FEDERAL COURT OF AUSTRALIA

Bywater v Appco Group Australia Pty Ltd [2018] FCA 707

File number: NSD 1857 of 2016

Judge: **WIGNEY J**

Date of judgment: 18 May 2018

Catchwords:

PRACTICE AND PROCEDURE – proceeding commenced as representative proceeding pursuant to Pt IVA *Federal Court of Australia Act 1976* (Cth) – application for declaration that proceeding not properly commenced as representative proceeding – whether claims give rise to substantial common issues of law or fact as required by s 33C *Federal Court of Australia Act 1976* (Cth) – whether "common questions" properly raised by pleadings – application dismissed

PRACTICE AND PROCEDURE – application pursuant to s 33N *Federal Court of Australia Act 1976* (Cth) for order that proceeding no longer continue as representative proceeding – whether representative proceeding would provide efficient and effective means of dealing with claims of group members – whether it was otherwise inappropriate that claims be pursued as representative proceeding – where application for s 33N order made prematurely – application dismissed

PRACTICE AND PROCEDURE – application to strike out parts of pleading pursuant to r 16.21 *Federal Court Rules 2011* (Cth) – whether meaningful particulars of claim provided – whether aspects of claim ambiguous or evasive

PRACTICE AND PROCEDURE – application for order that party provide particulars of claim – whether appropriate for representative party to provide particulars of group members' claims – whether ordering provision of particulars has utility, or is necessary or likely to assist

INDUSTRIAL LAW – whether group members employees or independent contractors – consideration of relevant factors – whether test requiring consideration of "totality of the relationship" between the parties can be addressed without considering individual circumstances of group members

Legislation:

Fair Work Act 2009 (Cth) ss 25, 44, 45, 335, 357, 538, 545, 546, 550

Federal Court of Australia Act 1976 (Cth) Pt IVA, ss 33C, 33H, 33N, 33P, 33ZB

Federal Court Rules 2011 (Cth) r 16.21

Cases cited:	*ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532 *Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 *Bright v Femcare Ltd* (2002) 195 ALR 574; [2002] FCAFC 243 *Coghill v Indochine Resources Pty Ltd* [2015] FCA 377 *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 324 ALR 316; [2015] FCA 328 *Guglielmin v Trescowthick (No 2)* 220 ALR 515; [2005] FCA 138 *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 *Jenkings v Northern Territory of Australia* [2017] FCA 1263 *Lopez v Deputy Commission of Taxation* (2005) 143 FCR 574 *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 *Meaden v Bell Potter Securities Ltd (No 2)* (2012) 291 ALR 482 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 *Pampered Paws Connection Pty Ltd (on its own behalf and in a representative capacity) v Pets Paradise Franchising (Qld) Pty Ltd* [2008] FCA 1606 *Stevens v Brodribb Sawmilling Company Pty Ltd* (1985) 160 CLR 16 *Timbercorp Finance Pty Ltd v Collins* (2016) 339 ALR 11; [2016] HCA 44 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255; [1999] HCA 48
Date of hearing:	16 May 2017
Registry:	New South Wales
Division:	General Division

National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	147
Counsel for the Applicant:	Mr T Lynch SC with Ms R Francois
Solicitor for the Applicant:	Chamberlains Law Firm
Counsel for the Respondent:	Mr J Kirk SC with Mr S Keizer
Solicitor for the Respondent:	Baker McKenzie

ORDERS

NSD 1857 of 2016

BETWEEN:	**JACOB CORNELIUS BYWATER** Applicant
AND:	**APPCO GROUP AUSTRALIA PTY LTD ABN 49 092 605 671** Respondent

JUDGE:	**WIGNEY J**
DATE OF ORDER:	**18 MAY 2018**

THE COURT ORDERS THAT:

1. The words "or an" be struck out of each of paragraphs 37(2)(a), 45 and 54(2) of the Amended Statement of Claim.
2. The Interlocutory Application dated 3 April 2017 be otherwise dismissed.
3. The costs of or relating to the Interlocutory Application be reserved.
4. The parties jointly arrange to have the matter listed for a case management hearing at the earliest date and time suitable to the parties and the Court.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WIGNEY J:

1. The main question raised by the interlocutory application which is the subject of this judgment is whether the claims of the representative party and the group members in this representative proceeding give rise to a substantial common issue of law or fact. If they do not, it necessarily follows that the proceeding was not properly commenced as a representative proceeding. If, on the other hand, they do, the question nevertheless arises whether the proceeding should no longer continue as a representative proceeding, either because it will not provide an efficient and effective means of dealing with the claims of the group members, or because it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

2. From 14 May 2014 to 17 February 2016, Mr Jacob Cornelius **Bywater** engaged in work that involved him marketing and selling merchandise and tickets to the public on behalf of various organisations or companies, including Surf Life Saving Australia, the Alannah Madeline Foundation, Blind Sports Australia, the Paralympic Association and the charity of the Australian Football League known as "Ladder". He did so, at least ostensibly, pursuant to agreements he entered into with Onshore Sports Group Pty Limited and, subsequently, Bay Marketing Group Pty Limited. Those agreements provided that Mr Bywater was engaged as an independent contractor. He claims, however, that in fact he was employed to engage in that work by **Appco** Group Australia Pty Limited.

3. On 8 December 2016, Mr Bywater commenced a proceeding in this Court against Appco. The proceeding is a representative proceeding pursuant to Part IVA of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth). Mr Bywater, as the representative party, commenced the proceeding on behalf of himself and group members who he claims engaged in the same sorts of activities and entered into the same agreements or arrangements in similar circumstances to him. He claimed that Appco failed to pay him and each of the group members ordinary rates of pay and overtime, termination payments, superannuation and allowances and expenses pursuant to two specified employment awards and thereby contravened ss 44 and 45 of the ***Fair Work Act*** *2009*

(Cth). He also claimed that Appco falsely represented to him and each of the group members that they were engaged as independent contractors and thereby contravened s 357 of the Fair Work Act, or that Appco was otherwise "involved in" those contraventions pursuant to s 550 of the Fair Work Act. Mr Bywater sought orders that Appco pay him and each of the group members compensation for loss suffered because of the alleged contraventions pursuant to s 545(2)(b) of the Fair Work Act, and also pay pecuniary penalties pursuant to s 546 of the Fair Work Act in respect of each of the contraventions to each individual who suffered a loss because of the contraventions.

4. Appco has not yet filed a defence in the proceeding. Instead, it filed an interlocutory application which sought a declaration that the proceeding, as presently framed, was not properly commenced as a representative proceeding and can only be continued as a proceeding brought by Mr Bywater on his own behalf. Appco contended, in short, that the claims of Mr Bywater and the group members as presently articulated in Mr Bywater's Amended Originating **Application** and Amended Statement of **Claim**, do not properly give rise to any substantial common issue of law or fact as required by s 33C(1)(c) of the Federal Court Act. Appco also sought, in the alternative, an order pursuant to s 33N(1) of the Federal Court Act that the proceeding no longer continue as a representative proceeding. Appco contended, in short, that even if there was a common issue of law or fact, a trial that resolved that common issue would not materially assist in resolving the claims of each group member. There would, in Appco's submission, effectively have to be further and separate trials involving the particular circumstances of each of the group members.

5. Mr Bywater contended, contrary to Appco's contention, that the proceeding did raise a common issue of law or fact. That common issue was, in summary, whether Appco had established a "standardised system" for the engagement of persons to undertake its sales business in a manner which created the appearance of those persons being engaged as independent contractors but which, in reality, was a relationship of employment. He contended that once he proved that the system, as it applied to him, gave rise to an employment relationship, the same conclusion would necessarily

follow in respect of the group members who were engaged by Appco pursuant to the same system.

6. The important issue that lies at the heart of this interlocutory dispute is whether it is possible or open to determine whether all the group members were independent contractors or employees on the basis of the alleged "standardised system" that applied to Mr Bywater. As will be seen, it is well-established on the authorities that, in determining whether a person is an employee or an independent contractor, it is necessary to have regard to the "totality of the relationship" between the parties. In those circumstances, can it be said that the alleged system constitutes the totality of the relationship between Appco and Mr Bywater? Perhaps more significantly, can it be said that the alleged system represents the totality of the relationships between Appco and all the group members? Does the common question effectively exclude consideration of what might be relevant aspects of the total relationship between Appco and all the group members? And, if the common question is resolved as Mr Bywater would have it, would it nevertheless be necessary to consider the individual circumstances of each group member, thereby making the conduct of the proceeding as a representative proceeding inefficient, ineffective or otherwise inappropriate?

THE STATUTORY SCHEME AND THE NEED FOR A COMMON ISSUE

7. The statutory scheme under Part IVA of the Federal Court Act has been the subject of many judgments of the Court. It is unnecessary to substantially add to what has already been said by the Court in relation to the general operation of the scheme.

8. Section 33C specifies the conditions or circumstances in which a representative proceeding may be commenced. It provides as follows:

> **33C Commencement of proceeding**
>
> (1) Subject to this Part, where:
>
> (a) 7 or more persons have claims against the same person; and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

(2) A representative proceeding may be commenced:

(a) whether or not the relief sought:

(i) is, or includes, equitable relief; or

(ii) consists of, or includes, damages; or

(iii) includes claims for damages that would require individual assessment; or

(iv) is the same for each person represented; and

(b) whether or not the proceeding:

(i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or

(ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

9. The requirement in s 33C(1)(c) that the claims of the seven or more persons "give rise to a substantial common issue of law or fact" is a "threshold requirement" which will "ordinarily be evaluated before it is known what issues remain as between the parties": ***Bright v Femcare*** *Ltd* (2002) 195 ALR 574, 600; [2002] FCAFC 243 at [124] (per Kiefel J). The provision "is concerned with the commencement, not subsequent conduct" of proceedings under Part IVA of the Federal Court Act: ***Wong v Silkfield*** *Pty Ltd* (1999) 199 CLR 255, 266; [1999] HCA 48 at [26]. The requirement that the common issue of law or fact be "substantial" is directed to issues which are "real or of substance"; it is not necessary for the issue to be "large" or "of special significance", or to be an issue which would have a "major impact on the … litigation": *Wong v Silkfield* at [28].

10. The question whether the claims of the group members raise a substantial common issue of law or fact depends on the way that the claims of the group members have been framed, and the way that the alleged questions of law common to those claims have been specified, in the originating application and pleading. In *Bright v Femcare*, Kiefel J said (at [126]):

> The focus of s 33C(1), particularly paras (b) and (c), is upon the applicant's *claims*. It follows, in my view, that a determination as to whether the requirements of s 33C(1) have been met is to be made by reference to the pleading or other document in which the claims of the applicant and the group members are made. Section 33H(1) is

> intended to facilitate that assessment. Whether those claims will remain at the close of pleadings, and whether the evidence which will be led in each case might differ in some respects, are not matters which are relevant to a determination as to whether there is a common question and whether s 33C(1) is satisfied.
>
> (Emphasis in original.)

