Common Law Division
Supreme Court
New South Wales

Case Name:	Fernandez & Anor v State of New South Wales & Ors
Medium Neutral Citation:	[2019] NSWSC 255
Hearing Date(s):	9 November 2018
Date of Orders:	15 March 2019
Date of Decision:	15 March 2019
Jurisdiction:	Common Law
Before:	Garling J
Decision:	(1) Notice of Motion dated 30 October 2018 is dismissed. (2) Defendants to pay the plaintiffs' costs of the Notice of Motion.
Catchwords:	CIVIL PROCEDURE – whether threshold requirements in the Civil Procedure Act 2005 for constitution of a representative proceeding have been complied with - whether the group members are precisely defined and identified – whether the group members advance sufficient common questions of law or fact – whether there is a reasonable cause of action as against all sixteen defendants – held there was substantial common questions to be determined – not an embarrassing pleading
Legislation Cited:	Access to Justice (Civil Litigation Reforms) Amendment Act 2009 (Cth) Australian Consumer Law 2010 (Cth) Civil Procedure Act 2005 Contracts Review Act 1980 Federal Court of Australia Act 1976 (Cth) Health Insurance Act 1973 (Cth) Health Services Act 1997 Uniform Civil Procedure Rules 2005
Cases Cited:	Agar v Hyde [2000] HCA 41; (2000) 201 CLR 552 Australian Conservation Foundation Inc v The Commonwealth [1980] HCA 53; (1980) 146 CLR 493 Bray v F Hoffman-Le Roche [2003] FCAFC 153;

	(2003) 130 FCR 317 Dey v Victorian Railways Commissioner [1949] HCA 1; (1949) 78 CLR 62 Giles v Commonwealth of Australia [2014] NSWSC 83 Onus v Alcoa of Australia Ltd [1981] HCA 50; (1981) 149 CLR 27 Pi v Zhou [2016] NSWCA 24 Spencer v Commonwealth of Australia [2010] HCA 28; (2010) 241 CLR 118 Wong v Silkfield Pty Ltd [1999] HCA 48; (1999) 199 CLR 255
Texts Cited:	Not Applicable
Category:	Procedural and other rulings
Parties:	Garfield Maria Fernandez (P1) Apikali Fotu (P2) State of New South Wales (D1) Western LHD (D2) Western Sydney LHD (2) South Western Sydney LHD (D3) Sydney LHD (D4) Northern Sydney LHD (D5) Nepean Blue Mountains LHD (D6) Illawarra Shoalhaven LHD (D7) Central Coast LHD (D8) Far West LHD (D9) Hunter New England LHD (D10) Mid North Coast LHD (D11) Murrumbidgee LHD (D12) Northern NSW LHD (D13) Southern NSW LHD (D14) Western NSW LHD (D15) South Eastern Sydney LHD (D16)
Representation:	Counsel: G Blake SC / P Batley (P1, P2) K Stern / T Phillips (D1-D16 inclusive) Solicitors: Legal Aid NSW (P1, P2) Ashurst Lawyers (D1-D16 inclusive)
File Number(s):	2018/263134
Publication Restriction:	Not Applicable

JUDGMENT

1 By a Notice of Motion filed on 30 October 2018, the Defendants in these proceedings, namely the State of New South Wales and fifteen Local Health Districts ("LHDs"), sought orders in relation to the Plaintiff's Amended Statement of Claim ("the ASOC") filed on 17 October 2018.

2 The Defendants sought an order striking out parts of the ASOC on what may be described as pleading grounds. In the alternative, the Defendants sought an order that the proceedings, to the extent that they make claims on behalf of a sub-group, no longer continue as representative proceedings. The characteristics of this sub-group will be discussed in further detail later in this judgment. Finally, an order was sought that the claims for relief as against the Fourth to Sixteenth Defendants be summarily dismissed. The fourth to sixteenth defendants are LHDs within the meaning of the *Health Services Act* 1997 ("the HSA").

The Proceedings

3 The first plaintiff, Mr Garfield Mario Fernandez, and the second plaintiff, Ms Apikali Fotu, commenced these proceedings on 27 August 2017, pursuant to Part 10 of the *Civil Procedure Act* 2005 ("the CPA"), as a representative proceeding.

4 Mr Fernandez and Ms Fotu commenced the proceedings on their own behalf and on behalf of a group of persons, referred to in the ASOC as "Ineligible Persons". Further to this, the pleading identified a sub-group which is referred to in the ASOC as "Impecunious Ineligible Persons".

