

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

Not Restricted

S ECI 2021 00826

IDRIS HASSAN

First Plaintiff

HAWA WARSAME

Second Plaintiff

v

DR ANNALIESE VAN DIEMEN & ORS
(according to the attached schedule)

Defendants

JUDGE: John Dixon J
WHERE HELD: Melbourne
DATE OF WRITTEN SUBMISSIONS: 3 November 2021
DATE OF JUDGMENT: 16 December 2021
CASE MAY BE CITED AS: Hassan v van Diemen
MEDIUM NEUTRAL CITATION: [2021] VSC 839

PRACTICE AND PROCEDURE - Group proceeding - Approval of discontinuance of proceeding - Where plaintiff seeks to discontinue proceeding as against three defendants and to abandon certain causes of action - Where approved notice of proposed discontinuance not given to group members - *Supreme Court Act 1986 (Vic)* ss 33V, 33X.

WRITTEN SUBMISSIONS: Counsel Solicitors
For the Plaintiffs Dr Juliet Lucy Clemens Haskin Legal

TABLE OF CONTENTS

Introduction	1
The proceeding.....	1
Discontinuance application.....	2
Applicable legal principles	2
Necessity of court approval.....	2
Notice to group members.....	3
Approval of discontinuance.....	5
Plaintiff’s submissions	6
Analysis.....	8
Conclusion and orders.....	9

HIS HONOUR:

Introduction

- 1 On 19 March 2021, the plaintiffs commenced this group proceeding on behalf of persons who were residents in apartments located in nine inner suburban estate towers in Melbourne (**'Estate Towers'**), or visitors of one of the Estate Towers, and who were detained in those apartments for a period of up to 14 days during July 2020.
- 2 This detention was pursuant to directions issued by the Deputy Chief Health Officer (Communicable Disease) using emergency powers arising from the declared state of emergency during the COVID-19 outbreak. The plaintiffs and group members seek relief arising from the Estate Towers lockdown and the conditions they endured during that detention.
- 3 By summons, the plaintiffs sought orders that, pursuant to s 33V of the *Supreme Court Act 1986* (Vic) (**'Act'**), the court approve the discontinuance of:
 - (a) the proceeding against the first, second and third defendants; and
 - (b) the claims of negligence and battery against the fourth defendant.
- 4 The summons was supported by counsel's written submission, an affidavit affirmed by Mr Benedict Clemens, the plaintiffs' solicitor, and confidential advice of counsel. The defendants do not oppose the application.

The proceeding

- 5 In the original statement of claim, the plaintiffs claim damages, including aggravated and exemplary damages, against various State officials for false imprisonment, negligence, battery and assault, and also seek to hold the State of Victoria vicariously liable for the acts of the first to third defendants and the Victoria Police Officers involved in enforcing the detention.
- 6 The original statement of claim included application for various declarations about the lawfulness of the State's actions in respect of the Estate Towers detention. This relief included that the detention directions were ultra vires and invalid; that the first

defendants' exercise of emergency powers, through the detention directions and in failing to review whether the detention was necessary, was unlawful under s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the '**Charter**'); and that various other State actions involved in the detention were similarly unlawful under the Charter.

Discontinuance application

7 The plaintiffs served an amended statement of claim dated 24 September 2021, in terms of which they seek damages only against the fourth defendant, the State of Victoria. They no longer seek relief against Dr Annelies van Diemen and Dr Finn Romanes, as authorised officers under the *Public Health and Wellbeing Act 2008* (Vic), nor against the Chief Commissioner of Police, Victoria. Although I granted leave to the plaintiff to do so, that leave did not extend to amending the writ by altering the parties to the proceeding. I will make appropriate procedural directions.

8 In addition, the plaintiffs no longer seek damages for negligence nor battery, and do not seek any declaratory relief based on the doctrine of ultra vires or the Charter.

9 The discontinuance application does not seek leave to discontinue the claims for declaratory relief. This, says the plaintiffs, is because the unlawfulness claims do not bear directly on the compensation sought and, in any event, have not been abandoned, and may still be invoked in reply to an anticipated defence of lawful justification in the false imprisonment claim.

