Supreme Court
New South Wales

Case Name:	Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited
Medium Neutral Citation:	[2016] NSWSC 17
Hearing Date(s):	8 December 2015
Date of Decision:	5 February 2016
Jurisdiction:	Equity Division
Before:	Ball J
Decision:	See paragraphs 48 to 50 of this judgment.
Catchwords:	PROCEDURE – representative proceedings – competing proceedings – whether one proceeding should be stayed – whether other orders should be made in relation to the conduct of the proceedings
Legislation Cited:	*Civil Procedure Act 2005* (NSW) *Class Proceeding Act 1992* (On) *Corporations Act 2001* (Cth)
Cases Cited:	*Branir Pty Ltd v Wallco Pastoral Co Pty Ltd* (2006) 203 FLR 115 *Commissioner of State Revenue v Aidlaw Pty Ltd* [2010] VSC 405. *Kirby v Centro Properties Limited* [2008] FCA 1505; (2008) 253 ALR 65 *Lidden v Composite Buyers Ltd* (1996) 139 ALR 549 *Locking v Armtec Infrastructure* 2013 ONSC 331 *Mancinelli et al v Barrick Gold Corporation et al* 2015 ONSC 2717 *Moore v Inglis* (1976) 9 ALR 509 *Thirteenth Corporation Pty Ltd v State* (2006) 232 ALR 491
Category:	Procedural and other rulings
Parties:	John Smith and Rosemary Smith (Plaintiffs 2015/171592) Innes Creighton (Plaintiff 2015/306222)

	Australian Executor Trustee Limited (Defendant)
Representation:	Counsel: AS Martin SC with GM Drew (Plaintiffs 2015/171592) MBJ Lee SC with Ms J McDonald (Plaintiffs 2015/306222) M Darke SC with P Knowles (Defendant) Solicitors: Meridian Lawyers (Plaintiffs 2015/171592) Slater & Gordon (Plaintiffs 2015/306222) Gilchrist Connell (Defendant)
File Number(s):	2015/171592 and 2015/306222
Publication Restriction:	Nil

JUDGMENT

Introduction

1 Before the court are two representative proceedings brought against Australian Executor Trustees Limited (***AET***) arising out of the collapse of Provident Capital Limited (***Provident***). AET was the trustee for holders of debentures issued by Provident under the provisions of Chapter 2L of the *Corporations Act 2001* (Cth) (***the Act***) pursuant to a trust deed made between Provident and AET. One proceeding is brought by Mr Creighton (the ***Creighton Proceeding***). The other is brought by Mr and Mrs Smith (the ***Smith Proceeding***). In both proceedings, the representative parties, who are holders of Provident debentures, allege that AET breached duties it owed under s 283DA of the Act as a consequence of which they and those whom they represent suffered loss and damage. They seek to recover that loss and damage under s 283F of the Act.

2 The question the subject of this judgment is whether both proceedings should be permitted to continue and, if so, on what terms.

3 The position taken by AET is that one or other of the proceedings should not be permitted to continue as a representative proceeding and should be stayed until further order of the court. Alternatively, AET seeks orders that the two proceedings be consolidated or directions regarding the appointment of a litigation committee that would manage the two proceedings on behalf of the class members of both proceedings. The position taken by Mr Creighton is that the Smith Proceeding should be stayed until a determination of the Creighton Proceeding. The position taken by Mr and Mrs Smith is that both proceedings should be permitted to continue as representative proceedings, but they should be heard together and an order should be made that evidence in one be evidence in the other.

The Creighton Proceeding

4 The Creighton Proceeding was commenced in the Victorian registry of the Federal Court of Australia on 23 December 2014.

5 At the time of its commencement, the group members in the Creighton Proceeding formed an "open class" initially consisting of persons who were issued debentures on or after 22 December 2010, but not including debentures that were funded by a roll over or reinvestment of any debentures issued before that date, and remained holders of the debentures on 18 September 2012, which was the date Provident entered into voluntary administration. The class was amended on 26 June 2015 to include all persons who held debentures on 18 September 2012.

