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FEDERAL CIRCUIT COURT OF AUSTRALIA

MONDAL v TRANSCLEAN FACILITIES PTY LTD & ANOR *[2020] FCCA 1334*

Catchwords:
INDUSTRIAL LAW – Fair Work – interlocutory application for summary dismissal – summary judgment – interlocutory application to strike out statement of claim – interlocutory application for discovery – procedural orders – no order as to costs.

Legislation:
Fair Work Act 2009 (Cth), ss.357, 544, 545, 550, 570, 793
Federal Circuit Court of Australia Act 1999 (Cth), ss.3, 17A, 43, 45
Federal Court of Australia Act 1976 (Cth), ss.31A
Federal Circuit Court Rules 2001 (Cth), rr.13.07, 13.10
Federal Court Rules 2011 (Cth), rr.16.02, 16.21

Cases cited:
Kalayzich v Santa Sabina College & Anor [2020] FCCA 11
Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2) [2017] FCA 551
Fair Work Ombudsman v Hu [2019] FCAFC 133
Zaghloul v Woodside Energy Limited (No. 7) [2019] FCA 818
Spencer v The Commonwealth of Australia (2010) CLR 118
Australian Rail, Tram and Bus Industry Union v Railtrain Pty Ltd [2019] FCA 1740
Abrahams v Qantas Airways Limited (No.2) (2007) 210 FLR 314
Australian Building & Construction Commissioner v CFMEU & Ors (No.5)[2018] FCCA 1100

Applicant:	SUBRATA KUMAR MONDAL
First Respondent:	TRANSCLEAN FACILITIES PTY LTD (ACN 141 630 355)
Second Respondent:	SHAYAN DATTA
File Number:	MLG 744 of 2019
Judgment of:	Judge O'Sullivan
Hearing date:	On the papers

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Date of Last Submission:	11 May 2020
Delivered at:	Melbourne (by telephone)
Delivered on:	28 May 2020

REPRESENTATION

Counsel for the Applicant:	Mr Hooper
Solicitors for the Applicant:	Rangi Lawyers
Counsel for the First Respondent:	Mr Catlin
Solicitors for the First Respondent:	Stephen Peter Byrne
Counsel for the Second Respondent:	Mr Misso
Solicitors for the Second Respondent:	Neesham White Gentle

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ORDERS

(1) The statement of claim filed 12 December 2019 be struck out.

(2) The applicant file and serve an amended statement of claim on or before 30 June 2020.

(3) If the applicant files and serves an amended statement of claim, the first and second respondents file and serve an amended defence on or before 4 August 2020.

(4) The application in a case filed 16 March 2020 and the application in a case filed 26 April 2020 be otherwise dismissed.

(5) The proceedings be adjourned **20 August 2020 commencing at 10:00 am** at the Federal Circuit Court of Australia at **Melbourne**.

(6) There be no order as to costs.

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FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 744 of 2019

SUBRATA KUMAR MONDAL
Applicant

And

TRANSCLEAN FACILITIES PTY LTD
(ACN 141 630 355)
First Respondent

SHAYAN DATTA
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. We are in the midst of a global pandemic caused by the spread of COVID-19.

2. The onset of the crisis caused by COVID-19 has been a kairotic moment for the whole community. As a result of State and Commonwealth government health directives steps are being taken to enforce what has been referred to as *"social distancing"*. To help with maintaining public health, the attention to regular cleaning of public spaces and high touch surfaces in all businesses including our public transport networks is more important than ever.

3. This case concerns a claim by someone who worked as one of the cleaners in the Victorian metropolitan transport network before the world changed as a result of COVID-19.

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4. In *Kalayzich v Santa Sabina College & Anor* [2020] FCCA 11 at paragraph [134] it was observed:

> *"...[I]t is pertinent to note that the Federal Circuit Court, unlike the Federal Court, is not generally a court of pleadings. Matters most commonly proceed in the absence of pleadings on the basis of written evidence. It is with this in mind that this Court has simply adopted the rules of the Federal Court in relation to pleadings for the relatively small number of cases in which pleadings are necessary. The Parliament has tasked this Court to deal with matters of less complexity than those dealt with by the Federal Court and the Family Court. …. Drawn out interlocutory disputes as to the quality of a pleading so sought and provided are alien to the normal practice and procedure of the Court and should, in my view, be discouraged."*

5. In the context of this case, and the current dispute before the Court, those comments are apposite.

Background

6. Since around 2011, Subrata Kumar Mondal ("the applicant") claims that he had been involved in cleaning metropolitan train stations in the Victorian public transport network. In March 2019, the applicant commenced proceedings in the Fair Work Division of the Court against Transclean Facilities Pty Ltd ("the first respondent") which holds a contract with Metro Trains Melbourne to carry out cleaning work at various Victorian metropolitan train stations.

7. The progress (and precise identification) of the issues between the parties (including whether the applicant has correctly articulated the claims he has made, or still makes (and against who)) has become problematic. There are now presently three parties to the proceedings however, the dispute which is the subject of these reasons only concerns the applicant and the first respondent.

8. It is necessary to rehearse (albeit in an abbreviated manner) some of the procedural background to date. The applicant filed an application, Form 4 and a document titled *"Points of Claim"* on 17 March 2019. Directions were made on 30 April 2019 for *inter alia* the first respondent (the only respondent at that time) to file a response and *"Points of Defence"*, the parties attend a mediation on 19 July 2019

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and the matter was programmed for a trial (which was to be held in February 2020).

9. Problems emerged almost immediately. It was necessary to extend time for the first respondent to file a response (and a costs order followed). The first respondent then filed *"Points of Defence"* and a cross claim on 10 July 2019. Predictably, the mediation which was held 9 days later was unsuccessful.

10. Later that same month, on 28 July 2019 the applicant filed an application in a case seeking to file an amended *"Points of Claim"*. When that application in a case came before the Court on 15 November 2019 it was accepted by both parties that the matter could not progress to trial in February 2020. Orders were made for the proceedings to proceed by way of pleadings and directions were made for that purpose. The February date was maintained for directions only.

11. The applicant then (for the first time) filed a statement of claim on 12 December 2019 (see Annexure A). In that pleading the applicant named 'Transclean Facilities Pty Ltd' as the first respondent and Mr Datta (an employee of the first respondent) as the second respondent. In his statement of claim the applicant alleged *inter alia* that between 2011 and 2017 he worked with entities associated with (and for periods worked directly as an employee for) the first respondent. The applicant made a number of claims of contraventions of the *Fair Work Act 2009* (Cth) ("the FW Act") arising from what he alleged did or did not do on during that period.

12. Importantly, not only did the (first) statement of claim omit allegations (and the relief sought as a result) that had been ventilated in his *'Points of Claim'* earlier in the proceedings, but made claims over, and dating back to, a period that was statute barred.[1]

13. When the first respondent filed a defence on 15 January 2020 (see Annexure B) it appeared to have abandoned its cross claim (as had been contained in the *"Points of Defence"*), and whilst admitting the applicant had been an employee for a brief period from 2016 to 2017, the first respondent otherwise denied the allegations and claims made by the applicant.

[1] see s.544, 545(5) of the *FW Act 2009* (Cth).

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14. When the proceedings returned to Court on 17 February 2020 for directions, the second respondent had only just been served with the statement of claim and had not filed a defence. At that directions hearing, the first respondent flagged that it wished to agitate an application for the proceedings to be summarily dismissed.

15. Accordingly, orders were made programming the matter for an interlocutory hearing on that issue (as well as allowing time for the second respondent to file a defence).

Interlocutory applications

First application in a case

16. As contemplated in the orders made on 17 February 2020, the first respondent filed an application in a case on 16 March 2020 ("first application in a case") supported by an affidavit of Mr Aguila filed 16 March 2020 seeking the following orders:

> *"1. Pursuant to order 13.07, summary judgment be given for the respondents.*
>
> *2. Pursuant to order 13.10, the applicant's claims be summarily dismissed.*
>
> *3. Such further or other order as the Court thinks appropriate.*
>
> *4. Costs."*

17. The applicant filed a response to that application in a case on 7 April 2020 supported by an affidavit of Mr Subrata Kumar Mondal, opposing the relief sought by the first respondent in the (first) application in a case.

18. The orders of 17 February 2020, made before the onset of the COVID-19 pandemic in Australia, had provided for the hearing of the interlocutory dispute to be held in open court. Given the public health directives and the State and Commonwealth government restrictions on the operation of the courts, a telephone mention was convened on 15 April 2020 to establish whether the dispute could be dealt with on the papers.

19. At the telephone mention, the second respondent still had not filed a defence and orders were made for *inter alia* the first respondent to file

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and serve a further application in a case for discovery ("the second application in a case").

Second application in a case

20. As was contemplated in those orders, the first respondent filed the second application in a case on 26 April 2020 supported by an affidavit of Mr Byrne (its solicitor) also filed on 26 April 2020.

21. The applicant filed a response to the (second) application in a case on 7 May 2020 supported by an affidavit of Mr Rangi (his solicitor) filed on the same day.

Position of the parties

22. The first respondent filed written submissions on 1 May 2020 and the applicant filed submissions in reply on 7 May 2020. It will be necessary to refer to those submissions in detail below to illustrate the position of both parties on the interlocutory applications.

23. On 11 May 2020 at a telephone mention, given the applicant and the first respondent had each filed written submissions addressing the issues raised in the first and second applications in a case, it was agreed those disputes could be determined on the papers.

24. Neither party contended it was necessary for the second respondent (who had by then obtained separate representation and filed a defence on 28 April 2020 (see Annexure C)) to be involved in the resolution of those interlocutory disputes. This was also the position taken by the second respondent at the telephone mention.

Pleadings

25. Before turning to the submissions of the first respondent and the applicant on each of the interlocutory applications, it is timely to note the following about the current pleadings.

26. The statement of claim filed 12 December 2019 is at Annexure A, the first respondent's defence is at Annexure B and the second respondent's defence is Annexure C to these reasons.

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27. The statement of claim alleged that the applicant worked for, and was employed by six different (what were described by the applicant in submissions as *"straw*", *"middleman"* or *"middlemen"*) companies between 2011 and 2017.

28. The statement of claim makes similar allegations of breaches of what were said to be the applicable industrial instruments against all six companies during the period of the requisite employment and alleges that the second respondent knew this and he and the first respondent, were accessorily liable as a result.

29. Nowhere in the statement of claim is there any reference to s.357 of the FW Act. In *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 551 at paragraphs [538] to [539] the Court made the following comments in relation to s.357:

> *"538. Section 357 is an important legislative protection against the exploitation of labour. Gilmore J observed in* Australian Building and Construction Commissioner v Inner Strength Steel Fixing Pty Ltd *[2012] FCA 499 at [14] that:*
>
> "The legislature has prohibited the practice of sham contracting because it undermines the protections afforded to employee by Australian industrial relations laws and instruments. Sham contracting arrangements enable employers to avoid legal obligations such as payment of payroll tax, workers compensation premiums, employee entitlements and superannuation contributions."
>
> *539. Furthermore, as his Honour said at [30]:*
>
> "The establishment of unlawful sham contract arrangements is objectively serious. Sham contracting, by its nature, provides a company with an unfair advantage over its competitors in that the company's operating expenses are unlawfully reduced, making it more competitive against its rivals and providing increased company revenue.""

30. Moreover, beyond references to s.550(2) and s.550(1) (along with s.793 of the FW Act), nowhere in the statement of claim is there any particularisation of or under what subsection of s.550(2) are either the second or first respondent said to be involved.

