

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

Not Restricted

S ECI 2020 03679

DRAGAN MARKOVIC

Plaintiff

v

UNIFIED SECURITY GROUP (AUSTRALIA) PTY LTD
(ACN 138 976 397)

First Defendant

MSS SECURITY PTY LTD (ACN 100 573 966)

Second Defendant

JUDGE: John Dixon J
WHERE HELD: Melbourne
DATE OF WRITTEN SUBMISSIONS: 29 November 2021
DATE OF JUDGMENT: 16 December 2021
CASE MAY BE CITED AS: Markovic v Unified Security Group (Australia) Pty Ltd
MEDIUM NEUTRAL CITATION: [2021] VSC 840

PRACTICE AND PROCEDURE - Group Proceeding - Approval of discontinuance of proceeding - Where no tenable cause of action against second defendant - 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 Plaintiff Mr T P Tobin SC with Mr A Arnold Thomas & Becker
Fraatz

TABLE OF CONTENTS

The application	2
Confidentiality	2
Applicable principles	3
Relevant circumstances	5
Other matters	9

HIS HONOUR:

The application

- 1 In this proceeding, the plaintiff claims damages for himself and group members as a consequence of personal injury or death from infection with COVID-19 during the period from May 2020 to October 2020 (**'Period'**) caused by breaches of duty owed by the first defendant, Unified Security Group (Australia) Pty Ltd (**'Unified'**) in failing to eliminate or reduce the risk that COVID-19 was spread from returning travellers at Rydges Hotel into the community, and the second defendant, MSS Security Pty Ltd (**'MSS'**) in failing to eliminate or reduce the risk that COVID-19 was spread from returning travellers at Stamford Plaza Hotel into the community.
- 2 By summons the plaintiff now seeks orders, pursuant to s 33V of the *Supreme Court Act 1986* (Vic) (**'Act'**), that the court approve the discontinuance of the proceeding against MSS, with no order as to costs.
- 3 The summons was supported by an affidavit affirmed by the plaintiff's solicitor, Kim Price. I also considered written submissions prepared by counsel for the plaintiff. Mr Price exhibited to his affidavit a confidential opinion prepared by counsel.

Confidentiality

- 4 The plaintiff sought an order, pursuant to s 33ZF of the Act, that Mr Price's affidavit and its exhibits not be published or disclosed to any person without further order of the court. The basis for this application, which is not uncommon in applications of this sort, was that the plaintiff considered confidentiality to be necessary and appropriate for the following reasons:
 - (a) Mr Price's affidavit and the opinions of counsel referred to below, contain matters that, if disclosed, may be prejudicial to the claims of the plaintiff and group members and, conversely, advantageous to the second defendant, in the event that the court does not approve the discontinuance;
 - (b) the matters in this affidavit are based on material and/or advice that was communicated to Mr Price or his firm by the plaintiff and group members in

circumstances protected by legal professional privilege;

- (c) the opinion of counsel exhibited to Mr Price's affidavit deals in detail with counsels' assessment of the merits and prospects of the plaintiff succeeding in the action against the defendants;
- (d) Mr Price's affidavit also discloses his assessment of the prospects of group members' claims; and
- (e) disclosure of these matters to the court is for the sole purpose of enabling the court to perform its function in determining the fairness and reasonableness of the proposed discontinuance.

5 Having considered these materials, I am satisfied that a confidentiality order is appropriate and I will, pursuant to s 33ZF of the Act, order that:

Until further order of the court, the affidavit of Kim Price affirmed 28 October 2021 (including exhibits) be kept confidential, not to be accessed without the leave of the court or a judge.

Applicable principles

6 Section 33V of the Act provides:

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.

7 Section 33X(4) of the Act provides:

- (4) 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.

8 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. No such notice has been given to group members foreshadowing this application.

9 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.¹ Factors relevant to the discretion include:

- (a) whether there was any real prospect that a group member, acting rationally, would oppose the orders sought;²
- (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;³ and
- (d) the court's statutory obligation, enshrined by ss 7-8 of the *Civil Procedure Act 2010* (Vic), to seek to give effect to the overarching purpose to facilitate the just, efficient, timely, and cost effective resolution of the real issues in dispute in the proceeding.⁴

10 In this proceeding, two considerations are relevant. For reasons that will later become apparent, there is no real prospect that any group member, acting rationally, would oppose the orders sought. Further, I am satisfied that the expense and inconvenience of requiring the notice to be provided to group members would be disproportionate to any benefit.