6 The Creighton Proceeding was transferred to this court by order of Middleton J made on 30 September 2015.

7 In the Creighton Proceeding it is alleged that AET by no later than 1 December 2008 (or in the alternative, 1 December 2010), consistently with the obligations imposed on it by s 283DA(a) of the Act to exercise reasonable diligence to ascertain whether the property of Provident was sufficient to repay the debentures, ought to have ascertained that Provident's financial position was such that its assets were insufficient to repay the debentures when they became due. Mr Creighton alleges that if AET had ascertained those facts then consistently with its duties it would have taken steps the result of which would have been:

(a) debentures would not have been issued on or after 22 December 2008 (or 22 December 2010);

(b) by no later than 22 December 2008 (or 22 December 2010) receivers would have been appointed to the property of Provident;

(c) those group members who were first issued debentures after 22 December 2008 (or 22 December 2010) would not have suffered any loss or damage (because they would not have acquired their debentures);

(d) those group members who already held debentures as at 22 December 2008 (or 22 December 2010) would have suffered less loss and damage.

8 The facts that it is said AET ought to have ascertained in accordance with its duties were that certain provisions should have been made against 16 identified loans that had been advanced by Provident. If those provisions had been made, it would have been evident that Provident was unable to pay all debenture holders in full.

9 The Creighton Proceeding was commenced by Slater & Gordon. Slater & Gordon are acting on a "no win, no fee" arrangement for Mr Creighton and other group members he represents. It has indemnified Mr Creighton against the risk of adverse costs orders or orders for security for costs in connection with the proceeding and has insured itself in respect of its liability under that indemnity through adverse costs insurance with a commercial insurer. The costs of that policy form part of the legal costs of the proceeding for the purposes of Mr Creighton's retainer agreement with Slater & Gordon. If the proceeding is successful, Slater & Gordon will seek to recover its professional costs and disbursements together with a 25 percent premium on its professional fees and the costs of the adverse costs order insurance out of the total amount recovered on behalf of all group members. No litigation funder is involved.

The Smith Proceeding

10 The Smith Proceeding was commenced in this court on 10 June 2015. It followed an earlier proceeding (the ***Examination Proceeding***) in which Mr and Mrs Smith had successfully sought orders pursuant to s 596A of the Act by which a number of examination summonses were issued to directors and former directors of Provident and existing and former officers of AET and a number of orders for the production of certain documents were issued to the receivers and managers of Provident and to AET. The Examination Proceeding was commenced after Mr and Mrs Smith had successfully applied

on 28 March 2014 to the Australian Securities and Investments Commission seeking authorisation to act as "eligible applicants" to examine persons about the examinable affairs of Provident pursuant to ss 596A and 596B of the Act. The Examination Proceeding was finally concluded on 10 July 2015.

11 Mr and Mrs Smith bring the Smith Proceeding on behalf of a "closed class" consisting of those persons who were holders of debentures issued by Provident as at 29 June 2012, which is the date orders were made appointing a receiver to Provident, and who signed a relevant funding agreement with Litman Holdings Pty Ltd (***Litman***) by 5.00pm on 16 July 2015.

12 In the Smith Proceeding, it is alleged that AET, in breach of its obligations under s 283DA(c) did not do everything within its power to ensure that Provident remedied any breach known to AET of the terms of the debenture trust deed and the Act. In particular, it is said that Provident breached various provisions of the trust deed and conducted specified finance facilities in a manner that did not satisfy the requirements of Provident's procedures manual or reasonably prudent lending practices by, among other things, making loans in excess of the loan to valuation ratio set out in the trust deed, by using debenture funds for the purposes not authorised by the trust deed (including the payment of dividends to fund general expenses, to meet existing current liabilities and to repay other debenture holders) and by failing to take a number of other steps in relation to those facilities. The facilities are identified in the statement of claim. Four of those are the subject of complaint in the Creighton Proceeding, but another 12 are not.

13 Mr and Mrs Smith allege that had AET exercised reasonable diligence it would have discovered most if not all of Provident's breaches, it would have served a notice on Provident requiring it to remedy those breaches within 21 days and, if the breaches had not been remedied, it would have exercised its powers to apply to the court for the appointment of a receiver. Mr and Mrs Smith do not specifically plead by when that would have occurred, but they do plead that if it had occurred by 31 December 2007, then all debenture holders as at that date would have been paid in full.

14 The Smith Proceeding is brought by Meridian Lawyers. The proceeding is funded by Litman, a litigation funder. In accordance with the funding agreements signed with each class member, Litman agrees to indemnify Mr and Mrs Smith and each class member in respect of legal costs and disbursements and any adverse costs order. In return, each class member is required to pay out of the amount recovered by the member a sum ranging from 30 percent to 40 percent of the amount recovered (depending on when recovery is made), a share of the legal costs and a share of the management fee of $5,000 per month payable to Litman.