11. The question raised by s 33C of the Federal Court Act must be approached on the basis that "it is the pleading which has precedence over any other evidentiary assertions": ***Allphones*** *Retail Pty Ltd* ***v Weimann*** [2009] FCAFC 135 at [67]; see also *Pampered Paws Connection Pty Ltd (on its own behalf and in a representative capacity) v Pets Paradise Franchising (Qld) Pty Ltd* [2008] FCA 1606 at [31]. A "conclusion that the claims do not give rise to a common question cannot be reached by reference to the evidence to be given on that point and a finding that it is likely to be different in each case": *Bright v Femcare* at [133] (per Kiefel J). If a respondent to a Part IVA proceeding claims that the proceeding does not raise a common question of law or fact, it must establish that the alleged common question or questions specified in the application or pleading is not arguable: *Allphones v Weimann* at [64]. It is, therefore, immaterial that it might be considered that the alleged common claim is weak.

12. Section 33N(1) provides as follows:

> (1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:
>
> (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
>
> (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
>
> (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
>
> (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

13. A representative proceeding that is found to have met the requirements of s 33C of the Federal Court Act may nevertheless be the subject of an order under s 33N: *Bright v Femcare* at [128] (per Kiefel J).

14. The consequence of an order made under s 33N(1) is that the proceeding may be continued as a proceeding by the representative party on his or her own behalf against the respondent: s 33P(a) of the Federal Court Act. The Court can also order, on the application of a person who was a group member, that the group member be joined as an applicant in the proceeding: s 33P(b) of the Federal Court Act.

15. The question posed by s 33N(1) is not whether the continuance of the representative proceeding can be seen to be efficient, but whether the Court is satisfied that it is in the interests of justice to order its discontinuance as a proceeding under Part IVA for the reasons listed in s 33N(1)(a)-(d): *Bright v Femcare* at [128] (per Kiefel J). Section 33N(1) is not intended to be applied unless the requisite level of satisfaction is reached: *Bright v Femcare* at [130] (per Kiefel J). It is not, however, necessary for a respondent who seeks an order under s 33N(1) to demonstrate that the proceeding is an abuse of process: *Bright v Femcare* at [130] (per Kiefel J). Nor is an application under s 33N an application for summary dismissal: *Bright v Femcare* at [20] (per Lindgren J).

16. Section 33N(1) "envisages that the Court will engage in a comparison between how the factors specified in grounds (a) to (d) apply to the existing representative proceeding and how they would apply to a hypothetical non-representative proceeding: ***Multiplex*** *Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 293; [2007] FCAFC 200 at [128] (per Jacobson J, with whom French J agreed). The need for the Court to engage in that sort of comparison exercise might mean that an applicant for a s 33N order will be required to adduce detailed evidence of the likely course or form of the comparator proceeding: *Multiplex* at [129]; cf. *Bright v Femcare* at [76] (per Lindgren J). It may, however, not always be necessary for the Court to give detailed consideration to the likely course of the comparator proceedings, particularly in a case where "the inefficiency or inappropriateness of the claims as a representative proceeding will be so great that the only possible order is to "de-class" the proceeding": *Multiplex* at [131].

17. In considering the "inefficiency" and "inappropriateness" grounds in s 33N(1)(c) and (d), the Court "will focus more closely on matters such as the commonality and non-

commonality of issues raised in the representative proceeding, as well as the purpose of that proceeding": *Multiplex* at [130].

18. It may be difficult for the Court to reach the requisite level of satisfaction required by s 33N(1) where the proceeding is at an early stage. That will particularly be the case where the arguments advanced by the party seeking an order under s 33N require a view to be reached about the evidence likely to be led at the trial. In *Bright v Femcare*, Lindgren J said as follows (at [18]):

> The applications under s 33N were made at a procedurally early stage. Defences have not yet been filed. In substance, the applicant commenced a representative proceeding which ex hypothesi, the legislature intended she be entitled to commence because of the presence of substantial common issues of law and fact, yet the court was immediately asked to accept that the proceeding would not provide an efficient and effective means of dealing with the claim of the group members. I do not mean to suggest that an application under s 33N at such an early stage of a properly commenced representative proceeding would always be premature: if there were an incompatibility or conflict between the representative party's case and the cases of the represented parties (cf *Tropical Shine Holdings Pty Ltd (t/a KC Country) v Lake Gesture Pty Ltd* (1993) 45 FCR 457 at 464; 118 ALR 510) or if the only substantial common issue were one of law on which a decision in the case of one group member would bind the others, it may be thought not efficient or effective for the representative proceeding to continue. But ordinarily one would expect that, in an attempt to give effect to the legislative intention, a means will be sought, by case management techniques, to enable a representative proceeding to continue to the stage of resolution of the substantial common issues on the basis that after that stage is completed, an order under s 33N or directions under s 33Q will be made: cf the order made by French J in *Zhang De Yong v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 45 FCR 384 at 403, 404; 118 ALR 165, and the course followed by Stone J in *Vasram v AMP Life Ltd* [2000] FCA 1676; BC200002043 at [18]).

19. Similar observations were made by Kiefel J in *Bright v Femcare* (at [149]); see also *Jenkings v Northern Territory of Australia* [2017] FCA 1263 at [97]; *Guglielmin v Trescowthick (No 2)* 220 ALR 515 at 532; [2005] FCA 138 at [76].

MR BYWATER'S PLEADED CASE

20. Mr Bywater's pleaded case may be broken down into five parts.

21. The first, and perhaps most critical, part is in paragraphs 3 to 16 of the Claim. Mr Bywater contended that those paragraphs of the Claim set out the material facts which establish Appco's "standardised system" for the engagement of persons to undertake its sales business.

22. The second part of the pleaded case is in paragraphs 17 and 18 of the Claim. Those paragraphs set out the relevant conclusions that are said to flow from the material facts pleaded in paragraphs 3 to 16. As will be seen, paragraphs 17 and 18 largely coincide with common questions 1 and 2 set out in Mr Bywater's Application.

23. The third part of the pleaded case is in paragraphs 19 to 36 of the Claim. Those paragraphs set out the material facts and circumstances relating to Mr Bywater's engagement, including the specific facts and circumstances in which he came to perform work for Appco and the nature of that work. Mr Bywater contended that paragraphs 19 to 36 plead "Mr Bywater's experience of the application of Appco's standard system in relation to the work he performed".

24. The fourth part of the pleaded case, paragraphs 37 to 51, contains the conclusions and allegations of the contraventions of the Fair Work Act by Appco in respect of Mr Bywater. Importantly, the conclusions and allegations are alleged to flow, not only from paragraphs 3 to 16 of the Claim (the facts and circumstances of the so-called "standardised system") but also paragraphs 17 and 18 (the conclusions from the "standardised system") and paragraphs 19 to 36 (the facts and circumstances relating specifically to Mr Bywater).

25. The fifth part of the pleaded case is also critical. It comprises paragraph 52, which identifies or describes the group members; paragraph 53, which, in effect, applies paragraphs 3 to 16 (the facts and circumstances of the so-called "standardised system") and paragraphs 19 to 35 (the facts and circumstances relating specifically to Mr Bywater) to each of the group members; and paragraphs 54 to 58, which plead the alleged contraventions of the Fair Work Act by Appco in respect of the group members.

Paragraphs 3 to 16 of the Claim – The "standardised system"

26. Given the central importance of paragraphs 3 to 16 of the Claim to the alleged common questions, they should be set out in full:

> **The business of Appco Group**
>
> 3. The Respondent ("**Appco Group**") has, at all times since at least 20 October 2010, carried on a business in all Australian States and in the Australian

Capital Territory:

(1) of selling and marketing to the public;

(2) the products merchandise, services and/or activities ("**Client Product/s**") of persons other than itself ("**Client/s**") including;

(i) charities and sports organisations;

(ii) electricity and gas providers;

(iii) food home delivery services;

(iv) car accessories and products; and

(v) cosmetics,

(the "**Appco Business**").

4. The selling and marketing to the public undertaken in the Appco Business was done by means of:

(1) an individual;

(2) approaching another person (the "**Customer**");

for the purpose of inducing the Customer to:

(3) purchase merchandise or services from a Client; or

(4) to donate to, or otherwise financially contribute towards supporting the activities of a Client;

("**Face to Face Selling**").

5. For the purpose of enabling it to carry on the Appco Business, Appco Group:

(1) did from time to time sponsor the establishment;

(2) by individuals who have previously worked in the Appco Business;

(3) of corporations referred to by it as "Incorporated Marketing Companies" ("**Marketing Company**"); and

(4) referred to the individuals who were approved by it as persons who could incorporate a Marketing Company as "Managing Directors" or "Managing Agents" ("**Managing Directors**").

6. Each of

(1) Appco Group Sports Pty Ltd A.C.N. 093 214 496;

(2) Appco Group Pro Sales Pty Ltd A.C.N. 127 090 457;

(3) Appco Group Support Pty Ltd A.C.N. 087 981 904; and

(4) Appco Group Energy Pty Ltd A.C.N. 095 538 248;

("**Appco Product Company/ies**") are at least 50% owned by the Holding Company.

7. As a condition of Appco Group approving as such, every Marketing Company, on or shortly after its establishment, entered into arrangements whereby:

(1) it was not permitted to contract with other entities other than the Appco Group and Appco Product Companies;

(2) it was required to conduct its business in accordance with structures imposed by Appco Group, including the use of the database known as "**Momentum**" for the recording of, among other things, the sales and financial performance of individuals undertaking Face to Face Selling and the remuneration entitlement of those individuals (as determined by the Appco Group);

(3) it was required to open and maintain a bank account approved by the Appco Group; and

(4) it was required to grant a power of attorney for the operation of its bank accounts to Accounts Direct Pty Ltd (a company whose offices are located in the same premises as Appco Group's registered offices);

Particulars

The Appco Group refers any individual approved for the purposes of establishing a Marketing Company to its accountants, DB Accounting Solutions Pty Ltd, whose offices are located in the same premises as Appco Group's registered offices. DB Accounting Solutions Pty Ltd incorporates the company and obtains the signatures of that individual on documents prepared by or on behalf of the Appco Group. These documents include an agreement with Appco Group, a book keeping agreement with Accounts Direct Pty Ltd (another company whose offices are located in the same premises as Appco Group's registered offices).

Further particulars will be provided after discovery.

8. From time to time Appco Group and one other of the Appco Product Companies entered into arrangements with a Client whereby:

(1) the Client Product to be sold and/or marketed by the Appco Business is identified and defined; and

(2) the nature, location, content and duration of the proposed promotional activity, and other matters including the price of any merchandise or services to be marketed and the remuneration to be paid to Appco Group were agreed,

(a "**Campaign**").

Particulars

Particulars of the arrangements for the undertaking of a Campaign will be provided after discovery.

