IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S ECI 2018 02591

JOHN SETKA — First Plaintiff

SHAUN REARDON — Second Plaintiff

v

PAUL DALTON — First Defendant

PETER HEAD — Second Defendant

JUDGE:	Daly AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	4 August 2020
DATE OF JUDGMENT:	28 September 2020
CASE MAY BE CITED AS:	Setka v Dalton
MEDIUM NEUTRAL CITATION:	[2020] VSC 521

PRACTICE AND PROCEDURE: Application by the defendants to strike out the plaintiffs' claim pursuant to Rule 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) – Whether the statement of claim discloses a cause of action – *Uber Australia Pty Ltd v Andrianakis* [2020] VSCA 186 referred to – Claim for false imprisonment – Whether the defendants could be the proximate cause of imprisonment – *Myer Stores Ltd v Soo* [1991] 2 VR 597; *Coles Myer Ltd v Webster* [2009] NSWCA 299; *Ruddock v Taylor* (2003) 58 NSWLR 269 referred to – Claim for malicious prosecution – Whether the defendants were the effective prosecutors – Whether the defendants could have been actuated by malice – *A v NSW* (2007) 230 CLR 500 referred to – Strike out application dismissed – Leave to replead granted to clarify aspects of plaintiffs' claims.

APPEARANCES:	Counsel	Solicitors
For the First Plaintiff	Ms F K Forsyth QC with Mr D K R Kinsey	Maurice Blackburn
For the First Plaintiff	Mr G Kozminsky with Mr A C Roe	Gordon Legal
For the Defendants	Dr M J Collins AM QC with Ms C Currie	Arnold Bloch Leibler

HER HONOUR:

Introduction and background

1 Mr John Setka is and was at all material times the Secretary of the Victorian-Tasmanian Divisional Branch of the Construction and General Division ('Branch') of the Construction, Forestry, Mining and Energy Union ('CFMEU').[1] Mr Shaun Reardon was at all material times the Assistant Secretary of the Branch. Mr Setka and Mr Reardon have brought this action against the defendants, who were at all material times senior employees of Boral Ltd ('Boral'), for false imprisonment and malicious prosecution with respect to events which took place during the course of an industrial dispute.

2 In 2013, the first defendant ('Mr Dalton') was the Executive General Manager (Southern Region) for Boral Construction Materials & Cement. The second defendant ('Mr Head') was the General Manager for Boral Concrete and Construction Materials & Cement (Southern Region). At all material times, Mr Head reported to Mr Dalton.

3 Boral Resources (Vic) Pty Ltd ('Boral Resources'), a subsidiary of Boral, supplied concrete to Grocon Constructors (Vic) Pty Ltd ('Grocon'), a member of the Grocon group of companies. From approximately mid-2012, the CFMEU was engaged in an industrial dispute with Grocon concerning Grocon's enterprise agreement, Grocon's safety record, and Grocon's refusal to allow CFMEU shop stewards and health and safety representatives on Grocon's building sites.

4 From early 2013, Mr Dalton and Mr Head believed that the CFMEU was seeking to prevent Boral from supplying concrete to Grocon ('ban'). The black ban led to Boral Resources initiating a proceeding in this Court in February 2013 ('civil proceeding')[2] which was concluded in September 2015, when Boral Resources' claim for damages against the CFMEU was compromised by the parties.

---

1 Now known as the Construction, Forestry, Maritime, Mining and Energy Union.

2 S CI 2013 00928.

5 On 23 April 2013, Mr Dalton and Mr Head met with Mr Setka and Mr Reardon at the Auction Rooms café in North Melbourne ('Auction Rooms meeting'). Mr Dalton and Mr Head arranged the Auction Rooms meeting in an attempt to resolve issues between Boral and the CFMEU related to the ban.

6 Nearly two years after the Auction Rooms meeting, on 16 April 2015, Mr Dalton signed a police statement ('Dalton police statement'), which stated, among other things:

(a) since February 2013, Boral had difficulties supplying concrete to customers on construction sites in Melbourne controlled by the CFMEU;

(b) at that time, Boral was supplying concrete to Grocon, when Grocon was involved in a long-running dispute with the CFMEU. Boral was Grocon's exclusive supplier of concrete in Victoria, and had supplied concrete to Grocon for approximately ten years;

(c) towards the end of 2012, Mr Dalton received a telephone call from Mr Setka, in which Mr Setka said words to the following effect:

> "This is John Setka from the CFMEU. Do you know who I am?
>
> …
>
> This is just a heads up that Boral's going to run into some trouble with this Grocon stuff. It's nothing personal"

(d) Mr Dalton understood the reference to "Grocon stuff" to mean the dispute between the CMFEU and Grocon;

(e) Mr Dalton had no further contact with anyone from the CFMEU until early 2013;

(f) on or about 14 February 2013, Mr Dalton was informed by Ms Linda Maney, Boral's General Manager Sales – Southern Region, that a number of Boral employees had been told that the CFMEU had implemented a ban on Boral supplying concrete to Melbourne construction sites, and the ban had been

imposed because Boral continued to supply concrete to Grocon;

(g) the effects of the ban included:

(i) Boral being prevented or otherwise hindered from supplying concrete to CFMEU-controlled building sites in the Melbourne metropolitan area;

(ii) Boral customers cancelling or discontinuing orders;

(iii) a substantial decline in requests for quotes and orders from Boral;

(iv) a decline in Boral's market share in Victoria; and

(v) a loss of revenue, which had been assessed by an external accounting firm as up to $20 million as at the time of Dalton police statement;

(h) Mr Dalton shared responsibility for coordinating Boral's response to the ban, and acted as the central internal contact for Boral regarding the ban;

(i) on 26 February 2013, Boral commenced the civil proceeding, and was granted an injunction restraining the CFMEU from procuring or advising any person working with concrete supplied by Boral at specified construction sites from performing or refusing to perform work otherwise than in their normal way;

(j) Boral obtained further injunctions from this Court in the civil proceeding on 7 March and 5 April 2013, which extended the original injunction to all construction sites in Victoria, and also restrained the CFMEU and its officers from preventing, hindering or interfering with, or attempting to prevent, hinder or interfere with, the supply or possible supply of goods or services by Boral at any construction site in Victoria;

(k) in March and April 2013, Mr Dalton was told by Boral sales employees that, notwithstanding the injunctions obtained by Boral in the civil proceeding, the ban was still being enforced by the CFMEU;

(l) in April 2013, Mr Head met with Mr Vin Sammartino, a director of Hacer Group Pty Ltd, a customer of Boral, who said he would arrange for Mr Dalton to speak with Mr Reardon;

(m) on the morning of 23 April 2013, Mr Dalton telephoned Mr Reardon, who suggested they meet at the Auction Rooms café;

(n) Mr Dalton and Mr Head, and Mr Setka and Mr Reardon attended the Auction Rooms meeting. At the meeting:

(i) Mr Setka said words to the effect that:

> "Concrete supply is like an intravenous drug.
>
> Builders can't survive without it. We're at war with Grocon and in a war you cut the supply lines.
>
> Boral Concrete is a supply line to Grocon"

(ii) Mr Setka further said words to the effect that:

> "The CFMEU has limited resources so we will focus on the Green and Gold.
>
> We will impact you more and more. Truck emissions testing will be the next phase of the action the CFMEU will take against Boral.
>
> We've been fighting with one arm behind our back and we're willing to significantly ramp up our campaign."

(iii) Mr Dalton understood the reference to "Green and Gold" to be referring to Boral, as this is the Boral livery;

(iv) Mr Dalton understood the reference to truck emissions testing to be referring to exhaust system tests on trucks, the imposition of which would affect the timeliness of Boral concrete deliveries to its customers;

(v) Mr Setka said that, if Boral did not cooperate with the CFMEU, the CFMEU would target membership of Boral's concrete batchers, which Mr Dalton understood as meaning that the CFMEU would seek to recruit Boral's concrete batchers as CFMEU members so that Boral

would have to deal directly with the CFMEU in the future, rather than with the union currently covering Boral's employees;

(vi) Mr Setka said words to the effect that:

> "All you [Boral] have to do is stop supply to Grocon for a couple of weeks.
>
> We can facilitate this by blockading your concrete plants and stopping supplies for Grocon directly. No one would have to know that you have stopped supply."

(vii) in response to this, Mr Dalton said words to the effect that:

> "Boral will not be doing any of those things. We will continue to support Grocon. We will not be doing any deals with the CFMEU."

(viii) Mr Setka then said words to the effect that:

> "All wars end and once peace is established the CFMEU will be at the table to divide up the spoils. The CFMEU will decide who gets what and what market share Boral will get. You'll have no loyalty from any of the builders."

(o) in the Dalton police statement, Mr Dalton said that it was clear to him that Mr Setka and Mr Reardon were threatening Boral's business, and if Boral did not comply with the CFMEU's demands, the CFMEU would take action to hurt Boral's business;

(p) following the Auctions Rooms meeting, Mr Dalton and Mr Head returned to Mr Head's car and each wrote their own notes of the meeting recording their independent recollections;

(q) the ban continued as it had since early 2013 to the time of the Dalton police statement; and

(r) no representatives of Boral had any further contact with the CFMEU following the Auction Rooms meeting.

7 On 17 April 2015 (the day after Mr Dalton signed the Dalton police statement), Mr Head signed a police statement ('Head police statement'), which stated, among other things:

(a) at the Auction Rooms meeting:

(i) there was no discussion of the proceeding issued by Boral against the CMFEU, other than Mr Reardon saying words to the effect that:

"I would be happy if the legal stuff stopped but Setka does not give a stuff."

(ii) Mr Reardon then said that the CFMEU had a day of action the following week and said words to the effect that:

"We will target Boral trucks first but this is really about Grocon and Daniel Grollo and John Van Camp.

This is easy. Just stop supplying Grocon for two weeks."

(iii) Mr Setka said words to the effect that:

"The CFMEU is at war with Grocon and that if you want to starve the enemy you cut off their supply lines.

We have not started"

(iv) Mr Setka also said words to the effect that:

"Just stop supplying Grocon for two weeks and this will go away.

How about we all have a bit of fun and just stop the Grocon trucks at the plant and let the other trucks though?"

(v) Mr Head understood Mr Setka to mean that the CFMEU would stop Boral trucks which were carrying concrete to Grocon sites but not trucks carrying concrete to other sites;

(vi) Mr Setka then said words to the effect that:

"We'll come after your batchers once this is sorted.