31. In *Fair Work Ombudsman v Hu* [2019] FCAFC 133 it was said at [15]:

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> *"Although the terms of s.550 have given rise to some potential divergence in the authorities (cf.* Ezy Accounting 123 Pty Ltd v Fair Work Ombudsman *[2018] FCAFC 134 at [14] to [15], (2018) 282 IR 86 at 90 to 91 per Flick, Bromberg and O'Callaghan JJ), that which is established has been summarised, in part, as follows by White J in* Fair Work Ombudsman v Devine Marine Group Pty Ltd *[2014] FCA 1365:*
>
> ***Relevant principles***
>
> *[176] Although the general principles relating to accessorial liability are settled, their application in a case such as the present is not without difficulty. In order to aid, abet, counsel or procure the relevant contravention, the person must intentionally participate in the contravention with the requisite intention:* Yorke v Lucas *(1984) 158 CLR 661 at 667. In order to have the requisite intention, the person must have knowledge of "the essential matters" which go to make up the events, whether or not the person knows that those matters amount to a crime:* Yorke v Lucas *at 667. Although it is necessary for the person to be an intentional participant and to have knowledge of the matters or things constituting the contravention, it is not necessary for the person to know those matters or things do constitute a contravention:* Rural Press Ltd v Australian Competition and Consumer Commission *[2002] FCAFC 213; (2002) 118 FCR 236 at [159]-[160]. That is to say, it is not necessary that the accessory should appreciate that the conduct in question is unlawful. ...*
>
> *[177] Actual, rather than imputed, knowledge is required. So much was made clear in* Giorgianni v The Queen *(1985) 156 CLR 473 at 506–7 by Wilson, Deane and Dawson JJ ...*
>
> *[178] The notion of being "knowingly concerned" in a contravention has a different emphasis from that of aiding, abetting, counselling or procuring" a contravention. To be knowingly concerned in a contravention, the person must have engaged in some act or conduct which "implicates or involves him or her" in the contravention so that there be a "practical connection between" the person and the contravention:* Construction, Forestry, Mining and Energy Union v Clarke *[2007] FCAFC 87; (2007) 164 IR 299 at [26];* Qantas Airways Ltd v Transport Workers' Union of Australia *[2011] FCA 470; (2011) 280 ALR 503; at [324]–[325].*

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> [179] *As indicated, these principles are not in doubt. The more difficult question arises from their application to the circumstances of this case and, in the identification of the essential facts about which an accessory must have actual knowledge. (extracts omitted).*"[2]

32. Whilst the *"middlemen"* companies are referred to in the statement of claim, the first respondent notes that none are named as parties to these proceedings and in any event given s.544 & 545(5) of the FW Act, a number of the applicant's claims are statute barred.

33. The first respondent admits to contracting with (but denies employing each of the directors) of the *"middlemen"* companies as well as denying the applicant sent *"invoices"* to the second respondent or that he arranged payment of those invoices to the applicant.

34. Whilst taking issue with the pleadings in the statement of claim the first respondent, in their submissions, does not engage with the interaction between s.793 and s.550 of the FW Act and how liability can be found as a result.[3]

35. Despite the disjunct between the positions of the parties they do agreed on some things including that the applicant was employed by the first respondent, albeit that they disagree for how long. The first respondent says it was only from early 2016 to 2017.

Consideration

36. Given the order in which the first respondent filed the two applications in a case (on 16 March 2020 & 26 April 2020 respectively) it is convenient to consider the orders sought in the same order.

Application for summary dismissal/ strike out

37. The first application in a case filed on 16 March 2020 sought the orders as set out in paragraph [16] above.

38. The first respondent's submissions filed on 1 May 2020 in support of the first application in a case were as follows:

---

[2] see also *Australian Rail, Tram and Bus Industry Union v Railtrain Pty Ltd* [2019] FCA 1740 at [10] – [15].
[3] see approach in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCA 42 at [51] to [58] and [300] and authorities referred to.

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"1. The First Respondent ("Transclean") filed an application on 17 (sic) March, 2020 to strike out the statement of claim ("SOC") dated 12 December, 2019 relying on rules 13.07 and 13.10 to strike out or summarily dismiss the claim. In support the First Respondent relies on affidavits:

(a) Stephen Peter Byrne sworn 24 April, 2020;

(b) Nelson Aguila sworn 22 April, 2020;

(c) Nelson Aguila sworn 16 February, 2020;

(d) deficiencies inherent in the SOC.

…

3. The current SOC has five categories of fatal flaw or deficiency:

a. any losses up to 12 December, 2013 are statute barred;

b. the claims of accessorial liability are confused, tenuous, do not benefit from any reverse onuses or deeming provisions under the Act and should not be allowed to proceed;

c. the hours claimed to have been worked are factually impossible;

d. the Applicant was a genuine sub-contractor by reason of inter alia, employing people himself, having multiple ABNs, being in partnership with his wife;

e. the Applicant is refusing to disclose where he worked and what he did and simply claims to be paid under an award.

…

Argument

Statute bar

6. The Act has a six-year limitation period. The Applicant has been warned that a substantial part (2.5 years) of his claim is statute barred. This has also been ventilated in court and in correspondence from Transclean. What should have happened is the excision of those parts of the SOC that precede 19 December 2013. Why this has not happened is not clear.

7. Thus the claims relating to CF Services Pty Ltd and part of the claims relating to Royal Facilities Services Pty Ltd should not be in the SOC.

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8. *It is a burden to both the Court and the Respondents to have to deal with irrelevant matter. The calculations of loss are entirely wrong as a consequence. It is vexatious to keep statute barred claims in the SOC, especially when civil penalties are claimed on them.*

Accessorial liability

9. *Liability for work for entitlements is said to arise from work conducted by the Applicant for:*

   (a) *CF Services Pty Ltd;*

   (b) *Royal Facilities Services Pty Ltd;*

   (c) *Platform Cleaning Services Pty Ltd SOC[6];*

   (d) *SNG 69 Pty Ltd SAOC[7];*

   (e) *MMGT Enterprises Pty Ltd SOC[8];*

   (f) *MML Cleaning Services Pty Ltd SOC[9]. (together the "**six entities**")*

10. *These entities are not parties to the proceeding. Instead, the Applicant alleges a tenuous basis for "involvement" as defined by s.550(2) of the Act as follows:*

   (a) *the directors of each of the six entities (different people) were employed by Transclean;*

   (b) *Transclean was related to each of the entities;*

   (c) *Transclean employed the director;*

   (d) *Transclean controlled each entity;*

11. *These allegations of employment by Transclean of the directors are denied and are unsupported by anything. The allegations of relations between entities are easily disposed of as a matter of law.*

12. *A relationship between Companies is defined by s.50 of the Corporations Act. It involves such matters as cross shareholdings or directorships of different entities all being from the same immediate family. None of that is alleged. At least the legal elements that support a relationship might have been alleged by the Applicant. Instead there is a bare allegation of a relation.*

13. *The next basis is that each director was employed by Transclean. This is denied.*

14. *The next basis is "control". This also has a* Corporations Act *definition per s.50AA which states as follows:*

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> (1) *For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.*
>
> (2) *In determining whether the first entity has this capacity:*
>
> > (a) *the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and*
> >
> > (b) *any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).*

15. *The control particularized is incoherent. In each case it is said the control derived from the director being employed by Transclean and Transclean:*

> ..directing (the director) to cause CF to perform a payroll function in relation to the cleaning work performed by the Applicant, including by way of CF paying the Applicant monies for performing cleaning work.

16. *Transclean submits the control allegation is incoherent. The control particularised above is duplicated for each of the six entities and is thus incompetent for each of the six.*

17. *For completeness, each director is alleged to have been "involved" but they are not joined as parties.*

18. *It is admitted by Transclean that each of the six entities had contracts with it at various times. That is not sufficient to establish involvement in the Applicant's relationships with the six entities for the purposes of s.550(2) of the Act.*

Independent -contractor

19. *There is significant evidence to the effect that the Applicant satisfied at least 4 keys elements that the Court may consider in deciding whether an Applicant is an employee:*

> (a) *whether he employs people himself;*
>
> (b) *whether he works for others as well as the Respondent/alleged employer;*

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(c) *whether his tax affairs are consistent with operating as a business as opposed to being an employee;*

(d) *whether he performed work as part of a genuinely separate business*

20. *Transclean pleads that other indicia of employment are not present, ie uniforms, equipment and associated materials, instructions: Response at 15(c) – (f).*

21. *The elements of a sham employment contract involvemes (sic) numerous considerations which are not re-stated here on the basis that they are known to the court.*[4] *The ultimate question is whether the worker is acting for another or on their own behalf.*[5]

Employing others

22. *The Applicant claims to have worked considerable hours that are non-sensical in the context of the shifts strictly available to workers on the railway stations. The shifts are simply*

(a) *6am to 12 noon (maximum 6 hours);*

(b) *1pm to 5pm (maximum 5 hours)*

As such, 11 hours a day was the maximum available to him. While some of those hours might constitute work outside the shifts is not possible.

23. *Certain numerical limits to the Applicants possible working hours are thus readily calculated. They are:*

(a) *11 hours a day Monday to Friday;*

(b) *55 hour weeks are the practical limit unless the Applicant works for other entities.*

(c) *242 hours a month is the practical limit;*

(d) *the relevant award was for a 38 hour week (clause 8.2).*[6]

(e) *Transclean employed people Monday to Friday.*[7]

Nelson Aguila deposes to this in his affidavit of 22 April, 2014.

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[4] *Stevens v Brodribb Sawmilling Pty Ltd* (1986) 160 CLR 16, 37.
[5] see also *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3)* (2011) 206 IR 252 at paragraph [208].
[6] as pleaded at paragraph [18] of the response.
[7] as pleaded at paragraph [18].

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24. *In those circumstances the hours set out in the table to the claim should be viewed with considerable skepticism. Examples of the absurdities are as follows:*

(a) *the Applicant alleges having worked 986 hours in the month of July, 2012 equating to 31 hours a day;*

(b) *the Applicant claims to have worked 552 hours in September, 2017 or 18.4 hours a day;*

(c) *in 2013-2014 the Applicant is routinely working 400 hours a month but in some cases much more:*

- *(i) October, 2013 600 hours;*
- *(ii) May 2013 584 hours;*
- *(iii) April, 2014 600 hours;*
- *(iv) October, 2014 680 hours*
- *(v) April 2015 630 hours*
- *(vi) April 2016 730 hours.*

The impossibility of the numbers is also evident in Mr Aguila's chart exhibited to his 16 Feb affidavit. The average hours a day alleged to have been worked is 14 which is impossible.

22. *Transclean submits a clear inference open to the Court is that the Applicant is employing other people and charging his respective employers (the six entities) for their labour.*

23. *As stated in the defence [15] the Applicant:*

(a) *has two ABNs 6575 7858 527 and 5183 1284 688*

(b) *one of his ABNs records him as operating in partnership with T Modal;*

(c) *the Applicant has rendered invoices imposing a GST surcharge between December, 2014 and May, 2017.*[8]

24. *Transclean has warned the Applicant that:*

(a) *Transclean paid him $9,026 in 2016;*

(b) *He told the ATO he earned $40,537 in 2016.*

This information is exhibited to the affidavit of Stephen Byrne sworn 29 April, 2020, namely the Applicant's tax summary and his Transclean tax.

25. *Two matters flow from this. The Applicant has clearly differentiated his employment. He is employed by Transclean but also earns other income of $31,511. He*

[8] these are yet to be exhibited.

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was content to paid by two separate employers at least in the year 2016 as another employer paid him $31,511.

26. *The Applicant's SOC claims states that he was paid **$75,273** by MML Cleaning Services in the 2016 financial year*[9] *not **$40,537** he told the ATO he was paid. Transclean submits such as discrepancy is no small matter for the reasons:*

(a) *the table denoting a total of $75,273 appears to have a common format with the other tables for other years and the other entities to whom he was contracted;*

(b) *by reason of (a) the same source documents used for (a) were probably used for other years;*

(c) *the tables for other years therefore must prima facie be in doubt;*

(d) *the discrepancy suggests dishonesty;*

(e) *the probative nature and necessity for the documents Transclean seeks by its discovery application becomes urgent and obvious.*

<u>What jobs does the Applicant do and where ?</u>

27. *There is another significant difficulty in that Transclean had contracts to do a range of matters including trams, tram depots, trains stations, trains and some transport yards. Accordingly, Transclean has some capacity to cross check the hours alleged to have been worked by checking whether the type of work and location of work asserted by the Applicant match with the hours he says he worked.*

28. *The Applicant refers to discussing and agreeing to "cleaning work" at SOC 2(a). What actual work he did and where disappears in a simple reference to work categories set out in the award: see SOC 4 i.*

29. *Aguila believes the Applicant was working on the Hurstbridge and South Morang train lines. In Aguila's words, some works are only performed in particular time windows. This is visually represented by graphs exhibited to Aguila's affidavit. As Aguilla states*[10]*, to work the hours alleged the Applicant would have to be at different places at the same time because the lengths of the shifts are no sufficient to support the hours worked.*

[9] see pg. 29 of the statement of claim
[10] see affidavit filed 16 February 2020 at paragraph [20]

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Principles

30. *The principles whether they be:*

   (a) *Section 17A of the* Federal Circuit Court of Australia Act 1999 *(Cth);*

   (b) *s 570(2)(a) of the FW Act;*

   (c) *rules 13.07.*

merge into the same question of whether there are reasonable prospects of success of the claim. Transclean submits the current claim needs to be re-pleaded at least. This will be the fourth iteration of the claim.[11] *The amendments needed are not fine tuning. Major amendments are needed. For major amendments to be needed at the fourth iteration bespeaks an ability to formulate a proper claim at all.*

31. *Fairness dictates that if Transclean is to be put to further costs it should have the costs of the proceeding to date and the costs of this application fixed and made payable forthwith.*

32. *Transclean seeks to place particular reliance on rule 13.10 (b) and (c):*

   - The Court may order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding, if the Court is satisfied that:
   - (b) the proceeding or claim for relief is **frivolous or vexatious**; or
   - (c) the proceeding or claim for relief is an **abuse of the process** of the Court.