9. A Marketing Company is utilised by Appco Group to provide:

(1) exclusively to Appco Group;

(2) in accordance with terms and by means specified by Appco Group which are standard for every Marketing Company; and

(3) within a geographical area or area specified by Appco Group for the purpose of its agreement with a Marketing Company (a "**Marketing Area**");

(4) at sites and locations within a Marketing Area, approved by Appco Group;

(a) away from a premises of Appco Group and the Marketing Company;

(b) such as late closing supermarkets, garages, shopping centres and public places; and

(5) on the days and for durations specified by Appco Group;

the services of individuals to undertake Face to Face Selling in a Campaign (who are referred to by Appco Group as "**Independent Contractors**").

Particulars

This agreement formed part of the arrangements described in 7 above and is also evidenced by documents including the "EDP Enterprise Development Program" v2 August, 2013, the 'Building Your Enterprise' apparently dated 16 February 2013.

Further particulars will be provided after discovery.

10. It was a requirement of Appco Group that every individual seeking to undertake Face to Face Selling in the Appco Business was to sign a document entitled "**Independent Contactor Agreement**" which is a standard form document:

(1) prepared by or for Appco Group;

(2) which had been and was used by every Marketing Company;

(3) for the engagement of every individual who undertakes Face to Face Selling in a Campaign.

11. The functions and duties of an Independent Contractor were to undertake for the purposes of a Campaign:

(1) by the means and in the matter determined by Appco Group (including the wearing of photo identification by the Independent Contractor identifying him or her as a representative of Appco Group and/or an Appco Product Company) and on the terms and for a rate of remuneration fixed by Appco Group;

(2) Face to Face Selling in the Appco Business.

12. In respect of all Independent Contractor Agreements:

(1) the entity referred to therein as the "Client Co-ordinator" was Appco Group; and

(2) Appco Group was in fact the only "Client Co-ordinator" for whom any Campaign was ever undertaken.

13. All Independent Contractor Agreements made with every Marketing Company stated:

(a) a type of Client Product in respect of which it was made; and

(b) that the individual entering into it did so as an Independent Contractor and not as an employee.

14. At all times material to the claims for relief made in these proceedings,

individuals who undertook Face to Face Selling in a Campaign:

(1) commenced doing so in a position designated as "Independent Contractor"; and

(2) subject to that individual's compliance with criteria specified by Appco Group and Appco Group's approval could thereafter progress to other positions designated as follows:

(a) "Leader" (and since on or about October 2016 also sometimes referred to as "Independent Contractor Advanced");

(b) "Team Leader" (and since on or about October 2016 also sometimes referred to as "Business Contractor");

(c) "Assistant Owner" (and since on or about October 2016 also sometimes referred to as "Business Contractor Advanced");

(d) "Owner-Partner"; and

(e) "Managing Director";

and for each of such position referred to in (1) and (2) the duties and remuneration were fixed and determined by Appco Group.

Particulars

A. The duties, functions and remuneration and the criteria for progression from one to another of those positions were stated in a document entitled "Building Your Enterprise" dated 16 February 2013 and later versions thereof.

B. Further particulars of the structure, wherein and terms on which individuals undertake Face to Face Selling in a Campaign will be provided after discovery.

15. At all times material to the claims for relief made in these proceedings, all Independent Contractors and Managing Directors could be terminated or otherwise disciplined in accordance with a single disciplinary scheme, imposed by Appco Group, in respect of the Face to Face Selling of all Client Products.

Particulars

Customer Service and Compliance Manuals issued for each Product Company.

Further particulars will be provided after discovery.

16. At all times material to the claims for relief made in these proceedings, individuals who undertook Face to Face Selling were, in the event the 'Owner-Partner' supervising them received approval from Appco Group to establish a Marketing Company, not permitted to remain with their prior Marketing Company and were required by Appco Group to transfer to that new Marketing Company.

27. It should be noted that it is not expressly alleged in these paragraphs that the pleaded facts and circumstances constituted or comprised a "standardised system" put in place by Appco for the engagement of persons to undertake its sales business. Nor is it

expressly stated that any such system was invariable and applied to all individuals who were ultimately engaged to carry out that work. Nevertheless, as discussed in more detail later, it would appear to be Mr Bywater's case that the agreements, systems and structures pleaded in paragraphs 3 to 16 of the Claim constituted an invariable system that applied to all individuals who were engaged to carry out the relevant work.

28. There appears in summary to be seven key elements to the alleged "standardised system".

29. First, Appco arranged for the incorporation of "**Marketing Companies**" (paragraph 5 of the Claim).

30. Second, the Marketing Companies were required to enter into arrangements with Appco which included a requirement that they conduct their business in particular ways including, for example, opening bank accounts that could be operated, pursuant to powers of attorney, by persons or companies associated with Appco (paragraph 7 of the Claim).

31. Third, Appco utilised the Marketing Companies to provide certain services involving "**Face to Face Selling**" in respect of "**Campaigns**" for "**Clients**" of Appco (paragraphs 8 and 9). The Marketing Companies were required to provide services exclusively to Appco.

32. Fourth, the Marketing Companies entered into "**Independent Contractor Agreements**" with individuals. Those agreements were "standard form", were used by every Marketing Company, and were prepared by or for Appco (paragraph 10 of the Claim). Every individual who undertook Face to Face Selling in Appco's business was required to sign an Independent Contractor Agreement.

33. Fifth, the "**Independent Contractors**" who signed the Independent Contractor Agreements were required to engage in Face to Face Selling in a manner determined by Appco, including in relation to wearing photo identification identifying them as representatives of Appco, and on the terms and at rates of remuneration determined by Appco (paragraph 11 of the Claim).

34. Sixth, the individuals who engaged in Face to Face Selling progressed through various positions in the course of their engagement: they commenced as "Independent Contractors" and then progressed to "Leader", then "Team Leader", then "Assistant Owner", then "Owner-Partner", then "Managing Director". At each position, their duties, functions and remuneration were fixed and determined by Appco (paragraph 14 of the Claim).

35. Seventh, all Independent Contractors and Managing Directors could be terminated, or otherwise disciplined, in accordance with a scheme imposed by Appco (paragraph 15 of the Claim).

Paragraphs 17 and 18 of the Claim – Conclusions flowing from the "standardised system"

36. The conclusions or findings that are alleged to flow from the facts and circumstances pleaded in paragraphs 3 to 16 are set out in paragraphs 17 and 18 of the Claim, which are in the following terms:

> 17. In the premises pleaded in 3 to 16 above, neither an Independent Contractor nor a Managing Director (nor a Marketing Company) had a business of his or her (or its) own, was not in the undertaking of any of his or her (or its) function in the Appco Business independent of Appco Group and was under the effective control of Appco Group.
>
> 18. In the premises pleaded in 3 to 17 above, every Independent Contractor and Managing Director was an employee of Appco Group and Appco Group was an employer as defined in:
>
> (1) s 24 for the purposes of Part 2.1 of the FWA;
>
> (2) s 335 for the purposes of Part 3.1 of the FWA; and
>
> (3) s 538 for the purposes of Part 4.1 of the FWA.

37. As will be seen, these paragraphs of the Claim correspond to, or set out Mr Bywater's case in relation to, common questions 1 and 2 as specified in the Application.

Paragraphs 19 to 36 of the Claim – Facts and circumstances specific to Mr Bywater

38. Paragraphs 19 to 36 of the Claim appear under the sub-heading "The Applicant works for Appco Group". Those paragraphs contain a broadly chronological account of the circumstances in which Mr Bywater came to engage in Face to Face Selling in respect of Appco's Campaigns including the agreements that he signed, the things he was told, both orally and in writing, primarily by a particular "Owner-Partner", and the

things he did. This part of the claim also details Mr Bywater's progression through various stages of the alleged hierarchy of positions, culminating in his designation as an "Assistant Owner".

39. The key facts and circumstances relating to Mr Bywater, which are pleaded in paragraphs 19 to 36, would appear to be: first, that he signed Independent Contractor Agreements (paragraphs 25 and 29 of the Claim); that he engaged in Face to Face Selling in respect of Campaigns "on the bases pleaded" in paragraphs 10 to 16 of the Claim (see paragraphs 27, 28 and 32 of the Claim); that for the whole period that he engaged in Face to Face Selling, Mr Bywater "obtained all cash or credit card proceeds from Customers while wearing, as required by Appco Group, photo identification identifying him as a representative of an Appco Product Company" (paragraph 33(1) of the Claim); that he engaged in work in respect of Campaigns for Appco for various Clients (paragraph 33(2) of the Claim); that he was required to pay cash proceeds and credit card receipts into a bank account as required by Appco (paragraph 33(3) of the Claim); that he received amounts earned by him after approval by Appco (paragraph 33(4) of the Claim); that, with the approval of Appco, he progressed to the "next level", in the "Career Scheme" (paragraph 21(2) of the Claim), designated as an "Assistant Owner" (paragraph 34 of the Claim); and that, as an "Assistant Owner", he was required to pay a proportion of his remuneration into a savings account controlled by or on behalf of Appco (paragraph 35 of the Claim).

40. As will be seen, there was an issue between the parties in relation to the proper characterisation of these paragraphs of the Claim. Appco characterised them as pleading facts and circumstances relating to Mr Bywater that went beyond the general system or scheme pleaded in paragraphs 3 to 16 of the Claim. Mr Bywater characterised them as facts and circumstances relating to Mr Bywater which go to prove the system pleaded in paragraphs 3 to 16. They are, Mr Bywater submitted, an example of the operation of the general system and do not include any facts which fall outside that system.

Paragraphs 37 to 51 of the Claim – Conclusions relating to Mr Bywater

41. The critical conclusions relating to Mr Bywater that are alleged to follow from the pleaded facts and circumstances are set out in the following terms in paragraph 37 of the Claim:

> In the premises pleaded in 3 to 36 above in the period between about 14 May 2014 to about 17 February 2016 and for the purposes of Parts 2.1, 3.1 and 4.1 of the FWA:
>
> (1) Mr Bywater worked "full time" as an employee and as:
>
> (a) a "Commercial Traveller" as defined in the Commercial Sales Award 2010 (the "**CT Award**"); or alternatively
>
> (b) an "Outdoor Sales Representative" in the General Retail Award 2010 (the "**GR Award**") for the period:
>
> (i) 1 May to 21 May 2014 at Retail Employee Level 1;
>
> (ii) 22 May to 12 July 2014 at Retail Employee Level 3;
>
> (iii) 13 July 2014 to 17 February 2016 at Retail Level 4;
>
> (collectively, the "**Awards**").
>
> (2) Appco Group was:
>
> (a) the or an employer of Mr Bywater; and
>
> (b) an employer covered by the one or other of the Awards.

42. As has already been noted, these conclusions are said to follow not only from the alleged general or "standardised system" pleaded in paragraphs 3 to 16 of the Claim, but also the facts and circumstances relating specifically to Mr Bywater as pleaded in paragraphs 19 to 36.