5 The group "Ineligible Persons" is defined in this way:

> "…are persons who have guaranteed to one of the second to sixteenth defendants the payment of all monies payable or owing by patients who:
>
> (a) received the provision of hospital services and other health services (the applicable health services) from a public hospital controlled by that defendant; and

(b) were not ineligible person for Medicare benefits within the meaning of the *Health Insurance Act* 1973 (Cth) (HIA)."

6 The sub-group "Impecunious Ineligible Persons" is described in this way:

> "…persons who have guaranteed to one of the second to sixteenth defendants the payment of all monies payable or owing by patients who:
>
> (a) received the applicable health services from a public hospital controlled by that defendant;
>
> (b) were without means to pay for the applicable health services; and
>
> (c) were not an eligible person for Medicare benefits within the meaning of the HIA."

7 The only criterion which separates the sub-group from the whole group is that members of the sub-group have the additional criterion in paragraph 3(b) of the ASOC, namely that the patients in respect of whom the guarantee was given:

> "…were without means to pay for the applicable health services."

8 The substance of the Plaintiffs' case arises from a series of directions contained in certain NSW Health Policy Directives made pursuant to s 32(1) of the HSA. The directions are said to require public hospitals (under the control of the second to sixteenth defendant LHDs) to ensure that payment arrangements are made on admission to a hospital of, generally speaking, a non-Australian permanent resident. Under the directions, LHDs can obtain assurances of payment through a personal guarantee from an Australian citizen, before treatment is provided. In the instance where an assurance of payment is not forthcoming, the patient can be informed that only the minimum and necessary medical care will be provided to stabilise the patient's condition.

9 It is alleged, and not presently disputed, that on 31 March 2017, the brother of the first plaintiff, Mr Fernandez, was admitted to Blacktown Hospital for an acute illness related to his chronic conditions of asthma and cerebral palsy.

The brother was ordinarily a resident of India. Mr Fernandez signed a document headed "Overseas Visitor Guarantor's Statement" to ensure the provision of applicable health services to his sick brother. The second defendant, Western Sydney LHD, claimed $18,075.30 in relation to the provision of health services to Mr Fernandez's brother.

10 Further, it is alleged and not presently disputed that on 17 August 2017, that the second plaintiff, Ms Fotu, signed a document headed "Deed of Guarantee". The document was signed so that the third defendant, South Western Sydney LHD, could proceed to provide Ms Fotu's mother with the applicable health services. Ms Fotu's mother was ordinarily a resident of Fiji. The third defendant claimed $86,948.00 in relation to the provision of health services to Ms Fotu's mother.

11 In the ASOC, it is alleged that the Group Members described as Ineligible Persons are people who provided a guarantee for payment to one of the second to sixteenth defendant LHDs. The guarantee was made for payments owed, or to become owing, by patients treated in New South Wales public hospitals who were not eligible for Medicare benefits within the meaning of the *Health Insurance Act* 1973 (Cth) ("the HIA").

12 The sub-group members described as Impecunious Ineligible Persons in the ASOC, similarly made a guarantee for payments owed by patients treated in NSW public hospitals who were not eligible for Medicare benefits under the HIA. However, unlike the main group, the patients whose guarantors fall within the sub-group definition were without the financial means to pay for their hospital treatment.

13 The patients, on whose behalf Mr Fernandez, Ms Fotu, the group members and the sub-group members made guarantees, were typically non-Australian permanent residents whose country of origin does not have a reciprocal agreement with Australia for the medical treatment of visitors.

The Amended Statement of Claim

14 In the ASOC, the plaintiffs advance the claim that the LHDs lacked the authority under the HSA to procure guarantees from them and the other group members.

15 This claim is based on the contention that the Court should construe the directions contained within the Policy Directives which require the provision of such a guarantee, as repugnant to the proper statutory construction of the HSA. According to the plaintiff's interpretation of s 70 of the HSA, only those persons who have in fact received a health service can be held liable for payment owed to the LHDs. Additionally, it is said that the person who has received a health service can only be liable according to that person's means. Relevantly, s 70 provides:

> "**70 Liability of persons for health service fees**
>
> (1) Any person who receives any health service (other than a non-chargeable hospital service) from a public health organisation is liable to contribute towards the funds of the organisation, according to the person's means, such sum in respect of the health service as is calculated in accordance with the scale of fees fixed under section 69."