33. *The vexation derives from:*

   (a) *the continued prosecution of claims that are timed barred;*

   (b) *the continued failure to particularise the nature of the work done and location so Transclean can verify the claim;*

   (c) *the incoherence of accessory liability claims;*

   (d) *the impossibility of the hours claimed;*

   (e) *the claim being onto the fourth iteration.*

[11] the first filed on 17 March 2019 , the second filed on 28 July 2019 and the third filed on 12 December 2019.

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> 34. *The Court should also have regard to the Applicant's attempt to scandalize and prejudice Transclean by appending to its second SOC a media article (ABC website) about an unrelated unfair dismissal claim. This was a crude attempt to embarrass and intimidate Transclean. Such conduct is not needed to support a meritorious claim…"*

39. The applicant's submissions filed on 7 May 2020, opposing this application were as follows:

> "3. *The Applicant submits that strike out and summary dismissal applications are not readily granted, and it is up to the First Respondent to establish for the Court that the Applicant has no reasonable prospects of successfully prosecuting his claim.*
>
> 4. *It is difficult to discern how the First Respondent could succeed in having the Applicant's claim summarily dismissed.*
>
> ***STRIKE OUT / SUMMARY DISMISSAL APPLICATION***
>
> ***Statute barred***
>
> 5. *The First Respondent complains that the Applicant claims for loss going back more than six years before the date he filed his claim in the Court (claim being filed on 19 December 2019).*
>
> 6. *This may be correct, however the Applicant claims loss for a period from 2011 to 2017, therefore there can be no argument that the majority of his claim is not statute barred.*
>
> 7. *Further, the Applicant agreed with the Second Respondent to do work for the benefit of the First Respondent in 2011. It was in 2011 that the First Respondent commenced having the Applicant invoice a string of six third party companies for his services. Therefore, for the sake of clarity, the claim is pleaded from 2011.*
>
> 8. *The Applicant will not press for compensation for unpaid Award entitlements that date from earlier than 13 December 2013 at hearing.*
>
> 9. *However, evidence from earlier than 13 December 2013 will be relevant to determining facts and issues in dispute such as:*

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> a. *Who did the Applicant agree to work for in 2011 – the First Respondent or CF Services?;*
>
> b. *Did the Second Respondent negotiate the agreement with the First Respondent to perform work and if so what were the terms of the agreement?;*
>
> c. *Was the Applicant engaged as an employee or contractor?*
>
> 10. *The First Respondent did not seek any assurance from the Applicant that he would not press for compensation for loss that occurred more than six years before he filed his claim, prior to the First Respondent filing an application for strike out or summary dismissal. For this reason the Applicant's application was premature.*
>
> 11. *In any event, an application for part of the claim to be struck out on the basis that it is statute barred does not support an application to have the residue of the claim, being the major part of the claim that is not statute barred, from being struck out.*
>
> ***Accessorial liability***
>
> 12. *In this matter the Applicant alleges that the First Respondent was an accessory as per s.550 of the Fair Work Act (the Act) to Modern Award breaches.*
>
> 13. *The First Respondent says that it did not have an employment or even a contractual relationship with the Applicant, as there were "middlemen" companies between the First Respondent and the Applicant.*
>
> 14. *The Applicant says that the middlemen companies were straw companies and that the First Respondent was an accessory via s.550 of the Act to the middleman companies breaches of the Award.*
>
> 15. *The middleman companies, of which there six that came and went at short order, are of no substance and in the man deregistered. Therefore, the focus of the Applicant's claim is against the First Respondent. It is the First Respondent that makes money on large cleaning contracts with Metro Rail.*
>
> 16. *The First Respondent seems to misconceive that the Applicant is seeking to establish that the First Respondent controlled the middlemen companies in the s.50AA of the* Corporations Act *sense. That is not the case.*
>
> 17. *Instead, the Applicant is seeking to establish that the First Respondent was an accessory to the middleman*

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companies breaches of the Award. In order to achieve that, the Applicant has to establish that the First Respondent had knowledge of the middleman companies Award breaches and was an intentional participant in such breaches. It is not necessary for the First Respondent's knowledge and participation in the Award breaches to amount to the First Respondent "controlling" the middleman companies.

18. *The Applicant points to facts that clearly suggest the First Respondent was involved with the middleman companies and Award breaches, including:*

    a. *prior to commencing the work the Applicant met and negotiated with the Second Respondent who has worked for the First Respondent at all relevant times;*

    b. *he was instructed to invoice a series of middleman companies by the Second Respondent who worked for the First Respondent at all times;*

    c. *the Applicant sent his invoices to the Second Respondent at all relevant times despite the fact that the invoices were made out to six different companies in line with the Second Respondent's instructions;*

    d. *so far as the Applicant can determine the middlemen companies were straw companies which did not contract to perform work for anyone other than the First Respondent .*

19. *It is true that since the parties were last before the Court the First Respondent's solicitor, Mr Byrne, has emailed the Applicant's solicitor to say that the First Respondent does not have wage records for the directors of the middlemen companies. However, given that straw nature of the middlemen companies and that the Applicant always sent his invoices to the Second Respondent rather than the middlemen companies, the Applicant seeks further discovery to clarify this issue (discovery as per request in the affidavit of the Applicant's solicitor dated 7 May 2020).*

20. *The First Respondent alleges that the Applicant's allegations against the middlemen companies are tenuous. In response, the Applicant alleges that the First Respondent's use of the straw middlemen companies makes it difficult for the persons performing work for it, such as the Applicant, to bring claims against it.*

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21. *In any event, the Applicant seeks further discover as referred to above in order to be able to substantiate his claim that the First Respondent was an accessory to the breaches of Award by the middlemen companies.*

Independent contractor

22. *Simply put, whether the Applicant was an employee or contractor is a question for substantive hearing. As in most such disputes, there are indicia pointing each way. It is only upon a careful gathering and examination of the indicia, and then a balancing of said indicia, that the Court will be able to determine this question. In any event, there is no basis for the Court to conclude that the Applicant's claim that he had the status of employee and not contractor should be struck our or summarily dismissed.*

"Employing others"

23. *The First Respondent says that based on the hours that shifts were usually worked at railway stations and the number of hours for which the Applicant invoiced, he must have been employing others to help him to work such large amounts of hours.*

24. *It should be noted that the First Respondent has picked out a handful of months from the years that the Applicant worked. The First Respondent does not address the rest of the time the Applicant cleaned railway stations and trains for the First Respondent's benefit.*

25. *Further, the Applicant has provided explanation for spikes in hours by way of affidavit (for example, a certain month's invoice contained hours for the preceding month as well thereby increasing the hours in the invoice).*

26. *Furthermore, regardless of the number of hours of the Applicant claims to have worked, there is no basis for the First Respondent to submit that the Court should conclude that the Applicant must have been "employing others". It would be even more unsound for the Court to then determine the Applicant's claim should be struck out or dismissed on an inference that he employed others, and if a person employs others then they cannot be an employee.*

27. *The matters of the hours the Applicant worked and claims underpayment, and whether or not he employed others, should not be conflated and are separate and discrete*

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> *matters appropriately determined after substantive hearing.*
>
> ***Tax issues?***
>
> *28. It appears that the First Respondent submits at paragraphs 23 to 26 of its submission that the Applicant may have issues with the ATO. The Applicant holds no such fears, and in any event those are matters for him and not the First Respondent.*
>
> *29. The Applicant notes that tax complications usually follow in situations where contractor arrangements are imposed on workers who are employees in the eyes of the law. The tax complication is a symptom the employer having imposed the wrong relationship, rather than being an indication that a worker is truly and in the eyes of the law a contractor.*
>
> ***Summary re strike out and summary dismissal***
>
> *30. The Applicant has not demonstrated that the Applicant has no prospects of successfully prosecuting his claim so there is no basis to summarily dismiss his claim.*
>
> *31. There is no basis to strike out any part of the Applicant's claim. That being said, the Applicant has sought specific discovery from the First Respondent and may replead relationships between the First Respondent and the middlemen companies based on what the First Respondent discovers. Further, the Applicant may need to subpoena the individuals who are recorded as shareholders and directors of the middlemen companies…"*

40. Putting to one side for present purposes the concession(s) made in the applicant's submissions what is immediately apparent is the applicant and his solicitor appear to still be coming to grips with the task of trying to articulate the case he wants to make and against who as well as foreshadowing (and assuming they would get leave for) further amendments to the statement of claim.

Approach to summary dismissal/strike out application

41. The *"Applicable Principles"* in the Federal Court were summarised by McKerracher J in *Zaghloul v Woodside Energy Limited (No. 7)* [2019] FCA 818 at paragraph [23] as follows:

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> "23. *The relevant test to be met under both s 31A(2) of the FCA Act and r 26.01(1)(a) of the Rules requires Woodside to satisfy the Court that Dr Zaghloul 'has no reasonable prospect of successfully prosecuting ... part of the proceeding'. It is unnecessary to refer extensively to the relevant procedural cases. The principles are well established and have been previously considered in detail: see, for example,* Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 2) *[2018] FCA 978 (at [3]), where I said:*
>
> > "Without reference to all the well-known authorities, the parties agree that it is well established that the Court may give judgment for a defending party in relation to the whole or any part of a proceeding where the Court is satisfied that the prosecuting party has no reasonable prospects of successfully prosecuting the proceeding or a part of the proceeding. Further:
> >
> > - *the claim need not be hopeless or bound to fail for it to have no reasonable prospects of success: s 31A of the Federal Court Act;*
> > - a reasonable prospect of success is one which is real, not fanciful or merely arguable: *Rogers v Assets Loan Co Pty Ltd* [2008] FCA 1305; (2008) 250 ALR 82 per Logan J (at [41]);
> > - there will be no prospect of success in circumstances where there is a defect in the pleadings which cannot be cured: *Ship "Sam Hawk" v Reiter Petroleum Ltd* [2016] FCAFC 26; (2016) 246 FCR 337 per Kenny and Besanko JJ (at [269]);
> > - s.31A is amenable to resolving straightforward questions of law: *Luck v University of Southern Queensland* [2008] FCA 1582 per Logan J (at [16]). However, summary judgment may still be appropriate if a question raised is of some complexity: *SK Foods LP v SK Foods Australia (in liq) (No 3)* [2013] FCA 526; (2013) 214 FCR 543 per Flick J (at [115]);
> > - if a *prima facie* case in support of summary judgment is established, the onus shifts to the opposing party to point to some factual or evidentiary issues making a trial necessary: *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; (2008) 167 FCR 372 per Gordon J (at [127]);

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- it is clear that the legislature's intention in enacting s.31A was to lower the bar for obtaining summary judgment, including summary dismissal, below that fixed by previous authorities: *Spencer v Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118 per Hayne, Crennan, Kiefel and Bell JJ; Jefferson Ford per Gordon J (at [127]);
- s.31A permits dismissal of a proceeding where an inquiry into the merits of the issues of law demonstrates the arguments are insufficiently strong to warrant the matter going to trial: *McAleer v University of Western Australia (No 3)* [2008] FCA 1490; (2008) 171 FCR 499 per Siopis J (at [39] and the cases therein cited);
- summary dismissal will not apply to 'a real question of law that is serious, important or difficult, involves conflicting authority, or is apparently arguable yet novel': *Nichol v Discovery Africa Ltd* (2016) 343 ALR 594 per Greenwood, McKerracher and Moshinsky JJ (at [134]);
- the moving party bears the onus of persuading the Court the application has no reasonable prospects of success. The assessment of whether a proceeding has no reasonable prospects of success necessitates the making of a value judgement in the absence of a full and complete factual matrix and argument, with a result that the provision vests a discretion in the Court. That discretion includes whether to deal with the motion at once or at some later stage in the proceedings, when the legal and factual issues have been more clearly defined: *Kimber v The Owners of Strata Plan No 48216* [2017] FCAFC 226 per Logan, Kerr and Farrell JJ (at [62]) quoting with approval *Eliezer v University of Sydney* [2015] FCA 1045; (2015) 239 FCR 381 per Perry J (at [37]);
- despite the threshold for summary dismissal having been lowered, it must still be exercised with caution. The power is not to be exercised lightly: *Spencer v Commonwealth* per Hayne, Crennan, Kiefel and Bell JJ (at [60]);
- the Court does not, in such an application, conduct a *'mini trial based upon incomplete evidence to decide whether the proceedings are likely to succeed or fail at trial'*. Rather, it *'requires a critical examination of the available materials to*

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> *determine whether there is a real question of law or fact that should be decided at trial'*: *Australian Securities and Investments Commission v Cassimatis* [2013] FCA 641; (2013) 220 FCR 256 per Reeves J (at [46]); and
>
> - each application for summary judgment or summary dismissal has to be determined according to its particular circumstances. What is required is a practical judgment of the case at hand. The relevant facts and circumstances will partly depend upon the stage which the proceedings have reached. Among other things, this will affect materials available to the Court for considering the application, for example, where the pleadings have been exchanged, or discovery of documents has occurred: *Cassimatis* per Reeves J (at [46])."