11 On the substantive question, the proper assessment to be made is whether the interests of group members would be unfairly, unreasonably or adversely affected by the approval of a discontinuance, which is the unilateral decision by a plaintiff to bring an end to some or all claims in the litigation.⁵ That assessment is fact sensitive, and may include focus on considerations such as the terms of any settlement, the plaintiff's

¹ *Femcare Ltd v Bright* (2000) 100 FCR 331, 347-8 [67]-[68].

² *Laine v Thiess Pty Ltd* [2016] VSC 689, [39] (*'Laine'*).

³ *Matthews v SPI Electricity Pty Ltd (Ruling No 16)* [2013] VSC 74, [30]-[33].

⁴ *Ibid.*

⁵ *Laine* [2016] VSC 689, [34]; *Babscaj Pty Ltd v Pitcher Partners* (2020) 148 ACSR 551, 552 [3], 555 [19]-[23].

prospects of success, the relationship between discontinuing and continuing claims, the size, complexity and cost of the proceeding, the economic viability of the proceeding, the size of the group, the awareness of group members of the proceeding, the residual position of group members whose claims are discontinued, the interests of group members whose claims are continuing, the costs consequences of discontinuance and the overarching purpose in civil litigation.⁶

Relevant circumstances

12 The plaintiff relevantly alleges that:

- (a) COVID-19 is a highly infectious respiratory disease;
- (b) travellers returning to Australia from overseas created a risk of unintended transmission of COVID-19 from infected persons to others in Victoria;
- (c) on 28 March 2020, the State of Victoria’s Deputy Chief Health Officer issued a direction pursuant to the *Public Health and Wellbeing Act 2008* (Vic) advising travellers returning to Australia on or after 28 March that they will be detained for a period of 14 days in a room at a designated hotel (**‘Hotel Quarantine Program’**);
- (d) MSS entered into an agreement with the State of Victoria to provide security services, including the supply of security guards, for management of returned overseas travellers within the State’s Hotel Quarantine Program at the Stamford Plaza Hotel during the Period;
- (e) under the agreement, MSS had responsibility for implementation of security and infection control measures within the Hotel Quarantine Program for returned travellers at Stamford Plaza Hotel;
- (f) by performing services pursuant to its contract, MSS had responsibility for and control over the risk that COVID-19 might spread from returned travellers at

⁶ *Turner v Bayer Australia Ltd* [2021] VSC 241, [30]-[38].

the Stamford Plaza Hotel into the community;

- (g) MSS owed a duty to take reasonable care to eliminate or reduce the risk that COVID-19 was spread from returned travellers at Stamford Plaza Hotel into the community;
- (h) COVID-19 spread widely across the Victorian community through ongoing transmission of COVID-19 cases originating at the Stamford Plaza Hotel (**'Hotel Quarantine outbreak'**);
- (i) MSS breached the duty it owed, which was a cause of the Hotel Quarantine outbreak, as a result of which the plaintiff suffered injury.

13 The same allegations are made by the plaintiff against Unified in respect of the Hotel Quarantine Program operated from Rydges Hotel, where Unified provided security services under an agreement with the State of Victoria.

14 Mr Markovic defines the group members on whose behalf the proceeding is brought to be:

- (a) the legal personal representatives of the estates of any deceased persons who died from COVID-19 contracted during the Period as a result of the Hotel Quarantine outbreak;
- (b) all those persons who suffered psychiatric injury (as defined) as a result of the death of a person who died from COVID-19 contracted as a result of the Hotel Quarantine outbreak in Victoria from Rydges Hotel and the Stamford Plaza Hotel respectively;
- (c) all those persons who suffered personal injury, loss and damage as a result of contracting COVID-19 during the Period as a result of the Hotel Quarantine outbreak; and
- (d) all those persons who were dependants of persons who died from COVID-19 contracted during the Period as a result of the Hotel Quarantine outbreak.

(e) the legal personal representatives of the estates of any deceased persons who came within one or more of the preceding sub-paragraphs.

15 Several hundred persons have registered with the plaintiff's solicitors as group members. When the writ was issued the plaintiff had no information that enabled him to determine whether a group member was infected through the Rydges Hotel transmission network or the Stamford Plaza Hotel transmission network. The parties accept that the group members referable to each transmission network are mutually exclusive.

16 The plaintiff obtained discovery from the Department of Health and Human Services ('DHHS') of its records, including of genomic assessment/tracing of viral infections from each of the hotels. That information demonstrated that the plaintiff's father's COVID-19 infection correlated with the Rydges Hotel transmission network. To have a claim against the second defendant, a plaintiff or group member must trace their loss and damage back through a COVID-19 infection correlated with the Stamford Plaza Hotel transmission network.