43. Paragraphs 38 to 48 of the Claim set out the alleged claims and causes of action against Appco that are said to follow from the claim that Mr Bywater was an employee of Appco and was covered by the Awards specified in paragraph 37(1). The claims include that: Mr Bywater was underpaid wages and overtime; Mr Bywater was not paid his annual leave entitlements upon the termination of his employment; Appco did not comply with the statutory requirements in relation to superannuation insofar as Mr Bywater was concerned; Mr Bywater was underpaid allowances and expenses properly payable to him; and Appco made a false representation to Mr Bywater to the effect that he was an independent contractor and thereby contravened s 357(1) of the Fair Work Act.

44. Paragraphs 49 to 51 contain alternative claims or contraventions against Appco that are based on the allegation that Mr Bywater was employed by the Marketing Companies who were parties to the Independent Contractor Agreements signed by Mr Bywater. The allegation against Appco is that, if the Marketing Companies were Mr Bywater's employer, Appco nonetheless induced, or was directly or indirectly knowingly concerned in contraventions by, the Marketing Companies, which mirror those alleged in paragraphs 38 to 47 of the Claim.

Paragraphs 52 to 58 – The claims of the group members

45. Paragraphs 52 to 58 of the Claim appear under the subheading "The Group Members and their Claim". Paragraph 52 describes or identifies the group members, as required by s 33H(1)(a), in the following terms:

> The members of the group referred to in 1(2) above are all of the individuals who:
>
> (1) undertook Face to Face Selling in Campaigns for Client Product in the period from 20 October 2010 to date;
>
> (2) on the basis of "Individual Contractor Agreements" or as a Managing Director; and
>
> (3) have entered into Retainer and/or Funding Agreements with Chamberlains Law Firm and Harbour Fund III L.P.
>
> ("**Group Members**")

46. Paragraph 53 of the Claim states as follows:

> Group Members undertook the activities in 52(1) above and entered into the arrangements at 52(2) above in the circumstances pleaded at 3 to 16 and similar to the circumstances pleaded at 19 to 35 above.

47. Paragraph 54 of the Claim, which essentially mirrors paragraph 37 of the Claim, sets out the central allegation concerning the group members as follows:

> In the premises of 53 and for the purposes of Parts 2.1, 3.1 and 4.1 of the FWA:
>
> (1) each Group Member worked "full time" and as:
>
> (a) a "Commercial Traveller" as defined in the CT Award; or
>
> (b) an "Outdoor Sales Representative" in the GR Award;
>
> and
>
> (2) Appco Group was for the period that each Group Member so worked:
>
> (a) the or an employer of each Group Member;
>
> (b) an employer covered by one or other of the Awards.

48. Paragraphs 55 to 58 then set out the specific claims and causes of action against Appco that involve the group members, as opposed to Mr Bywater specifically. These paragraphs largely mirror paragraphs 38 to 51 of the Claim.

THE ALLEGED COMMON QUESTIONS

49. The questions that are said to be common to the claims of the group members are specified in the following terms in the Application:

> **Questions common to the claims of group members**
>
> The questions of law or fact common to the claims of the group members are:
>
> 1. Whether in the circumstances pleaded in paragraphs 3 to 16 of the Amended Statement of Claim, neither an Independent Contractor nor a Managing Director had a business of his or her own and was not in the undertaking of any of his or her functions in the Appco Business independent of Appco Group and was under the effective control of Appco Group.
>
> 2. If so, whether every Independent Contractor and Managing Director was an employee of Appco Group and Appco Group was an employer as defined in:
>
>   (1) s 24 for the purposes of Part 2.1 of the FWA;
>
>   (2) s 335 for the purposes of Part 3.1 of the FWA; and
>
>   (3) s 538 for the purposes of Part 4.1 of the FWA.
>
> 3. Whether the work by Independent Contractors and Managing Directors of Face to Face Selling in a Campaign was that of either:
>
>   (a) a Commercial Traveller as defined in the Commercial Sales Award 2010; or
>
>   (b) working as an "Outdoor Sales Representative" in the General Retail Award 2010;
>
>   (**Work**).
>
> 4. Whether the Work was done otherwise than in compliance with the terms of the Commercial Sales Award 2010 or the General Retail Award 2010.
>
> 5. Whether, in the circumstances pleaded in paragraphs 20(7), 21(4), 22, 26 and 31 of the Amended Statement of Claim and in circumstances which are the same or similar to those paragraphs with respect to Group Members, Appco Group contravened section 357(1) of the FWA by representing that Face to Face Selling in a Campaign would be and was a contract for services under which the Applicant and each Group Member would perform that work as an Independent Contractor.
>
> 6. Alternatively to 2, if the Respondent was not the or an employer:
>
>   (a) was the Marketing Company which entered into the Independent Contractor Agreement with each Group Member the employer; and
>
>   (b) was Appco Group, for the purposes of s.550 of the FWA, "involved in" in any contraventions by those employers in respect of the Work.

50. It can readily be seen that the alleged common issues of law or fact all relate, in one way or another, to the question whether Mr Bywater and the group members were employees of Appco, as opposed to independent contractors. That is the specific focus of questions 1 and 2.

51. Question 1 raises three factual issues which would appear to be critical to Mr Bywater's case that he and the group members were employees. The words "if so" that preface question 2 would suggest that Mr Bywater accepts that if those questions are answered in the negative, question 2 does not arise. If they are answered in the affirmative, the suggestion appears to be that those answers are relevant to question 2, which is whether the group members who were party to the relevant agreements and arrangements were employees of Appco. Sections 25, 335 and 538 of the Fair Work Act all relevantly provide that the words "employer" and "employee" have their ordinary meanings.

52. Questions 3 and 4 effectively depend on the answer to question 2. If the answer to question 2 is that the group members were not employees, questions 3 and 4 do not arise. The same can effectively be said of question 5. Question 6 concerns whether, if the answer to question 2 is that the group members were not employees of Appco, they were the employees of the so-called Marketing Companies.

53. Given that the alleged common questions all relate in one way or another to the question whether the group members were employees of Appco, rather than independent contractors, before considering whether the common questions properly arise from the claims, it is necessary to consider the relevant legal principles that apply in determining that question.

EMPLOYEE OR INDEPENDENT CONTRACTOR – RELEVANT PRINCIPLES

54. The question whether a person who engages in work for another is an employee or independent contractor must be determined by having regard to a wide range of factors or indicia. One of the key factors is the degree of control that can be exercised over the person who performs the work: "whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the

latter's order and directions": *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404 (per Dixon J).

55. Control, however, is not the sole criterion. In ***Stevens v Brodribb*** *Sawmilling Company Pty Ltd* (1985) 160 CLR 16, Mason J (with whom Brennan and Deane JJ relevantly agreed) said (at 24):

> But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question: *Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation*; *Zuijs' Case*; *Federal Commissioner of Taxation v. Barrett*; *Marshall v. Whittaker's Building Supply Co.* Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.
>
> (Footnotes omitted.)

56. Mason J also said (at 29) that "it is the totality of the relationship between the parties which must be considered".

57. Wilson and Dawson JJ in *Stevens v Brodribb* stated that while the "control test" may be the surest guide in many cases, it is not a sufficient or even an appropriate test in all cases. As for the other indicia, Wilson and Dawson JJ said (at 36-37):

> The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.
>
> Having said that, we should point out that any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance. That is best illustrated by turning to the circumstances of this case and in particular to those circumstances which were suggested as indicating that Gray was the servant of Brodribb.

58. In ***Hollis*** *v Vabu Pty Ltd* (2001) 207 CLR 21, a decision of the High Court concerning whether bicycle couriers were employees or independent contractors, the majority considered that the question hinged on whether, viewed as a practical matter, the bicycle couriers were running their own business or enterprise and had independence in the conduct of their operations. The majority (at [40]) approved the statement by Windeyer J in *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 that the distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own".

59. It would appear that Mr Bywater's common question 1 is largely based on this aspect of the judgment of the majority in *Hollis*.

60. The majority in *Hollis* also emphasised (at [24]) that the relationship between the parties was not to be found merely from the contractual relationship, but also from the "system which was operated thereunder" and the "work practices imposed". The majority also referred to *Stevens v Brodribb* and reaffirmed that it was the "totality of the relationship" which had to be considered. The factors that the majority considered as relevant to the totality of the relationship, and as bearing on the question, included: the level of skill applied to the couriers' labour; whether the couriers were required to wear a uniform; the extent to which the couriers' leave was regulated by the courier company; the extent to which the finances of the couriers were supervised or controlled; the extent to which the courier company controlled the allocation and direction of deliveries; and the extent to which the couriers' equipment was supplied or paid for by the courier company.

61. It can be seen from *Hollis* that the list of potentially relevant factors is very broad, that the weight to be given to the factors may vary in any given case, and that none of the factors are necessarily determinative. The task is essentially evaluative. In that regard, in *Lopez v Deputy Commission of Taxation* (2005) 143 FCR 574, 600 at [82], the Full Court referred with approval to what was said by Mummery J in *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944:

> [It] is not a mechanical exercise of running through items on a check list to see

> whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

SECTION 33C - IS THERE A SUBSTANTIAL COMMON ISSUE OF LAW OR FACT?

62. In a typical representative proceeding, the common issue of law or fact arising from the claims of the representative party and group members is one that can be determined without regard to the individual or particular circumstances of the representative party or group members. For example, in a representative proceeding in which the group members claim that they suffered loss or damage arising from their acquisition of a defective product, the common question of law or fact is, generally speaking, whether the particular product in question was defectively designed or manufactured, or unfit for the purpose for which it was supplied. That question almost invariably does not depend on the individual circumstances of the group members. The product was either defective or unfit for purpose, or it was not. The group members are generally described simply as persons who acquired or were exposed to the relevant product. If the common question is resolved in favour of the group members and the product is found to be defective or unfit, the group members then simply have to prove that they acquired or were exposed to the product and suffered loss or damage as a result.

63. Similarly, in a representative proceeding where current or former shareholders in a company claim that they suffered loss or damage because they acquired shares in the company as a result of a misleading statement in a prospectus, or at a time when the company had failed to comply with its disclosure obligations, the common issue of fact or law almost invariably does not depend on the individual circumstances of the group members. The common question, in general terms, is whether the statement in the prospectus was misleading or not, or whether the company failed to comply with its disclosure obligations. That common question does not depend at all on the individual circumstances of the group members. The prospectus was either misleading or deceptive, or it was not; the company either did, or did not, comply

with its disclosure obligations. If those issues are resolved in favour of the group members, the remaining issues generally involve the group members proving that they acquired the shares at a particular time or during a particular period and that they suffered loss or damage arising from that acquisition. It may also be necessary for individual group members to prove that they relied on the prospectus, or the publicly available information in relation to the relevant company.

64. Those are, of course, not the only types of representative proceedings. They do, however, serve to illustrate the differences and potential difficulties when it comes to this representative proceeding.