42. Finally, and as referred to at the beginning of these reasons, there is an overview of the *"Relevant Principles"* for an application such as the first application in a case when it is filed in this Court are set out in *Kalayzich v Santa Sabina College & Anor* [2020] FCCA 11 at paragraphs [20] to [27].

43. The principles and approach set out in the above mentioned decisions that will now be applied in the context of the orders sought by the first respondent in the application in a case filed 16 March 2020.

Resolution of summary dismissal/strike out application

44. Section 17A of the *Federal Circuit Court of Australia Act 1999* (Cth) ("the FCCA Act"), makes specific provision for the Court to give summary judgment in a case. That section of the FCCA Act has its equivalent in s.31A of the *Federal Court of Australia Act 1976* (Cth) ("the FC Act") and the leading authority on the application of s.31A of the FC Act is *Spencer v The Commonwealth of Australia* (2010) CLR 118.

45. There is a difference between a summary judgment application and an application to strike out a form of pleadings.[12]

46. Having considered the submissions of the parties against the approach in the authorities referred to above, it would be wrong to exercise

[12] see *Australian Rail, Tram and Bus Industry Union v Railtrain Pty Ltd* [2019] FCA 1740 at [25].

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discretion to summarily enter judgment in favour of the first respondent. Any application for summary judgment pursuant to Rules 13.07 or 13.10 of the *Federal Circuit Court Rules 2001* ("the Rules") or under s.17A of the FCCA Act is refused. The facts as presently known, whatever be the deficiency as to the manner in which they have been articulated are not such that on any view could be formed that the first respondent does not have a case to answer.

47. However, for the following reasons, the statement of claim should be struck out. The case as it is presently formulated cannot proceed. The operation of the FCCA Act and the Rules means that *inter alia*, Rule 16.02 and 16.21 of the *Federal Court Rules 2011* (Cth) ("the FC Rules") applies to the orders sought the by the first respondent in the alternative for the statement of claim to be struck out.

48. Leaving to one side the absence of the "*middlemen*" companies as respondents, in this case the statement of claim is deficient in so far as it includes claims that are statue barred and should have included, in relation to each of the relevant claims, a pleading of the relevant subsections of s.550(2) of the FW Act that was alleged to have been contravened by the respondents in this case.

49. In order for the applicant to succeed on an accessorial liability claim something more than a pleading that somebody was involved in the contraventions is needed. Given the serious nature of the allegations, more is required of the pleading than just a reference to s.550(2) of the FW Act.[13]

50. The problems with the pleadings were not all one way. The first respondent's defence filed on 15 January 2020 contained a number of typographical errors at paragraph [5] where subparagraphs (i) and (j) are repeated in the pleading. This mistake appears again at paragraphs [6], [7] and [9] of the defence.

51. Given the matters canvassed at paragraphs [29] to [32] and [44] to [49] above and for the reasons set out above, I have concluded that many essential paragraphs of the statement of claim are flawed. They are sufficiently important to the pleading that the appropriate order to be

[13] see approach in *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 at [229] and *Whitby v ZG Operations Australia Pty Ltd (No. 2)* [2019] FCA 201 at [28]-[32].

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made is that the statement of claim should be struck out. However, the making of such an order should not preclude the applicant from filing a further statement of claim.

52. As the authorities demonstrate, where a pleading is defective and there is perhaps some prospect that the defective pleading might be replaced by one that is adequate, then leave to re-plead ought to be given.

53. Indeed, as the first respondent averted to in submissions the applicant's current claim needs to be re-pleaded.[14]

54. Given this, I will address the matter by making directions for amended pleadings.

Application for discovery

55. There was also a dispute between the parties over discovery. The second application in a case filed 26 April 2020 by the first respondent sought an order for discovery in the following terms:

> *"1. Pursuant to section 45(1) and division 14.2 of the rules, more specially rule 14.02, the applicant disclose:*
>
> *(a) generally; or alternatively;*
>
> *(b) in relation to particular classes of documents; or alternatively;*
>
> *(c) in relation to particular issues;*
>
> *By 13 May 2020. Documents, the specific particulars of which, referred to in the affidavit of Stephen Peter Byrne sworn 24 April 2020 in support of this application.*
>
> *2. The proceedings be dismissed.*
>
> *3. Costs."*

56. However, as was apparent from the submissions filed 1 May 2020, at paragraph 35, the first respondent was seeking discovery of documents coming within nine different categories, as referred to in the affidavit of its solicitor Mr Byrne filed 24 April 2020. The *raison d'etre* for this was set out in the first respondent's submissions as follows:

> *"35. The documents sought by Transclean are set out in Stephen Byrne's 24 April, 2020 affidavit.*

[14] see paragraph [30] of the first respondent's submissions filed 1 May 2020.

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...

(a) *Transclean submits the Applicant saying one thing to the ATO and another to the Court. He clearly has other entities. The Court and the Respondents are entitled to know;*

(b) *the Applicant should be claiming payment for specified work, not simply work under an award. The reason he does not specify it is that he fears that evidentiary triangulation will reveal the falsity of the claim.*

37. *The Application is made because despite His Honour's suggestions of co-operation following Transclean's unsuccessful request for the documents in February they have not been forthcoming.*

Principles

38. *Transclean seeks the documents under Rule 14.2 which requires that an order be appropriate in the interests of the administration of justice. This was considered by Lucev FM in* Abrahams v Qantas Airways Ltd (No.2) *[2007] FMCA 639 (30 April 2007).*

39. *The Court referred to the definition of interests of the administration of justice" in* Genovese v BGC Construction Pty Ltd *[2006] FMCA 507 at [24] – [25]. In* Genovese *the Court said:*

"In BHP Billiton Ltd v Schultz *(2004) 221 CLR 400, [2004] HCA 61, ("Schultz") the High Court considered the nature of the "interests of justice": Gleeson CJ, McHugh and Heydon JJ CLR at p.421, HCA at par [15] said:*

> *The interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered. Even so, the interests of the respective parties, which might in some respects be common (as, for example, cost and efficiency), and in other respects conflicting, will arise for consideration. The justice referred to in s.5 is not disembodied, or divorced from practical reality.*
>
> *Gummow J observed that the interests of justice "are even-handed"; CLR at p.445, HCA at par [100] while Callinan J referred to the requirement to "do equal justice": CLR at p.492, HCA at par [258]. "*

and further said:

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> *"In assessing the "interests of the administration of justice" similar considerations to those in Schultz apply, with the qualification related to "administration of justice". Administration means "management": Concise Oxford Dictionary, 7th Edition (Oxford: Oxford University Press, 1984) at p.13. Thus, s.39(3)(d) of the [FM] Act is directed to a consideration of the interests of the management of justice, which must mean management by the Court of the proceedings pending before the Court. "*

40. *The court then summarized the essential matters to be considered:*

    (a) *the relevance of any documents sought to be discovered;*

    (b) *the volume of documents sought to be discovered;*

    (c) *whether there is a court book containing relevant documents, and the extent to which relevant documents are included in the court book;*

    (d) *whether discovery would narrow the issues;*

    (e) *whether both parties seek discovery;*

    (f) *whether there is consent to discovery;*

    (g) *whether discovery is "of benefit" in the litigation; and*

    (h) *the effect of discovery on litigants, especially, vulnerable litigants.*

41. *Transclean submits relevance is already established. Otherwise, it submits discovery is appropriate with regard to the items by their number in the list set- out in Mr Byrne's affidavit:*

    (a) *Re 1: notes diaries and records – these records must already have been relied on to create the tables in the claim – given the volume and the principle significance of corroboration, inspection by Transclean would be sufficient;*

    (b) *Re 2: banks statements of the ABNs – there directly go to the nature of his status. Transclean submits he was likely receiving payments for multiple workers. Such statements can be speedily copied digitally from a digital source (online banking) and therefore cheaply;*

    (c) *Re 3: all records of corporate entities may be too broad -but documents showing the entities associated*

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> *with the provision of services on the Victorian rail network are highly relevant;*
>
> (d) *Re 4: insurance documents would indicate an independent contractor status;*
>
> (e) *Re 6: correspondences with the Applicant's staff would establish Transcleans allegations in that regard;*
>
> (f) *Re 7: proofs of debt would indicate inconsistent claims;*
>
> (g) *Re 9 & 10: abn registration details will indicate how the Applicant was characterizing those businesses, similarly GST registration details;*
>
> (h) *Re 11: The partnership is inconsistent with the Applicant's alleged employee status*
>
> (i) *Re 12: the tax returns will show the true nature of the Applicant's commercial activities associated with the railway work, cleaning or otherwise.*
>
> 42. *Transclean submits discovery would narrow the issues and thus be a benefit to the litigation. The issues will be narrowed because the Applicant will be forced to disclose a credible basis for the claim and thereby enable Transclean to take it seriously.*
>
> 43. *An alternative but overlapping consideration is the administration of justice in flushing out whether this claim is bona fide. In addition, the claim the applicant makes is likely to approach $450,000. Any anticipated burden of discovery on the Applicant should be considered relatively."*

57. The applicant in submissions filed 7 May 2020 did not appear to resist an order for discovery, as such. Indeed, as set out in the affidavit filed on 7 May 2020, by his solicitor Mr Rangi, he also sought an order for discovery in the following terms:

> *"...that the First Respondent disclose the following documents/information between 1 May 2011 to 30 November 2017:*
>
> (a) *All documents supporting the invoices raised by the six entities to the First Respondent in relation to the applicant;*
>
> (b) *All agreements/contracts/deeds between the six entities and the First Respondent in relation to cleaning Services provided to Metro Rail."*

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58. The applicant's submissions filed 7 May 2020 were notable, as save for asserting that there was public interest in making the order for discovery and that he sought and accepted that he would provide *"tax returns for the years for which he seeks compensation"*, he otherwise objected in the most general terms to the categories and class of documents sought by the first respondent as *"unnecessarily broad and overly invasive"*.[15]

Approach to discovery

59. Section 45 of the FCCA Act provides that:

> *"(1) Interrogatories and discovery are not allowed in relation to proceedings in the Federal Circuit Court of Australia unless the Federal Circuit Court of Australia or a Judge declares that it is appropriate, in the interests of the administration of justice, to allow the interrogatories or discovery.*
>
> *(2) In deciding whether to make a declaration under subsection (1), the Federal Circuit Court of Australia or a Judge must have regard to:*
>
> > *(a) whether allowing the interrogatories or discovery would be likely to contribute to the fair and expeditious conduct of the proceedings; and*
> >
> > *(b) such other matters (if any) as the Federal Circuit Court of Australia or the Judge considers relevant."*

60. Rule 14.02 of the Rules also makes provision for matters relating to discovery in this Court.

61. What is clear from the FCCA Act, the Rules and the case law relevant to these provisions, is that discovery is rare and the threshold is high. Importantly, there is a presumption that the *"fair and expeditious conduct of the proceeding"* does not require discovery (see *Devine Marine Group Pty Ltd v Fair Work Ombudsman* [2013] FCA 442 at [54] and *Vanden Driesden v Edith Cowan University* (2012) 226 IR 452).