17 It followed that the plaintiff had no claim against the second defendant. Further investigations sought to identify a suitable person to join in the proceeding as a second plaintiff.

18 Information from DHHS has only enabled the plaintiff's solicitors to identify one person among the registered group members who can conclusively be identified as having contracted the virus from the Stamford Plaza Hotel transmission network. That one person has instructed Mr Price that he does not oppose the discontinuance of the claim against the second defendant. That information also shows that, overwhelmingly, infections correlated with the Rydges Hotel transmission network.

19 I accept that there are significant difficulties in identifying by advertising, eligible group members in respect of the claim against the second defendant who have not yet registered their details, because they are unlikely to be aware of the transmission network relevant to their claim. I am satisfied that the cost of advertising in print

media to notify potential eligible group members of the proposed discontinuance would be disproportionate to any likely benefit to those persons. In this context, a discontinuance of the plaintiff's proceeding against the second defendant will not affect any substantive rights of a group member who has a cause of action against the second defendant. The opportunity for a person who suffered loss related to the Stamford Plaza Hotel transmission network to commence a proceeding against MSS will not be lost.

20 The state of the proceeding against Unified must also be noted. On about 26 May 2021, the court ordered that Unified be wound up in insolvency and liquidators were appointed. Accordingly, the proceeding cannot continue against the first defendant without leave of the court, which has not been sought.

21 The confidential material placed before the court details the enquiries made by the plaintiff's solicitor to quantify the prospects of recovery of any judgment in these circumstances. I accept that there are sound commercial reasons why the plaintiff does not intend to seek leave to proceed with the action against the first defendant. The claims against the first defendant are effectively terminated in those circumstances and the court's leave under s 33V of the Act is not required.

22 The plaintiff has accordingly instructed his solicitors to file a notice of discontinuance against the second defendant because there is no causal link between his claimed loss and the actions or omissions of the second defendant, having negotiated an agreement that the second defendant will not apply for costs should he do so.

23 Although the data was incomplete, the plaintiff's legal advisors considered that there was, at the time of issuing the proceeding, a proper basis to allege that the plaintiff's father was infected by COVID-19 consequent upon the hotel quarantine outbreak originating from either the outbreak from Rydges Hotel or Stamford Plaza Hotel. Subsequent investigations have shown that less than 1% of total hotel quarantine infection can be related back to the Stamford Plaza Hotel outbreak. This data is consistent with the inability of the plaintiff's solicitors to identify more than one

person from the health records who is connected to the Stamford Plaza Hotel transmission network.

24 There is not, it would appear, a proper basis to conclude that seven or more persons having a claim against the second defendant could be readily identified.

25 I am satisfied that it cannot be said that discontinuance would be unfair, unreasonable or adverse to the interests of group members. Four factors contribute to this conclusion, based upon the matters raised in counsel's confidential opinion. Those factors are:

- (a) The risk of establishing liability against MSS;
- (b) The disproportionate cost of pursuing a small number of potential claims against MSS in the light of Unified being placed into liquidation;
- (c) The discontinuance does not affect the substantive rights of the group members; and
- (d) The known attitude of group members to the discontinuance orders.

26 Pursuant to s 33V of the Act, I approve the discontinuance of the proceeding between the plaintiff and the second defendant, with no order as to costs.

27 I will further order that any *inter partes* costs orders in the proceeding as between the plaintiff and the second defendant be vacated.

Other matters

28 The plaintiff's solicitors propose to distribute a notice of discontinuance approval to registered group members, the form of which has been provided to the court as Annexure A to the summons. Having considered that notice, I approve the content of the 'Notice of Discontinuance Approval to Group Members' (**Notice of Discontinuance**) being Annexure A to the Summons.

29 I will further order:

- (a) By 4pm on 4 February 2022, the Notice of Discontinuance be given to all registered group members by the plaintiff, by his solicitors:
- (i) causing the Notice of Discontinuance to be sent either by ordinary pre-paid post to the postal address for each person recorded on the database of group members maintained by Arnold Thomas & Becker, or, where Arnold Thomas & Becker has an email address for the person, to be sent by email to the person;
 - (ii) causing a copy of the Notice of Discontinuance to be published on Arnold Thomas & Becker Lawyers website; and
 - (iii) causing a copy of the Notice of Discontinuance to be provided to the Common Law Class Actions Coordinator to be published on the Supreme Court of Victoria's website.
- (b) The plaintiff by his solicitors file and serve an affidavit as to compliance with paragraph 29(a) by 4:00pm on 11 February 2022.

CERTIFICATE

I certify that this and the 9 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