Then we can turn off and on supply by calling the shop stewards at the plants and Boral won't even know."

(vii) Mr Setka further said words to the effect that:

"At the end we will be divvying up the spoils and we'll decide who supplies who. Grocon won't give a shit about Boral at that point."

(b) Mr Head viewed the comments made during the Auctions Room meeting as being unreasonable, and as representing a direct threat to Boral's business;

(c) Mr Head and Mr Dalton then returned to Mr Head's car and prepared their own handwritten notes;

(d) following the Auction Rooms meeting, the CFMEU allowed Boral to supply concrete at the Werribee Plaza project and at the Eastland Shopping Centre project in Ringwood, but to Mr Head's knowledge the ban otherwise stayed in place; and

(e) the ban had a significant financial impact on Boral's business in Victoria.

8 On 6 December 2015, Mr Setka was arrested by Detective Acting Sergeant Rodney Andrew. Mr Setka was taken to the Melbourne West Police Station, questioned in relation to the Auction Rooms Meeting, and detained for a period of around two hours and twenty-five minutes.

9 Also on 6 December 2015, Mr Reardon was arrested by Detective Senior Constable Dave Neil. Mr Reardon was taken to Melbourne West Police Station, questioned in relation to the Auction Rooms meeting, and detained for a period of about three hours and twenty-three minutes.

10 On 6 December 2015, charges were filed against Mr Setka and Mr Reardon ('charges'), alleging that on 23 April 2013 (the date of the Auction Rooms meeting) each of Mr Setka and Mr Reardon had:

(a) with an intent to cause loss to Grocon made an unwarranted demand with menaces of Mr Dalton and Mr Head; and

(b) contravened section 87 of the *Crimes Act 1958* (Vic), being the prohibition on blackmail.

11 In May 2018, a committal hearing was conducted in respect of the charges against Mr Setka and Mr Reardon ('committal hearing') before his Honour Magistrate Rozencwajg. During the committal hearing, the Dalton police statement and Head police statement were adopted on oath by Mr Dalton and Mr Head respectively as being true and correct, and were tendered by counsel for the police informants. The Statement of Material Facts Relevant to Charges ('statement of material facts') provided to his Honour made extensive references to, among other things, the Dalton police statement and the Head police statement.

12 In the course of the committal hearing,[3] Mr Dalton gave evidence under cross-examination that, among other things:

(a) at the time of the conversation at the Auction Rooms meeting he did not think Mr Setka and Mr Reardon made threats;

(b) he never thought of what was said at the Auction Rooms meeting as involving the making of an unwarranted demand with menaces;

(c) Mr Setka and Mr Reardon's comments regarding Boral stopping supply to Grocon were put as a request; and

(d) it was not until June 2014 that it was suggested to him that what was said to him by Mr Setka and Mr Reardon at the Auction Rooms meeting might have amounted to blackmail.

13 In the course of the committal hearing, Mr Head gave evidence under cross-examination that, among other things:

(a) Mr Setka's and Mr Reardon's comments regarding Boral stopping supply to Grocon were put as an appeal;

---

[3] The transcript of the evidence given by Messrs Dalton and Head in the committal hearing was in evidence before me, and this summary of that evidence was derived from the statement of claim and the transcript. What was said by Mr Dalton and Mr Head during the course of the committal hearing was, at least for the purposes of the current application, not in dispute.

(b) the atmosphere during the Auction Rooms meeting was amicable and cordial; and

(c) it was not until more than a year after the Auction Rooms meeting that the word "blackmail" was used by anyone in relation to what transpired during the Auction Rooms meeting.

14 On 16 May 2018, after Mr Dalton and Mr Head had completed giving their evidence, the charges were withdrawn by the prosecution and struck out by the learned magistrate.

15 This proceeding was issued on 3 April 2020. The current application was initiated by the defendants' summons filed on 19 June 2020, which seeks to strike out critical paragraphs of the plaintiffs' amended statements of claim ('amended statement of claim').[4] In particular, the defendants contend that the plaintiffs' claim for false imprisonment is untenable, and that the plaintiffs' pleading of its malicious prosecution claim is defective. As the paragraphs sought to be struck out contain the critical allegations in the proceeding, and the defendants submit that no leave to replead should be granted, acceding to the defendants' application in full would for all practical purposes bring the proceeding to an end, notwithstanding the fact that no application for summary judgment has been made by the defendants.

The Statement of Claim

16 The amended statement of claim made allegations consistent with the factual matters set out in paragraphs 1 to 14 above, which are, at least for present purposes, uncontroversial.

17 The focus of the defendants' current application is paragraphs 24 to 30 of the amended statement of claim, which are reproduced below.

4 Mr Reardon's statement of claim is substantially identical to Mr Setka's statement of claim.

False Imprisonment

18 Paragraphs 24 and 25 of the amended statement of claim provide as follows:

> 24. By reason of the matters pleaded in paragraphs 15 and 16 above (and the particulars thereto), on 6 December 2015:
>
> a. Setka's liberty was restrained for two hours and twenty-five minutes; and
>
> b. Reardon's liberty was restrained for three hours and twenty-three minutes.
>
> 25. Dalton and Head:
>
> a. were active in promoting and causing the arrests and subsequent detention which resulted in the restraint of liberty referred to in the previous paragraph;
>
> b. further or alternatively, engaged in conduct that amounted to a direct request, direction, or procurement to the police to make the arrests and subsequent detention resulting in the restraint of liberty alleged in the previous paragraph;
>
> c. further or alternatively, are to be regarded as having directly brought about the arrests and subsequent detention resulting in the restraint of liberty alleged in the previous paragraph.
>
> **Particulars**
>
> (i) Setka and Reardon's arrests were supported by (further or alternatively, reliant on the contents of) Dalton's Police Statement and Head's Police Statement.
>
> (ii) Dalton and Head were the only people present at the Auction Rooms Meeting other than Setka and Reardon.
>
> (iii) Dalton's Police Statement and Head's Police Statement relevantly related to conduct – what occurred at the Auction Rooms Meeting – that was within the knowledge only of Dalton and Head such that as a practical matter the police could not have exercised any independent discretion in arresting Setka and Reardon, further or alternatively the police were in possession of information which virtually compelled them to arrest Setka and Reardon.
>
> (iv) Dalton's Police Statement and Head's Police Statement were given to the police voluntarily.
>
> (v) Dalton's Police Statement and Head's Police Statement, in respect of the alleged blackmail was [sic]:
>
> a. false;
>
> b. further or alternatively, deliberately false (see further the particulars to paragraph 29 below).

Malicious Prosecution

19 Paragraphs 26 to 30 of the amended statement of claim provide as follows:

> 26. By reason of the matters pleaded in paragraphs 17 and 18 (and the particulars thereto), criminal proceedings were initiated against Setka and Reardon on 6 December 2015.
>
> 27. The criminal proceedings alleged in the preceding paragraph were initiated, and (further or alternatively) maintained by Dalton and Head because Dalton and Head:
>
> a. played an active role in the conduct of the criminal proceedings;
>
> b. further or alternatively, were instrumental in the conduct of the criminal proceedings;
>
> c. further or alternatively, set the criminal proceedings in motion;
>
> d. further or alternatively, provided false information to the police and withheld relevant information from the police;
>
> e. further or alternatively, put the police in possession of information which virtually compelled the police to bring criminal charges against Setka and Reardon;
>
> f. further or alternatively, put the police in possession of information which meant that as a practical matter the officers who brought criminal charges against Setka and Reardon could not have exercised any independent discretion; and
>
> g. further or alternatively, persuaded the formal prosecutor to institute proceedings by prejudicing the formal prosecutor's judgment.
>
> **Particulars**
>
> (i) The criminal proceedings alleged in paragraph 17 above were supported by (further or alternatively, reliant on the contents of) Dalton's Police Statement and Head's Police Statement.
>
> (ii) Dalton and Head were the only people present at the Auction Rooms Meeting other than Setka and Reardon.
>
> (iii) Dalton's Police Statement and Head's Police Statement relevantly related to conduct – what occurred at the Auction Rooms Meeting – that was within the knowledge only of Dalton and Head such that as a practical matter the police could not have exercised any independent discretion in laying the charges, further or alternatively the police were in possession of information which virtually compelled them to bring the charges.
>
> (iv) Dalton's Police Statement and Head's Police Statement were given to the police voluntarily.

(v) Dalton's Police Statement and Head's Police Statement, in respect of the alleged blackmail was [sic]:

a. false;

b. further or alternatively, deliberately false (see further the particulars to paragraph 29 below).

(vi) (With respect to maintaining the prosecution) Dalton and Head each:

a. did not amend their Police Statement, nor withdraw those Statements, in the time between when Setka and Reardon were charged and the Committal;

b. attended, and gave evidence at, the Committal; and

c. adopted their Police Statements on oath as true and correct in their evidence in chief at the Committal.

(vii) (With respect to sub-paragraph (g) above) the prosecution was formally conducted by Victoria Police, and the informant was Detective Acting Sergeant Rodney Andrew.

28. The criminal proceedings against Setka and Reardon terminated in favour of Setka and Reardon.

Particulars

Setka and Reardon refer to and repeat paragraph 23 above.

29. The criminal proceedings against Setka and Reardon were initiated, or maintained by Dalton and Head without reasonable and probable cause.