10 The negligence claim against the fourth defendant involved allegations of breach of duty arising from the alleged detention and the conditions of detention. The battery claim involved the alleged non-consensual application of mid-turbinate nasal swabs by Department of Health workers during the COVID-19 testing in the Estate Towers, for which the State was alleged to be variously liable.

Applicable legal principles

Necessity of court approval

11 Section 33V of the Act provides:

33V Settlement and discontinuance

- (1) A group proceeding may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court.

12 In *Matthews v SPI Electricity Pty Ltd (Ruling No 16)*, I considered the extent to which a partial compromise of a group proceeding, as against a single defendant, required court approval.¹

13 Section 3 of the Act defines ‘proceeding’ as ‘any matter in the court’. By virtue of that broad definition, the requirements of s 33V extend to any substantive claim – each a ‘matter in the court’ – made in a proceeding. Adopting a literal interpretation of the provision, and reading it as if court approval is only necessary for the compromise of a proceeding in its entirety, would be inconsistent with the court’s protective jurisdiction to be exercised in favour of group members.²

14 I am satisfied that both aspects of the discontinuance application, against the first to third defendants and in respect of two causes of action, are properly matters requiring court approval.

Notice to group members

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

Unless the Court is satisfied that it is just to do so, an application for approval under section 33V must not be determined unless notice has been given to group members.

16 Section 33Y requires that any notice given under s 33X be approved by the court, together with directions as to who is to provide the notice and the manner in which it is to be given.

17 No notice as contemplated under s 33Y has been given to group members foreshadowing the applications now before the court. However, according to Mr

¹ [2013] VSC 74, [8]–[13] (*Matthews*). See also *Laine v Thiess Pty Ltd* [2016] VSC 689, [10]–[12], [14] (*Laine*); *Jackson v GP & JM Bruty Pty Ltd* [2016] VSC 717; *Turner v Bayer Australia Ltd* [2021] VSC 241.

² *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457, [4].

Clemens, the plaintiffs' solicitors have taken the following steps to notify group members of the proposed amendments:

- (a) Posted the amended summary statement on the firm website, together with a contact email address, with a hyperlink to the court's webpage where the statement of claim, proposed amended statement of claim and amended summary statement are available; and
- (b) Exhibited a notice on the firm's website outlining the changes and the reasons for the changes to the statement of claim.

18 Mr Clemens reported that he has not received any complaints, queries or comments from group members adverse to the proposed amendments.

19 He also stated that the firm has not yet sent opt-out notices to group members and he believes that process would provide a further opportunity to clarify the amendments. I pause to note that no order has been made under s 33J of the Act.

20 The discretion of the court to dispense with the notice requirement for a s 33V application needs to take into account the consequences for a group member of being bound by an adverse determination, should the application succeed, of which they have not had prior notice.³ Factors relevant to the discretion include:

- (a) whether there was any real prospect that a group member, acting rationally, would oppose the orders sought;⁴
- (b) whether the expense and inconvenience of requiring the notice to be provided to group members would be disproportionate to any benefit that would arise;
- (c) whether provision of notice will create a risk of confusion or uncertainty on behalf of group members;⁵ and

³ *Femcare Ltd v Bright* (2000) 100 FCR 331, 347-8 [67]-[68].

⁴ *Laine* [2016] VSC 689, [39].

⁵ *Matthews* [2013] VSC 74, [30]-[33].

- (d) the court's statutory obligation, enshrined by s 8 (read with s 7) of the *Civil Procedure Act 2010* (Vic), to seek to give effect to the overarching purpose to facilitate the just, efficient, timely, and cost effective resolution of the real issues in dispute in the proceeding.⁶

Approval of discontinuance

21 In *Turner v Bayer Australia Ltd*, I set out the relevant principles applicable to the approval of a discontinuance.⁷ These are:

- (a) A representative proceeding cannot be discontinued without the approval of the court. Any order that is made must have regard to the interests of the present parties and group members who may be affected by the terms of any grant of leave to discontinue. The order must not have a substantive impact on group members or affect their rights. The court must guard against any injustice that could be done to persons who are not represented in these proceedings and whose rights may be adversely affected by their outcome. The court has an important responsibility of safeguarding the interests of group members as a whole. It must carefully scrutinise the way in which any order is formulated.⁸
- (b) Some courts have found that, in approving a discontinuance against certain defendants, the test is the same as a settlement or compromise of a claim, in that the court must assess whether the discontinuance is a fair and reasonable one, in the interests of the group members as a whole, not just the applicant and respondent. The applicant bears the onus to establish this.⁹
- (c) Other courts have held that the test is whether the discontinuance will not adversely impact the legal or financial position of any group members, and will not be unfair, unreasonable or adverse to the interests of group members.¹⁰

⁶ Ibid.

⁷ *Turner v Bayer Australia Ltd* [2021] VSC 241 ("**Turner**").

⁸ *Turner* [2021] VSC 241, [31], citing *Wotton v Queensland* (2009) 109 ALD 534, 544-5 [37]-[40].

⁹ *Turner* [2021] VSC 241, [32], citing *Mercedes Holdings Pty Ltd v Waters* (2010) 77 ASCR 265, 268 [10].

¹⁰ *Turner* [2021] VSC 241, [35], referring to *Laine* [2016] VSC 689, [34].

- (d) In cases of unilateral discontinuance at an early stage of the proceeding and well in advance of the expiry of limitation periods after discontinuance, I prefer this latter approach.¹¹ The legal effect of a unilateral discontinuance is different to a settlement because in this case, the applicant is free to commence a new proceeding against the same respondent and no res judicata or issue estoppel arises.¹²
- (e) An approval for discontinuance of a claim may be brought on the basis that, after further investigation, the plaintiff comes to the conclusion that the cause of action bears slim or no prospect of success, there is a want of economic viability, and there is no res judicata or impending expiry of a limitations period.¹³

Plaintiff's submissions

22 The plaintiff submitted that it was fair, reasonable and in the interests of group members for the court to approve the discontinuance application, in respect of the negligence and battery claims, because:

- (a) The factual allegations for the negligence claim are subsumed into the false imprisonment claim and, as a result, this claim would probably not significantly increase the quantum for false imprisonment damages;
- (b) There would be significant time and expense involved in obtaining medical evidence to overcome the threshold for personal injury loss for the negligence claim – that of ‘significant injury’¹⁴ – and there may be difficulties meeting this threshold in some cases;
- (c) The factual allegations in relation to the battery claim do not involve serious battery on any standard and would likely only result in minimal damages, and there have been no instructions as to significant injury arising from the COVID-

¹¹ *Agnello v Heritage Care* [2021] VSC 838, [164]-[165]. See also *Watson v Maximus Holdings (NSW) Pty Ltd* [2021] FCA 87, [49].

¹² *Turner* [2021] VSC 241, [37], citing *Babsday Pty Ltd v Pitcher Partners* (2020) 148 ACSR 551, 555 [19]-[23].

¹³ *Turner* [2021] VSC 241, [33]-[35], referring to *Laine* [2016] VSC 689.

¹⁴ *Wrongs Act 1958* (Vic) s 28LE.

19 testing;

- (d) The standard of care in relation to the medical procedures relevant to the battery claim would involve significant expert evidence, cost and complexity;
- (e) The battery claim is eclipsed by a broader assault claim in the proposed amended statement of claim;
- (f) Pleadings are not yet closed and no defence has been filed; and
- (g) Group members are not precluded from initiating fresh proceedings on the negligence claim or the battery claim.

23 As to the discontinuance as against the first three defendants, this is fair, reasonable and in the interests of group members because they were sued in their capacity as statutory office holders or state employees and are parties for whom the fourth defendant, the State of Victoria, is liable. In addition s 75(1) of the *Victoria Police Act 2013* (Vic), provides that a police tort claim must be made against the State and not against the police officer who allegedly committed the police tort. Accordingly, the claim could not be brought against the third defendant in any event.