62. The *"fair and expeditious conduct of the proceedings"* (as referred to in s.45(2)(a)) is determined by reference to the objectives that govern this Court. These are set out in s.3 of the FCCA Act and Rule 1.03 of the Rules and can be summarised as follows:

---

[15] see paragraphs [32] to [34] of the applicant's submissions filed on 7 May 2020.

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a) the Court should act as informally as possible in the exercise of judicial power;

b) proceedings should not be protracted;

c) the resolution of the proceedings should be achieved justly, efficiently and economically;

d) streamlined procedures should be used; and

e) the Court should seek to avoid undue delay, expense and technicality.

63. In relation to s.45(2)(b) of the FCCA Act, in *Abrahams v Qantas Airways Limited (No.2)* (2007) 210 FLR 314 at [25] a non-exhaustive list of matters that may be considered *"relevant"* for the purposes of s.45(2)(b) were identified as follows:

> *"(a) the relevance of any documents sought to be discovered;*
>
> *(b) the volume of documents sought to be discovered;*
>
> *(c) whether there is a court book containing relevant documents, and the extent to which relevant documents are included in the court book;*
>
> *(d) whether discovery would narrow the issues;*
>
> *(e) whether both parties seek discovery;*
>
> *(f) whether there is consent to discovery;*
>
> *(g) whether discovery is "of benefit" to the litigation; and*
>
> *(h) the effect of discovery on litigants; especially vulnerable litigants."*

64. This list is not exhaustive and the Court must consider the particular circumstances of the case before it.

Resolution of application for discovery

65. The first respondent's submissions filed 1 May 2020 addressed the reasons for the order sought and the "*Principles*" associated with making such an order and then addressed *seriatim* the "*essential matters*" that are required to be considered. Were this the only issue between the parties, it would be open to the Court to make the orders sought by the first respondent.

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66. Indeed, given the position taken by the applicant in submissions it would appear that the parties agreed discovery should take place however, they disagreed on why it has not already (and/or adequately) occurred and as well as on the scope of same.

67. However, nowhere in the submissions did the parties particularise which of the provisions in Rule 14.02(2) of the Rules they relied on for the orders sought.

68. In *Australian Building & Construction Commissioner v CFMEU & Ors (No.5)*[2018] FCCA 1100 it was said at paragraph [9]:

> *"9. It will be seen that r.14.02(2) of the FCC Rules provides for the making of three types of disclosure orders: an order for disclosure* "generally"*; an order for disclosure* "in relation to particular classes of documents"*; and an order for disclosure* "in relation to particular issues". *Thus, when read with r.14.02(2) of the FCC Rules, the expression* "allow . . . discovery" *in s.45(1) of the FCC Act means the making of one of the three orders for disclosure provided for by r.14.02(2) of the FCC Rules. Given that the three disclosure orders provided for by r.14.02(2) are alternatives to each other, an application for a declaration under s.45(1) of the FCC Act must be made by reference to one of the three types of disclosure orders identified in r.14.02(2) of the FCC Rules. That has the practical consequence that a party who applies for a declaration under s.45(1) of the FCC Act must identify which of the three types of disclosure order provided for by r.14.02(2) of the FCC Rules the party will ask the Court to make if the Court were to make a declaration under s.45(1) of the FCC Act and, where disclosure is not sought* "generally"*, the classes of documents or the issues in relation to which the party would seek a disclosure order."*

69. Given the resolution of the first application in a case it would be premature to descend into a detailed order in relation to discovery (in the absence of a further amended statement of claim and amended defence).

70. In any event, and for the reasons set out above, in advance of the amended statement of claim being filed, no declaration for discovery or order should be made for the production of documents.

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Conclusion

71. Finally, given the conclusions arrived at in relation to each of the first and second applications in a case, and the absence of submissions sufficient to invoke the exceptions provisions of s.570(2)(a) or (b) of the FW Act there will be no order as to costs.

72. For the reasons set out above, there will be orders as set out at the beginning of these reasons for decision.

I certify that the preceding seventy-two (72) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Associate:

Date: 28 May 2020

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ANNEXURE A

IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA File number **MLG744/2019**
REGISTRY: MELBOURNE
FAIR WORK DIVISION

SUBRATA KUMAR MONDAL

Applicant

TRANSCLEAN FACILITIES PTY LTD (ABN 24 141 630 355)

First Respondent

SHAYAN DATTA

Second Respondent

Statement of Claim

Date of document: 12 December 2019 Solicitors Code: CR 110822
Filed on behalf of the Applicant
Law Firm: Rangi Lawyers Telephone: 0469 414 110

Email: Rangilawyers@live.com Ref: 607/19/Mondal

Initial discussion and agreement with First and Second Respondent

1. In or about 2011 and prior to the Applicant commencing work for CF Services Pty Ltd the Applicant met with Shayan Datta (**Second Respondent**), Manager of the Transclean Facilities Pty Ltd (**the First Respondent**).

2. At the above meeting the Applicant and the Second Respondent:

   a. Discussed that the First Respondent had a contract to clean Metro Trains Melbourne Facilities;

   b. Discussed that the First Respondent would employ the Applicant to perform work cleaning the Metro Trains Melbourne Facilities; and

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c. Agreed that the First Respondent would employ the Applicant to perform work cleaning the Metro Trains Melbourne Facilities.

3. Despite the agreement referred to above, the Second Respondent thereafter directed the Applicant to invoice CF Services Pty Ltd (**CF**) rather than the First Respondent for the work of cleaning the Metro Trains Melbourne Facilities.

CF Services Pty Ltd

4. Between the dates 1 May 2011 to 30 April 2012:

   a. The Applicant was employed by CF Services Pty Ltd (**CF**);

   b. Christos Mitzia (**Mitzia**) was the sole director of CF;

   c. Mitzia was employed by:

      i. Transclean Facilities Pty Ltd (**the First Respondent**); or alternatively

      ii. a corporate entity related to the First Respondent;

   d. Mitzia was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Fair Work Act 2009 (**the Act**).

   e. The First Respondent had a contract to clean Metro Trains Melbourne Facilities (**the cleaning work**);

   f. The First Respondent:

      i. subcontracted part of the cleaning work to CF;

      ii. controlled CF;

Particulars

Mitzia controlled CF by virtue of being sole director of CF. In turn, the First Respondent controlled Mitzia by virtue of being Mitzia's employer and directing Mitzia to cause CF to perform a payroll function in relation to the cleaning work performed by the Applicant, including by way of CF paying the Applicant monies for performing cleaning work.

   g. The Applicant performed part of the cleaning work that the Respondent subcontracted to the CF (**the CF employment**);

   h. The CF employment was covered by the *Cleaning Services Award* 2010 (**the Award**);

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i. The Applicant was appropriately classified under the Award as a Level 3 employee;

Particulars

The Applicant satisfied the following classification indicia:

- works from complex instructions and procedures;
- is responsible for ensuring the quality of their work; and
- has a knowledge of the employer's operation.
- ensuring that proper maintenance procedures for building plant and equipment are observed;
- arranging service calls to ensure that building plant is operating correctly;
- dealing with tenants and owners responsible with respect to the proper cleaning, servicing and functioning of the building;
- co-ordinating the work with leading hands of all building cleaners;
- handling routine personnel, industrial relations and health and safety matters.

j. Throughout the CF employment the applicant was paid a flat rate as per column 4 of the attached Schedule of Underpayments (**the Schedule**);

k. The Applicant sent invoices for the cleaning work he did for CF to Shayan Datta (**Second Respondent**), Manager of the First Respondent,

l. After receiving the Applicant's invoices for the cleaning work the Second Respondent arranged for payment of the invoice by way of payment from CF.

m. CF failed to pay the Applicant Award entitlements including:

i. Base hourly rate (clause 16 of the Award);

ii. Overtime penalty rates (clause 28 of the Award);

iii. Weekend and public holiday penalty rates (clause 27 of the Award);

iv. Annual leave (clause 29 of the Award); and

v. Superannuation (clause 23 of the Award).

n. The failures to pay the Award entitlements resulted in;

i. the Applicant being paid less than Award entitlements; and

ii. the First Respondent breaching s.45 of the Act in relation to breaches of clauses 16, 23, 27, 28 and 29 of the Award.

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o. The Applicant was underpaid and consequently suffered loss and damage of the amounts specified in the Schedule being specifically the amounts of $43,798.34

p. The Second Respondent knew or ought to have known that CF was failing to pay the Applicant Award entitlements including:

i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

Particulars

Further particulars of the contractual arrangement between the First Respondent and CF in relation the performance of the First Respondent's contract to clean Metro Trains Melbourne Facilities will be provided after discovery by the First Respondent prior to hearing.

q. The Second Respondent as Manager of the First Respondent:

i. was responsible for ensuring the First Respondent complied with its obligations under the Act;

ii. had actual knowledge of the First Respondent's failures to comply with the Act;

iii. was an intentional participant in the First Respondent's failure to comply with the Award and the Act.

Particulars

The Second Respondent made or participated in relevant decisions in relation the employment including failing to pay:

i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

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r. By reason of the matters pleaded above the Second Respondent:

i. was involved within the meaning of s.550(2) of the Act in the CF's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

s. The Second Respondent was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Act.

t. By reason of the matters pleaded in the paragraph above the First Respondent:

i. was involved within the meaning of s.550(2) of the Act in the CF's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

Royal Facilities Services Pty Ltd

5. Between the dates 1 May 2012 to 30 April 2014:

a. The Applicant was employed by Royal Facilities Services Pty Ltd (**Royal**);

b. Christos Mitzia (**Mitzia**) was the sole director of Royal;

c. Mitzia was employed by:

i. Transclean Facilities Pty Ltd (**the First Respondent**); or alternatively

ii. a corporate entity related to the First Respondent;

d. Mitzia was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Fair Work Act 2009 (**the Act**).

e. The First Respondent had a contract to clean Metro Trains Melbourne Facilities (**the cleaning work**);

f. The First Respondent:

i. subcontracted part of the cleaning work to Royal;

ii. controlled Royal;

Particulars

Mitzia controlled Royal by virtue of being sole director of Royal. In turn, the First Respondent controlled Mitzia by virtue of being Mitzia's employer and directing Mitzia to cause Royal to perform a payroll

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function in relation to the cleaning work performed by the Applicant, including by way of Royal paying the Applicant monies for performing cleaning work.

g. The Applicant performed part of the cleaning work that the Respondent subcontracted to the Royal (**the Royal employment**);

h. The Royal employment was covered by the *Cleaning Services Award* 2010 (**the Award**);

i. The Applicant was appropriately classified under the Award as a Level 3 employee;

Particulars

The Applicant satisfied the following classification indicia:

- works from complex instructions and procedures;
- is responsible for ensuring the quality of their work; and
- has a knowledge of the employer's operation.
- ensuring that proper maintenance procedures for building plant and equipment are observed;
- arranging service calls to ensure that building plant is operating correctly;
- dealing with tenants and owners responsible with respect to the proper cleaning, servicing and functioning of the building;
- co-ordinating the work with leading hands of all building cleaners;
- handling routine personnel, industrial relations and health and safety matters.

j. Throughout the Royal employment the applicant was paid a flat rate as per column 4 of the attached Schedule of Underpayments (**the Schedule**);

k. The Applicant sent invoices for the cleaning work he did for Royal to Shayan Datta (**Second Respondent**), Manager of the First Respondent,

l. After receiving the Applicant's invoices for the cleaning work the Second Respondent arranged for payment of the invoice by way of payment from Royal.

m. Royal failed to pay the Applicant Award entitlements including:

i. Base hourly rate (clause 16 of the Award);

ii. Overtime penalty rates (clause 28 of the Award);

iii. Weekend and public holiday penalty rates (clause 27 of the Award);

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iv. Annual leave (clause 29 of the Award); and

v. Superannuation (clause 23 of the Award).

n. Royal's failures to pay the Award entitlements resulted in;

i. the Applicant being paid less than Award entitlements; and

ii. the First Respondent breaching s.45 of the Act in relation to breaches of clauses 16, 23, 27, 28 and 29 of the Award.

o. The Applicant was underpaid and consequently suffered loss and damage of the amounts specified in the Schedule being specifically the amounts of $70,587.20

p. The Second Respondent knew or ought to have known that Royal was failing to pay the Applicant Award entitlements including:

i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

Particulars

Further particulars of the contractual arrangement between the First Respondent and Royal in relation the performance of the First Respondent's contract to clean Metro Trains Melbourne Facilities will be provided after discovery by the First Respondent prior to hearing.

q. The Second Respondent as Manager of the First Respondent:

i. was responsible for ensuring the First Respondent complied with its obligations under the Act;

ii. had actual knowledge of the First Respondent's failures to comply with the Act;

iii. was an intentional participant in the First Respondent's failure to comply with the Award and the Act.