Particulars

(i) Dalton's Police Statement and Head's Police Statements (especially Dalton's Police Statement at paragraphs 74-75 and 84-85; and Head's Police Statement at paragraph 77) were:

a. false, further or alternatively deliberately false, in alleging that Setka and Reardon each made an unwarranted demand with menaces at the Auction Rooms Meeting; further or alternatively

b. Dalton and Head did not honestly believe, or had no sufficient basis for an honest belief, that Setka and Reardon each made an unwarranted demand with menaces at the Auction Rooms Meeting as alleged therein;

(ii) Setka and Reardon rely upon the following matters:

a. the statements and admissions made by Dalton and Head when giving evidence during the Committal, including those matters set out in paragraphs 21 and 22 above (and the particulars thereto);

b. Dalton's acceptance, in his evidence in an examination conducted by the ACCC on 26 June 2014 pursuant to s 155 of the *Competition and Consumer Act 2010* (Cth) (**Dalton's s 155 Examination**) (being 10 months prior to Dalton making his Police Statement), that he did not consider that threats had been made at the time of the Auction Room Meeting (Dalton's s 155 Examination Transcript T24.1-2);

c. omissions and inconsistencies between Dalton and Head's contemporaneous notes of and related to the Auction Rooms Meeting, Head's draft police statements, Head's Police Statement, Dalton's Police Statement, and Dalton's s 155 Examination Transcript;

d. the absence of any reference to threats or blackmail in internal monthly Boral reports relating to the Alleged Ban;

e. the absence of any reference to threats or blackmail in communications with or briefing papers by Boral to Members of Parliament in relation to the Alleged Ban; and

f. blackmail was first raised around a year after the Auction Rooms Meeting, by Boral's in-house counsel;

(iii) the matters identified in subparagraphs (i) and (ii) above occurred in the following context:

a. the industrial dispute and Alleged ban alleged at paragraphs 6 to 8 above;

b. following the Auction Rooms Meeting, Dalton and Head told Boral's lawyers about the Auction Rooms Meeting, and Dalton was told that it was of no significance, there was nothing in it, and that it was not relevant to any legal proceedings either on foot or contemplated at that time (the particulars to paragraphs 21 and 22 are repeated);

c. Dalton and Head believed that Boral was unable to resolve the Alleged Ban (particulars (ii) to (xvii) to paragraph 30 are repeated); and

(iv) further or alternatively, neither Setka nor Reardon made any unwarranted demands with menaces at the Auction Rooms Meeting.

30. Dalton and Head, in initiating or maintaining the proceedings, acted maliciously and were actuated by a sole or dominant purpose other than the proper invocation of the criminal law.

Particulars

Malice can be inferred from the following matters, including a combination of one or more of those matters:

(i) Paragraph 29 above, and the particulars thereto are repeated;

(ii) Dalton was responsible for Boral's response to the Alleged Ban, and Head played a role in Boral's response to the Alleged Ban, and that response had been unsuccessful;

(iii) Boral was driving a campaign of public attention and pressure against the CFMEU in respect of the Alleged Ban for and with the assistance of Members of Parliament and Dalton was active in driving that campaign and authoring documents for those Members of Parliament;

(iv) Boral had brought court proceedings against the CFMEU in respect of the Alleged Ban (see the particulars to paragraph 8 above, and particular (xii) below);

(v) Boral had sought to persuade the ACCC to bring proceedings against the CFMEU in respect of the Alleged Ban (see the particulars to paragraph 8 above);

(vi) Dalton's and Head's superiors (including Kane), were frustrated by the perceived ineffectiveness of those court processes and the ACCC in dealing with the Alleged Ban, and Dalton and Head were aware of this;

(vii) the public statements made by Kane (Dalton's and Head's superior), about the CFMEU, including: (A) the statements made by Kane on *7.30* on 28 October 2013; (B) the statements attributed to Kane in the article by John Durie and Ewin Hannan entitled 'Boral boss backs CFMEU attack' published in *The Australian* on 31 January 2014; (C) the statements made in the article published by Kane entitled 'How a rogue union is damaging our business' published in *The Age* on 10 February 2014; (D) the statements attributed to Kane in the article by Tim Binstead entitled 'Boral caught in crossfire of CFMEU-Grocon war' published in *The Sydney Morning Herald* on 25 March 2014; (E) the statements attributed to Kane in the article by Michael Smith and Tim Binsted entitled 'Boral chief lashes out at CFMEU "cowards and bullies" over ban' published in *The Australian Financial Review* on 26 March 2014; (F) the statements attributed to Kane in the article by Michael Smith entitled 'Boral is bruised but will beat the CFMEU: Mike Kane' published in *The Australian Financial Review* on 8 May 2014; (G) in his email to Boral staff on 9 July 2014; (H) the statements made by Kane in his speech to the Cement Concrete Aggregate Australia Conference on 4 September 2014; and (I) the statements attributed to Kane in the article by Matthew Stevens entitled 'Building union marked by Kane' published in *The Australian Financial Review* on 18 September 2015;

(viii) the public statements made by Dalton (Head's superior) about the CFMEU, including: (A) in the letter written by Dalton to Boral customers on 22 August 2013; (B) the statements attributed to Dalton in the article by Lucille Keen entitled 'Boral claims CFMEU blocking its trucks from Grocon sites' published in *The Australian Financial Review* on 23 August 2013; and (C) in his email to the Southern Region Team on 9 July 2014;

(ix) Dalton's (Head's superior) involvement in the media messaging in respect of the Alleged Ban, including as shown in: (A) the email sent by Fitzgerald to Dalton and Bill Fisher (**Fisher**) on 17 April 2013 at 4.14 pm; (B) the email sent by Dalton to Garcia on 13 August 2013 at 8.37 am; and (C) the emails between Dalton, Garcia and Fitzgerald on 10 September 2013 (at 2.34 pm, 4.32 pm, 4.41 pm) and 11 September 2013 (at 9.52 am, 10.00 am, 10.05 am, 10.57 am, 11.08 am, and 11.43 am).

(x) Dalton's (Head's superior) prior knowledge of some of the statements referred to in particular (vii) above, as shown in: (A) the email sent by Garcia to Dalton and Fitzgerald on 6 February 2014 at 10.09 am; (B) the email sent by Fitzgerald to Damien Sullivan (**Sullivan**) and Dalton on 6 February 2014 at 5.26 pm; (C) the email sent by Dalton to Fisher, Fitzgerald and Sullivan on 6 February 2014 at 6.01 pm; and (D) the email sent by Fitzgerald to Dalton on 1 September 2014 at 5.17 pm;

(xi) Grocon was an important client for Boral, and Boral, Dalton, and Head formed the view that the Alleged Ban was adversely impacting Boral's business;

(xii) the filing of proceedings for contempt by Boral against the CFMEU on 22 August 2013;

(xiii) the media releases made by Boral Ltd on 19 December 2014 and 30 December 2015;

(xiv) in Dalton's s 155 Examination, Dalton said that Boral tried to hire non-CFMEU people (Dalton's s 155 Examination Transcript T25.1-2);

(xv) both Dalton and Head knew and understood that the Auctions Room Meeting was off the record, but nevertheless disclosed the alleged content of the Auction Rooms Meeting, and in doing so, disclosed the alleged content of without prejudice communications;

(xvi) two years had passed between the Auctions Rooms Meeting and the provision of the Police Statements by Dalton and Head;

(xvii) Dalton and Head were actuated by:

a. frustration regarding the Alleged Ban and/or its perceived impact on Boral; further and alternatively

b. a desire to punish Setka and Reardon for their alleged involvement in, or responsibility for the Alleged Ban; further and alternatively

c. anti-CMFEU sentiment; further and alternatively

d. seeking to damage the reputation of Setka and/or Reardon and/or the CFMEU; further and alternatively

e. seeking to gain favour with Boral and their superiors therein (including Kane), who had expressed animosity, frustration, and/or anger directed at the CFMEU in relation to the Alleged Ban and/or its perceived impact on Boral, further or

alternatively

f. seeking to benefit or provide an advantage to Boral in any further dealings with the CFMEU; and

(xviii) further and alternatively, by reason of the matters in the particulars above, it can be inferred that with regard to the matters alleged in paragraph 27 above (and the particulars thereto), Dalton and Head were not actuated by the purpose of properly invoking the criminal law.

20 In the prayer for relief, the plaintiffs seek the following:

(a) declarations that the plaintiffs were falsely imprisoned as a result of the actions of the defendants;

(b) declarations that the plaintiffs were maliciously prosecuted by the defendants;

(c) damages; and

(d) exemplary and aggravated damages.

21 The defendants filed a defence to the statement of claim on 5 May 2020. The defendants' substantive responses to the amended statement of claim are, in summary, as follows:

(a) the defendants admitted the existence of the industrial dispute and that Mr Dalton and Mr Head believed the ban was in place;

(b) the defendants did not admit that the charges against Mr Setka and Mr Reardon were supported by, or alternatively reliant upon, the contents of the Dalton police statement and the Head police statement; and

(c) the defendants denied the allegations with respect to false imprisonment and malicious prosecution.

The evidence

22 The defendants relied upon the affidavit of Ms Teresa Ward of the defendants' solicitors, affirmed on 19 June 2020 in support of their summons filed 19 June 2020. In her affidavit, Ms Ward deposed to the steps taken by the parties in this proceeding to

date, and correspondence between the legal representatives for the parties, including an exchange of memoranda between counsel, regarding the alleged deficiencies in the amended statement of claim.

23 Exhibited to Ms Ward's affidavit are the following documents:

(a) an email from Ms Ward to the solicitors for the plaintiffs dated 7 April 2020;

(b) an email from the solicitors for Mr Setka to Ms Ward dated 9 April 2020, attaching the documents referred to in the statement of claim; and

(c) a copy of the statement of material facts.

24 The plaintiffs relied on the affidavit of Ms Jessica Dawson-Field, a lawyer with Mr Setka's solicitors, affirmed on 3 July 2020. This affidavit exhibited the following documents:

(a) the Dalton police statement and the Head police statement

(b) copies of Mr Setka and Mr Reardon's charge sheets;

(c) excerpts from the transcript of the committal hearing; and

(d) a copy of the transcript of Mr Dalton's examination by the Australian Competition and Consumer Commission ('ACCC"), which took place on 26 June 2015.

The defendants' application and submissions

25 In their written submissions filed on 19 June 2020,[5] the defendants submitted that paragraphs 24, 25, 27, 29 and 30 of the plaintiffs' amended statement of claim should be struck out under r 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules') on the basis that:

[5] At the hearing on 4 August 2020, the defendants did not press their application to strike out paragraph 29 of the amended statement of claim.

(a) they do not disclose a cause of action; and

(b) further or alternatively, they may prejudice, embarrass or delay the fair trial of the proceeding.