16 Based on these contentions, the plaintiffs plead that the guarantees are invalid and that each applicable defendant is liable to refund the relevant group member for any funds paid pursuant to an invalid guarantee. The plaintiffs also seek declarations that the policy directives and directions are invalid.

17 The plaintiffs allege a series of further matters, any one of which would lead to the setting aside of the guarantees. First, they allege that the LHDs provided no consideration for the guarantee procured from sub-group members. The plaintiffs argue that the lack of consideration stems from an ongoing duty under s 71 of the HSA not to refuse care or treatment to impecunious ineligible persons admitted to any public hospital, by reason only of that person's inability to pay for the care or treatment. Relevantly, that provision provides:

> "**71 Care and treatment to be provided to persons without means**
>
> A person without means must not be refused care or treatment for sickness or injury at any public hospital by reason only of the person's inability to pay for the care or treatment."

18 Secondly, the plaintiffs claim that the LHDs failed to make appropriate disclosure to the potential guarantors of information which was within their knowledge, and unlikely to be within the knowledge of the potential guarantors. The information, which it is said ought to have been disclosed, was the obligation of the hospitals within the LHDs fixed by s 71 of the HSA to provide care and treatment to people who may be unable to pay for it. It is alleged that the information was important to the decision to provide a guarantee and the failure to disclose it means that the guarantee can be rescinded.

19 Thirdly, the plaintiffs plead that the failure to disclose the information described above before procuring the guarantee was unconscionable conduct in contravention of s 20 of the *Australian Consumer Law* 2010 (Cth) ("the ACL") and/or constituted misleading and deceptive conduct in contravention of s 18 of the ACL.

20 Finally, the plaintiffs plead that by reason of the circumstances in which the guarantee was procured (outlined above at [18]), the guarantee was unjust within the meaning of s 7(1) of the *Contracts Review Act* 1980 ("the CRA").

21 By way of relief, the plaintiffs seek a declaration that any directions contained within the NSW Health Policy Directives requiring the provision of a guarantee in relation to services at public hospitals, is invalid. They also seek a declaration from the Court that the guarantees made under any of those directions are void *ab initio* or void on such other date as determined by the Court.

Outline of the Defendants' Motion

22 In response to the ASOC, the first defendant contends that there has been a failure to comply with the threshold requirements in the CPA regarding the constitution of a representative proceeding. This stems from the plaintiff's purported failure to adequately define and identify the sub-group designated Impecunious Ineligible Persons.

23 Alternatively, if the sub-group's claims are not struck out for that reason, the defendants submit that the Court should order pursuant to s 166 of the CPA that the proceedings can no longer continue as a representative proceeding. The defendants argue, by reference to s 161(1) of the CPA, that there is no "*true commonality of issues"* and common questions of fact and law asserted in the ASOC are illusory.

24 The final submission on this Notice of Motion is that, pursuant to r 13.4 of the *Uniform Civil Procedure Rules* 2005 ("the UCPR"), if the Court comes to the finding that there is no reasonable cause of action against the fourth to sixteenth defendants, the proceedings should be summarily dismissed. The defendants say that the ASOC does not disclose any basis upon which either of the plaintiffs have claims against any of the fourth to sixteenth defendants.

Legislative Framework

25 It is convenient to set out the relevant parts of the legislation.

26 Sections 157, 158, 161(1) and 166 of the CPA relevantly provide:

> "**157 Commencement of representative proceedings**
>
> (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 question of law or fact, proceedings may be

commenced by one or more of those persons as representing some or all of them.

(2) Representative proceedings 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 proceedings:
(i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual group members, or
(ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

158 Standing

(1) For the purposes of section 157 (1) (a), a person has a sufficient interest to commence representative proceedings against another person on behalf of other persons if the person has standing to commence proceedings on the person's own behalf against that other person.

(2) The person may commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings.

(3) If a person has commenced representative proceedings, that person retains standing:
(a) to continue the proceedings, and
(b) to bring an appeal from a judgment in the proceedings,
even though the person ceases to have a claim against any defendant.

…

161 Originating process

(1) The originating process in representative proceedings, or a document filed in support of the originating process, must, in addition to any other matters required to be included:

(a) describe or otherwise identify the group members to whom the proceedings relate, and

(b) specify the nature of the claims made on behalf of the group members and the relief claimed, and

(c) specify the question of law or facts common to the claims of the group members.