15 It is apparent that there is a substantial overlap and substantial differences between the two proceedings. In both proceedings, it is alleged that AET failed to exercise reasonable diligence in discharging its duties under s 283DA of the Act to ascertain the true financial position of Provident and, having ascertained that position, to take steps to protect the interests of debenture holders. Four of the loans or facilities which are relevant to Provident's financial position about which complaint is made are common to both proceedings, but another 24 (12 in each proceeding) are not. Furthermore, the precise default is alleged to be different in each proceeding and to have had slightly different consequences. In the Creighton Proceeding, it is alleged that AET should have ascertained that Provident did not have sufficient funds to pay all debentures by 1 December 2008 (or 1 December 2010). If it had ascertained that fact, it would have taken steps that would have resulted in the appointment of a receiver by no later than 22 December 2008 (or 22 December 2010), with the consequence that those who acquired debentures after 22 December 2008 (or 22 December 2010) would have suffered no loss and those who acquired debentures before that date would have suffered less loss and damage. In the Smith Proceeding, the primary case appears to be that, if AET had complied with its duties, it would have ascertained that Provident had breached various provisions of the trust deed and taken steps with the result that a receiver would have been appointed by 31 December 2007. If that had happened, none of the debenture holders would have suffered a loss.

16 It is neither possible nor appropriate for the court to express any view at this stage of the proceedings on the absolute or relative merits of the two proceedings. All that can be said is that, as the two proceedings stand at present, it is at least theoretically possible that one could succeed and the other could fail. Even if both cases succeeded, it is possible because of the way in which the cases are put that some debenture holders could recover more as a member of the class on behalf of whom the Smith Proceeding is brought (***the Smith Class***) than as a member of the class on behalf of whom the Creighton Proceeding is brought (***the Creighton Class***).

Relevant principles

17 There is no doubt that the court is given broad powers to make orders regulating the conduct of representative actions. Section 166 of the *Civil Procedure Act 2005* (NSW) (***CPA***) relevantly provides:

> **166 Court may order discontinuance of proceedings in certain circumstances**
>
> (1) The Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because:
>
> (a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or
>
> (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under this Part, or
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> (c) the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or
>
> (d) a representative party is not able to adequately represent the interests of the group members, or
>
> (e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.
>
> (2) It is not, for the purposes of subsection (1) (e), inappropriate for claims to be pursued by means of representative proceedings merely because the persons identified as group members in relation to the proceedings:

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

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

18 Section 183 provides:

> **General power of Court to make orders**
>
> In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

19 The parties accept that in accordance with ss 166 and 183, the court has power to make any of the orders they seek, among others.

20 In written submissions filed on behalf of Mr Creighton it was pointed out that there was nothing in the CPA nor so far any determinative authority in Australia to guide the court on the appropriate approach to take when faced with competing representative actions. In those circumstances, it was submitted that, consistently with Canadian authority, the appropriate approach was for the court to select only one of the alternative representative actions to proceed. In making that selection, the court should have regard to the following non-exhaustive factors that were referred to in *Locking v Armtec Infrastructure* 2013 ONSC 331 and *Mancinelli et al v Barrick Gold Corporation et al* 2015 ONSC 2717, two recent decisions of the Ontario Superior Court of Justice, Divisional Court, and in the decision of Finkelstein J in *Kirby v Centro Properties Limited* [2008] FCA 1505; (2008) 253 ALR 65:

(a) The experience of the practitioners seeking to bring the representative actions;

(b) The likely costs to be incurred by the firm acting for the group members;

(c) The terms of the funding for the representative action;

(d) The nature and scope of the causes of action advanced in each action and the theories advanced as being supportive of the claims advanced;

(e) The presence of any conflicts of interest;

(f) The number, size and extent of involvement of the proposed representative plaintiffs;

(g) The relative priority of commencing the representative actions;

(h) The status of each class action, including preparation.