26 The defendants referred to the summary of the principles that apply to strike out applications outlined by Elliott J in *BFJ Capital Pty Ltd v Financial Ombudsman Service Ltd (in liq)*,[6] as follows (citations omitted):

> The elements of an adequate pleading are straightforward. A pleading must comprise a coherent narrative of material facts which set out and frame the elements of a cause of action. It must be pleaded with sufficient clarity, must not be unintelligible, ambiguous or vague and must not raise allegations that are offensive. Where particulars are relied upon, they ought not be used to 'fill material gaps' or 'cure a bad statement of claim.' Ultimately, the purpose of a proper pleading is to allow, in the interests of fairness, the opposite party to know what is alleged. Where a pleading is deficient in any of these respects, an application striking out the pleading may be warranted.[7]

27 In relation to the plaintiffs' cause of action for false imprisonment, the defendants submitted that the allegations in paragraphs 24 and 25 of the amended statement of claim are untenable, for the following reasons:

(a) in order to be liable for false imprisonment, the defendants must be the proximate cause of the plaintiffs' detention. The only allegation made by the plaintiffs regarding the defendants' involvement in the arrest and detention of the plaintiffs is that they provided information to the police. The defendants submitted that this allegation is embarrassing, and cannot be responsibly pleaded, as in the intervening seven months between the time the defendants provided information to the police and the date of the arrests, the police conducted extensive investigations. The defendants submitted that the only relevant allegation could be that the police could not and, in fact, did not exercise any independent discretion in arresting and detaining the plaintiffs, and such an allegation is not pleaded; and

---

6 [2019] VSC 71.

7 Ibid [34].

(b) at paragraph 25 of the amended statement of claim, the plaintiffs plead alternative theories by which the plaintiffs are alleged to have brought about the arrests and detention of the plaintiffs. The defendants submitted that this pleading is defective as:

(i) none of the particulars identify any arguable factual basis for the allegations of "active promotion", "direct request", "direction", or "procurement" of the arrests and detentions, and the case the defendants have to meet in respect of those allegations is not clear; and

(ii) the inclusion of six alternatives impermissibly obscures the case the plaintiffs actually intend to make against the defendants.

28 In relation to paragraph 27 of the amended statement of claim, the defendants submitted that this paragraph is defective for the following reasons:

(a) no particulars have been provided with respect to the plaintiffs' allegations that the defendants played an active role in the conduct of the proceeding following the laying of the charges against the defendants ('criminal proceeding'), and were instrumental in the conduct of the criminal proceeding, other than that the defendants attended and gave evidence at the committal hearing;

(b) the plaintiffs alleged that the formal prosecutors were members of Victoria Police. However, it is the Director of Public Prosecutions ('DPP') who institutes, prepares and conducts proceedings for indictable offences on behalf of the Crown. The allegations that the defendants played an active role or were instrumental in the conduct of the criminal proceeding, such that they should be regarded as having instigated and maintained the criminal proceeding, are central to the malicious prosecution claim. Inherent in this allegation is the proposition that the then DPP breached his obligations as an independent statutory office holder by not bringing an independent mind to bear upon the exercise of his prosecutorial discretion, and the plaintiffs have not provided any particulars in support of such a proposition;

(c) the allegation that the defendants set the criminal proceeding in motion is unparticularised;

(d) the allegation that the defendants provided false information to the police and withheld relevant information from the police is unrelated to the matters alleged at paragraph 27 of the amended statement of claim, and as such is embarrassing; and

(e) the allegation that the defendants persuaded the formal prosecutor to institute a proceeding by prejudicing their judgment is a wholly unparticularised allegation with respect to the state of mind of the DPP at the relevant time.

29 The defendants submitted that there is no conduct alleged against the defendants other than providing information to the police, which is not conduct capable of amounting to playing an active role in or being instrumental in the conduct of the criminal proceeding. It is impossible for the defendants to understand how it could be said that the police were virtually compelled to bring criminal charges, and could not as a practical matter have exercised any independent discretion, in circumstances where it took the police approximately seven months from the time the Dalton police statement and the Head police statement were made to lay charge against the plaintiffs, and in that time the police conducted a raft of other investigations prior to initiating the criminal proceeding.

30 With regard to paragraph 30 of the amended statement of claim, the defendants submitted that allegations of malice must be properly particularised, and this paragraph should be struck out unless supported by allegations of fact which are not capable of being construed in any other way. The defendants submitted that the particulars to paragraph 30 are defective for the following reasons:

(a) the allegation that the defendants were motivated by frustration regarding the alleged ban and/or its perceived impact on Boral is consistent with both malice and the absence of malice, such that the allegation is incapable of providing a basis upon which malice could be found;

(b) particulars (xvii)(a) to (f), which concerned the alleged motivations of the defendants in providing the police with information regarding the Auction Rooms meetings, are no more than bald, unparticularised, and speculative assertions;

(c) the particulars to paragraph 30 impermissibly conflate the alleged states of mind of both of the defendants, as the alleged malice of one defendant cannot, without more, be imputed to the other defendant.

(d) the particulars to paragraph 30 make embarrassing assertions about the states of mind of third parties, such as the defendants' superiors at Boral, which are wholly irrelevant to the plaintiffs' allegations that the defendants acted with malice.

31 The defendants referred to the decision of John Dixon J in *Madafferi v The Age Company Ltd*[8] as authority for the proposition that an allegation of malice must be established by cogent evidence commensurate with the seriousness of the allegation, and must not be based upon mere speculation. The defendants also referred to the decision of Eady J of the High Court of England and Wales in *Hughes v Risbridger & Anor*[9] as authority for the proposition that the factual allegations underpinning a plea of malice must be more consistent with the presence of malice than with its absence, and if this is not the case, the plea is liable to be struck out.

32 The defendants submitted that if the relevant paragraphs of the amended statement of claim are struck out, then leave to replead should not be granted, as the plaintiffs cannot responsibly plead the essential elements of the tort of false imprisonment or the tort of malicious prosecution, because the plaintiffs cannot allege that the defendants were:

(a) the proximate cause of the plaintiffs' detention by the police;

---

8 [2015] VSC 687.

9 [2009] EWHC 3244 (QB).

(b) the effective prosecutors of the criminal proceeding; and/or

(c) actuated by malice.

33 The defendants submitted that the amended statement of claim does not plead a cause of action of false imprisonment known to the law in Victoria, referring to the following passage in the decision of the Full Court of this Court in *Myer Stores Ltd v Soo* ('*Soo*'):[10]

> For a person to be liable at law for false imprisonment that imprisonment must be the act of that person or the act of his agent or someone for whose act he is liable. The notion of procuring in the sense referred to, although relevant to and applicable to the tort of malicious prosecution, is not a relevant consideration to the tort of false imprisonment. Fleming, *Law of Torts*, 7th ed., distinguishing false imprisonment from malicious prosecution, at p. 29 writes: "False imprisonment arising from an improper arrest of a suspect bears a resemblance to the tort of malicious prosecution, which consists in maliciously and without reasonable and probably cause instituting a groundless criminal prosecution. The distinction between them lies in whether the restraint on the plaintiff's liberty is directly imposed by the defendant himself, acting either personally or by his agent, or whether there is interposed the exercise of an independent discretion. ***A person who brings about an arrest by merely setting in motion the formal process of law, or by making a complaint before a justice of the peace or applying for a warrant, is not liable for false imprisonment, because courts of justice are not agents of the prosecutor or their acts are not imputable him. He is liable, if at all, only for the misuse of legal process by procuring an arrest for an improper purpose for which the appropriate remedy is an action for malicious prosecution.***"
>
> To be liable for false imprisonment it must be the act of the defendant or his agent that imprisons the plaintiff or the defendant must be active in promoting and causing the imprisonment. The act of imprisoning a person either personally or by an agent or by being active in promoting and causing that imprisonment thereby is the proximate cause of the imprisonment and is distinguished from the mere giving of information to a police officer or the mere signing of a charge sheet.[11] (citations omitted and emphasis added)

34 The defendants submitted that, accordingly, the plaintiffs' claims with respect to false imprisonment are not maintainable, and the proceeding must therefore be confined to claims for malicious prosecution. The defendants submitted that paragraph 25 of the amended statement of claim refers to conduct which might, if established, give rise to one of the elements of malicious prosecution, but which, on the binding authority of *Soo*,[12] is irrelevant to and incapable of giving rise to a claim for false imprisonment,

---

10 [1991] 2 VR 597.
11 Ibid, 629.
12 Ibid.

there being no allegation that the defendants were the proximate cause of the plaintiffs' detention.

35 The defendants submitted further that, notwithstanding the plaintiffs' reliance on the decision of the New South Wales Court of Appeal in *Coles Myer Ltd v Webster*, ('*Webster*')[13] to support their claims for false imprisonment in this proceeding, to the extent that *Webster*[14] articulates a different test from that laid down in *Soo*,[15] this Court is bound by the decision in *Soo*.[16] The defendants submitted that even on the most expansive view possible of the test in *Webster*,[17] the amended statement of claim does not raise a viable claim for false imprisonment, and should therefore be struck out.

The plaintiffs' submissions[18]

36 The plaintiffs observed that:

(a) the function of a pleading is to alert the other party to the case they need to meet at trial, and to define the precise issues for determination by the Court;

(b) the power to strike out a pleading is discretionary and, as a rule, will be exercised only where there is some substantial objection to the impugned pleading or if some real embarrassment is shown;

(c) the Court will not generally strike out a pleading where the pleading raises a debatable point of law; and

(d) where a pleading is held to be objectionable under s 23.02 of the Rules, the party will generally be given leave to amend the pleading, or where the whole pleading is struck out, to file and serve another pleading.

---

13 [2009] NSWCA 299.
14 Ibid.
15 [1991] 2 VR 597.
16 Ibid.
17 [2009] NSWCA 299.
18 Mr Reardon's written submissions filed on 3 July 2020 agree with and adopt Mr Setka's written submissions. Accordingly, in these reasons, I will refer to the 'plaintiffs' submissions', unless the context requires otherwise.

37 The plaintiffs referred to the observations of Byrne J in *Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd*,[19] in which his Honour stated:

> …[a] plaintiff will be stopped from putting a claim forward only where, assuming the facts pleaded have been established, the claim is so manifestly hopeless that a trial would be a futility. In case of doubt I should refuse to exercise the power.[20]

38 The plaintiffs submitted that the Court should be wary of effectively shutting the plaintiffs out from bringing their claims under the cover of a strike out application. The plaintiffs submitted that the amended statement of claim makes it extremely clear what case is being put by the plaintiffs, and in particular, that the defendants provided false and/or deliberately false information to the police, which is the foundation for the plaintiffs' claims for both false imprisonment and malicious prosecution.

39 The plaintiffs relied upon the recent decision of the Court of Appeal in *Uber Australia Pty Ltd v Andrianakis* ('*Uber*')[21] as authority for the proposition that where there is a contentious or debatable point of law which arises on a pleading, it is usually inappropriate to determine the issue in the context of a strike-out application, particularly where the viability of the plaintiffs' claims may depend on the factual context in which the claims are made, which will ordinarily be established during the process of discovery and through adducing evidence at trial. The plaintiffs submitted that it is not necessary for the plaintiffs at this stage of the proceeding to demonstrate that they have a strong case, merely an arguable case, especially where the plaintiffs' claim for false imprisonment is based upon the same factual sub-stratum as their malicious prosecution claim, which is clearly a viable claim.