…

166 Court may order discontinuance of proceedings in certain circumstances

(1) The Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because:

(a) the costs that would be incurred if the proceedings were to continue as representative proceedings 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 proceedings other than representative proceedings under this Part, or

(c) the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or

(d) a representative party is not able to adequately represent the interests of the group members, or

(e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.

(2) It is not, for the purposes of subsection (1) (e), inappropriate for claims to be pursued by means of representative proceedings merely because the persons identified as group members in relation to the proceedings:

(a) do not include all persons on whose behalf those proceedings might have been brought, or

(b) are aggregated together for a particular purpose such as a litigation funding arrangement.

..."

Discernment

27 There are two aspects to the Motion brought by the defendants. The first group of submissions deal with questions which commence with criticisms of the pleading and lead to a variety of forms of relief. In this group of issues, the defendants submit:

(a) that the definition of group members, insofar as there are sub-groups defined, lacks precision and as a consequence fails to comply with s 161(1) of the CPA;

(b) the pleading does not establish that each of the claims advanced on behalf of sub-group members involves a substantial common question of law or fact, and consequently does not comply with s 157 of the CPA;

(c) alternatively, the nature of the claims made are such that the Court should exercise its discretion under s 166 of the CPA to order the proceedings not to continue as a representative proceeding.

28 The second principal submission made by the defendants is that the plaintiffs lack standing to commence and conduct representative proceedings against the fourth to sixteenth defendants, because the plaintiffs do not have a claim against those defendants.

29 Before embarking upon an analysis and careful consideration of these submissions, I should note the following:

(a) the State and each of the LHDs are jointly represented by the same solicitor. At the hearing of the Motion, they were all jointly represented by the same senior counsel and junior counsel; and

(b) one single set of submissions was put in on behalf all of the defendants without any discrimination between any of the LHDs.

30 The NSW Health Policy Directives were tendered in evidence. These Directives were amended from time-to-time, but remained to the same substantive effect. It was not submitted that members of the group represented by the plaintiffs may not have claims against each of the thirteen LHDs who have not had dealings with either of the plaintiffs. It was not submitted that the various directions which were issued within the Policy Directives to each of the LHDs, were in different terms. It was not submitted that any of the LHDs had differential obligations pursuant to these directions.

31 Nor was it submitted that there was any reason why LHDs would apply these various directions in any different way. They were all obliged to apply the directions, which were in substantially the same terms.

32 As each of the Policy Directives said, in similar terms on the front cover:

> "This policy directive may be varied, withdrawn or replaced at any time. Compliance with this directive is **mandatory** for NSW Health and is a condition of subsidy for public health organisations." (emphasis in original)

33 An LHD is a public health organisation: s 7 HSA. It is appropriate here to outline the statutory framework for LHDs and hospital care in NSW.

Structure of the Public Health System

34 The public health system in NSW is provided for in Chapter 2 of the HSA.

35 Section 6 of the HSA identifies local health districts, statutory health corporations and the Health Secretary as comprising the public health system, together with some affiliated organisations.

36 Section 7(2) of the HSA articulates the principal reason for the constitution of LHDs as being the facilitation of the conduct of public hospitals and the provision of health services in their defined areas. The functions of an LHD which are set out in s 10 of the HSA, focus on the provisions of public hospital care and the promotion and maintenance of the health of the residents living in the local area. LHDs can also provide health services to residents outside their defined areas.

37 Part 2 of Chapter 3 of the HSA deals with the control and management of LHDs. Section 24 provides that the offices of an LHD are managed and controlled by a chief executive officer. However, the Minister of Health appoints the members of the Board of an LHD. The Board has a range of functions set out in s 28. Relevantly, s 28(2) precludes the Board from exceeding any function in a way that is executed with the exercise of a function by the Health Secretary.

38 The administration of the public health system is provided for in Part 10 of the HSA. Section 122(1) gives the Health Secretary functions which include the effective, efficient and economic oversight of the operations of public hospitals and the provision of health services.

39 LHDs do not represent the Crown. They do not employ staff. Staff members of public hospitals are employed by the NSW Health Service. Staff members are not employed in the Public Service of NSW, but are employed by the Government "*… in the service of the Crown*": s 115 HSA. The Health Secretary is the person responsible for the employer functions of the Government in relation to the NSW Health Services: s 116(3) HSA.