21 In my opinion, however, it is not appropriate to apply a fixed rule that no more than one representative proceeding can be permitted to continue and that the court should determine which one that is. Although that appears to be the position in Ontario (and other jurisdictions in Canada), it is important to bear in mind that in those jurisdictions the relevant legislation contains a requirement for the certification of a class proceeding by the court: see, for example, *Class Proceeding Act, 1992* (On), s 5. Consequently, in those jurisdictions, without certification, a proceeding cannot continue as a class action. On the other hand, the question under the CPA is whether an order should be made that a proceeding no longer continue as a representative action because the court considers that that is not in the interests of justice having regard to the matters set out in s 166(1). What is in the interests of justice will depend on the individual facts of each case and what other orders the court might make under s 183.

22 It is implicit in the submissions made on behalf of AET that it is vexatious and oppressive for two representative actions to be brought against it arising out of the same subject-matter. However, the fact that two representative proceedings are brought against the same defendant in respect of the same subject-matter is not sufficient to make the proceedings vexatious and oppressive. If one representative proceeding were brought and a number of

class members opted out of the proceeding and brought their own proceedings, it would not be oppressive for them to do so. The sections of the CPA governing representative proceedings specifically contemplate that as a possibility. It would not make any difference if those class members chose to bring a single proceeding. And it is difficult to see why the position would be any different if, instead of each class member who opted out joining an alternative proceeding as a plaintiff, what happened was that a second representative proceeding was commenced on behalf of those who opted out of the first. In each of those cases, it may be necessary in the interests of justice to make orders regulating the conduct of the multiple proceedings. Where there are common issues and a common defendant, the interests of justice strongly point to the proceedings being heard together, with evidence in one being evidence in the other, so as to reduce costs and avoid the possibility of inconsistent judgments. All the parties accept that, at a minimum, orders to that effect should be made in this case.

23 As AET points out, an order that proceedings be heard together will not eliminate all of the disadvantages of multiple proceedings. There will still be two sets of pleadings. AET will be required to give discovery in both proceedings and, if the claims are framed differently as is the case in the present proceedings, it will be necessary for AET to prepare evidence that addresses both claims. The hearing itself may take longer and if AET is unsuccessful in both proceedings it may be liable for two sets of legal costs. Where appropriate, some of those matters can be addressed by other orders of the court including orders placing limits on discovery and cross-examination and orders limiting the plaintiffs' ability to recover costs. Whether any of those orders should be made will depend on the particular circumstances of the case. However, the fact that a defendant is exposed to additional costs does not itself demonstrate that multiple proceedings against it are oppressive and, in the normal case, it is not oppressive for different plaintiffs to bring proceedings against the same defendant arising out of the same or substantially the same facts. Normally, a plaintiff will only be prevented from bringing multiple proceedings where both actions involve the same parties and same subject-matter and there is no reasonable justification for the two

proceedings: *Moore v Inglis* (1976) 9 ALR 509; *Thirteenth Corporation Pty Ltd v State* (2006) 232 ALR 491; *Lidden v Composite Buyers Ltd* (1996) 139 ALR 549; *Branir Pty Ltd v Wallco Pastoral Co Pty Ltd* (2006) 203 FLR 115; *Commissioner of State Revenue v Aidlaw Pty Ltd* [2010] VSC 405.

24 An important difference in this case, of course, is that each proceeding is brought on behalf of all the members of each relevant class. It is not entirely clear, but it appears that all members of the Smith Class are also members of the Creighton Class. The only possible exceptions are those who held debentures as at 29 June 2012 (and have signed a costs agreement with Litman) but sold them before 18 September 2012. It is unclear whether there are any debenture holders in that class. But it seems unlikely that there are because it is unlikely that any debenture holders were able to sell their debentures after 29 June 2012, when a receiver was appointed to Provident. On the other hand, there will be debenture holders who are members of the Creighton Class who are not members of the Smith Class – in particular, all those members of the Creighton Class who have not signed an agreement with Litman.

25 In my opinion, it would not be in the interests of justice to permit both proceedings to continue with overlapping class members. That is principally because it would place AET in a very difficult position. A notable feature of representative proceedings is that they frequently settle before the common issues are determined and well before it becomes necessary to deal with issues which are specific to the claims of individual class members (such as, where they arise, questions of causation and the assessment of damages). Settlements are to be encouraged because they often produce the most satisfactory outcome for the parties and free up judicial resources for other cases. However, if the same class members are represented by different lawyers propounding different cases, it is difficult to see how any settlement could be reached unless both representative proceedings were settled at the same time. That could only happen if the lawyers in both proceedings reached a common position in relation to settlement. The prospects of that happening in this case seem remote. The lawyers have not reached a

common position on how the cases should be put. The mechanism for funding the two cases is quite different, and accommodating those two mechanisms in any settlement where the class members overlap may be difficult. There is already a degree of distrust between the solicitors for Mr and Mrs Smith and the solicitors for Mr Creighton arising from a circular to debenture holders distributed by the former which the latter claims is misleading. That is likely to reduce the degree of co-operation that might otherwise be expected. It is not in the interests of debenture holders or AET if there are barriers to settlement in addition to those that normally exist.

