of a similar nature; time savings or other efficiencies that might be achieved; the stage each proceeding has reached; likely overlap of witnesses in the proceedings; the nature and number of issues

that are not common to the proceeding; whether inconsistent findings might result from separate trials and the effect of consolidation on the prospects of the proceedings being resolved by negotiation.<sup>1</sup> Those matters are to be considered in the context of the overarching purpose, which is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.<sup>2</sup>

- (b) The criteria for the making of an order under r 9.12(1) are satisfied in this case. The legal and factual allegations made in each proceeding are substantively the same. The causes of action relied upon and the relief claimed is the same. The proceedings involve a common defendant (IAL), although the Dawson proceeding is also brought against IMA. The allegations against IMA and IAL are substantially the same. Although the allegations in the Inglis proceeding concern policies issued under the NRMA brand (and the Dawson proceeding concerns policies issued by IAL under the SGIO and SGIC brands) the allegations made in respect of those policies - the defendants' conduct in relation to the offer of purported discounts, the manner of calculation of the premiums and the circumstances of the conduct - are substantially the same.
- (c) In those circumstances there will undoubtedly be common questions of law and fact arising in each proceeding and significant efficiencies which will be gained from consolidating the proceedings. Indeed there would be a risk of inconsistent findings from separate trials were the proceedings not consolidated. The Inglis proceeding has been recently issued. The Dawson proceeding is somewhat more advanced but still in the early stages.
- (d) The plaintiffs in each proceeding are represented by the same firm of solicitors. There are no inefficiencies that would flow from joint representation and no apparent unfairness to the defendants.

4 It is also appropriate that I make the order in respect of costs sought by the parties,

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<sup>1</sup> See for example *Lidgett v Downer EDI Ltd* [2023] VSC 574; *Kajula Pty Ltd v Downer EDI Ltd* [2024] VSCA 236; *Jowene Pty Ltd v Downer EDI Ltd* [2023] FCA 924; *Teoh v Downer EDI Ltd* [2023] VSC 574, [17]; not disturbed on appeal *Kajula Pty Ltd v Downer EDI Ltd* [2024] VSCA 236.

<sup>2</sup> *Civil Procedure Act 2010* (Vic), s 7.

namely that subject to further order, costs incurred to date in each proceeding will be costs in the consolidated proceeding. On 20 December 2024, a group costs order was made in the Dawson proceeding under s 33ZDA of the *Supreme Court Act 1986* (Vic). Whether that order should continue to apply without adjustment to the consolidated proceedings and whether that question needs to be addressed at this time or deferred until the resolution of the proceedings, should be the subject of a submission in due course.

### **Documents in the consolidated proceeding**

- 5 There is only one issue in dispute. The plaintiffs seek an order that all documents produced and discovered in the Dawson proceeding including by way of discovery, pursuant to s 26 of the *Civil Procedure Act 2010* (Vic) (**CPA**) or pursuant to subpoena are to be treated as documents produced or discovered (as applicable) in the consolidated proceeding (the **Documents Order**). The documents produced so far:
- (a) were produced by the Australian Securities and Investments Commission (**ASIC**) on 9 and 14 August 2024 pursuant to a subpoena issued by the plaintiffs in the Dawson proceeding;
  - (b) were produced by the defendants to the Dawson proceeding on 28 April 2024 pursuant to their obligations under s 26 of the CPA (the **s 26 Documents**).
- 6 The defendants oppose the order. The basis for their opposition is that ‘there is no established reason the proposed order is needed now’, asking rhetorically why the plaintiff in the Inglis proceeding requires access to the documents when he has already filed a statement of claim. The defendants say that the proposed order should be supported by an affidavit in light of matters raised in correspondence about the basis of the allegations made in the Inglis proceeding. In short, the history of this matter is as follows:
- (a) Slater and Gordon wrote to IAL’s solicitors (Freehills) in June 2024 saying that they were contemplating potential group proceeding against IAL in respect of misconduct arising out of the pricing of NRMA branded home and contents

insurance policies. They sought documents from IAL relevant to the modelling process for the pricing of NRMA policies, under the *Civil Dispute Resolution Act 2011* (Cth). They referred to their own investigation into potential misconduct relating to the pricing of NRMA branded home and contents insurance policies issued by IAL, ASIC Report 765, a proceeding issued by ASIC against IAL in the Federal Court of Australia and IAL's concise statement of response in that proceeding, and the Dawson proceeding.

- (b) IAL did not produce documents in response and asked Slater & Gordon about the jurisdiction in which the proposed proceedings would be issued.
- (c) In October 2024, IAL produced its s 26 documents in the Dawson proceeding.
- (d) In December 2024, Mr Inglis commenced his proceeding against IAL.
- (e) In December 2024, Freehills wrote to Slater and Gordon inquiring about the basis upon which it had completed the factual basis certification in the Inglis proceeding and whether the factual and legal material relied upon included documents produced under s 26 in the Dawson proceeding.
- (f) Slater and Gordon wrote to Freehills on 19 December 2024 setting out in general terms the material relied upon and stating that no documents produced under s 26 were in any way used to assist the investigation that culminated in the filing of the NRMA proceeding, to satisfy the solicitors as to a proper basis for the allegations made, or in connection with the investigation or commencement of the proceeding. They said that the same applied in respect of documents produced by ASIC on subpoena.
- (g) In 31 January 2025, Freehills pursued the issue again, accepting that aspects of work undertaken for the commencement of the Inglis proceeding may be privileged but seeking particularisation of the factual grounds supporting the allegations made in the Inglis proceeding.
- (h) On 7 February 2025, Slater and Gordon again said that no use of any documents

produced in the Dawson proceeding had been made by Slater and Gordon or counsel briefed in the Inglis proceedings.