40 In practical terms the Health Secretary can, through the exercise of their statutory functions relating to staffing, funding and directions about the efficient and economic operation of public hospitals, exert effective control over LHDs and public hospitals. Because Boards of LHDs are appointed by the Minister for Health, the Minister can exercise a significant measure of influence over the operations of an LHD.

41 The NSW Health Policy Directives, which are the central feature of these proceedings, are one of the ways in which the Health Secretary carries out their statutory function. It follows that all LHDs are obliged to act in accordance with them.

Lack of Standing

42 It is convenient to commence with the second principle submission brought by the defendant in the Notice concerning the lack of standing issue.

43 As earlier indicated, the defendants in the proceedings comprise the State of NSW and fifteen LHDs. The first and second plaintiffs were concerned with only two of those LHDs. Those LHDs are the second and third defendants, respectively.

44 The Motion brought by all of the defendants' claims that the plaintiffs do not have standing to join the remaining LHDS as defendants, other than the second and third defendants. In order to determine that issue, regard must be had, according to the Defendants' submissions, to the provision of s 158 of the CPA.

45 Section 158(1) informs the question of standing of a plaintiff. The subsection provides that the plaintiff has a sufficient interest to commence a representative proceeding on behalf of other persons if the plaintiff personally has standing to make a claim against the prospective defendant.

46 The principal purpose of this subsection is to provide that a plaintiff has standing to represent other individuals. It is a core provision which enables the establishment of a representative proceeding. The limitation is that the plaintiff must have sufficient standing to commence the proceedings on their own behalf. In other words, the purpose of this provision is to ensure that an officious bystander is not able to commence proceedings if they do not have standing to bring a personal claim. The representatives of the group (the plaintiff) cannot be anyone who wishes to sue, but must be a legitimate claimant. This calls up the general requirements relating to standing, with respect to a person having to have a sufficient interest to commence proceedings: see *Australian Conservation Foundation Inc v The Commonwealth* [1980] HCA 53; (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27. .

47 Subsection (2) is, in the context of this Motion, the critical provision. But it is appropriate to first call attention to subsection (3). Section 158(3) enables a person who has standing to commence proceedings, to continue proceedings and to bring an appeal from a judgment in proceedings, even where that person ceases to have a claim against any defendant.

48 This subsection recognises that providing proceedings are properly commenced, a plaintiff can remain as such even though they have no claim extant against any defendant in the proceedings. This provision is one which ensures procedural efficiency by avoiding a necessity to replace a plaintiff with another member of the group where a defendant chooses to resolve the proceedings with that plaintiff individually, or alternatively that individual fails to establish their claim. It also accepts that such a plaintiff is an appropriate person to continue to be the representative in the litigation of the group member.

49 In providing for such procedural efficiency, the provision supports a conclusion that the provisions of Part 10 need to be read having particular regard to the need to ensure the overriding purpose set out in s 56 of the CPA is achieved.

50 It is necessary now to return to s 158(2). With respect to this provision, the defendants submit that the enactment of s 158(2) and its interpretation ought be viewed against the background where the legislature was endorsing the view expressed in *Bray v F Hoffman-Le Roche* [2003] FCAFC 153; (2003) 130 FCR 317 at [130] per Carr J and [243] per Finkelstein J, that whilst an applicant needed to have a claim against each respondent, not all group members needed to.

51 The defendants submit that s 158(2) should be understood as having been included in the CPA to:

> "…clarify that representative proceedings may be taken against several defendants even if not all group members have claims against all defendants, but not as permitting such proceedings to be brought in circumstances in which none of the representative plaintiffs have any claim against one or more of the defendants."

52 The plaintiffs submit to the contrary of that interpretation. They say that the scope of the provision:

> "is not confined by matters not required by its term or context; however, the terms must be construed and the context considered … [the cognate provision] attempts to resolve issues which have bedevilled representative procedures as they have been developed particularly by courts of equity. This is apparent from the terms …"

53 In doing so, the plaintiffs have regard to the evident purpose of Part 10, particularly when read with s 56 of the CPA, and the remarks of the High Court of Australia in *Wong v Silkfield Pty Ltd* [1999] HCA 48; (1999) 199 CLR 255 at [11]-[13], with respect to the cognate provision in the *Federal Court of Australia Act* 1976.

54 The plaintiffs submit that the construction proposed by the defendants fails to acknowledge that individual meaning should be given to the words "the persons" being plaintiffs and the words *"*each of those persons*"* being the group members, since these are descriptions which are separately identified and maintained throughout Part 10. The plaintiffs submit that the Court should interpret the statute in a way which provides that the plaintiffs and group members ought be considered as distinct entities, insofar as claims are brought against more than one defendant.