The options

26 If the principal injustice arises from the difficulty of settling overlapping representative proceedings, that injustice can be overcome in one of three ways. The first is by consolidating the two proceedings. The second is by permitting only one of them to proceed. The third is by making orders the effect of which would be to prevent debenture holders from being members of more than one class.

27 Although the first option is one possibility raised by AET, no one seriously put it forward as a viable alternative in this case. Its success would depend on a degree of co-operation between the plaintiffs' lawyers that does not exist or on the court making a decision which gave the control of the consolidated proceeding to one set of lawyers or the other, possibly against the wishes of one or more of the plaintiffs, with the result that, in effect, those lawyers would control both proceedings. In my opinion, that should not be done without the agreement of the affected parties.

28 There are advantages and disadvantages of the other two alternatives.

29 If one of the proceedings were stayed, that would simplify the proceedings and minimise costs. However, it would also involve the court making a choice between the two proceedings and, in effect, forcing that choice on all debenture holders. In my opinion, that is not desirable. It is not desirable that the court make a choice between competing proceedings that individually are

both properly brought, particularly where competing considerations need to be weighed in making that choice. In principle, it is preferable that the persons affected by the decision make it.

30 Mr Lee SC, who appeared for Mr Creighton, did not suggest that a stay of the Smith Proceeding necessarily had to be permanent. In his submission, it would be possible to hear the common issues raised by the Creighton Proceeding and, depending on the outcome, to deal with the remaining issues raised by the Smith Proceeding. However, in my view, any stay of the Smith Proceeding would have to operate as a permanent stay. It is difficult to see how it would be possible to settle the Creighton Proceeding unless there was no possibility of the Smith Proceeding being revived. If the Creighton Proceeding was successful, it is difficult to see what role would be left for the Smith Proceeding. On the other hand, if the Creighton Proceeding was unsuccessful, in my opinion, it would be vexatious and oppressive to permit the Smith Proceeding then to continue. Any claim that formed part of the Smith Proceeding should have been brought in the Creighton Proceeding.

31 Mr Lee pointed out that in this case the debenture holders were largely retirees who were likely to be unsophisticated litigators and ill-equipped to make the choice that would be presented to them. Moreover, in his submission, the Creighton Proceeding clearly provided greater benefits to debenture holders when considering the factors referred to above.

32 First, the class on whose behalf the Creighton Proceeding is brought is an open class. That is more consistent with the opt out model adopted by the CPA. Effectively all debenture holders who are likely to have suffered a loss as a result of the collapse of Provident are members of the Creighton Class unless they opt out. On the other hand, only those debenture holders who have signed an agreement with Litman are members of the Smith Class. In effect, debenture holders must opt in by signing a funding agreement with Litman.

33 Second, and related to the first point, the funding model adopted in the Creighton Proceeding is more favourable to debenture holders than the one adopted in the Smith Proceeding. In the Smith Proceeding, debenture holders will have to pay Litman a substantial percentage of any judgment or settlement. On the other hand, in the Creighton Proceeding, debenture holders will only have to pay the costs incurred by Slater & Gordon (including an uplift of 25 percent) together with the premium paid to obtain adverse costs insurance. The written submissions filed on behalf of Mr Creighton contained worked examples that suggest that, on any reasonable hypothesis about the amount the debenture holders are likely to recover, they would be substantially better off as members of the Creighton Class than as members of the Smith Class.

34 Third, the solicitors acting in the Creighton Proceeding have extensive experience in dealing with representative actions, including representative actions brought by debenture holders. The solicitors acting in the Smith Proceeding do not have the same level of experience.

35 Fourth, the Smith Proceeding is more complicated than the Creighton Proceeding. In the Creighton Proceeding, to succeed Mr Creighton must prove that acting with reasonable diligence AET would have ascertained that Provident could not repay the debentures in full. On the other hand, the claim brought by Mr and Mrs Smith depends on proving that Provident committed breaches of provisions of the trust deed and Act over an extended period of time, which is said to add an additional layer of complexity to the claim.