Particulars

The Second Respondent made or participated in relevant decisions in relation the employment including failing to pay:

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i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

r. By reason of the matters pleaded above the Second Respondent:

i. was involved within the meaning of s.550(2) of the Act in the Royal's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

s. The Second Respondent was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Act.

t. By reason of the matters pleaded in the paragraph above the First Respondent:

i. was involved within the meaning of s.550(2) of the Act in the Royal's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

Platform Cleaning Services Pty Ltd

6. Between the dates 1 May 2014 to 30 December 2015:

a. The Applicant was employed by Platform Cleaning Services Pty Ltd (**Platform**);

b. George Katsakis (**Katsakis**) was the sole director & secretary of Platform;

c. Katsakis was employed by:

i. Transclean Facilities Pty Ltd (**the First Respondent**); or alternatively

ii. a corporate entity related to the First Respondent;

d. Katsakis was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Fair Work Act 2009 (**the Act**).

e. The First Respondent had a contract to clean Metro Trains Melbourne Facilities (**the cleaning work**);

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f. The First Respondent:

i. subcontracted part of the cleaning work to Platform;

ii. controlled Platform;

Particulars

Katsakis controlled Platform by virtue of being sole director of Platform. In turn, the First Respondent controlled Katsakis by virtue of being Katsakis's employer and directing Katsakis to cause Platform to perform a payroll function in relation to the cleaning work performed by the Applicant, including by way of Platform paying the Applicant monies for performing cleaning work.

g. The Applicant performed part of the cleaning work that the Respondent subcontracted to the Platform (**the Platform employment**);

h. The Platform employment was covered by the *Cleaning Services Award* 2010 (**the Award**);

i. The Applicant was appropriately classified under the Award as a Level 3 employee;

Particulars

The Applicant satisfied the following classification indicia:

- works from complex instructions and procedures;
- is responsible for ensuring the quality of their work; and
- has a knowledge of the employer's operation.
- ensuring that proper maintenance procedures for building plant and equipment are observed;
- arranging service calls to ensure that building plant is operating correctly;
- dealing with tenants and owners responsible with respect to the proper cleaning, servicing and functioning of the building;
- co-ordinating the work with leading hands of all building cleaners;
- handling routine personnel, industrial relations and health and safety matters.

j. Throughout the Platform employment the applicant was paid a flat rate as per column 4 of the attached Schedule of Underpayments (**the Schedule**);

k. The Applicant sent invoices for the cleaning work he did for Platform to Shayan Datta (**Second Respondent**), Manager of the First Respondent,

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l. After receiving the Applicant's invoices for the cleaning work the Second Respondent arranged for payment of the invoice by way of payment from Platform.

m. Platform failed to pay the Applicant Award entitlements including:

i. Base hourly rate (clause 16 of the Award);

ii. Overtime penalty rates (clause 28 of the Award);

iii. Weekend and public holiday penalty rates (clause 27 of the Award);

iv. Annual leave (clause 29 of the Award); and

v. Superannuation (clause 23 of the Award) .

n. Platform's failures to pay the Award entitlements resulted in;

i. the Applicant being paid less than Award entitlements; and

ii. the First Respondent breaching s.45 of the Act in relation to breaches of clauses 16, 23, 27, 28 and 29 of the Award.

o. The Applicant was underpaid and consequently suffered loss and damage of the amounts specified in the Schedule being specifically the amounts of $86,080.88

p. The Second Respondent knew or ought to have known that Platform was failing to pay the Applicant Award entitlements including:

i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

Particulars

Further particulars of the contractual arrangement between the First Respondent and Platform in relation the performance of the First Respondent's contract to clean Metro Trains Melbourne Facilities will be provided after discovery by the First Respondent prior to hearing.

q. The Second Respondent as Manager of the First Respondent:

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i. was responsible for ensuring the First Respondent complied with its obligations under the Act;

ii. had actual knowledge of the First Respondent's failures to comply with the Act;

iii. was an intentional participant in the First Respondent's failure to comply with the Award and the Act.

Particulars

The Second Respondent made or participated in relevant decisions in relation the employment including failing to pay:

i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

r. By reason of the matters pleaded above the Second Respondent:

i. was involved within the meaning of s.550(2) of the Act in the Platform's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

s. The Second Respondent was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Act.

t. By reason of the matters pleaded in the paragraph above the First Respondent:

i. was involved within the meaning of s.550(2) of the Act in the Platform's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

SNG 69 Pty Ltd

7. Between the dates 1 January 2016 to 30 May 2016:

a. The Applicant was employed by SNG 69 Pty Ltd (**SNG**);

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b. Stavros Nikolaidis and Peter Metaxopoulos (Nikolaidis and Metaxopoulos) were the directors of SNG;

c. Nikolaidis and Metaxopoulos were employed by:

   i. Transclean Facilities Pty Ltd (**the First Respondent**); or alternatively

   ii. a corporate entity related to the First Respondent;

d. Nikolaidis and Metaxopoulos were persons who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Fair Work Act 2009 (**the Act**).

e. The First Respondent had a contract to clean Metro Trains Melbourne Facilities (**the cleaning work**);

f. The First Respondent:

   i. subcontracted part of the cleaning work to SNG;

   ii. controlled SNG;

Particulars

Nikolaidis and Metaxopoulos controlled SNG by virtue of being sole director of SNG. In turn, the First Respondent controlled Nikolaidis and Metaxopoulos by virtue of being the employer of Nikolaidis and Metaxopoulos and directing Nikolaidis and Metaxopoulos to cause SNG to perform a payroll function in relation to the cleaning work performed by the Applicant, including by way of SNG paying the Applicant monies for performing cleaning work.

g. The Applicant performed part of the cleaning work that the Respondent subcontracted to the SNG (**the SNG employment**);

h. The SNG employment was covered by the *Cleaning Services Award* 2010 (**the Award**);

i. The Applicant was appropriately classified under the Award as a Level 3 employee;

Particulars

The Applicant satisfied the following classification indicia:

- works from complex instructions and procedures;
- is responsible for ensuring the quality of their work; and
- has a knowledge of the employer's operation.
- ensuring that proper maintenance procedures for building plant and equipment are observed;

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- arranging service calls to ensure that building plant is operating correctly;
- dealing with tenants and owners responsible with respect to the proper cleaning, servicing and functioning of the building;
- co-ordinating the work with leading hands of all building cleaners;
- handling routine personnel, industrial relations and health and safety matters.

j. Throughout the SNG employment the applicant was paid a flat rate as per column 4 of the attached Schedule of Underpayments (**the Schedule**);

k. The Applicant sent invoices for the cleaning work he did for SNG to Shayan Datta **(Second Respondent)**, Manager of the First Respondent,

l. After receiving the Applicant's invoices for the cleaning work the Second Respondent arranged for payment of the invoice by way of payment from SNG.

m. SNG failed to pay the Applicant Award entitlements including:

   i. Base hourly rate (clause 16 of the Award);

   ii. Overtime penalty rates (clause 28 of the Award);

   iii. Weekend and public holiday penalty rates (clause 27 of the Award);

   iv. Annual leave (clause 29 of the Award); and

   v. Superannuation (clause 23 of the Award) .

n. SNG's failures to pay the Award entitlements resulted in;

   i. the Applicant being paid less than Award entitlements; and

   ii. the First Respondent breaching s.45 of the Act in relation to breaches of clauses 16, 23, 27, 28 and 29 of the Award.

o. The Applicant was underpaid and consequently suffered loss and damage of the amounts specified in the Schedule being specifically the amounts of $24,186.97

p. The Second Respondent knew or ought to have known that SNG was failing to pay the Applicant Award entitlements including:

   i. Base hourly rate;

   ii. Overtime penalty rates;

   iii. Weekend penalty rates;

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iv. Annual leave; and

v. Superannuation.

Particulars

Further particulars of the contractual arrangement between the First Respondent and SNG in relation the performance of the First Respondent's contract to clean Metro Trains Melbourne Facilities will be provided after discovery by the First Respondent prior to hearing.

q. The Second Respondent as Manager of the First Respondent:

i. was responsible for ensuring the First Respondent complied with its obligations under the Act;

ii. had actual knowledge of the First Respondent's failures to comply with the Act;

iii. was an intentional participant in the First Respondent's failure to comply with the Award and the Act.

Particulars

The Second Respondent made or participated in relevant decisions in relation the employment including failing to pay:

i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

r. By reason of the matters pleaded above the Second Respondent:

i. was involved within the meaning of s.550(2) of the Act in the SNG's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

s. The Second Respondent was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Act.

t. By reason of the matters pleaded in the paragraph above the First Respondent:

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i. was involved within the meaning of s.550(2) of the Act in the SNG's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

MMGT Enterprise Pty Ltd

8. Between the dates 1 June 2016 to 30 July2016:

a. The Applicant was employed by MMGT Enterprise Pty Ltd (**MMGT**);

b. Maria Tsakopoulos (**Tsakopoulos**) was the sole director of MMGT;

c. Tsakopoulos was employed by:

i. Transclean Facilities Pty Ltd (**the First Respondent**); or alternatively

ii. a corporate entity related to the First Respondent;

d. Tsakopoulos was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Fair Work Act 2009 (**the Act**).

e. The First Respondent had a contract to clean Metro Trains Melbourne Facilities (**the cleaning work**);

f. The First Respondent:

i. subcontracted part of the cleaning work to MMGT;

ii. controlled MMGT;

Particulars

Tsakopoulos controlled MMGT by virtue of being sole director of MMGT. In turn, the First Respondent controlled Tsakopoulos by virtue of being Tsakopoulos's employer and directing Tsakopoulos to cause MMGT to perform a payroll function in relation to the cleaning work performed by the Applicant, including by way of MMGT paying the Applicant monies for performing cleaning work.

g. The Applicant performed part of the cleaning work that the Respondent subcontracted to the MMGT (**the MMGT employment**);

h. The MMGT employment was covered by the *Cleaning Services Award* 2010 (**the Award**);

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i. The Applicant was appropriately classified under the Award as a Level 3 employee;

Particulars

The Applicant satisfied the following classification indicia:

- works from complex instructions and procedures;
- is responsible for ensuring the quality of their work; and
- has a knowledge of the employer's operation.
- ensuring that proper maintenance procedures for building plant and equipment are observed;
- arranging service calls to ensure that building plant is operating correctly;
- dealing with tenants and owners responsible with respect to the proper cleaning, servicing and functioning of the building;
- co-ordinating the work with leading hands of all building cleaners;
- handling routine personnel, industrial relations and health and safety matters.

j. Throughout the MMGT employment the applicant was paid a flat rate as per column 4 of the attached Schedule of Underpayments (**the Schedule**);

k. The Applicant sent invoices for the cleaning work he did for MMGT to Shayan Datta (**Second Respondent**), Manager of the First Respondent,

l. After receiving the Applicant's invoices for the cleaning work the Second Respondent arranged for payment of the invoice by way of payment from MMGT.

m. MMGT failed to pay the Applicant Award entitlements including:

i. Base hourly rate (clause 16 of the Award);

ii. Overtime penalty rates (clause 28 of the Award);

iii. Weekend and public holiday penalty rates (clause 27 of the Award);

iv. Annual leave (clause 29 of the Award); and

v. Superannuation (clause 23 of the Award) .

n. MMGT's failures to pay the Award entitlements resulted in;

i. the Applicant being paid less than Award entitlements; and

ii. the First Respondent breaching s.45 of the Act in relation to breaches of clauses 16, 23, 27, 28 and 29 of the Award.