55 As a consequence, the plaintiffs submit that there does not have to be a named plaintiff with a claim against every named defendant. It is sufficient that the plaintiffs and members of the group have claims against each of the defendants.

56 In the proceedings, the plaintiffs and each of the group members have a claim against the first defendant, the State of NSW. This claim features at its core the proposition that the policy directives and directions are *ultra vires* and ought to be set aside. The other claims, which relate directly to the LHDs, seek to have particular transactions (i.e. the entry into guarantees), set aside because of the invalidity of the policy directives, amongst other things. Because the guarantees are between an individual and only one LHD, it necessarily follows that not every plaintiff and every group member will have a claim against every LHD.

57 Of itself, that fact does not mean that these claims are not in respect of, or do not arise out of, similar or related circumstances nor that there is not a substantial common question of law or fact as required by ss 157(1)(b) and (c) of the CPA. Part 10 of the CPA accepts that not all questions in all claims will be common to all group members and plaintiffs: ss 168 and 169 CPA.

58 In *Giles v Commonwealth of Australia* [2014] NSWSC 83, I identified at [81]-[82] a number of advantages and disadvantages of representative proceedings. It is unnecessary to repeat all of what is there recorded. However, two of the principal advantages of representative proceedings

cannot be overlooked in the determination of the issues before the Court. First, that they are a cost-effective means for enabling the pursuit of a legal remedy against one or more defendants where there is commonality of conduct, and, secondly, that representative proceedings are a means of providing access to justice for claimants where because of impecuniosity and the relatively modest sum of money involved, individual suits are not feasible.

59 Section 56 of the CPA enjoins the Court when it interprets any provision of the Act, to give effect to the overriding purpose, namely, to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

60 The general context to which I have referred, and the statutory imperative of s 56 of the CPA, are directly relevant to the interpretation exercise upon which the Court has here embarked. That said, the exercise of statutory interpretation requires careful attention to the text of the provision and, in the wider sense, its context.

61 These two submissions point to a question of statutory construction. Both are arguable and both have elements to commend them.

62 In my view, the preferable interpretation of s 158(2) is that it is not necessary for a plaintiff to have a claim personally against each respondent joined to the proceeding. What is necessary, in accordance with s 158 of the CPA, is that either a plaintiff or a group member has a claim against at least one of the respondents.

63 This is consistent with the aim of Part 10 of the CPA which is to provide an effective and efficient means of determining a large number of claims, where it can be shown that they arise out of the same, similar, or related circumstances, and that there are substantially common questions of fact or law to be determined.

64 Particularly have regard to the provisions of s 158(3), there seems to be no reason why a plaintiff may not adequately represent group members in the

proceedings even though that plaintiff does not have a claim extant against any or all defendants.

65 In my view, the preferable construction is that advanced by the plaintiffs. The words of s 158(2) do not require the plaintiff in representative proceedings or the group members, to have a claim against every defendant against whom or which is joined, providing that either a plaintiff or a group member has such a claim.

66 The consequence of this conclusion is that Order 6 in the Notice of Motion must be dismissed.

67 However, even if I be wrong in the conclusion as to the correct statutory interpretation, it does not automatically follow that the order should be made. That is because Order 6 seeks that the claims for relief by the plaintiff against the fourth to sixteenth defendants be summarily dismissed.

68 Before a court can summarily dismiss a claim, the Court has to be persuaded that the case for summary dismissal is very clear, and that the plaintiffs as group members ought to be deprived of a hearing of the claims against the fourth to sixteenth defendants.

69 In *Dey v Victorian Railways Commissioner* [1949] HCA 1; (1949) 78 CLR 62 at 91, Dixon J said:

> "A case must be very clear indeed to justify the summary intervention of the Court to prevent a plaintiff submitting his case for determination in the appointed manner by the Court with or without a jury. The fact that a transaction is intricate may not disentitle the Court to examine a cause of action alleged to grow out of it for the purchase of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process."