36 Fifth, to the extent that priority in time is relevant, the Creighton Proceeding was commenced first and is more advanced.

37 However, in my opinion, the position is not as clear as these submissions suggest.

38 Little weight can be placed on the fact that the Creighton Class is an open one whereas the Smith Class is closed. Section 166(2)(b) of the CPA makes it

clear that it is not inappropriate for representative proceedings to be brought on behalf of a closed class defined by reference to the fact that members of the class have signed a litigation funding agreement.

39 There can be little doubt that if the proceedings settle for a substantial sum of money then the funding arrangements in the Creighton Proceeding are more beneficial to class members than the funding arrangements in the Smith Proceeding, since in the former case class members will not have to pay a percentage of their recoveries to a litigation funder. That is a significant factor favouring the Creighton Proceeding, and may be a critical one to many debenture holders. But the position is less clear if the proceedings do not settle. It seems apparent that, subject to the terms of the funding agreement, Litman will fund each class member's claim in the Smith Proceeding up until judgment and will bear any adverse costs order against the class member. It is not clear on the evidence that the position will be the same for class members in the Creighton Proceeding. It is possible that common questions will be determined by the court and it will become necessary for individual class members to have their claims assessed separately. In the Creighton Proceeding, it is not clear how any adverse costs orders against class members in that case will be dealt with, and it may be necessary for individual class members to reach separate agreements with Slater & Gordon if the proceeding reaches a stage where questions specific to individual class members need to be determined. The possibility of that happening may be remote. As I have said, a feature of representative proceedings is that they often settle. Moreover, in this case, if the common questions are determined by the court, it is to be expected that quantification of class members' claims will be simple. This is not a case where questions of reliance and the individual circumstances of class members will be important in determining the question of damages. Nonetheless, the funding arrangements in the Smith Proceeding appear to cater for a broader range of possible outcomes than those in the Creighton Proceeding and that is a factor that may cause some debenture holders to prefer to be a class member in the Smith Proceeding.

40 As to the third point, I do not accept that the level of experience in running particular types of representative actions is an important factor. It is one factor that a client might take into account along with others in selecting a legal representative. What may be important is whether the solicitors and counsel acting in the matter have sufficient experience and competence to be able properly to represent the interests of class members in this case. There is nothing to suggest either team of advisors fails to meet that standard.

41 As to the fourth point, I have already indicated that it is neither possible nor appropriate for the court to express a view on the competing merits of the two claims. Mr Lee submitted that it was always possible for the plaintiff in either proceeding to seek leave to amend their claim to include aspects of the other and it was open for class members to raise possible amendments with the lawyers responsible for handling the proceeding. Consequently, the court can proceed on the basis that even if only one claim is permitted to proceed, the claim that is most beneficial to the debenture holders will be put before the court. To some extent that is true. However, reasonable persons can differ on the legal and tactical merits of pursuing some claims and not others. Moreover, in this case, the claim brought by Mr and Mrs Smith may be more complicated but it may also be more advantageous to some debenture holders if both claims succeed. Different persons may have different views on how those competing considerations should be resolved. All that can be said in this case is that, at the moment, two different cases are advanced in the two proceedings. Amendments may or may not be made in the future which may make them more closely aligned. In the absence of amendment, the two proceedings present alternative ways of pursuing what is essentially the same claim. It is not appropriate for the court to make a choice between those two alternatives as part of a decision to permit only one proceeding to continue. The position might be different if one claim was obviously flawed or the claims brought in one proceeding were a subset of those brought in the other. But that is not the position in this case.

42 As to the fifth point, in *Kirby v Centro Properties Limited* [2008] FCA 1505; (2008) 253 ALR 65 at [29] Finkelstein J expressed the view that the fact that

one proceeding was first in time carried little weight. However, whether that is so will depend on the particular circumstances of the case. Where, for example, it appears that the later claim has only been brought to benefit those who propound it, the order in which the proceedings were brought may be important. But that is not this case. Although it is true that the Creighton Proceeding was commenced before the Smith Proceeding, it is relevant that Mr and Mrs Smith commenced the Examination Proceeding before Mr Creighton commenced his proceeding. Although the Creighton Proceeding is more advanced, the hearing of both proceedings has tentatively been fixed to commence on 26 September 2016 and that is unlikely to change depending on which proceedings are heard. Consequently, this factor carries little weight.