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o. The Applicant was underpaid and consequently suffered loss and damage of the amounts specified in the Schedule being specifically the amounts of $3,530.90

p. The Second Respondent knew or ought to have known that MMGT was failing to pay the Applicant Award entitlements including:

  i. Base hourly rate;

  ii. Overtime penalty rates;

  iii. Weekend penalty rates;

  iv. Annual leave; and

  v. Superannuation.

Particulars

Further particulars of the contractual arrangement between the First Respondent and MMGT in relation the performance of the First Respondent's contract to clean Metro Trains Melbourne Facilities will be provided after discovery by the First Respondent prior to hearing.

q. The Second Respondent as Manager of the First Respondent:

  i. was responsible for ensuring the First Respondent complied with its obligations under the Act;

  ii. had actual knowledge of the First Respondent's failures to comply with the Act;

  iii. was an intentional participant in the First Respondent's failure to comply with the Award and the Act.

Particulars

The Second Respondent made or participated in relevant decisions in relation the employment including failing to pay:

  i. Base hourly rate;

  ii. Overtime penalty rates;

  iii. Weekend penalty rates;

  iv. Annual leave; and

  v. Superannuation.

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r. By reason of the matters pleaded above the Second Respondent:

i. was involved within the meaning of s.550(2) of the Act in the MMGT's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

s. The Second Respondent was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Act.

t. By reason of the matters pleaded in the paragraph above the First Respondent:

i. was involved within the meaning of s.550(2) of the Act in the MMGT's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

MML Cleaning Services Pty Ltd

9. Between the dates 1 September 2016 to 30 November 2017:

a. The Applicant was employed by MML Enterprise Pty Ltd (**MML**);

b. Ionna Mortis (**Mortis**) was the sole director of MMGT;

c. Mortis was employed by:

i. Transclean Facilities Pty Ltd (**the First Respondent**); or alternatively

ii. a corporate entity related to the First Respondent;

d. Mortis was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Fair Work Act 2009 (**the Act**).

e. The First Respondent had a contract to clean Metro Trains Melbourne Facilities (**the cleaning work**);

f. The First Respondent:

i. subcontracted part of the cleaning work to MML;

ii. controlled MML;

Particulars

Mortis controlled MML by virtue of being sole director of MML. In turn, the First Respondent controlled Mortis by virtue of being Mortis's employer and directing Mortis to cause MML to perform a

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payroll function in relation to the cleaning work performed by the Applicant, including by way of MML paying the Applicant monies for performing cleaning work.

g. The Applicant performed part of the cleaning work that the Respondent subcontracted to the MML (**the MML employment**);

h. The MML employment was covered by the *Cleaning Services Award* 2010 (**the Award**);

i. The Applicant was appropriately classified under the Award as a Level 3 employee;

Particulars

The Applicant satisfied the following classification indicia:

- works from complex instructions and procedures;
- is responsible for ensuring the quality of their work; and
- has a knowledge of the employer's operation.
- ensuring that proper maintenance procedures for building plant and equipment are observed;
- arranging service calls to ensure that building plant is operating correctly;
- dealing with tenants and owners responsible with respect to the proper cleaning, servicing and functioning of the building;
- co-ordinating the work with leading hands of all building cleaners;
- handling routine personnel, industrial relations and health and safety matters.

j. Throughout the MML employment the applicant was paid a flat rate as per column 4 of the attached Schedule of Underpayments (**the Schedule**);

k. The Applicant sent invoices for the cleaning work he did for MML to Shayan Datta (**Second Respondent**), Manager of the First Respondent;

l. After receiving the Applicant's invoices for the cleaning work the Second Respondent arranged for payment of the invoice by way of payment from MML.

m. MML failed to pay the Applicant Award entitlements including:

i. Base hourly rate (clause 16 of the Award);

ii. Overtime penalty rates (clause 28 of the Award);

iii. Weekend and public holiday penalty rates (clause 27 of the Award);

iv. Annual leave (clause 29 of the Award); and

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v. Superannuation (clause 23 of the Award) .

ı. MML's failures to pay the Award entitlements resulted in;

i. the Applicant being paid less than Award entitlements; and

ii. the First Respondent breaching s.45 of the Act in relation to breaches of clauses 16, 23, 27, 28 and 29 of the Award.

ı. The Applicant was underpaid and consequently suffered loss and damage of the amounts specified in the Schedule being specifically the amounts of $26,597.90

. The Second Respondent knew or ought to have known that MML was failing to pay the Applicant Award entitlements including:

i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

Particulars

Further particulars of the contractual arrangement between the First Respondent and MML in relation the performance of the First Respondent's contract to clean Metro Trains Melbourne Facilities will be provided after discovery by the First Respondent prior to hearing.

The Second Respondent as Manager of the First Respondent:

i. was responsible for ensuring the First Respondent complied with its obligations under the Act;

ii. had actual knowledge of the First Respondent's failures to comply with the Act;

iii. was an intentional participant in the First Respondent's failure to comply with the Award and the Act.

Particulars

The Second Respondent made or participated in relevant decisions in relation the employment including failing to pay:

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i. Base hourly rate;

ii. Overtime penalty rates;

iii. Weekend penalty rates;

iv. Annual leave; and

v. Superannuation.

r. By reason of the matters pleaded above the Second Respondent:

i. was involved within the meaning of s.550(2) of the Act in the MML's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

s. The Second Respondent was a person who engaged in conduct on behalf of the First Respondent pursuant to s.793 of the Act.

t. By reason of the matters pleaded in the paragraph above the First Respondent:

i. was involved within the meaning of s.550(2) of the Act in the MML's breaches of the Act; and

ii. by reason of s.550(1) of the Act is taken to have committed those contraventions.

Redundancy of employment with First Respondent

10. The First Respondent employed the Applicant from in or about early 2011.

11. The First Respondent terminated the Applicant's employment effective 29 November 2017.

Particulars

The First Respondent advised the Applicant that his employment would terminate for reason of redundancy effective 29 November 2017 by way of letter dated 31 October 2017 from Rhonda Nielsen, HR Manager of the First Respondent.

12. In the above circumstances the Applicant was entitled to be paid a severance payment of 11 weeks wages pursuant to s.119 of the Act.

13. The First Respondent failed to pay the Applicant the severance payment.

14. In the circumstances the Applicant has suffered loss and damage of $8,900.10.

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Particulars

11 weeks of Award wages for classification level 3 = 11 X $809.10 = $8,900.10.

AND THE APPLICANT CLAIMS:

A. Loss and damage against the First Respondent pursuant to:

a. paragraph 4(o): $43,798.34
b. paragraph 5(o): $70,587.20
c. paragraph 6(o): $86,080.88
d. paragraph 7(o): $24,186.97
e. paragraph 8(o): $3,520.90
f. paragraph 9(o): $26,597.90
g. paragraph 14: $8900.10.

B. Declaration that the First Respondent has contravened s.45 of the Act.

C. An order pursuant to s.546(1) of the Act imposing penalties on the First Respondent or its involvement (within the meaning of s.550(2) of the Act) in respect of the contraventions of s.45 of the Act.

D. An order pursuant to section 546(3)(c) of the Act that any pecuniary penalty imposed on the First Respondent under the Act be paid to the Applicant.

E. Declaration that the Second Respondent has contravened s.45 of the Act.

F. An order pursuant to s.546(1) of the Act imposing penalties on the Second Respondent for his involvement (within the meaning of s.550(2) of the Act) in respect of the contraventions set out above.

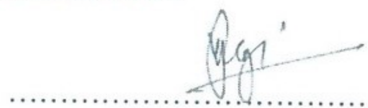
G. An order pursuant to section 546(3)(c) of the Act that any pecuniary penalty imposed on the Second Respondent under the Act be paid to the Applicant.

H. Costs.

I. Interest pursuant to section 547 of the Act at the rate prescribed in rule 26.01 of the Federal Circuit Court Rules.

J. Such further or other relief as may seem fit to this Honourable Court.

Dated: 12 December 2019



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Solicitors for the Applicant

This pleading was prepared by James Hooper of Counsel

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ANNEXURE B

IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA

File No. **MLG744/2019**

REGISTRY: MELBOURNE

FAIR WORK DIVISION

SUBRATA KUMAR MONDAL

Applicant

TRANSCLEAN FACILITIES PTY LTD (ABN 24 141 630 355)

First Respondent

SHAYAN DATTA

Second Respondent

DEFENCE

Date of document: 14 January 2020
Filed on behalf of the First Respondent
Prepared by:

Stephen Peter Byrne
Level 1 16 High Street
GLEN IRIS VIC 3146

Solicitors Code: 21553
Telephone: 0412 589 281
E-mail: stephenbyrne@colefowler.com.au

As to the Statement of Claim dated 12 December, 2019 the First Respondent pleads as follows to the allegations seriatim unless otherwise stated. Unless otherwise stated the First Respondent adopts the abbreviations used by the Applicant in its statement of claim.

1. Under cover of objection as to any allegations dating back to 2011 being out of time, the First Respondent admits the Second Respondent and the Applicant conversed in 2011.

Particulars

The First Respondent refers to s.544 of the Fair Work Act ("**The Act**") and the relevant breaches alleged, namely of s.45 being a civil remedy provision and the relevant limitation period being six years from the date of any alleged contravention. The Applicant's claim was first filed on 18 March, 2019 such that any contravention or loss prior to 18 March, 2013 is statute barred.

2. As to the allegations in paragraph 2:

   (a) admits the allegations in 2(a);

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(b) denies the allegations in 2(b);

(c) under cover of further objection that the allegation in 2(c) contradicts the allegation in paragraph 4(a) denies the allegations in 2(c).

3. The First Respondent does not admit the allegations in paragraph 3 and says further the Applicant:

(a) had an active ABN status from April, 2009 namely ABN 51 831 284 688 and, from 7 April 2015, ABN 65 757 858 527 which he denoted on invoices sent by him for payment:

(b) rendered invoices for laboring services imposing a G.S.T surcharge to various of the entities;

(c) received payments that including a GST component;

(d) was pre-disposed to working as a sub-contractor;

(e) considered himself a sub-contractor;

(f) arranged to be paid as a sub-contractor;

(g) arranged for his own workers to perform tasks assigned to him

and in the circumstances was not an employee but an independent sub-contractor sub-contracted to CF.

Particulars

The First Respondent refers to and repeats paragraph 15 herein. The invoices referred to in (b) are available for inspection on reasonable request. The six entities are Royal, CF, MML, Platform, SMG and MMGT

Re CF

4. Under cover of objection as to the allegations in paragraph 4 as they relate to allegations that are out of time; the First Respondent:

(a) admits the allegations in paragraph 4 (a) insofar as "employed" means contracted to CF as an independent contractor;

(b) admits the allegations in paragraph 4 (b);

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(c) denies the allegations in 4(c)(i) and 4(c)(ii);

(d) denies the allegations in paragraph 4(d);

(e) admits the allegations in paragraph 4(e)

(f) admits the allegations in paragraph 4(f)(i) and denies the allegations in paragraph 4(f)(ii);

(g) cannot plead to the allegations in paragraph 4(g) in that it is embarrassing insofar as the First Respondent has to guess what is meant;

(h) does not admit the allegations in paragraph 4(h);

(i) does not admit the allegations in paragraph 4(i);

(j) does not admit the allegations in paragraph 4(j);

(k) denies the allegations in paragraph 4(k)

(l) denies the allegations in paragraph 4(l)

(m) does not admit the allegations in 4 (m) and says further that as an independent contractor the Applicant was not entitled to award rates;

(n) denies the allegations in 4 (n);

(o) denies the allegations in 4 (o);

(p) does not plead to the allegation in 4 (q) as no allegations are made against it;

(q) denies the allegations in 4 (q);

(r) does not admit the allegations in 4 (r) and says further no allegations are made against it;

(s) denies the allegations in 4 (s);

(t) denies the allegations in 4 (t).

Particulars

The First Respondent does not know the conditions of the arrangement the Applicant had with CF.