65. Mr Bywater contended that this representative proceeding was no different from the examples just given. His submissions in that regard focussed almost entirely on common questions 1 and 2. In his submission, common questions 1 and 2 in the Application do not depend on either his, or any other group member's, individual circumstances. That is because questions 1 and 2 are to be determined solely on the basis of paragraphs 3 to 16 of the Claim which simply plead what, on Mr Bywater's case, was Appco's standardised and highly prescriptive system for the engagement of persons to undertake its sales business. The conclusions pleaded in paragraphs 17 and 18 of the Claim, which are the conclusions that mirror questions 1 and 2, are to be drawn solely from paragraphs 3 to 16 of the Claim. They do not flow from the facts pleaded in paragraphs 19 to 36, which relate to Mr Bywater's particular circumstances.

66. Importantly, Mr Bywater also contended that if common questions 1 and 2 are resolved in his and the group members' favour, in any subsequent proceedings relating to the group members' individual claims, the group members would only be required to prove that they were engaged in accordance with the "standardised system" the subject of paragraphs 3 to 16 of the Claim. In Mr Bywater's submission, that showed that the factual and legal issues arising from the "standardised system" were common to the group members' claims. If the group members' claims were not included in a representative proceeding, the statement of claim in each group member's separate action would commence with the pleading of the alleged system.

67. Mr Bywater conceded that there will be some factual differences between the group members. It is, for example, likely that they carried out Face to Face Selling pursuant to the alleged system at different times and on different Campaigns. They also no doubt entered into Independent Contractor Agreements with different Marketing Companies. They may also have reached different levels in the alleged career hierarchy that was part of the system. Mr Bywater's case in respect of the common questions, however, was that the differences in the minutiae would not alter or impact upon the conclusions in relation to the individual group member's employment status that would otherwise flow from their engagement pursuant to the "standardised system" alleged in paragraphs 3 to 16 of the Claim.

68. Mr Bywater's contentions in that regard would appear to be correct, at least at a relatively superficial level. Common questions 1 and 2 are undoubtedly framed in such a way that they are to be resolved solely on the basis of the facts and circumstances pleaded in paragraphs 3 to 16 of the Claim. Those facts and circumstances do not involve the individual or particular circumstances of either Mr Bywater himself, or any specific group member or members.

69. Subject to one potential qualification, it would also appear to be correct that, as the group member claims are presently pleaded, if common questions 1 and 2 are answered in the manner contended by Mr Bywater, group members would subsequently only have to prove that they were engaged to perform the relevant work in accordance with the "standardised system" alleged in paragraphs 3 to 16 of the Claim. That is clear not only from the terms of common questions 1 and 2, but also from the terms of paragraphs 52 and 53 of the Claim. To qualify as a group member as described in paragraph 52, a person need only prove, relevantly, that he or she undertook Face to Face Selling on the basis of Independent Contractor Agreements or as a Managing Director. Importantly, however, the effect of paragraph 53 appears to be that to make or qualify for a claim, a group member will also have to prove that he or she entered into the agreement, and undertook the activities, in the circumstances pleaded in paragraphs 3 to 16 of the Claim: in other words, that they entered into, or were subject to the alleged "standardised system". The qualification to that

conclusion arises from the additional allegation or requirement in paragraph 53, which is that the arrangements were entered into in circumstances "similar" to those pleaded in paragraphs 19 to 35 of the Claim. That feature of paragraph 53 is discussed later.

70. While Mr Bywater's contentions concerning the pleading would appear to be correct, the critical issue is whether, having regard to the nature of the legal and factual issues raised by the common questions and the terms of the Claim, it is open to determine common questions 1 and 2 and, ultimately, the group members' claims, on the somewhat narrow basis contended by Mr Bywater.

71. Upon close analysis, there would appear to be two potential problems or issues with the proposed common questions. The first potential problem or issue arises from the nature of the legal test that applies when determining whether a person who performs work does so as an employee or an independent contractor. The issue is whether a test which requires consideration of the "totality of the relationship" can be addressed without considering the individual circumstances of the persons in that relationship. The second relates to some parts of the Claim which would tend to suggest that, contrary to the way that common questions 1 and 2 have been framed, the claims of both Mr Bywater and the group members in fact depend on a consideration of their individual circumstances.

72. As has already been established, the question whether a person is an employee or an independent contractor, which is the question that lays at the heart of common questions 1 and 2, must be determined on the basis of the "totality of the relationship" between the parties. The test is multi-factorial and involves a wide range of indicia, none of which are necessarily determinative. The weight to be given to each of the relevant indicia or factors will depend on the particular circumstances of the parties in question.

73. Paragraphs 3 to 16 of the Claim and common questions 1 and 2, however, are such that the question whether the group members were employees, as opposed to independent contractors, can only be determined on the basis of the alleged system employed by Appco to engage persons to provide services for the purposes of its

business. Indeed, having regard to the way the questions are framed, they must be determined on the basis of the alleged system without reference to the individual facts and circumstances relating to any group member, not even those relating to Mr Bywater.

74. The issue is whether the questions can properly be answered on that limited basis. It should be noted, in that context, that the group member claims may involve many hundreds of people who performed work in respect of Appco's Campaigns, at different levels in the alleged career progression, over a period that may exceed eight years. Can the question whether all those group members were employees or independent contractors be determined on the basis of the pleaded system alone?

75. Appco contended that the common questions could not properly be determined on the basis of the system alone. In its submission, in light of the legal test, the only way the questions could properly be determined would be for the individual circumstances of each group member to be pleaded and in due course proved. That is because the legal test involves the consideration of the totality of the relationship between the alleged employee and the alleged employer. In Appco's submission, because the individual circumstances of each of the group members might differ in material respects, the nature of the relationship between Appco and each of the group members might also differ. The pleaded system does not permit a consideration of each group member's individual circumstances and, therefore, the totality of their relationship with Appco.

76. In that context, Appco contended that common questions 1 and 2 were, in effect, based on an assumption or hypothesis that the circumstances of the individual group members were identical. Appco submitted that, in those circumstances, it would not be permissible to decide the alleged common questions because the judicial determination of issues or questions on the basis of assumed or hypothetical facts is impermissible: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357 and 359.

77. Mr Bywater relied, in support of his contention that it was possible to rely on a system to prove an employment relationship, on some observations made by Perram J in *ACE Insurance Ltd v* ***Trifunovski*** (2011) 200 FCR 532. In that case, five travelling

insurance agents performed work for an insurer (referred to in the judgment as "**Combined**") pursuant to contracts which declared the agents to be independent contractors. The agents, however, claimed that they were employees and were therefore entitled to annual leave and long service leave requirements. The agents were retained in a hierarchical structure or system, in the sense that some agents worked as sales representatives, some worked as territory representatives and some worked as sub-regional representatives. It is readily apparent there are some factual parallels between *Trifunovski* and this case, though *Trifunovski* was not a representative proceeding.

78. An issue arose in *Trifunovski* concerning the admissibility of evidence that concerned whether sales representatives retained by Combined in general – not just the five in question in the proceeding – were employees. Perram J addressed that issue as follows (at [34]-[35]):

> Combined submitted that the issues which arose had to be considered on a contractor-by-contractor and period-by-period basis: the question which arose in every case was whether *this* contractor at *this* time was an employee. As a corollary it was inutile to investigate the broader question of whether, for example, sales representatives in general were Combined's employees. It followed that attention had to remain focused on each agent's account and evidence of a general kind should not be resorted to; similarly, it was not appropriate to introduce conclusions reached in relation to one agent as bearing on the situation of another.
>
> I do not accept the general thrust of this submission. It is possible that at a theoretical level different answers on the employment question could be given in respect of different agents. This is certainly the case where the agents fill different positions within the pyramid. That observation, however, is more reflective of the differences between the positions than differences between circumstances of individual agents. I do not discount that in appropriate cases the situations of individuals alleged to be employees might fluctuate depending on particular circumstances. But when the basal question is in whose business was the putative employee toiling, it is likely, in very many cases, that this will invite an examination of the business structures involved and this, in turn, suggests that systemic issues are likely to be relevant.

79. The point to note about this passage is that Perram J said only that an examination of business structures and systemic issues is likely to be "relevant". His Honour did not suggest that the structures and systems would be determinative. Yet, if common questions 1 and 2 can properly be answered on the basis of paragraphs 3 to 16 of the Claim, Mr Bywater's case must necessarily be that the agreements, structures and systems pleaded in those paragraphs are determinative. His case must be that any

person who was retained pursuant to, or was subject to, the pleaded system, was an employee of Appco, not an independent contractor.

80. For the alleged "standardised system" to be determinative in this sense, however, it would seem that the Court would need to be satisfied of at least two things in relation to the application and operation of the alleged system.

81. First, it is likely that the Court would need to be satisfied that the application and operation of the agreements, systems and structures pleaded in paragraphs 3 to 16 was invariable. It would need to be demonstrated, at the very least, that the agreements or arrangements between Appco and every Marketing Company, and the agreements and arrangements between every Marketing Company and every Independent Contractor, were in relevantly identical terms. It would also most likely have to be demonstrated that other important aspects of the system which were not directly or expressly provided for in those agreements, particularly those concerning remuneration, financial arrangements, the wearing of uniforms or photo identification, and discipline and termination, did not relevantly vary as between individual Independent Contractors.

82. Second, it is likely that the Court would have to be satisfied that the agreements, systems and structures pleaded in paragraph 3 to 16 were so highly prescriptive and all-encompassing, insofar as the relationship between the parties was concerned, that no other facts or circumstances relating to individual group members would or could materially affect the conclusions that would otherwise flow from the agreements, systems and structures. It would most likely need to be shown, in effect, that the individual facts and circumstances of a person who entered into, or was subject to, the alleged agreements, systems and structures, could not alter the nature of the relationship otherwise established by the agreements, systems or structures. For example, it may be necessary to establish that minor differences in the facts relating to individual group members, such as the names of the particular Marketing Companies who were parties to the relevant Independent Contractor Agreements, or the types of Campaigns worked on, or the length of service and the level of the career hierarchy

reached by individual group members, would not or could not alter the conclusions that would otherwise flow from the "standardised system".

83. The reason that the Court would need to be satisfied of those two elements of the claims before answering common questions 1 and 2, is that, once answered, the common questions bind not only Mr Bywater and Appco, but all the group members who had not opted out of the proceeding: s 33ZB(b) of the Federal Court Act: *Timbercorp Finance Pty Ltd v Collins* (2016) 339 ALR 11, 23; [2016] HCA 44 at [52]. If common questions 1 and 2 were answered in the affirmative, as Mr Bywater would have it, Appco would be bound by the finding that every group member who could prove that they entered into, or were subject to, the alleged agreements, systems and structures pleaded in paragraphs 3 to 16 of the Claim, was an employee of Appco. It would not be open to Appco to contend, at some later stage of the proceeding, that such a person was not an employee because of some other fact or circumstance relating specifically to them. Equally, if the questions were answered in the negative, it would not be open to a group member who entered into or was subject to the alleged agreements, systems and structures, to subsequently contend that he or she was an employee of Appco because of some fact or circumstance relating specifically to them.