40 In relation to the defendants' submission that the false imprisonment claim is defective because the plaintiffs failed to plead that the police in arresting and detaining Mr Setka and Mr Reardon did not, in fact, exercise any independent

---

19 (VSC, 16 September 1994, BC9405102, unreported).
20 Ibid, page 3.
21 [2020] VSCA 186.

discretion, the plaintiffs submitted that such a plea is not necessary.[22]

41 The plaintiffs went to submit, referring to the decision of the New South Wales Court of Appeal in *Webster*[23], as follows (citations omitted):

> [The plaintiffs accept] that in order to establish liability for false imprisonment more is required than the mere giving of information to the police. [The plaintiffs also accept] that, at trial, it will be necessary to establish that the Defendants were "active in promoting and causing the imprisonment" (or one of the other alternative formulations pleaded in ASOC. However, [the plaintiffs'] case goes beyond the mere giving of information to police, and [they have] properly pleaded how the Defendants' conduct caused [their] arrest.

42 The plaintiffs submitted that, even if the person who issued the warrant or laid the charges is exercising an independent discretion, a critical issue remains as to whether the defendants have given *false*, or deliberately false information to the police. That may well be considered to amount to directly bringing about the arrest of the plaintiffs. The plaintiffs' case goes beyond an allegation of the mere giving of information to the police, but rather involves the giving of deliberately false information to the police, thus rendering the defendants liable for false imprisonment. The plaintiffs submitted that, at the very least, the proposition that a person giving false information to the police may be found to be liable for false imprisonment is debatable, such that the Court should not strike out the claim for false imprisonment at this stage of the proceeding.

43 The plaintiffs submitted that the particulars to paragraph 25 of the amended statement of claim set out the following material facts:

(a) the defendants were the only people at the Auction Rooms meeting other than Mr Setka and Mr Reardon;

(b) the defendants gave statements to the police about what allegedly occurred at the Auction Rooms meeting – matters within their knowledge only – such that, as a practical matter, the police could not have exercised any independent

---

22 In any event, such a plea is to be found in paragraph 27(g) of the amended statement of claim.

23 [2009] NSWCA 299.

discretion in arresting the plaintiffs, and were consequently in possession of information which virtually compelled them to arrest the plaintiffs;

(c) the plaintiffs' arrests were supported by or reliant upon the contents of the Dalton police statement and the Head police statement; and

(d) the Dalton police statement and the Head police statement were false, or deliberately false.

44 The plaintiffs submitted that, in these circumstances, relying on the decision in *Webster*,[24] the plaintiffs' detention should be regarded as having been brought about directly by the defendants, and therefore the claims for false imprisonment are maintainable.

45 The plaintiffs submitted that the decision in *Webster*[25] adopted and expanded on the decision in *Soo*,[26] rather than departed from the reasoning in *Soo*.[27] Further, even if there is scope for debate about the arguably different approaches taken in *Webster*[28] and *Soo*,[29] this is a debatable point of law, which is a matter for further evidence and argument at trial.

46 In response to the defendants' submission that it is impermissible for the plaintiffs to set out a number of alternative theories by which the defendants are alleged to have brought about the arrest and detention of the plaintiffs, the plaintiffs submitted that paragraph 25 of the amended statement of claim properly alleges a single cause of action by way of a series of alternatives reflecting the various ways in which the relevant test has been expressed in the authorities, each being grounded in the same facts, and as such it cannot be said that the defendants cannot understand or meet the case against them.

---

24 [2009] NSWCA 299.
25 Ibid.
26 [1991] 2 VR 597.
27 Ibid.
28 [2009] NSWCA 299.
29 [1991] 2 VR 597.

47 In response to the defendants' submission that the plaintiffs failed to properly particularise their allegations of deliberate falsity, the plaintiffs submitted that an allegation of knowledge is normally established inferentially from facts which must be pleaded or particularised. The particulars subjoined to paragraph 29 of the amended statement of claim, which set out a long list of facts underpinning an available inference of deliberate falsity, is therefore compliant with r 13.10(3) of the Rules.

48 In relation to paragraph 27 of the amended statement of claim, the plaintiffs submitted that the defendants' submission that the pleading is defective because the prosecutor was the DPP is predicated on a misconception of the relevant principles. The criminal proceeding was commenced by the filing of a charge sheet signed by the police officers who arrested the plaintiffs. However, the authorities make clear that where false or deliberately false evidence is given to police, particularly where the facts relating to the alleged offence are solely within the complainant's knowledge, liability for malicious prosecution may lie not with the formal prosecutor but with the "real prosecutor", in this case, the defendants.

49 In support of this proposition, the plaintiffs relied upon the following passage from the plurality of the High Court of Australia in *A v NSW* (citations omitted):[30]

> The identification of the appropriate defendant in a case of malicious prosecution is not always straightforward. "To incur liability, the defendant must play an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion."[31]

50 The plaintiffs also referred to the following statement of Dixon J in *Commonwealth Life Assurance Society v Brain* (citations omitted):[32]

> It is clear that no responsibility is incurred by one who confines himself to bringing before some proper authority information which he does not disbelieve, even although in the hope that a prosecution will be instituted, if it is actually instituted as the result of independent discretion on the part of that authority…But, if the discretion is misled by false information, or it otherwise practised upon in order to procure the laying of the charge, those who thus

---

30 (2007) 230 CLR 500.
31 Ibid [34].
32 (1935) 53 CLR 343.

brought about the prosecution are responsible…

…

> The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings. If the actual prosecutor acts maliciously without reasonable and probable cause, those who aid and abet him in doing so are joint wrong doers with him.[33]

51 The plaintiffs submitted that it is neither necessary for the plaintiffs to allege, nor for this Court to find, that the DPP breached his obligations as an independent statutory office holder in order to find that the responsibility for the false imprisonment of the plaintiffs should be fixed upon the defendants.

52 In relation to the defendants' complaints with respect to paragraph 30 of the amended statement of claim, the plaintiffs submitted that the defendants' reliance on defamation cases as setting the test for what amounts to malice is misplaced, as malice for the purpose of malicious prosecution differs from "malice in the law". The plaintiffs submitted that malice in the context of a claim for malicious prosecution is a broader concept than ill-will or spite, and includes an improper purpose. The plaintiffs submitted that malice in the context of malicious prosecution extends to circumstances where the person against whom an allegation of malicious prosecution is made brings or initiates a prosecution for a purpose other than the proper invocation of the criminal law.

53 The plaintiffs submitted that they have identified some motives of the defendants which could substantiate an allegation of malice in the sense said to be necessary by the defendants. Alternatively, if they can establish that the defendants had a purpose other than the proper invocation of the criminal law, they may well be successful in making good their claims for malicious prosecution at trial without having to establish that the defendants were motivated by spite or ill-will.

54 The plaintiffs submitted that malice may be established inferentially, and that where the same facts may give rise to inferences of absence of reasonable and proper cause

---

33 Ibid, 379.

and to inferences of malice, the absence of a reasonable and probable cause may be evidence of malice, particularly where there has also been actual dishonesty on the part of the defendants.

55 The plaintiffs submitted, referring to the decision of the Hall J of the New South Wales Supreme Court in *Landini v NSW & Ors*,[34] that the allegations in paragraph 29 of the amended statement of claim of falsity and deliberate falsity, being the pivotal allegations in this proceeding, may well substantiate malice on the part of the defendants, as malice can be inferred from deliberate falsity. The plaintiffs submitted that the authorities establish that the plaintiffs may plead that a particular motive can be inferred from established facts, which is the "direct" route, or adduce evidence which tells against the probability of a proper motive, being the "indirect" route, and that giving false evidence in the absence of reasonable and probable cause can lead to an inference of malice.

56 In response to the defendants' submissions that the allegations in relation to each of Mr Dalton and Mr Head were impermissibly rolled up, the plaintiffs submitted that a proper reading of the particulars makes it clear to whom each allegation relates, and the connection between the states of mind of the defendants, and that of Boral and Mr Kane is set out in the particulars to paragraph 30 of the amended statement of claim.

Mr Reardon's submissions

57 As noted above, Mr Reardon adopted the written submissions made on behalf of Mr Setka. In his oral submissions, counsel for Mr Reardon submitted further that the amended statement of claim discloses a cause of action, as:

(a) the amended statement of claim properly alleges the defendants gave deliberately false information to the police, in circumstances where the complaint related to matters solely within the defendants' knowledge;

---

34 [2006] NSWSC 1054.

(b) the amended statement of claim alleges that the criminal proceeding was reliant on the Dalton police statement and the Head police statement, in which false information was deliberately given; and

(c) in those circumstances, the authorities say the defendants will be liable for false imprisonment and malicious prosecution.

58 Counsel for Mr Reardon submitted that allegations made in paragraph 27 of the amended statement of claim do no more than pick up the language of the relevant authorities. Mr Reardon submitted further that the facts in *Martin v Watson*[35] are materially similar to the present case, as that decision also concerned circumstances where the facts relating to the alleged offence were solely within the complainant's knowledge, such that the police could not have exercised any independent discretion in bringing charges in relation to the subject matter of the complaint.

59 Counsel for Mr Reardon referred to the following statement of Kitto J in *Trobridge v Hardy*[36] in support of the proposition that malice can be inferred from a prosecutor's lack of a *bona fide* belief in the guilt of the accused:

> If they [the jury] think it is more probable than not that the prosecutor lacked a belief in the guilt of the accused, they are justified in taking the next step of concluding that the prosecution was not instituted from a genuine desire to serve the ends of justice and is not to be satisfactorily explained save on the supposition that the prosecutor was actuated by an indirect or improper motive. If so, they may legitimately make a finding of malice, even though they may not feel able to say precisely what the malicious motive was.[37]

The defendants' submissions in reply

60 In reply, senior counsel for the defendants submitted that it is apparent from the submissions made by the plaintiffs that the amended statement of claim does not accurately reflect the case they wish to advance at trial. As the plaintiffs have confirmed that their claims in the proceeding are founded upon an allegation that the defendants deliberately gave false information to the police, it follows that paragraphs

---

35 [1996] 1 AC 74.