Re Royal

5. Under cover of objection as to the allegations in paragraph 5 insofar as they relate to allegations that are out of time; the First Respondent:

(a) admits the allegations in paragraph 5 (a) insofar as "employed" means contracted to Royal as an independent contractor;

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(b) admits the allegations in paragraph 5 (b);

(c) denies the allegations in 5(c)(i) and 5(c)(ii);

(d) denies the allegations in paragraph 5(d);

(e) admits the allegations in paragraph 5(e);

(f) admits the allegations in paragraph 5(f)(i) and denies the allegations in paragraph 5(f)(ii);

(g) cannot plead to the allegations in paragraph 5(g) in that it is embarrassing insofar as the First Respondent has to guess what is meant;

(h) does not admit the allegations in paragraph 5 (h);

(i) does not admit the allegations in paragraph 5 (i);

(j) does not admit the allegations in paragraph 5 (j);

(i) does not admit the allegations in paragraph 5(i);

(j) does not admit the allegations in paragraph 5(j);

(k) denies the allegations in paragraph 5(k);

(l) denies the allegations in paragraph 5(l);

(m) does not admit the allegations in 5 (m) and says further that as an independent contractor the Applicant was not entitled to award rates;

(n) denies the allegations in 5 (n);

(o) denies the allegations in 5 (o);

(p) does not plead to the allegation in 5 (q) as no allegations are made against it;

(q) denies the allegations in 5 (q);

(r) does not admit the allegations in 5 (r) and says further no allegations are made against it;

(s) denies the allegations in 5 (s);

(t) denies the allegations in 5 (t).

Particulars

The First Respondent does not know the conditions of the arrangement the Applicant had with Royal.

Re Platform

6. As to the allegations in paragraph 6 the First Respondent:

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(a) admits the allegations in paragraph 6 (a) insofar as "employed" means contracted to Platform as an independent contractor;

(b) admits the allegations in paragraph 6 (b);

(c) denies the allegations in 6 (c)(i) and 6(c)(ii);

(d) denies the allegations in paragraph 6(d);

(e) admits the allegations in paragraph 6(e);

(f) admits the allegations in paragraph 6(f)(i) and denies the allegations in paragraph 6(f)(ii);

(g) cannot plead to the allegations in paragraph 6(g) in that it is embarrassing insofar as the First Respondent has to guess what is meant;

(h) does not admit the allegations in paragraph 6(h);

(i) does not admit the allegations in paragraph 6(i);

(j) does not admit the allegations in paragraph 6(j);

(i) does not admit the allegations in paragraph 6(i);

(j) does not admit the allegations in paragraph 6(j);

(k) denies the allegations in paragraph 6(k)

(l) denies the allegations in paragraph 6(l)

(m) does not admit the allegations in 6(m) and says further that as an independent contractor the Applicant was not entitled to award rates;

(n) denies the allegations in 6(n);

(o) denies the allegations in 6(o);

(p) does not plead to the allegation in 6(q) as no allegations are made against it;

(q) denies the allegations in 6(q);

(r) does not admit the allegations in 6(r) and says further no allegations are made against it;

(s) denies the allegations in 6(s);

(t) denies the allegations in 6(t).

Particulars

The First Respondent does not know the conditions of the arrangement the Applicant had with Platform.

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Re SNG

7. As to the allegations in paragraph 7 the First Respondent:

(a) admits the allegations in paragraph 7(a) insofar as "employed" means contracted to SNG as an independent contractor;

(b) admits the allegations in paragraph 7(b);

(c) denies the allegations in 7(c)(i) and 7(c)(ii);

(d) denies the allegations in paragraph 7(d);

(e) admits the allegations in paragraph 7(e);

(f) admits the allegations in paragraph 7(f)(i) and denies the allegations in paragraph 7(f)(ii);

(g) cannot plead to the allegations in paragraph 7(g) in that it is embarrassing insofar as the First Respondent has to guess what is meant;

(h) does not admit the allegations in paragraph 7(h);

(i) does not admit the allegations in paragraph 7(i);

(j) does not admit the allegations in paragraph 7(j);

(i) does not admit the allegations in paragraph 7(i);

(j) does not admit the allegations in paragraph 7(j);

(k) denies the allegations in paragraph 7(k);

(l) denies the allegations in paragraph 7(l);

(m) does not admit the allegations in 7(m) and says further that as an independent contractor the Applicant was not entitled to award rates;

(n) denies the allegations in 7(n);

(o) denies the allegations in 7(o);

(p) does not plead to the allegation in 7(q) as no allegations are made against it;

(q) denies the allegations in 7(q);

(r) does not admit the allegations in 7(r) and says further no allegations are made against it;

(s) denies the allegations in 7(s);

(t) denies the allegations in 7(t).

Particulars

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The First Respondent does not know the conditions of the arrangement the Applicant had with SNG.

Re MMGT

8. As to the allegations in paragraph 8 the First Respondent:

(a) admits the allegations in paragraph 8(a) insofar as "employed" means contracted to MMGT as an independent contractor;

(b) admits the allegations in paragraph 8(b);

(c) denies the allegations in 8(c)(i) and 8(c)(ii);

(d) denies the allegations in paragraph 8(d);

(e) admits the allegations in paragraph 8(e);

(f) admits the allegations in paragraph 8(f)(i) and denies the allegations in paragraph 8(f)(ii);

(g) cannot plead to the allegations in paragraph 8(g) in that it is embarrassing insofar as the First Respondent has to guess what is meant;

(h) does not admit the allegations in paragraph 8(h);

(i) does not admit the allegations in paragraph 8(i);

(j) does not admit the allegations in paragraph 8(j);

(k) denies the allegations in paragraph 8(k);

(l) denies the allegations in paragraph 8(l);

(m) does not admit the allegations in 8(m) and says further that as an independent contractor the Applicant was not entitled to award rates;

(n) denies the allegations in 8(n);

(o) denies the allegations in 8(o);

(p) does not plead to the allegation in 8(q) as no allegations are made against it;

(q) denies the allegations in 8(q);

(r) does not admit the allegations in 8(r) and says further no allegations are made against it;

(s) denies the allegations in 8(s);

(t) denies the allegations in 8(t).

Particulars

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The First Respondent does not know the conditions of the arrangement the Applicant had with MMGT.

Re MML

9. As to the allegations in paragraph 9 the First Respondent:

(a) admits the allegations in paragraph 9(a) insofar as "employed" means contracted to MML as an independent contractor;

(b) admits the allegations in paragraph 9(b);

(c) denies the allegations in 9(c)(i) and 9(c)(ii);

(d) denies the allegations in paragraph 9(d);

(e) admits the allegations in paragraph 9(e);

(f) admits the allegations in paragraph 9(f)(i) and denies the allegations in paragraph 9(f)(ii);

(g) cannot plead to the allegations in paragraph 9(g) in that it is embarrassing insofar as the First Respondent has to guess what is meant;

(h) does not admit the allegations in paragraph 9(h);

(i) does not admit the allegations in paragraph 9(i);

(j) does not admit the allegations in paragraph 9(j);

(i) does not admit the allegations in paragraph 9(i);

(j) does not admit the allegations in paragraph 9(j);

(k) denies the allegations in 9(k)

(l) denies the allegations in 9(l)

(m) does not admit the allegations in 9(m) and says further that as an independent contractor the Applicant was not entitled to award rates;

(n) denies the allegations in 9(n);

(o) denies the allegations in 9(o);

(p) does not plead to the allegation in 9(q) as no allegations are made against it;

(q) denies the allegations in 9(q);

(r) does not admit the allegations in 9(r) and says further no allegations are made against it;

(s) denies the allegations in 9(s);

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(t) denies the allegations in 9(t).

Particulars

The First Respondent does not know the conditions of the arrangement the Applicant had with MML

10. The First Respondent denies the allegations in paragraph 10 and says further the Applicant:
    (a) commenced employment with it after 31 March 2016 pursuant to a written agreement;
    (b) was after 31 March 2016 separately contracted to different entities to provide cleaning services outside hours worked for the First Respondent;
    (c) prior to 31 March, 2016 provided cleaning services solely as a sub-contractor.

11. The First Respondent admits the allegations in paragraph 11.

12. The First Respondent denies the allegations in paragraph 12.

13. The First Respondent denies the allegations in paragraph 13 by reason of the Applicant having no such entitlement and says further the Applicant was paid his proper entitlements.

14. The First Respondent denies the allegations in paragraph 14.

And the First Respondent pleads further:

15. The Applicant was an independent contractor for the six entities Royal, Platform, MML, MMGT, SNH69 and CF. The indicia of his independent contractor status were as follows:
    (a) the Applicant had an ABN number from 2009 and one which records him as operating a partnership with "T. Modal", from 2015;
    (b) the Applicant was registered with ABN numbers and rendered invoices imposing a G.S.T. surcharge to various of the entities between December 2014 and May, 2017;

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(c) the First Respondent did not supply the applicant with machinery, equipment or tools from 2011;

(d) the First Respondent did not supply the applicant with claiming consumables from 2011;

(e) the applicant did not wear a uniform from 2011;

(e) the First Respondent did not give instructions to the applicant except on an occasional basis when the applicant was interacting with other staff;

(f) the applicant employed or subcontracted out to other individuals to perform services for the six entities and the First Respondent.

Particulars

As to (f) the First Respondent is endeavoring to obtain particulars but otherwise refers to the particulars sub-joined to paragraph 17 which, if genuine, indicate the Applicant was invoicing for his own work and for workers other than himself. The two ABN's are 65757858527 and 51831284688.

16. The Applicant's claim is statute barred for the period of six years prior to the filing of the first points of claim on 18 March 2019 such that any loss alleged for the period after 18 March 2013 is not claimable pursuant to s.544 of the Act.

Particulars

The Applicant's claim is grounded in s.45 of the FWA. S.45 is a civil penalty provision and subject to the limitation in s.544.

17. The Applicant's claim is for amounts commensurate with falsely stated hours and is vexatious and an abuse of process.

Particulars

The Applicant alleges having worked 986 hours in the month of July, 2012 equating to 31 hours a day. The Applicant claims to have worked 552 hours in September, 2017 or 18.4 hours a day.

18. The Applicant agreed in March, 2016 to work separately as an independent contractor for entities other than the First Respondent on weekends, remuneration for which was not the subject of an award.

Particulars

The First Respondent will rely on the terms of the written Full Time (Award) Employment Contract which provide that the Applicant works a 38 hour week (clause 8.2) and the schedule thereto which states the Applicant shall only work Monday to Friday.

James D. Catlin

Stephen Peter Byrne

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Stephen P. Byrne

Solicitor for the Plaintiff

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ANNEXURE C

IN THE FEDERAL CIRCUIT COURT
OF AUSTRALIA
REGISTRY: MELBOURNE
FAIR WORK DIVISION

Court Number MLG744 of 2019

SUBRATA KUMAR MONDAL

Applicant

TRANSCLEARN FACILITIES PTY LTD (ABN 24 141 630 355)

First Respondent

SHAYAN DATTA

Second Respondent

SECOND RESONDENT'S DEFENCE

Date of Document: 28 April 2020
Filed on behalf of: Second Respondent
Australian lawyer
Name: Neesham White Gentle
Address: 55 Main Street
Monbulk VIC 3793

Code: 105678
Telephone: 9756 6254
Ref: DGM:MA:2020121David Misso
Email: david@lawsuit.com.au

As to the Statement of Claim dated 12 December 2019 the Second Respondent pleads as follows to the allegations seriatim unless otherwise stated. Unless otherwise stated the Second Respondent adopts the abbreviations used by the Applicant in its statement of claim.

1. As to paragraph 1 thereof, he admits that he and the Applicant had a conversation in 2011.

2. As to paragraph 2 thereof:
   (a) Admits that allegations in 2(a)
   (b) Denies the allegations in 2(b) and (c) thereof.

3. As to paragraph 3 thereof, he denies the contents thereof.

4. As to paragraph 4 thereof, he denies the contents of paragraphs 4(a) to 4(t) thereof.

5. As to paragraph 5 thereof, he denies the parts 5(a) to 5(t) thereof.

6. As to paragraph 6 thereof, he denies the contents of paragraphs 6(a) to 6(t) thereof

7. As to paragraph 7 thereof, he denies the contents of 7(a) to 7(t) thereof.

8. As to paragraph 8 thereof, he denies the contents of 8(a) to 8(t) thereof.

9. As to paragraph 9 thereof, he denies the 9(a) to 9(t) thereof.

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10. As to paragraph 10 to 14 thereof:
    (a) He denies any part thereof which specifically refers to the Second Respondent.
    (b) He otherwise does not plead.

11. And the Second Respondent pleads further:
    (a) The Applicant's claim against the Second Respondent is alleged as at 2011 and is therefore statute barred.
    (b) Any claim against the Second Respondent be dismissed.

Neesham White Gentle ....

NEESHAM WHITE GENTLE
Solicitors for the Second Respondent

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