84. It is perhaps not too difficult to imagine that Mr Bywater may ultimately have some difficulties in establishing these two elements which appear to be implicit in paragraphs 3 to 16 of the Claim and common questions 1 and 2. How, it might be asked rhetorically, will he go about proving that the "standardised system" was invariable and so highly prescriptive that facts and circumstances peculiar to any individual group member could not materially alter the conclusions otherwise to be drawn from the system? Can that be proved without, in effect, adducing evidence concerning the facts and circumstances relating to all of the group members? Can it be proved by calling evidence concerning Mr Bywater's circumstances alone?

85. As has already been noted, however, the question whether the group members' claims give rise to a substantial common issue of law or fact for the purposes of s 33C of the Federal Court Act must be considered and determined on the pleadings. The Court

should not speculate or hypothesise about what the evidence and issues at trial may turn out to be.

86. The critical question, then, is whether the Claim properly pleads these implicit elements of Mr Bywater's case, such that it can be concluded that the common questions properly arise from, and can be determined on the basis of, the general or "standardised system" pleaded in paragraphs 3 to 16 of the Claim.

87. Appco pointed to two features of the Claim which it contended undermined Mr Bywater's contention that the common questions can be determined on the basis of the agreements, systems and structures pleaded in paragraphs 3 to 16 of the Claim, without regard to the facts and circumstances peculiar to individual group members. Those two features of the Claim, in Appco's submission, showed not only that Mr Bywater relied on facts and circumstances peculiar to him, but also that he accepted that the circumstances of other group members may not be identical to his circumstances.

88. The first feature of the Claim relied on by Appco relates to what has been referred to as the fourth part of the Claim. That part of the Claim, which comprises paragraphs 37 to 51, contains the conclusions and alleged contraventions relating to Mr Bywater. The important point to note from those paragraphs is that the conclusions and alleged contraventions insofar as Mr Bywater is concerned are claimed to flow not only from facts and circumstances relating to the system pleaded in paragraphs 3 to 16, but also facts and circumstances specific to Mr Bywater (paragraphs 19 to 36 of the Claim). Those facts and circumstances, in Appco's submission, do necessarily relate to or arise from the alleged "standardised system".

89. In Mr Bywater's case, for example, it is alleged that Mr Danny **Lawrence**, of Onshore Sports Group Pty Limited, made various representations to Mr Bywater and others at a "training session" held on 1 May 2014 (see paragraphs 19, 20 and 23 of the Claim). Mr Bywater was also given a document during the training session which contained representations (see paragraphs 21 and 23 of the Claim) and was required to undergo a test at the conclusion of the session (see paragraphs 22 and 23 of the Claim). Those oral and written representations are alleged to be amongst the facts

and circumstances which compel the conclusion that Mr Bywater was an employee of Appco (see paragraph 37 of the Claim). It is not entirely clear whether it is alleged that the same representations were made to all group members, though paragraph 55(2) of the Claim would suggest that it is alleged that at least some of the representations were.

90. Other examples of facts and circumstances peculiar to Mr Bywater which are relied on to support the conclusion that he was an employee are that he was remunerated pursuant to an agreement entitled "Growth Incentives Payment" and that his career progression was in strict compliance with a document entitled "Career Scheme" (see paragraph 35 of the Claim). It is not entirely clear from the pleading whether it is alleged that all group members were remunerated on the basis of an agreement in the same or similar terms to the "Growth Incentives Payment" agreement, or that the career progression of all group members was determined by the terms of the "Career Scheme" document. It is, however, alleged that Appco fixed the terms and rate of the remuneration of all Independent Contractors, as well as persons who progressed to higher levels in the hierarchy (see paragraphs 11 and 14 of the Claim).

91. In Appco's submission, the fact that Mr Bywater's claims rely on facts and circumstances which are, or might be, specific to him, and do not appear to be part of the alleged "standardised system" pleaded in paragraphs 3 to 16 of the Claim, is significant. It is inconsistent with the contention that common questions 1 and 2 can be answered on the basis of the agreements, systems and structures in paragraphs 3 to 16 alone.

92. The second feature of the Claim relied on by Appco relates to what has been referred to as the fifth part of the Claim. The fifth part of the Claim, which comprises paragraphs 52 to 58, contains not only the description or definition of the group members (paragraph 52), but also the claims of the group members, as opposed to Mr Bywater. Appco contended that this part of the Claim undermines the implicit contention that the agreements, systems and structures were invariable and that the facts and circumstances of each group member were relevantly identical.

93. Paragraph 52 of the Claim suggests that a person will be a group member if, relevantly, he or she undertook "Face to Face Selling on Campaigns for Client Product" from 20 October 2010 on the basis of Individual Contractor Agreements or as a Managing Director. Importantly, however, it would also appear, having regard to the terms of paragraph 53 of the Claim, that the group member claims rely on the contention that each group member undertook the relevant activities (Face to Face Selling on Campaigns for Client Product) and entered into the relevant arrangements (Individual Contractor Agreements or arrangements relating to them being a Managing Director), not only in the circumstances pleaded in paragraphs 3 to 16 of the Claim, but also in circumstances which were "similar" to the circumstances in which Mr Bywater undertook those activities and entered into those arrangements as pleaded in paragraphs 19 to 35 of the Claim.

94. In Appco's submission, the allegation or requirement in paragraph 53 that group members entered into arrangements in circumstances "similar" to Mr Bywater effectively means that the individual circumstances of each group member will need to be considered in order to determine each of the group member's claims. That, in Appco's submission, is at odds with the contention, implicit in the way that paragraphs 3 to 16 and common questions 1 and 2 have been framed, that the material facts and circumstances relating to each group member are identical, and that common questions 1 and 2 can accordingly be answered on the basis of the system alone.

95. Appco's criticisms of these two aspects of the pleading appear to have some merit. There is a certain lack of consistency and clarity in those parts of the Claim. The two-stage manner in which the claims are pleaded is rather unusual for a pleading in a representative proceeding. On balance, however, the issues with the pleading raised by Appco in that regard do not compel the conclusion that the pleading does not satisfy the threshold requirement in s 33C of the Federal Court Act.

96. While the clarity of the pleading could no doubt be improved, it would appear that it is fairly and properly alleged that Appco had put in place an invariable set of agreements, systems and structures that applied to all persons who were to engage in

Face to Face Selling on its behalf, and that the agreements, systems and structures were so prescriptive and all-encompassing that they compel a conclusion that all individuals who were party to, or engaged pursuant to, that system were employees of Appco. It is also tolerably clear that the case in respect of the common questions, as pleaded, relies entirely on the system. To the extent that Mr Bywater pleads facts and circumstances specific or peculiar to him, those facts and circumstances are relied on to prove the alleged system by way of example. It follows that the claims of the group members as framed in the pleading give rise to common questions 1 and 2. Those questions comprise or constitute substantial common issues of fact and law for the purposes of s 33C.

97. Paragraphs 3 to 16 of the Claim and common questions 1 and 2 do not expressly allege or contend that that the agreements, systems and structures, referred to in those paragraphs comprised an invariable system that applied to all persons who were retained to engage in Face to Face Selling for the purposes of Appco's Campaigns. Nevertheless, the language that is used in paragraphs 3 to 16 is sufficiently clear to convey that Mr Bywater's case is that there was such an invariable system. It is, for example, pleaded that: "every" Marketing Company entered into arrangements with Appco, which included that it was required to conduct its business in accordance with structures imposed by Appco, including in relation to bank accounts (paragraph 7 of the Claim); Marketing Companies were utilised by Appco to provide the services in accordance with "standard" terms specified by Appco (paragraph 9 of the Claim); "every" individual seeking to undertake Face to Face Selling was required to sign a "standard form" Independent Contractor Agreement prepared by or for Appco (paragraph 10 of the Claim); the Independent Contractors were required to undertake the relevant services in a manner determined by Appco including, for example, by wearing photo identification which identified the individual as a representative of Appco (paragraph 11 of the Claim); the duties and remuneration of each individual, at every level of the relevant career hierarchy, were fixed and determined by Appco (paragraph 14 of the Claim); "all" Independent Contractors and Managing Directors could be terminated or disciplined in accordance with a single scheme imposed by Appco (paragraph 15 of the Claim).

98. It is also tolerably clear from the pleading that Mr Bywater's case is that the agreements, systems and structures particularised in paragraphs 3 to 16 of the Claim were sufficiently prescriptive and all-encompassing as to compel the conclusion that persons who were engaged and performed work pursuant to those agreements, systems and structures were employees of Appco, not independent contractors. There is nothing in paragraphs 3 to 16, which are the paragraphs which provide the basis for common questions 1 and 2, to suggest that any facts or circumstances that might be peculiar or specific to individual group members could alter the conclusions that would otherwise flow from the nature of the alleged invariable agreements, systems and structures.

99. It is true that the Claim alleges various facts and circumstances that are specific to Mr Bywater (paragraphs 19 to 36 of the Claim). It is also true that the conclusions and alleged contraventions relevant to Mr Bywater (paragraphs 37 to 51 of the Claim) are alleged to depend, at least in part, on those facts and circumstances. It is, however, equally clear that Mr Bywater's case is that the facts and circumstances pleaded in paragraphs 19 to 36 are simply relevant to proving the invariable agreements, systems and structures that he contends all group members were subject to. His case is that the facts and circumstances relating specifically to him are simply an illustration or demonstration of how the agreements, systems and structures applied to him. He contends that if the facts and circumstances specific to him compel a conclusion that he was an employee of Appco, they will similarly compel a conclusion that anyone else who was a party to, or subject to the same agreements, systems and structures was also an employee of Appco.

100. At first blush, it might appear that some of the pleaded facts and circumstances that relate specifically to Mr Bywater appear to travel beyond what is said to be the standard or invariable agreements, systems and structures identified in paragraphs 3 to 16. It is, for example, somewhat unclear whether the representations allegedly made to Mr Bywater by Mr Lawrence at the training session in early May 2014 (paragraph 20 of the Claim) and the representations contained in the document given to Mr Bywater during or at the end of that session (paragraph 21 of the Claim) fall within

the alleged invariable systems and structures. It would appear, however, that Mr Bywater's case is that representations of this sort were made, or required to be made, to all persons who entered into, or became subject to, the alleged agreements, systems and structures. That is because the making of representations of that sort were required by, or were part of, the "standardised system" whereby Marketing Companies were required to operate in accordance with terms and by means specified by Appco (paragraph 9(2) of the Claim), and that the functions and duties of Independent Contractors were determined by Appco (paragraph 11 of the Claim). That is the effect of what Mr Bywater alleges he was told by Mr Lawrence.