36 (1995) 94 CLR 147, citing *Brown v Hawkes* (1891) 2 QB 718, 722 per Cave J.

37 Ibid, 164.

25(a) and (b), and all of paragraph 27 (apart from sub-paragraphs (e) and (f)) of the amended statement of claim must fall away.

61 Senior counsel for the defendants submitted that, the approach in *Webster*[38] cannot be reconciled with the test established by the Full Court in *Soo*,[39] which is the applicable law in Victoria. He submitted that, in Victoria, a plaintiff must allege that the conduct of the defendant has directly caused the restraint upon the plaintiff's liberty. He submitted further that, consistent with the Full Court's decision in *Soo*,[40] if the prosecution is brought about by the provision of false information to police, the plaintiffs will have, at best, a cause of action for malicious prosecution and not a cause of action for false imprisonment.

62 In relation to the malicious prosecution allegation, senior counsel for the defendants submitted that the plaintiffs did not engage with the defendants' complaint, which is that the allegation of malice is not properly particularised.

63 Senior counsel for the defendants submitted that the allegations in paragraphs 25(a) and (b) of the amended statement of claim that the defendants actively promoted and caused the arrests, or engaged in conduct that amounted to a direct request, direction or procurement to the police must, in the absence of any particulars, fall away. If the plaintiffs are left only with the allegation in paragraph 25(c), the proposition that such conduct gives rise to a liability for false imprisonment only finds support in the statement of the learned authors of "*The Law of Torts in Australia*"[41] *('Trindade & Cane')* referred to in *Webster*,[42] which is to the opposite effect of the passage of '*Fleming's: The Law of Torts*'[43] *('Fleming')* referred to in *Soo*.[44]

64 Senior counsel for the defendants submitted that the amended statement of claim fails to adequately expose what the plaintiffs say their real case is: that is, a case based upon

---

38 Ibid.
39 [1991] 2 VR 597.
40 Ibid.
41 Trindade, Cane & Lunney (Oxford University Press, 4th edn, 2007), p 63.
42 [2009] NSWCA 299.
43 (LBC Ltd , 7th edn, 1987), p 29.
44 [1991] 2 VR 597.

the defendants allegedly deliberately giving false information to the police. Rather, the allegation that the Dalton police statement and the Head police statements were deliberately false is an alternative plea buried in the particulars to paragraph 29 of the amended statement of claim.

65 In relation to the malicious prosecution claim, senior counsel for the defendants submitted that the plaintiffs had not addressed the gravamen of the defendants' complaint that the plaintiffs have not provided particulars of the motives alleged in paragraph 30 of the amended statement of claim. No attempt has been made to align those particulars with what the plaintiffs now say is their real case, being the allegations in paragraph 27 (e) and (f) of the amended statement of claim.

Discussion and conclusion

66 For the reasons which follow, I will dismiss the defendants' application, save that I agree that paragraphs 25, 27 and 30 of the amended statement of claim ought to be amended to better clarify the case the plaintiffs seek to advance against the defendants at trial.

67 I preface my reasons with a reminder that, on a strike out application under r 23.02 of the Rules, I am not required to consider whether the plaintiffs' allegations concerning the conduct of the defendants are true: that is a matter for trial. Rather, the issue is whether the plaintiffs have pleaded the necessary material facts which, if proved, would make good a cause of action known to the law. Further, I also need to be satisfied whether the pleading is of sufficient clarity and contains the necessary particulars to ensure that the defendants (and the Court) can understand the case to be advanced by the plaintiffs at trial. Accordingly, where I make reference to, say, the defendants providing deliberately false information to the police, I should not be taken to have made a finding of fact of that kind: rather, I am referring to the plaintiffs' allegations to that effect.

68 In summary, a review of the authorities concerning when a person may be liable for false imprisonment indicates that the plaintiffs' contention that the defendants will be

so liable if it was found that they deliberately provided false information to police, is at least arguable, such that their claims should be permitted to proceed to trial. Further, I agree with the submissions advanced on behalf of the plaintiffs that 'malice' for the purpose of establishing a claim for malicious prosecution extends beyond 'spite and ill will' to encompass circumstances where a prosecution is brought or maintained for a purpose other than the proper invocation of the criminal law. Finally, while I accept, on the whole, that the pleadings are maintainable and generally well particularised, there were aspects of the plaintiffs' case which were better expressed during the course of their submissions than in the pleading itself. Accordingly, I will give the plaintiffs leave to amend their statement of claim to further clarify the case the defendants have to meet at trial, and in particular, to eliminate any false issues, particularly with respect to the false imprisonment claim.

69 Turning first to the pleading of the false imprisonment claim, I accept that I am bound by the decision of the Full Court of this Court in *Soo*,[45] and, to the extent that the reasoning in *Webster*[46] departs from the test in *Soo*,[47] I should not follow that reasoning.

70 However, I am not satisfied that the test laid down in *Soo* (see paragraph 33 above),[48] being that the defendants must be the proximate cause of the plaintiffs' detention, should be construed so narrowly such that in the present case, the plaintiffs cannot possibly satisfy that test, as contended for by the defendants.

71 In *Soo*,[49] a store detective in a large department store was found to have been the proximate cause of the plaintiff's detention by making a report to the police regarding a suspected shoplifter which turned out to be incorrect, and resulted in the police arresting and detaining the customer. In that case, the store detective not only provided the police incorrect information prior to the customer's arrest, but also accompanied the police when they detained the customer. Accordingly, not only did the provision of false information cause the police to detain the customer, the store

45 [1991] 2 VR 597.
46 [2009] NSWCA 299.
47 Ibid.
48 Ibid.
49 Ibid.

detective was also physically 'proximate' to the arrest. While there were grounds for suspecting that the store detective deliberately or at least recklessly gave false information to the police (the store detective did not give evidence at trial), it was not necessary to determine that question in that proceeding, given the active involvement of the store detective in the arrest and detention of the customer.

72 The decision in *Soo*[50] has been referred to with approval by the Full Court of the Federal Court in *Cubillo v Commonwealth*,[51] in *Ruddock v Taylor*,[52] and in *Webster*.[53] *Webster*[54] also involved a claim against a store employee for false imprisonment by two customers of a large shopping centre. In that case, the trial judge, and the New South Wales Court of Appeal found that the store employee (who was not physically present during the arrest and subsequent detention of the customers) provided information to the police which was not only incorrect, but must have been, in the circumstances of the case, deliberately false.

73 The lead judgment in *Webster*[55] was delivered by Ipp JA. His Honour referred to the decision in *Soo*,[56] and the Court's finding in that case that the store detective was active in promoting and causing the detention of the customer, and observed that the facts in the case before the Court were not dissimilar to those in *Soo*.[57] He went on to refer to the decision in *Davidson v Chief Constable of North Wales* ('*Davidson*')[58] as an example of where a store detective, in providing information to the police about a suspected shoplifter, was not liable for false imprisonment, because the store detective had:

> not gone beyond laying information before police officers for them to take such action as they thought fit and amounted to some direction, or procuring, or direct request, or direct encouragement that they should act by way of arresting these defendants.[59]

---

50 Ibid.
51 (2001) 112 FCR 455.
52 (2003) 58 NSWLR 269.
53 [2009] NSWCA 299.
54 Ibid.
55 Ibid.
56 [1991] 2 VR 597.
57 Ibid.
58 [1994] 2 All ER 597.
59 Ibid, 604.

74 His Honour referred to the statements of the store employee to the police as having a 'mischievous quality', which 'manifested an intention that there be an imprisonment', on the basis that the store employee 'deliberately and falsely invented accusations which she communicated to the police officers and which led directly to the arrest of the customers, observing that this element was not present in *Davidson*.[60]

75 His Honour referred to the following passage of *Trindade & Cane*:[61]

> Whatever view one takes when the wrong information is given innocently, the deliberate giving of false information, it is suggested, should be treated differently. Where the deliberate false information concerns facts relating to an alleged offence that can be within the knowledge only of the complainant and it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and as a result of a prosecution initiated by the police officer there is a deprivation of the plaintiff's liberty, the total restraint of the plaintiff should be regarded as being brought about *directly* by the complainant, and an action in false imprisonment would lie against the complainant who deliberately supplied the false information (see *Martin v Watson* [1996] 1 AC 74, 86-87 (a malicious prosecution case)).[62]

76 His Honour considered that the principle above applies also to cases of false imprisonment, stating:

> This is confirmed by the decision in *Roy v Prior* [1971] AC 470; [1970] 2 All ER 729, where the plaintiff was arrested pursuant to a warrant and imprisoned for some hours. He claimed that the evidence led in support of the application for the warrant was false. Lord Morris (with whom Lord Reid, Viscount Dilborne, Lord Wilberforce and Lord Diplock agreed) said at 477:
>
> > What the plaintiff alleges is that the defendant acting both maliciously and without reasonable cause procured and brought about his arrest … The gist of the complaint, where malicious arrest is asserted, is not that some evidence is given (although if evidence is given falsely it may be contended that malice is indicated) but that an arrest has been secured as a result of some malicious proceeding for which there was no reasonable cause.
>
> The House of Lords held that a cause of action for malicious arrest was disclosed, even though the magistrate who issued the warrant had exercised an independent discretion, the persons arresting the plaintiff had acted lawfully pursuant to the warrant, and the defendant had not personally arrested the plaintiff.[63]

---

60 [2009] NSWCA 299 [114].
61 Trindade, Cane and Lunney (Oxford University Press, 4th ed [2007], p 69.
62 Ibid, 69.
63 [2009] NSWCA 299 [117]-[118].

77 The defendants submit that the passage from *Trindade & Cane* reproduced in paragraph 75 above cannot be reconciled with the statement in *Fleming* [64] (referred to in *Soo*[65]) distinguishing false imprisonment from malicious prosecution, as follows:

> False imprisonment arising from an improper arrest of a subject bears a resemblance to the tort of malicious prosecution. The distinction between them lies in whether the restraint on the plaintiff's liberty is directly imposed by the defendant himself, acting either personally or by his agent, or whether there is imposed the exercise of an independent discretion.
>
> A person who brings about an arrest by merely setting in motion the formal process of law, or by making a complaint before a justice of the peace or applying for a warrant, is not liable for false imprisonment, because courts of justice are not agents of the prosecutor or their acts are not imputable to him. He is liable, if at all, only for the misuse of legal process by procuring an arrest for an improper purpose for which the appropriate remedy is an action for malicious prosecution.'[66]

78 The defendants submitted that the plaintiffs cannot establish that the defendants were active in promoting or causing the arrest and detention of the plaintiffs, and thus the defendants cannot have been the proximate cause of the imprisonment of the plaintiffs.