70 A number of other authorities have since then applied that principle in the context of summary disposal of cases.

71 The test for summary dismissal was summarised in this way by the majority (Gaudron, McHugh, Gummow and Hayne JJ) in *Agar v Hyde* [2000] HCA 41; (2000) 201 CLR 552 at [57]:

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the Court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way." (footnotes omitted)

72 In 2010, the High Court of Australia emphasised the importance of that authority in *Spencer v Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118. In their joint judgment, French CJ and Gummow J, said at [24]:

> "The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous or vexatious of an abuse of process. The same applies where such disposition is sought in a summary judgment application supported by evidence."

73 In 2016, in *Pi v Zhou* [2016] NSWCA 24, Gleeson JA said at [9]:

> "It may be accepted that the power to order summary dismissal is one that should be exercised with great care and not unless it was clear that there is no real question to be tried. The test to be applied has been variously expressed, including: 'So obviously untenable that it cannot possibly succeed'; and 'manifestly groundless', but the underlying point is that there must be a high degree of certainty about the ultimate outcome of the proceedings if it were allowed to go to trial or a hearing in the ordinary way: *Agar v Hyde* [2000] HCA 41; (2000) 201 CLR 552; *Batistatos v Roads and Traffic Authority (NSW)* [2006] HCA 27; (2006) 226 CLR 256 at [46]; *Spencer v Commonwealth* [2010] HCA 28; (2010) 241 CLR 118 at [24]-[25] (French CJ and Gummow J)."

74 I am conscious of the limited circumstances in which this Court ought exercise its power under r 13.4 of the UCPR. The circumstances must be very clear and in exercising the power, I must proceed cautiously.

75 On any view of the authorities to which I have referred above with respect to the summary dismissal, I have not been persuaded that the case to summarily dismiss the fourth to sixteenth defendants from the proceedings is sufficiently

clear, or that I have a high degree of certainty as to the outcome as is necessary.

76 Accordingly, even if I be wrong in my interpretation of the statute, I would not be prepared to make Order 6 of the Motion.

Balance of the Motion

77 The second part of the Motion deals with a fundamental pleading question, and appropriate relief.

78 The first is whether the sub-group is adequately defined. The defendants submit that the provisions of s 161(1) of the CPA are applicable to the identification of sub-groups and not just the group in respect of whom the proceedings have been commenced, and within which the sub-group exists.

79 The terms "group" and "sub-group" are not themselves defined in the CPA. Section 155 of the CPA defines "group member" as being "*… a member of a group of persons on whose behalf representative proceedings have been commenced*". That section defines a "sub-group member" as "*… a person included in a sub-group established under s 168*".

80 Section 168 of the CPA provides mechanical provisions which operate where it appears to the Court that a determination of any question or questions will not finally determine the claims of all group members. In such circumstances, s 168(2) provides that the Court, in giving directions with respect to questions common to the claims of only some of the group members, may include directions "*… establishing a sub-group consisting of those group members*". A person can be appointed to represent that sub-group.

81 The provisions of s 161, upon which the defendants rely to support their submissions that the pleading is inadequate with respect to the sub-group, are directed at the originating process in a representative proceeding. Those provisions require identification of group members, specificity of the nature of

the claims being made, and the question of law or facts common to the claims of those group members.

82 The attack on the pleading relates to vague and uncertain words or phrases, in particular that the sub-group is said to comprise persons who have given a guarantee in respect of patients who were "without means to pay" for the relevant health services. It is submitted that the expression "without means to pay" is not defined and may convey multiple meanings depending on context.

83 It is to be observed from the provisions of ss 70 and 71 of the HSA extracted above that similar expressions are used. Section 70 directs attention to "*… the person's* means". Section 71 uses the expression "*… person without means*" and the phrase "*… person's inability to pay*". The defendants submit that this is no answer to the criticism which they make because what is essential is that a putative sub-group member needs to determine if they fall in that sub-group for the purposes of, at least, determining whether they wish to remain in the litigation as a group or sub-group member.

84 The purpose of the sub-group seems to me to identify those members of the group who have given guarantees in respect of patients who would fall within s 71 of HSA. The significance of which is that the hospital was not entitled to refuse care or treatment for sickness or injury to that patient because they were a person without means and unable to pay for their care or treatment.

85 Whilst there is undoubtedly some generality and perhaps uncertainty in that definition, such generality derives from the hospital's obligation provided by the statute with respect to its patients, rather than some uncertainty of the pleading for which the pleader can be criticised.