101. Equally, while the pleaded facts and circumstances relating to Mr Bywater include his remuneration pursuant to the agreement called the "Growth Incentives Payments Agreement" (paragraph 35(1) of the Claim), it is also tolerably clear that Mr Bywater's case is that this agreement or arrangement was part of the pleaded "standardised system". The system that applied to all group members is alleged to include arrangements whereby the rates and terms of the remuneration of Independent Contractors was fixed by Appco (paragraphs 9 and 11(1) of the Claim). The same applied when an Independent Contractor progressed to higher levels in the career hierarchy (paragraph 14 of the Claim).

102. Other paragraphs of the Claim also make it sufficiently clear that Mr Bywater's case is that he was engaged pursuant to the alleged "standardised system" pleaded in paragraphs 3 to 16. Paragraphs 27, 28 and 32, for example, allege that Mr Bywater undertook his Face to Face Selling activities on the bases pleaded in paragraphs 10 to 16 of the Claim. Appco failed to point to any specific fact or circumstance relating to Mr Bywater that was unequivocally outside the pleaded "standardised system", or that would necessarily require the consideration of the individual circumstances of each group member.

103. In any event, even if there is some uncertainty about whether the alleged facts and circumstances relating specifically to Mr Bywater fell within the alleged system that applied to all group members, it is sufficiently clear from the pleading that, in seeking to make out his case in relation to common questions 1 and 2, Mr Bywater can only

rely on those facts and circumstances that relevantly fall within paragraphs 3 to 16 of the Claim. If evidence specific to Mr Bywater is adduced and admitted, having regard to the way common questions 1 and 2 are framed, that evidence could not be relied on in relation to determining common questions 1 and 2 unless it could be said to fall within the general system and structures pleaded in paragraphs 3 to 16 of the Claim.

104. As for paragraph 53 of the Claim, the additional allegation or requirement that group members entered into the alleged systemic arrangements in circumstances "similar" to Mr Bywater is not necessarily inconsistent with the contention that common questions 1 and 2 can be answered on the basis of the facts and circumstances pleaded in paragraphs 3 to 16 of the Claim. Rather, it appears to reflect the fact that, if the common questions are answered as contended by Mr Bywater, group members may then be required, in effect, to demonstrate that they entered into the same systemic arrangements in materially the same way that Mr Bywater did. The use of the word "similar", in paragraph 53, was most likely intended to engage with, or satisfy the requirement in, s 33C(1)(b) of the Federal Court Act that the claims of the group members arise out of the same or similar or related circumstances. The critical point, insofar as compliance with the threshold requirement in s 33C(1)(c) is concerned, however, is that the question whether the group members entered into the systemic arrangements in circumstances similar to Mr Bywater would appear to arise only after common questions 1 and 2 have been determined. It accordingly does not compel a finding that common questions 1 and 2 do not properly or genuinely raise common issues of law or fact as required by s 33C.

105. Paragraph 53 could perhaps be criticised for its lack of clarity or precision. It might, for example, be said that it is unclear exactly what circumstances have to be similar and what differences might be said to be material or immaterial in determining whether the circumstances of the group member and Mr Bywater were relevantly similar. Such criticisms, however, amount to little more than complaints about the pleading. That might be relevant if this was an application to strike out that part of the Claim. Criticisms concerning the particularity or clarity of the proceeding do not,

however, necessarily go to the question whether the Claim satisfies the threshold requirement in s 33C of the Federal Court Act. It should also perhaps be noted that these types of complaints can be dealt with by requiring further particularisation at an appropriate stage of the proceeding.

106. It follows from what has been said about the way that the claims of the group members and the common questions have been framed that there is no merit in Appco's contention that the common questions are based on an assumption or hypothesis concerning the alleged agreements, systems or structures employed by Appco, or the way they were applied to the group members. Mr Bywater's case, as pleaded, is that the agreements, systems and structures alleged in paragraphs 3 to 16 applied to all group members and that those agreements, systems and structures compel the conclusion that all the group members were employees of Appco. That is not an assumption or hypothesis. Rather, it is something that must in due course be proved if the alleged common questions are to be answered in Mr Bywater and the group members' favour.

107. It is not to the point that Mr Bywater may ultimately not be able to adduce evidence which is capable of proving the elements of the Claim that are necessary before common questions 1 and 2 can be answered in the way he contends they should. It may turn out to be the case that Mr Bywater is unable to prove that the agreements, systems and structures pleaded in paragraphs 3 to 16 were invariable and sufficiently prescriptive and all-encompassing to compel a finding that all persons who were subject to them were employees, irrespective of other facts and circumstances that may be peculiar to some of those persons. As discussed later in these reasons, if that does turn out to be the case, it may in those circumstances be appropriate, at that stage of the proceeding, to make an order under ss 33N(1) and 33P(a) that the proceeding not continue as a representative proceeding, and continue instead as a proceeding by Mr Bywater on his own behalf. Alternatively, the Court could potentially reframe the common questions having regard to the issues and evidence that emerge at trial. It would also be open to the Court to simply dismiss the Application. It does not follow, however, that common questions 1 and 2 are not properly raised for the purposes of s

33C of the Federal Court Act. As has already been emphasised, compliance with the threshold requirement in s 33C must be addressed on the basis of the pleadings, not on the evidence, actual or assumed.

108. Appco did not dispute that if common questions 1 and 2 were properly raised by the pleadings, they were "substantial" common issues for the purposes of s 33C. Appco also conceded that if common questions 1 and 2 were properly raised on the pleadings, it was unnecessary, at least for present purposes, to examine common questions 3 to 6 in any detail.

109. It follows that the Claim meets the threshold requirement in s 33C of the Federal Court Act. The pleaded claims of the group members give rise to a substantial common issue of law or fact. The declaration to the contrary sought by Appco in its interlocutory application should not be made.

SECTION 33N – IS IT IN THE INTERESTS OF JUSTICE TO "DE-CLASS" THE PROCEEDING?

110. The next issue is whether, despite having been properly commenced as a representative proceeding, an order should nonetheless be made under s 33N of the Federal Court Act that it no longer continue as a representative proceeding. As has already been noted, Appco's case in that regard was that it was in the interests of justice that such an order be made because the proceeding will not provide an efficient, effective or appropriate means of dealing with the claims of group members.

111. Appco advanced two main submissions in support of its case that an order should be made under s 33N.

112. First, it submitted that, even if "in theory" there was a common issue of law or fact arising from the group members' claims, the proceeding will nonetheless be so dominated by issues individual to particular group members that it will be inefficient, ineffective or otherwise inappropriate for the proceeding to continue as a representative proceeding.

113. Second, Appco submitted that there is a likelihood or possibility that there will be a conflict between the interests of different group members. The likely conflict was

said to flow from the fact that it was an important element of the case advanced by Mr Bywater that relevant representations were made to him by Mr Lawrence in his capacity as "Owner-Partner" (paragraphs 20, 22 and 24 of the Claim). Mr Lawrence was someone who was likely to fall within the definition of group member. It was also contended that the cases of other group members were also likely to depend on similar representations being made to them by other group members in their capacities as Leaders, Team Leaders, Managing Directors or Assistant Owners and Owner-Partners in the relevant hierarchy. There was, therefore, in Appco's submission, a very real prospect that the Court will be required to resolve allegations that some group members made "impermissible" representations to other group members.

114. Appco also relied on the fact that Mr Bywater's alternative case was that he and other group members were employed by Marketing Companies which were incorporated as part of Appco's systems or structures (see common question 6, paragraph 3 of the Application and paragraphs 49 to 51 and 56 to 58 of the Claim). Thus, part of Mr Bywater's case was that Marketing Companies, of which some group members were Managing Directors, were in breach of their obligations towards other group members.

115. The difficulty for Appco is that its submissions in that regard depend on assumptions or hypotheses about what the issues and evidence will be when the matter proceeds to trial. The proceeding, however, is at a very early stage. Appco has not even filed a defence. It is not clear what the factual and legal issues will be once the pleadings are closed. Perhaps more significantly, neither party has filed their evidence, or even been directed to file their evidence. Exactly what the evidence will be, and what issues may arise in relation to it, is entirely unclear at this stage. Appco's contentions concerning what the issues and evidence are likely to be are premature.

116. As has already been explained, Mr Bywater's case in respect of common questions 1 and 2 relies on the facts and circumstances pleaded in paragraphs 3 to 16 of the Claim. Those facts and circumstances relate to what Mr Bywater contends was the "standardised system" employed by Appco to secure the provision of services by the

group members. Having regard to the way the case is pleaded, and the way common questions 1 and 2 have been framed, the individual circumstances of the group members are likely to be irrelevant, at least if they do not go to the nature of the alleged standardised agreements, systems and structures. There is, in any event, no suggestion that Mr Bywater will seek to adduce evidence concerning the individual circumstances of the group members at the common question stage of the proceeding. It cannot, in those circumstances, be concluded that the proceeding is likely to be so dominated by issues individual to particular group members that it will be inefficient or ineffective.

117. Nor can it be concluded, at least at this stage, that it would be otherwise inappropriate that the claims of the group members be pursued by means of a representative proceeding. If, as events transpire, the evidence adduced by Mr Bywater fails to establish that the agreements, systems and structures employed by Appco were invariable as between the group members, or that the agreements, systems and structures were so prescriptive and all-encompassing that the individual circumstances of the group members are essentially irrelevant in terms of determining whether group members were employees or independent contractors, the Court may refuse to answer common questions 1 and 2 as presently framed. It may instead at that stage make orders pursuant to ss 33N(1) and 33P(a) that the proceeding not continue as a representative proceeding and instead continue as a proceeding by Mr Bywater on his own behalf. Alternatively, depending on the circumstances, the Court might reframe the common questions having regard to the way the evidence emerged at trial. It cannot, however, be concluded, at least at this early stage of the proceeding, that the current representative nature of the proceeding will not provide an efficient or effective means of dealing with the group members' claims.

118. Appco contended that this representative proceeding was analogous to the representative proceeding which was "de-class[ed]" pursuant to s 33N in ***Meaden v Bell Potter*** *Securities Ltd (No 2)* (2012) 291 ALR 482; [2012] FCA 418. In that case, a representative applicant, Ms Meaden, commenced representative proceedings against **Bell Potter** Securities Limited alleging, amongst other things, that Bell Potter

made misleading representations to her and each group member concerning the valuation of certain shares. Those representations were alleged to be partly in writing and partly oral. They were also alleged to have been made at different times to different group members. Not all group members relied on oral representations. Importantly, it would appear that the oral representations allegedly made to Ms Meaden were different to those allegedly made to other group members.