79 However, I do not consider that the approaches in *Soo*[67] and in *Webster*[68] are irreconcilable, at least with the degree of certainty required to strike out the relevant part of the amended statement of claim as disclosing no cause of action. Ultimately, the question of whether the defendants ought to be found liable for false imprisonment is a question of causation, which is essentially a fact driven enquiry.

80 Certainly, the requirement for there to be a direct connection between the conduct of a complainant and the detention of the alleged offender is consistent with the dictionary definition of 'proximate', as follows:

---

64 Fleming, John G. (LBC Ltd, 7th edn, 1987).
65 [1991] 2 VR 597.
66 Ibid, 29.
67 [1991] 2 VR 597.
68 [2009] NSWCA 299.

> **Proximate 1.** Next; nearest. 2. Closely adjacent; very near. … 4. Next in a chain of relation.
>
> **Proximity.** Nearness in place, time or relation.[69]

81 However, my review of the authorities suggests that 'proximate' includes proximate in the chain of causation (or, 'in a chain of relation') rather than there necessarily being a requirement that there be proximity in the spatial or temporal sense. In *Ruddock v Taylor*,[70] the New South Wales Court of Appeal found that the Ministers who invalidly cancelled a visa were liable for false imprisonment of the visa holder, in circumstances where the *Migration Act 1958* (Cth) provided that first, a person whose visa is cancelled becomes an unlawful non-citizen, and secondly, an immigration official must detain a person that he or she knows or reasonably suspects is an unlawful non-citizen. The Court found that there was the requisite element of directness between the Ministers' decisions and the detentions.

82 Spigelman CJ agreed with that the trial judge's conclusion that the detention was an inevitable consequence of the visa cancellation. He referred to the passage in *Soo*[71] relied upon by the defendants in support of their strike out application, and went on to say as follows:

> The terminology of 'proximate cause' is sometimes used in other areas of the law, for example insurance, to mean the 'dominant' or 'effective' or 'direct' cause. (See, for example, *Halsbury's Laws of England*, 4th ed, Vol 25, par 175). The applicable terminology with respect to the tort of false imprisonment is 'direct cause'. (The Australian texts are unanimous on the need for directness. See R P Balkin and J L R Davis, *Law of Torts*, 2nd ed (1996) Sydney, Butterworths, at 59; J G Fleming, *The Law of Torts*, 9th ed (1998) Sydney, LBC Information Services, at 36; F Trindade and P Cane, *The Law of Torts in Australia*, 3rd ed (1999) South Melbourne, Oxford University Press, at 50.) There must be 'direct violation of the protection which the law throws around the person' (*Williams v Milotin* (1957) 97 CLR 465 at 474).
>
> …
>
> It is not the case that an act indicating a wish or expectation that another should be imprisoned establishes liability for the tort. There will be such liability if the person who ultimately confines the plaintiff would not have acted at all but for the urging on the part of another. (See, for example, *Dickenson v Waters Ltd* (1931) 31 SR (NSW) 593 at 595-596; 48 WN (NSW) 232 at 233; *Pike v Waldrum*

---

69 Macquarie Dictionary, 6th edn, p 1181.
70 (2003) 52 NSWLR 269.
71 [1991] 2 VR 597.

> *and P & O Steamship Navigation Co* [1952] 1 Lloyd's Rep 431 at 454-455.) It is otherwise if the ultimate actor exercises an independent discretion. (See, for example, *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597.) See generally *Clerk & Lindsell on Torts*, 17th ed (1995) London, Sweet & Maxwell, paras [12-23] to [12-32]. On the distinction between direct and consequential injury see *Hutchins v Maughan* [1947] VLR 131 at 133; *Platt v Nutt* (1988) 12 NSWLR 231 at 244-246.
>
> The element of directness – the sufficiency of the next between the defendant's act and the imprisonment – is satisfied, in the present case. The detention was, as her Honour found, 'an inevitable consequence'. The issue is whether the element of intention has been satisfied.[72]

83 In *Ruddock v Taylor*,[73] as in the current case, there was no spatial or temporal proximity between the decisions of the Ministers and the arrests of the visa holder. Rather, the Court held that the detention were the inevitable consequence of the decisions. The decision of the New South Wales Court of Appeal in *Ruddock v Taylor*[74] was overturned by the High Court, but on unrelated grounds. No comment was made by the plurality of the correctness or otherwise of Spigelman CJ's formulation or application of the test of directness for the purposes of the tort of false imprisonment.

84 Thus, the authorities demonstrate that it is not necessary for the defendants to be at the scene of an arrest, or for the arrest to be carried out immediately after the complaint was made, or the defendants to be found to have urged or encouraged the arrest of the plaintiffs, for the defendants' conduct to be found to be the 'proximate cause' of the plaintiffs' arrest and detention. Further, it may well be that if the plaintiffs can establish that the defendants gave deliberately false information to the police, that conduct may be sufficient to satisfy the Court at trial that the defendants were the proximate cause of the plaintiffs' imprisonment.

85 The Court in *Soo*[75] was not required to, and did not consider whether the provision of deliberately false, as opposed to mistaken, information to police could establish the provider of the information as the proximate cause of the detention. To the extent that there is some room for debate about the scope of the phrase 'proximate cause', it seems

---

72 (2003) 58 NSWLR 269, 276-7.
73 Ibid, 276-7.
74 Ibid.
75 [1991] 2 VR 597.

to me that this is a matter for trial, informed by the evidence that emerges during the process of discovery and interrogation, and during the course of the trial itself.

86 Accordingly, I accept the submissions advanced on behalf of the plaintiffs that it is arguable that the decision in *Webster*[76] was an elaboration upon the reasoning in *Soo*,[77] not a departure from the reasoning in *Soo*.[78] In *Webster*,[79] the question of liability for false imprisonment turned not so much upon the temporal or physical proximity of the complainant and the accused's detention, but the fact that the complainant had given deliberately false information to the police.

87 The defendants' application and contentions in the current proceeding are materially similar to what confronted the Court of Appeal (and the primary judge) in *Uber*.[80] *Uber* is a class action currently on foot initiated by, among others, holders of taxi cab licences, against local and US entities associated with the well-known ride sharing platform ('Uber entities'). The group members assert that the Uber entities are liable for the tort of unlawful means conspiracy, on the basis that the Uber entities combined to injure the group members by unlawful means. The Uber entities brought an application to, among other things, strike out the statement of claim on the basis that it failed to disclose a cause of action. In particular, the Uber entities asserted that the group members failed to plead the material facts necessary to establish the Uber entities' intention to cause injury to the group members.

88 The primary judge rejected the Uber entities' application, save that he considered that the group members needed to amend their statement of claim to plead the element of intention to harm more clearly and transparently. The group members complied with that direction. The Uber entities appealed, but while leave to appeal was granted, the appeal was dismissed. After considering the authorities regarding the elements of the tort of unlawful conspiracy with intent to injure, the Court of Appeal considered the

---

76 [2009] NSWCA 299.
77 [1991] 2 VR 597.
78 [2009] NSWCA 299.
79 [1991] 2 VR 597.
80 [2020] VSCA 186; see also *Andrianakis v Uber Technologies (Ruling No 1)* [2019] VSC 850.

principles applicable to applications to strike out pleadings, stating as follows:

> Uber's contentions on ground 1 fail to grapple with the high hurdle it must cross, and the low bar confronting the plaintiff. When a defendant contends that a statement of claim should be struck out because it does not disclose a cause of action it is necessary for a defendant in the position of Uber to establish that it would be futile to allow the statement of claim to go forward, because it raises a claim that has no real prospect of success in the sense of being 'fanciful'. It follows that, where there is a contentious or debatable point of law which arises on a pleading, it is usually inappropriate for a trial judge or the Court of Appeal to determine the issue on a strike-out application, particularly where the answer may depend upon the factual context.
>
> This approach is consistent with that of this Court in *CA & CA Ballan Pty Ltd v Oliver Hume (Australia) Pty Ltd* and of the High Court in *Trkulja v Google LLC*. In *CA Ballan*, this Court emphasised that, although the test for summary judgment has been slightly lessened by the real prospect of success criterion, the High Court cases concerning the previous test nevertheless demonstrate the need for there to be a very clear case indeed, which could not be altered by evidence at trial, before striking out a statement of claim on the basis that it raises a case which would not survive a summary judgment application. In that regard, this Court in *CA Ballan* spoke in terms that the Court should be mindful that the evidence at trial 'can shape the case in ways that have not been anticipated despite the best efforts of the litigants and their legal advisors', and adopted the observations of Whelan JA in *Mutton v Baker* that:
>
> > Even if it is said that an issue is purely a question of law, the court should not strike out a claim on this basis if it is conceivable that some factual matter could emerge at trial which might alter the analysis.[81]

89 In my view, the current case is of a kind where substantial caution needs to be exercised in determining on a summary basis whether the plaintiffs have a viable cause of action. As observed by the primary judge in *Uber*:[82]

> Where it is contended that a pleading does not disclose a cause of action, the case must be particularly clear to justify the court intervening, at a summary stage, to deprive a party of the right to trial on the cause of action as pleaded.
>
> It is to be borne in mind that there are other interlocutory processes, subsequent to the pleading, that continue to perform and progress the function of informing the other side of the case to be met and to ensure that it is not ambushed at trial. With that understanding, and without underestimating the importance of a pleading for identifying the elements of the claim brought by a plaintiff against a defendant, a judgment is to be made whether the pleading outlines the case, at that stage, at an appropriate level of detail or at too great a level of generality or abstraction.[83]

---

81 *Uber Australia Pty Ltd v Andrianakis* [2020] VSCA 186 [35]-[36].

82 [2019] VSC 850.