86 Resort to the Policy Directives does not assist in any clarification of the relevant expression. At paragraph 4.4 of the Medicare Ineligible and Reciprocal Health Agreement – Classification and Charging Policy Directive of 2016 ("the 2018 Policy Directive"), the following appears:

> "If it is likely that Medicare ineligible patient, or prospective patient, may be unable to pay for some or all of the costs of the medical and other services that are expected to be provided, it will be necessary for the relevant financial officer to consider whether it would appropriate to request a supporting patient to guarantee from a suitable person."

87 It is to be observed that the test to be applied is not an objective one, but a subjective one relying upon the assessment of the relevant Financial Officer of the LHD, i.e. that is likely that a patient may be unable to pay for some or all of the services.

88 The relevant financial officer is directed to a Guide, which forms part of the 2016 Policy Directive, entitled "Medicare and Eligible Financial Guarantees – Guide to Revenue or Finance Officers". However, resort to that Guide is of itself not particularly illuminating. It suggests that a guarantee can be requested:

> "… if there is doubt about whether the patient can or will make payment of the expected costs for the services to be provided".

89 The Financial Officer is directed to consider giving an explanation to a prospective guarantor in slightly different terms. One of the suggestions is that the Financial Officer should say to the prospective guarantor that:

> "…where a patient is not eligible for Medicare, and where there is a concern that the hospital will be at financial risk in providing the required services to the patient."

90 Quite what financial risk to a hospital is, or may be, is not further explained in the suggested example.

91 The terms of the standard guarantee, which also form part of the 2016 Policy Directive, do not assist in the determination of the question. The standard guarantee includes this clause:

> "The patient has been, or will be, admitted as a patient who will receive services from the provider. To better secure the payment by the patient of the costs of the services being provided (and to be provided) to the patient, the guarantor has agreed to provide the guarantee and indemnity set out in this document."

92 No issue of means nor inability to pay nor financial risk to the hospital is encompassed by this paragraph in the guarantee.

93 The expression with respect to a patient that he or she is "without means" to pay for the relevant services, or else as set out in s 71 of the HSA, "the person's inability to pay for the care or treatment" are matters necessarily of individual assessment and depend upon the services being provided or to be provided. They are also terms of common usage and to be understood by the application of common sense.

94 No doubt also, in individual cases, there will have been an assessment by the relevant Financial Officer that the patient falls within these expressions before the guarantor is approached. It is the combination of those facts, with the application of common sense, which will determine whether a person is a member of a sub-group.

95 I am not prepared, at this stage of the proceedings, to require any further definition of the clauses by which membership of the sub-group is identified. Nor do I think that the expression is so uncertain, or vague, as to amount to an "embarrassing" pleading as that term is used in r 14.28 of the UCPR.

96 That is for two reasons. First, I am unpersuaded that s 161 applies to a sub-group. A sub-group is a creature of s 168 of the CPA and there is no reason to think, in the absence of that provision calling up s 161 and its requirements, that those requirements should be imposed on a sub-group through the process of statutory interpretation. Second, in the particular circumstances of this case, I am unpersuaded that the definition, even if s 161 were to apply, is so vague or uncertain as to result in an embarrassing pleading.

97 By way of an alternative, the second contention is that if the Court is unpersuaded to strike out the definition of the sub-group, by reason of the necessary individuality, the Court should order pursuant to s 166 of the CPA that the proceedings no longer continue as representative proceedings.

98 I note that, as yet, no defence has been filed. Accordingly, it is too early to tell what the issues are that are to be faced between the parties. Accordingly, it is only possible to proceed by reference to the issues identified in the ASOC.

99 There is undoubtedly a substantial common question to be determined about the validity of the various Policy Directives and the extent to which those policy directives intruded into the obtaining of guarantees with respect to patient treatment.

100 It seems to be, but is unnecessary to finally determine at this stage, that questions about the setting aside of guarantees are likely to be individual matters.

101 Assuming that is so and without determining it, the possibility of individual matters arising is no reason to make an order at present under s 166 of the CPA that the proceedings no longer continue as representative proceedings. I am satisfied that the substantial common question which has been identified to exist is sufficient for present purposes, for the effective and efficient administration of justice to enable proceedings to remain as representative proceedings.

Conclusion

102 Having regard to the previous findings, it seems to me to be appropriate that the Notice of Motion be dismissed. There is no reason why costs should not follow the event so that the defendants should pay the costs of the plaintiffs.

Orders

103 I make the following order:

(1) Notice of Motion dated 30 October 2018 is dismissed.

(2) Defendants to pay the plaintiffs' costs of the Notice of Motion.

****