43 Looked at from the point of view of debenture holders it is not obvious that one proceeding is better than the other. The Creighton Proceeding has one significant advantage in terms of costs. But there are other factors that distinguish the two proceedings which are more difficult to weigh in deciding which is the better proceeding to bring. Nonetheless, I accept that if only one proceeding is permitted to continue as a representative proceeding, that should be the Creighton Proceeding. The effect of staying the Creighton Proceeding would be to deprive a substantial number of debenture holders of the benefit of being members of a representative action. To some extent, that disadvantage could be overcome if the stay was on condition that debenture holders who were not members of the Smith Class because they had not signed funding agreements with Litman were given an opportunity to do so. But even then, in my opinion, it would be unreasonable to put debenture holders in a position where they could only continue to participate in a representative action by signing a funding agreement with Litman, whereas prior to any stay that was not the case.

44 Mr Lee submitted that a disadvantage of permitting both proceedings to continue is that there is no mechanism for ensuring that each debenture holder is a member of no more than one class. Eventually, absent a stay, class members will be given an option in each proceeding to opt out of it.

Even if they are required to make an election, there is no reason to think that all debenture holders will make that election and no mechanism was advanced for ensuring that they do so.

45 It would, however, be possible to make an order excluding members of the Smith Class who did not opt out of the Smith Proceeding by a certain date from the Creighton Class. On that basis, debenture holders who were members of both classes would have an option to opt out of both classes, but if they opted out of neither they would be taken to have opted out of the Creighton Class. That seems more appropriate than the other way around, since members of the Smith Class have in a sense specifically chosen to opt into that class by signing a funding agreement with Litman. If that approach were adopted, it would be desirable for the opt out procedure to occur earlier rather than later, so that the parties knew where they stood. It would also be necessary to put in place a mechanism by which both parties had an opportunity to put material before class members in relation to the choice that they had and the consequences of their choice (or the failure to exercise it) as well as a more standard opt out notice to the group members explaining their rights to opt out of the proceedings. Each of the notices would require court approval.

Conclusion

46 The choice is between staying the Smith Proceeding or giving debenture holders who are members of the Smith Class an option to continue in the Smith Proceeding alone or in the Creighton Proceeding alone. Necessarily, the first option involves the court imposing a choice on members of the Smith Class which at least superficially appears to be inconsistent with the choice they have made to date.

47 Of the two options, I prefer the latter. The two proceedings offer true alternatives in the sense that they have different funding models and frame their cases in significantly different ways. The choice is not simply which legal advisors should be permitted to advance what is effectively the same

proceeding. The Creighton Proceeding has one substantial advantage over the Smith Proceeding in terms of costs in the event that there is a settlement. But otherwise the choice between them is not an easy one to make. If the court makes the choice that will simplify the proceedings and reduce costs. But for the reasons I have given, I do not think that that can be a decisive consideration. It may be accepted that the debenture holders are unsophisticated litigators. But there is no evidence before the court to suggest that they would be incapable of making a choice between the two proceedings if presented with material to assist them in doing so. The choice that is made could have significant consequences for debenture holders. In those circumstances, and where the choice is not obvious, in my opinion, it is inherently undesirable for the court to make it on behalf of debenture holders. It seems to me that it is possible to devise a mechanism to permit a choice to be made by debenture holders which will ensure that AET does not ultimately have to deal with two proceedings brought on behalf of the same individuals.

Orders

48 It is appropriate to make orders now that the two proceedings be heard together and that evidence in one be evidence in the other; and I make those orders.

49 Otherwise, the proceedings should stand over to a date convenient to the parties for submissions on what further orders should be made. I have in mind that a date should be fixed for the date by when class members should opt out of the proceedings and a timetable fixed for the service of opt out notices and any accompanying material and the approval of that material by the court. I also have in mind that I would make an order that members of the Smith Class who have not opted out of the Smith Proceeding by a specified date will be taken to have opted out of the Creighton Proceeding.

50 Having regard to the conclusions I have reached, it may also be necessary to deal with applications for security for costs and Mr Creighton's motion concerning what is said to be misleading statements by the solicitors for Mr

and Mrs Smith to debenture holders. A date for the hearing of those matters can be fixed at the next directions hearing.

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