83 Ibid [40]-[41]. .

90 Statements to a similar effect were made by John Dixon J in *Roo Roofing Pty Ltd v Commonwealth*,[84] where his Honour went on to say as follows, referring to the statement of Kirby P in *Wickslead v Brown*:[85]

> … a Court should be very reluctant to terminate summarily part of an action based upon an alternative cause of action when the trial on other causes of action based on substantially overlapping facts will be proceeding, notwithstanding that the legal basis for it may be doubtful or problematic in circumstances where the Court will nevertheless be required to hear and determine substantially the same factual matters.[86]

91 The available evidence, in particular, the transcript of the evidence given by Mr Dalton and Mr Head at the committal hearing, does not shed much light on the nature and extent of the defendants' dealings with the police prior to the arrest of the plaintiffs, or their motivations in making their statements to the police. While the plaintiffs' cause of action in false imprisonment may not succeed, it seems to me that there is at least scope for inquiry as to whether the defendants deliberately provided false information to the police, and scope for debate as to whether the deliberate provision of false information to the police satisfies the proximate cause test referred to in *Soo*.[87] Further, the resolution of questions of causation is predominantly a fact based inquiry, which tells against summary determination, which is effectively what the defendants seek here. Finally, that inquiry will traverse substantially the same facts which will arise for consideration in determining the plaintiffs' malicious prosecution claim, such that the prosecution of that claim will not materially alter the length or complexity of the trial of the proceeding.

92 Accordingly, I do not propose to strike out paragraphs 24 and 25 of the amended statement of claim on the grounds that those paragraphs disclose no cause of action in false imprisonment. However, I agree with the defendants that the pleading in paragraph 25 of the amended statement of claim obscures, rather than clarifies, the case which the plaintiffs propose to advance at trial.

---

84 [2017] VSC 31.
85 (1992) 30 NSWLR 1.
86 [2017] VSC 31 [120].
87 [1991] 2 VR 597.

93 The allegations in paragraph 25 of the amended statement of claim (and the particulars under paragraph 25(c)) are said by senior counsel for Mr Setka to be expressed to conform with the various ways in which the test is expressed in the authorities. In some respects, that is part of the problem. Paragraph 25 contains conclusionary statements rather than the material facts upon which the claim for false imprisonment is based, and what might amount to material facts (such as the allegation that the defendants provided false, or deliberately false evidence to the police) are buried in the particulars. It is also difficult to see how, without more, the allegation that the defendants engaged in conduct which amounted to a 'direct request, direction or procurement to the police' to arrest the plaintiffs can responsibly be put, at least at this stage of the proceeding.

94 Turning now to the malicious prosecution claim, a review of the authorities relied upon by the plaintiffs confirms their submissions that, in order to establish malice for the purposes of the tort of malicious prosecution, it may well be that it is sufficient for the plaintiffs to show is that the defendants were the real prosecutors, and that the prosecution was initiated and maintained for purposes other than a proper invocation of the criminal law.

95 Some of the defendants' criticisms of the plaintiffs' pleading of their malicious prosecution claim are well founded. Turning first to paragraph 27, it is difficult to see how the allegations in paragraphs 27(a) and (b) could be made out, at least on the facts currently pleaded in the amended statement of claim, and the plaintiffs' legal team should give some consideration as to whether these allegations could be responsibly pleaded. If not, their inclusion in the amended statement of claim is unnecessary and confusing. However, while no such concession was expressly made, I do not understand the defendants to cavil with the proposition that if the allegations in paragraphs 27(e) and (f) could be made out, the plaintiffs' claim that the defendants were the real prosecutors for the purposes of pursuing malicious prosecution claim is at least a viable claim. Finally, the allegation in paragraph 27(g) of the amended statement of claim makes the allegation necessary to support the plaintiffs' claim that

the defendants were the real prosecutors of the criminal proceeding, consistent with what is said in the authorities (see, for example, *Martin v Watson*.[88])

96 The leading authority with respect to the principles governing actions for malicious prosecution is the decisions of the High Court in *A v New South Wales*[89]. In that decision, the plurality observed that '…the identification of the appropriate defendant in a case of malicious prosecution is not always straightforward',[90] and that '…to incur liability the defendant must play an active role in the conduct of the proceedings, as by "instigating" or setting them in motion'.[91] The plurality referred with approval to the decision of the House of Lords in *Martin v Watson*[92], (a decision which the plaintiffs say is on all fours with the current case) that:

> A person may be regarded as the prosecutor if he puts the police in possession of information which virtually compels an officer to bring a charge.[93]

97 In current case, I agree that, at least for the purposes of determining whether a pleading can go forward, the claim that the defendants were the 'instigators' of the criminal proceeding is at least maintainable, particularly given that the plaintiffs and the defendants were the only attendees at the Auction Room meetings, and the charges against the plaintiffs were based upon what was said by the plaintiffs to the defendants at the Auction Rooms meeting. The nature and effect of the other investigations carried out by the police upon the decision of the police informants to lay charges against the defendants is really a matter for trial. I also agree that the role of the DPP is maintaining the criminal proceeding is not an absolute bar to the defendants being found to be 'real prosecutors'. Indeed, in *A v New South Wales*[94], the police informant was the defendant, notwithstanding that the conduct of the relevant criminal proceeding was taken over by the NSW Director of Public Prosecutions, albeit that in that case the High Court was not required to rule upon the question of whether

---

88 [1996] AC 74, 89.
89 (2007) 230 CLR 500.
90 Ibid [34].
91 Ibid.
92 [1986] AC 74.
93 Ibid, 84.
94 (2007) 230 CLR 500.

the police informant was the real prosecutor.

98 The defendants' real complaints concerning the pleading of the malicious prosecution claim focus on the allegation that the defendants acted maliciously in initiating or maintaining the criminal proceeding. The defendants no longer take any issue with the pleading in paragraph 29 of the amended statement of claim, which concerns the plaintiffs' allegations that the defendants acted without reasonable or probable cause.

99 The defendants say that the particulars of malice are deficient. However, once one accepts that malice for the purpose of the tort of malicious prosecution extends beyond ill-will or spite to having a purpose other than the invocation of the criminal law, the defendants' objections to the particulars to paragraph 30 of the statement of claim must be rejected.

100 The particulars to paragraph 30 of the amended statement are detailed and lengthy. Significantly, they incorporate the particulars to paragraph 29 of the amended statement of claim, that is, the allegation that the Dalton police statement and the Head police statements were false, or deliberately false, that the defendants did not honestly believe, or had no basis for an honest belief, that Mr Setka and Mr Reardon had made an unwarranted demand with menaces at the Auction Rooms meeting, and that the Dalton police statement and the Head police statement were made in the context of an ongoing industrial dispute involving the alleged targeting of Boral's business by the CFMEU. These matters were said to lend support to the proposition that the defendants were not motivated by the purpose of properly invoking the criminal law.

101 In any event, I agree with the plaintiffs that the preponderance of the authorities, including, but not limited to, the decision of the High Court in *A v New South Wales*[95], supports the view that when a party initiates a prosecution for a purpose other than a proper purpose of invoking the criminal law, malice may be inferred from that very conduct. As observed by the plurality in that case:

> What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal

95 Ibid. See also *Wood v State of New South Wales* [2019] NSWCA 313; *Trobridge v Hardy* (1955) 94 CLR 147.

> law – an "illegitimate or oblique motive". That improper purpose must be the sole or dominant purpose actuating the prosecutor.
>
> Purposes held to be capable of constituting malice (other than spite or ill will) have included to punish the defendant and to stop a civil action brought by the accused against the prosecutor. But because there is no limit to the kinds of other purposes that may move one person to prosecute another, malice can be defined only by a negative proposition: a purpose other than a proper purpose. And as with absence of reasonable and probable cause, to attempt to identify exhaustively when the processes of the criminal law may properly be invoked (beyond the general proposition that they should be invoked with reasonable and probable cause) would direct attention away from what it is that the plaintiff has to prove in order to establish malice in an action for malicious prosecution – a purpose other than a proper purpose.[96]

102 Further, as observed by the plurality, proof of malice may often be a matter of inference from established facts.[97] The issue of what inferences may be drawn from admissible evidence is quintessentially a matter of fact, which should be determined at a trial,[98] unless I can be satisfied that there is no real prospect of an inference of malice being drawn from the matters referred to in the particulars to paragraph 30 of the amended statement of claim.[99] I am not so satisfied.

103 The particulars under paragraph 30 of the amended statement of claim are somewhat prolix, and some are arguably unnecessary, in that, strictly speaking, they refer to the evidence upon which the plaintiffs will seek to rely upon to establish malice on the part of the defendants. However, it is tolerably clear, from reviewing the particulars as a whole, and in their context, that the plaintiffs' case theory is that the provision of the Dalton police statement and the Head police statement to the police was part of a broader legal and public relations campaign by Boral against the CFMEU concerning the ban, which had a number of elements, including the initiation and prosecution of the civil proceeding, encouraging the ACCC to bring a civil proceeding, and making pejorative statements about the CFMEU to the media. Whether that case theory can be made out is a question for trial, but the case theory itself is tolerably clear from paragraphs 29 and 30 of the amended statement of claim.

---

96 Ibid [91]–[92].
97 Ibid [93].
98 See *British American Tobacco Australia Ltd v Gordon (No 3)* [2009] VSC 619 [59]-[60].
99 See *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2014] VSC 181 [17].

104 Further, I do not see the interchangeable references to Mr Dalton and Mr Head, and the references to Mr Kane, the then CEO of Boral, in the particulars to paragraph 30 of the amended statement of claim as being particularly problematic. Both Mr Dalton and Mr Head were senior managers of Boral's Victorian operations. Their dealings with the plaintiffs were in their professional capacities, not their personal capacities. The extent to which their actions reflected or were directed by Boral's corporate policy with respect to the ban and the CMFEU is a matter that can be explored at trial. In my view, the defendants have all of the information they need to understand the case that will be advanced against them at trial.

105 Finally, as for the defendants' submission that the allegation that the defendants were 'frustrated' with the conduct of the CFMEU cannot of itself amount to malice, I agree with the submissions of the plaintiffs that 'malice' in the current context should not be limited to what amounts to malice within the framework of defamation law.[100] While 'frustration' with the CFMEU may not of itself amount to malice, it could may well be the reason behind what may be found to be malicious conduct.

106 Accordingly, I will order that the plaintiffs file and serve a further amended statement of claim to address the (relatively minor) criticisms I have made of paragraphs 25, 27 and 30 of the amended statement of claim in these reasons, and otherwise dismiss the defendants' summons. I request that the parties confer and prepare draft minutes of orders to give effect to these reasons, including a timetable for the parties to provide brief written submissions on the question of costs.

---

100 See *A v New South Wales* (2007) 230 CLR 500 [93].

CERTIFICATE

I certify that this and the 46 preceding pages are a true copy of the reasons for judgment of Daly AsJ of the Supreme Court of Victoria delivered on 28 September 2020.

DATED this twenty eighth day of September 2020.