119. Perhaps not surprisingly, Edmonds J made an order pursuant to s 33N of the Federal Court Act. His Honour's reasons for making that order were explained in [65] of the judgment, where his Honour said:

> The entire theory of Pt IVA representative proceedings is that the trial of one representative action will determine for all group members the common question or questions. The efficacy of that process depends upon true commonality of issues. Any determination will ordinarily bind all group members, other than those opting out: see s 33ZB(b). I agree with the submission of Bell Potter that the fundamental problem with this case is that it is impossible to see how the trial of an action based on evidence from and concerning only Ms Meaden will determine any issue of sufficient significance to render it a process that has any real utility. There is such a lack of commonality that any determination of Ms Meaden's claim would offer no real guide as to how the balance of the claims by the claimants would be determined were they to proceed to be determined individually.

120. Edmonds J found (at [70]) that allowing the proceeding to continue as a Part IVA proceeding would be productive of only "difficulty and delay".

121. The facts and circumstances of the case in *Meaden v Bell Potter* are, however, significantly different to the facts and circumstances of this case, at least as presently pleaded. For the reasons already given, there is a "commonality of issues" between Mr Bywater's claims and the claims of the group members. That commonality arises from what Mr Bywater alleges was a standardised and highly prescriptive system that applied to all group members. For the reasons already given, Mr Bywater's case in respect of the common questions as pleaded does not rely on, or require the consideration of, the individual facts and circumstances of all the group members. If the common questions are determined affirmatively, as Mr Bywater contends they should, individual group members will most likely have to prove that they entered into the same "standardised system" in circumstances similar to Mr Bywater. It does not follow, however, that it can be concluded, at least at this early stage of the

proceeding, that the resolution of the group members' claims in that way, or on that basis, is, or is likely to be, inefficient, ineffective or productive of difficulty or delay.

122. As for the alleged inconsistency between the claims of the group members, whether there is any inconsistency, and the significance of any such inconsistency, can again only be determined once the evidence has been adduced and considered. The significance, if any, of any evidence concerning representations made by some group members to others, remains to be seen. Appco's contention that there is likely to be a conflict between the claims of group members appears to be based on a theoretical or hypothetical possibility that one or more of the group members may seek some relief against other group members on the basis of alleged misrepresentations made by those group members in their capacity as Managing Directors of Marketing Companies. Whether that, in fact, occurs remains to be seen. If it does, it can be addressed at that stage of the proceeding.

123. Likewise, whether it becomes necessary for Mr Bywater to press his alternative claim concerning employment by the Marketing Companies, or whether that alternative claim is available on the evidence, is unclear at this stage of the proceeding. It cannot be said to be inevitable or even likely. Perhaps more significantly, the implications for the proceeding if it does turn out to be the case are also unclear. It is not possible to consider or resolve these issues at this early stage of the proceeding.

124. It follows that Appco's application pursuant to s 33N(1) is premature and has not been made out. The Court cannot be satisfied at this stage of the proceeding that it is in the interests of justice that the proceeding no longer continue as a representative proceeding, either because it will not provide an efficient or effective means of dealing with the claims of group members, or because it is otherwise inappropriate for the claims to be pursued by means of a representative proceeding.

OTHER ISSUES

125. Appco's interlocutory application raises two other subsidiary issues. The first is whether certain paragraphs of the Claim should be struck out pursuant to r 16.21 of the *Federal Court* ***Rules*** *2011* (Cth). The second is whether the Court should order

Mr Bywater to provide Appco with further particulars of aspects of the Claim. Fortunately, these issues may be dealt with in short terms. They were not the subject of detailed oral submissions.

The strike out application

126. Appco contended that paragraphs 1, 37(2)(a), 45 and 52 to 59 should be struck out.

127. The contention in relation to paragraphs 1 and 52 to 59, to the extent that it was possible to glean it from Appco's written submissions, is that the claims of the group members, as pleaded in paragraphs 52 to 59, do not give rise to a common question of law or fact and therefore do not comply with s 33C of the Federal Court Act. Appco did not advance any, or any persuasive, oral submissions in support of that contention. It has no merit for the reasons already given.

128. The contention in relation to paragraphs 37(2)(a), 45 and 54(2) of the Claim was different. Both paragraph 37(2)(a) and paragraph 45 of the Claim allege that Appco was "the or an employer of Mr Bywater". Paragraph 54(2) alleges that Appco was "the or an employer" of each group member. Appco requested Mr Bywater to indicate whether this was an allegation that Mr Bywater and the group members were employed jointly by Appco and some other employer and, if so, who the other employer was. Mr Bywater's reply was that there was no assertion of joint employment, though it was added that the "pleading admits the possibility [of joint employment] but does not allege it". The rather Delphic nature of that response was, if anything, exacerbated by the equally obscure statement by Mr Bywater, in apparent justification of those parts of the pleading, that "while that concept [joint employment] is novel in Australian law its possibility has been recognised" and that "[t]he consequence is that if the claim had been as [Appco] apprehends it, one of joint employment, it would not have been "bound to fail"".

129. If Mr Bywater does not allege joint employment, the words "or an" should be struck out of each of paragraphs 37(2)(a), 45 and 54(2) of the Claim on the basis that they are ambiguous or evasive. If, on the other hand, he wants to allege joint employment, or even "admit the possibility" of such a finding, he is required to plead the material

facts necessary to found such an allegation: *Coghill v Indochine Resources Pty Ltd* [2015] FCA 377 at [30]. That would include, at the very least, who the joint employer was. That has not been pleaded and no meaningful particulars have been provided.

130. The words "or an" should accordingly be struck out of each of paragraphs 37(2)(a), 45 and 54(2) of the Claim.

Further particulars

131. Appco sent a detailed request for further particulars to Mr Bywater. Most of the particulars were provided. Three questions were not answered.

132. First, a request for particulars of the facts, matters and circumstances relating to the allegation in paragraph 53 of the Claim that the group members undertook activities and entered into arrangements in circumstances "similar" to the circumstances pleaded in paragraphs 19 to 35 of the Claim was effectively left unanswered.

133. Second, a request for particulars of the basis upon which it was alleged in paragraph 54 of the Claim that group members worked full time was met by the response that it was not a proper request for particulars.

134. Third, a similar response was given to a request for particulars of the representations made to group members by Appco referred to in paragraph 55 of the Claim.

135. Appco submitted the further particulars of those three matters should be provided.

136. Mr Bywater submitted, in response, that he was not required to supply particulars of the claims of individual group members. That was said to be contrary to the statutory scheme in relation to representative proceedings.

137. It is unnecessary to address in any detail Mr Bywater's lengthy submissions in that regard. Suffice it to say that there may be some circumstances in which it is appropriate to require the representative party to provide particulars of group members' claims: *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 324 ALR 316 at 329; [2015] FCA 328 at [47(b)] and the cases there referred to.

138. Nevertheless, in the particular circumstances of this case, it would not be appropriate to order Mr Bywater to provide the requested further particulars, at least at this stage of the proceeding. That is mainly because it would have little or no utility. Compelling further correspondence between the parties in respect of the particulars in dispute is unlikely to assist in the further conduct of the proceeding. Rather, the appropriate course would be to resolve any outstanding issues in relation to those aspects of the Claim at a case management hearing. It should only be necessary to resolve any issues in relation to requested particulars if Appco genuinely contends that it is unable to plead to those paragraphs of the Claim on the basis of the existing particulars. Appco did not contend that it was unable to plead to the Claim on the basis of the existing particulars.

139. As for paragraph 53 of the Claim, that paragraph was the subject of detailed submissions in relation to Appco's contentions concerning ss 33C and 33N of the Federal Court Act. While, as has already been noted, it may be accepted that there is a certain lack of clarity in the use of the word "similar" in paragraph 53, Appco now knows what Mr Bywater's case is concerning the claims of the group members. It is clear that, in determining common questions 1 and 2, Mr Bywater relies entirely on the "standardised system" pleaded in paragraphs 3 to 16. For common questions 1 and 2 to be answered, or answered in the terms Mr Bywater contends they should be in paragraphs 17 and 18 of the Claim, Mr Bywater must effectively prove that the alleged system was invariable, insofar as the other group members are concerned, and so highly prescriptive that any facts or circumstances individual or peculiar to the group members are effectively immaterial. Paragraph 53 is essentially directed to the requirement in s 33C that the claims of the group members arise out of circumstances similar to those of Mr Bywater.

140. It is doubtful that further particulars in relation to paragraph 53 will assist. If Appco maintains that, notwithstanding the way that Mr Bywater has now articulated his case, paragraph 53 is somehow defective, or that it cannot plead to it, it should raise that issue at the next case management hearing. Alternatively, it should move to strike that paragraph out.

141. As for particulars relating to paragraph 54, it is unnecessary to require Mr Bywater to provide further particulars of the allegation that other group members worked "full time" at this stage of the proceeding. That is unlikely to be an issue at the common question stage of the proceeding.

142. The same can be said concerning the particulars relating to paragraph 55. It is also tolerably clear, having regard to the way Mr Bywater has now articulated his case, that the basis of the allegation that Appco made representations to other group members to the same effect as those made to Mr Bywater is that the making of such representations was part of, or a manifestation of, the alleged "standardised system" pleaded in paragraphs 3 to 16. Appco is no doubt able to plead to paragraph 55 on that basis. Further particulars of the representations at this stage are unnecessary and unlikely to assist.

143. Appco's written submissions in reply referred to other requests for particulars that were not answered by Mr Bywater. No oral submissions of substance were made about those additional particulars. It is unnecessary to consider them separately or in detail. Suffice it to say that the additional particulars do not appear to be critical or important to the further conduct of the proceeding at this stage. If they do become important at some later stage, for example when the minutiae of the claims of individual group members may be important, the requests can then be re-agitated and reconsidered.

CONCLUSION AND DISPOSITION

144. Appco has not succeeded in demonstrating that the proceeding, as presently framed in the Application and Claim, was not properly commenced as a representative proceeding under Part IVA of the Federal Court Act. Appco's application for a declaration to that effect is dismissed.

145. Appco has also failed to demonstrate, at least at this stage of the proceeding, that it is in the interests of justice to order that the proceeding no longer proceed under Part IVA of the Federal Court Act because it will not provide an efficient and effective means of dealing with the claims of group members, or because it is otherwise

inappropriate that the claims be pursued by means of a representative proceeding. Appco's application for an order under s 33N of the Federal Court Act is accordingly dismissed.

146. As for the remaining relief sought in Appco's interlocutory application, an order will be made striking out the words "or an" in each of paragraphs 37(2)(a), 45 and 54(2) of the Claim. Those words, in the circumstances, are either vague or ambiguous or do not, without more, raise an arguable claim. An order will not be made for the provision of the further particulars referred to in the interlocutory application. In all the circumstances, the provision of those further particulars is unnecessary and unlikely to have any utility.

147. The parties agreed that the question of costs of the interlocutory application should be reserved. Should it be necessary to resolve the question of costs, the parties will, in any event, need to make further submissions on that issue having regard to the potential application of the provisions of the Fair Work Act concerning costs.

I certify that the preceding one hundred and forty-seven (147) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 18 May 2018