24 The plaintiffs' confidential counsel opinion also confirms that there is no utility in continuing to proceed against the first to third defendants, and supports, in greater detail, the points advanced by Mr Clemens in respect of discontinuing the negligence and battery claims.

25 The plaintiffs' submissions add that the 'benefit' of the discontinuance of the negligence and battery claims 'would be a reduction in the size complexity and cost of the proceeding,'¹⁵ the discontinuance would be consistent with the plaintiffs' overarching obligations under s 24 of the *Civil Procedure Act 2010* (Vic),¹⁶ and the overarching purpose to facilitate the just, efficient, timely and cost effective resolution

¹⁵ *Turner* [2021] VSC 241, [44].

¹⁶ The obligation to use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.

of the real issues in dispute in the proceeding.¹⁷

26 The plaintiffs also submitted, as to whether it was just to make this order without formal notice to group members, that there is no real prospect a group member acting rationally would oppose these orders because they simply have the effect of streamlining the proceedings without compromising members' rights; the expense and inconvenience of requiring notice would be disproportionate to any benefit that might arise; and notice would create confusion and uncertainty on behalf of group members because opt-out notices are yet to be served.

Analysis

27 The issue for determination is whether the discontinuance would be unfair, unreasonable or adverse to the interests of group members.

28 I am persuaded that neither of the two aspects of the discontinuance application would result in the plaintiffs and group members suffering any consequence that was unfair, unreasonable or adverse. I am persuaded by the plaintiffs' submissions that the comparison of the economic viability of the abandoned claims with their likely prospects of success clearly favours discontinuance. In any event, group members will not be precluded from pursuing these abandoned claims against the fourth defendant, should they be so advised.

29 I am also satisfied that group members will not suffer any materially adverse cost consequences if the discontinuance application is approved. The discontinuance has occurred at an early stage of the proceeding and the defendants do not oppose the summons in terms of s 33V of the Act, in terms of which the plaintiffs sought no order as to costs.

30 It is just to determine the applications despite noncompliance with the notice requirements under s 33X read with s 33Y of the Act. I do not consider that any group member, acting rationally, would oppose the discontinuance or withdrawal. The plaintiffs' solicitors have published notices to group members on their website, noting

¹⁷ *Civil Procedure Act 2010* (Vic) ss 7-8.

the amendments to the statement of claim, and foreshadowing the application, together with a detailed explanation as to why it has been brought and why it will not adversely affect their interests. Although these notices do not constitute compliance with ss 33X(4) and 33Y of the Act, I will exercise my discretion to dispense with the notice requirement. In doing so, I note that the notice that has been given has not caused any group members to oppose the approval of either part of the application.

Conclusion and orders

31 For the foregoing reasons, both components of the discontinuance application will be approved.

32 I will order that:

1. The discontinuance by the plaintiff of the following claims is approved:
 - (a) all claims against the first to third defendants; and
 - (b) the claims of negligence and battery against the fourth defendant.
2. The plaintiff has leave to amend the writ by amending the title of the proceeding to remove the first to third defendants as parties and to rely on the amended statement of claim dated 24 September 2021.
3. Counsel's opinion provided to chambers in support of this application, is confidential and is not to be disclosed to any person other than a group member, except by leave of a judicial officer.
4. No order as to costs in respect of the discontinuance application.

CERTIFICATE

I certify that this and the 8 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 16 December 2021.

DATED this 16th day of December 2021.


Associate

SCHEDULE OF PARTIES

S ECI 2021 00826

BETWEEN:

IDRIS HASSAN	First Plaintiff
HAWA WARSAME	Second Plaintiff
- and -	
DR ANNALIESE VAN DIEMEN, IN HER CAPACITY AS AUTHORISED OFFICER UNDER THE PUBLIC HEALTH AND WELLBEING ACT 2008 (VIC)	First Defendant
DR FINN ROMANES, IN HIS CAPACITY AS AUTHORISED OFFICER UNDER THE PUBLIC HEALTH AND WELLBEING ACT 2008 (VIC)	Second Defendant
CHIEF COMMISSIONER OF POLICE, VICTORIA	Third Defendant
STATE OF VICTORIA	Fourth Defendant