- (i) In February 2025, Freehills again pursued the issue saying they were unclear as to how certain paragraphs of the pleading were founded. Slater and Gordon responded on 11 February 2025 reiterating their previous statements. In response to information provided by Freehills about which s 26 documents had been accessed via a secure link, Slater and Gordon advised that one staff member had accessed one or two documents that were intended to be confined behind an 'information barrier' (intended to confine access to the documents for the purposes of the Dawson proceeding) but that no information from that document was provided to any member of the team of solicitors or counsel working on the Inglis proceeding or otherwise used in the preparation of the Inglis proceeding.

7 IAL has not identified any real reason why the documents produced in the Dawson proceeding should not be treated as though they had been discovered in the consolidated proceeding.

8 IAL's attempted interrogation of the proper basis certification for the Inglis proceeding has been met on three occasions with unambiguous statements by Slater and Gordon that no documents produced in the Dawson proceeding were used in or for the Inglis proceeding. IAL has not said in its submissions or its solicitor's affidavit that there is a basis to conclude that documents produced in the Inglis proceeding were in fact used in or for the preparation of the Inglis proceeding. The material the subject of correspondence raises no issue for decision. Insofar as the real reason for the defendants' seeking an affidavit is the pursuit of the interrogation of the proper basis certification, the material does not support the necessity for requiring such an affidavit. The material does not establish a basis to require an affidavit from the plaintiffs or their solicitors in support of what is in reality, a procedural order concerned with the orderly management of the consolidated proceedings. The matters ventilated in correspondence do not provide a basis to defer the orderly management

of the consolidated proceeding, including as to documents already produced.

9 The so-called implied undertaking not to make collateral use of the documents disclosed on discovery ‘arises automatically as an incident of the discovery process.’<sup>3</sup> The expression, implied undertaking’ is ‘a formula through which the law ensures that there is not placed upon litigants, who in giving discovery are suffering “a very serious invasion of the privacy and confidentiality of their affairs” any burden which is “harsher or more oppressive ... than is strictly required for the purpose of securing that justice is done.”<sup>4</sup> The rationale for the principle is that, ‘it would be inequitable if a party were compelled by court process to produce private documents for the purposes of litigation yet be exposed to publication of them for other purposes.’<sup>5</sup>

10 In this case, once the proceedings are consolidated, the proceeding in which the documents were produced will continue and the Documents Order will facilitate their ongoing use in the same proceeding. The use to which the s 26 Documents may be put if the Documents Order is made will include the prosecution of the allegations against IAL who produced the documents, in respect of both the SGIC and SGIO policies and the NRMA policies. The allegations made against IAL in respect of the offering of those policies to renewing policy holders, are substantively the same. Neither IAL nor IMA has identified any disclosure that would occur by reason of the Documents Order that would cause prejudice to it. It is relevant that despite resisting the Documents Order the defendants have not said in their submissions or affidavit that there are issues arising in the Dawson proceeding that are not raised in the Inglis proceeding or identified some other reason why the documents already produced would not be produced in the Inglis proceeding or identified any prejudice to it that would flow from the making of the Documents Order. IAL says only that the order should be ‘supported by an affidavit’ and deferred until after the close of pleadings.

11 It is conceivable in theory that two proceedings might be consolidated in

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<sup>3</sup> *Hearne v Street* (2008) 235 CLR 125 (*Hearne v Street*) 158, [106], citing *Bourns Inc v Raychem Corporation* [No 3] [1991] 1 ALL ER 908, 915 [16].

<sup>4</sup> *Hearne v Street*, 158-9, [107] (citations omitted).

<sup>5</sup> *Eso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 33, cited in *Hearne v Street* at 161, [110].



circumstances where one or both raise discrete issues in respect of which discovery was given before consolidation that give rise to particular concerns about disclosure to a party not involved in both proceedings. That kind of case might in fact raise difficulties for consolidation. But that is not this case. In this case and in the ordinary course where proceedings are consolidated, documents produced in the legacy proceedings should as a matter of procedural efficiency, become documents in the consolidated proceeding. In this case, the reasons that support consolidation also support the Documents Order. That order will not impose any additional burden on the defendants (none has been identified). Permitting the use of the documents in the consolidated proceeding going forward will not sanction collateral use of the documents. It is an order suited to the attainment of justice because it facilitates the orderly and efficient conduct of the proceeding and does not involve the consequences that the rule protecting against collateral use is intended to prevent.

12 These reasons will be published in both proceedings.

## CERTIFICATE

I certify that this and the 9 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Nichols of the Supreme Court of Victoria delivered on 11 March 2025.

DATED this 11<sup>th</sup> day of March 2025.

  
Associate of a Judge of the Court