[2020] HCATrans 052

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S317 of 2019

B e t w e e n -

MARION ANTOINETTE WIGMANS

Applicant

and

AMP LIMITED ABN 49 079 354 519

First Respondent

KOMLOTEX PTY LTD

Second Respondent

FERNBROOK (AUST) INVESTMENTS PTY LTD ACN 068 190 296

Third Respondent

Application for special leave to appeal

NETTLE J
GORDON J

TRANSCRIPT OF PROCEEDINGS

FROM MELBOURNE BY VIDEO LINK TO SYDNEY

ON FRIDAY, 17 APRIL 2020, AT 11.10 AM

MR J.T. GLEESON, SC: May it please the Court, I appear with **MR A.M. HOCHROTH**, for the applicant. (instructed by Quinn Emanuel Urquhart & Sullivan)

MS E.A. COLLINS, SC: May it please the Court, I appear with **MR I.J.M. AHMED**, for the first respondent. (instructed by Herbert Smith Freehills)

MR C.A. MOORE, SC: May it please the Court, I appear with my learned friends, **MR G.A. DONNELLAN** and **MR A.N. D'ARVILLE**, for the second and third respondents. (instructed by Maurice Blackburn Lawyers)

NETTLE J: Yes, Mr Gleeson.

MR GLEESON: Your Honours, this application concerns the scope of the Court's powers and the principled approach to discretion when faced with a problem which is very prevalent in the class action matters in the courts of Australia which is the problem of competing duplicative open class actions. Your Honours, could I pause on the sense in which we use the term "duplicative", which is that a first action has been properly commenced under section 157 of the *Civil Procedure Act* (NSW).

The originating process in accordance with section 161 properly identifies the group members, the claims, the relief and the common questions and then – this is the rub – then a group member without exercising any of the specific avenues within Part 10 to challenge the action decides, aided by a rival lawyer and funder, to commence its own action which mirrors the first. When I say mirrors the first, I mean in terms of *CSR v Cigna*, complete relief in respect to the controversy is already available in the first action.

In short, we submit that those facts raise three questions of law of general importance. Could I state those questions and then develop them? The first question is whether the court has a protective jurisdiction which cannot be sourced to any particular provision of Part 10 which empowers the court to stay the first filed action on the basis of a forward-looking prediction that if the matter is successful the later filed duplicative action might yield a higher return for the group members. When I say higher return, that could be either on a gross or a net basis.

The Federal Court approach in *GetSwift* favours an inquiry into gross returns. The New South Wales court, as we will show, favours an inquiry into net returns. On either basis, our answer to that first question is no.

The second question we raise is whether the second or later duplicative actions should be regarded as, prima facie, vexatious or oppressive and themselves liable to be stayed unless they can point to a traditional juridical advantage which the courts are well capable of assessing and which outweighs the prima facie vexation or oppression. We submit that question should be answered yes.

The third of the three questions, which is ground 2 of our application, is whether even if courts have power to engage in predictive assessments of likely future returns of competing class actions, how is that power to be exercised consistent with the judicial method, and we say in answer to that question that where the differing actions have differing funding models with differing incentives and disincentives attached to them, as is the present case, it is not permissible for the court simply to make a standardised assumption that each action will achieve the same gross return.

Your Honours, they are the three matters we seek to raise. It should be apparent from our written material that the approach which has been pioneered by Justice Lee in the Federal Court in *GetSwift*, approved in the Federal Court on appeal, and now followed in New South Wales, has as its fundamental premise that multiple, duplicative class actions are a good thing. They are in no way to be discouraged, contrary, we would say, to the law's ordinary strong aversion to multiplicity of action.

GORDON J: Is discouragement or encouragement the right analysis, or is it merely that, as we have seen here, even in this case, one can have two actions commenced on the same day? One has the first mover advantage difficulty and one has to resolve it.

MR GLEESON: Your Honours, on the facts, the *Wigmans* action was commenced first and, I think this is correct, filed first before any other matter – but that is a slight point of timing. The larger question raised by your Honour's question, we would submit, is this – that where the second action is duplicative in the sense I have identified, and there could be a third or a fourth or a fifth such action raised, is it part of the court's power to preside over what we would call, we hope without disrespect, an auction because what happens under this approach is that each party puts forward its bids for the right to win the carriage of the common action, with an ability to improve its bids prior to the hearing and an essential feature of the

court's approach is to seek to predict which action will achieve the best return for the class.

GORDON J: You accept that the first mover is not determinative?

MR GLEESON: It is not determinative, your Honour. It is not determinative. The reason we put that is that firstly, consistent with traditional principle of *CSR v Cigna* and *Carron Iron*, the second duplicative action would be only prima facie vexatious or oppressive, but the question would then be, can the second action point to a matter which is capable of assessment in accordance with the traditional judicial method so as to outweigh what would otherwise be vexation or oppression.

Your Honours, the difference between the Federal Court and the Supreme Court concerns whether the inquiry is into gross returns or net returns. In the Federal Court in *GetSwift* on appeal, at paragraphs 276 to 278, the approach has been taken that the court should not be looking for the action with the lowest legal costs and funding commission for the reason that those matters will be properly assessed at the end of the case, whereas the approach which has been taken in the Supreme Court is rather different because between paragraphs 208 to 211 of the judgment the primary judge found that the differing funding models had competing incentives and disincentives where they were such that it would be speculative to predict which action would achieve the highest gross return.

In that state of agnosticism, her Honour at paragraph 212, which we say contains error, resorted to an assumption that each action would produce the same gross return, the very assumption which could not be reached based on her Honour's previous finding and once that was made the *Komlotex* action was allowed to proceed as a matter of simple arithmetic.

Your Honours, in respect to the first of our three points, the primary argument we put, which is recorded by the learned President but never really addressed, is that if one considers the particular powers within Part 10 which are available in a case like the present, *Komlotex* did not seek to make out any ground for interference with the *Wigmans* action. By that I mean it did not seek to establish a stay under section 165, which is on page 195 of the book. It did not seek a discontinuance under section 166 and it did not seek to have the representative removed for inadequacy under section 171.

GORDON J: Is that any more to say than that the statutory scheme that the President identifies, I think at paragraphs 45 and 46, are referred to but not addressed?

MR GLEESON: That is what I am putting, your Honour. That was our core argument put at 45, 46, never addressed except we think parenthetically at the end of paragraph 78. Our primary point is that that argument, based on the scheme, which was a strongly viable argument, has really never been addressed and what the Court has before it in fact are very competing arguments on the statutory scheme.

We draw attention to this part of the scheme. Mr Moore's written submission is that a very different view should be taken of Part 10 which is that because his client is not a party in our action his client has a right as good as our right under section 157 to commence an action and so the part actually encourages as many actions as possible and then the court has to resolve that controversy in some way.

NETTLE J: Mr Gleeson, can I ask you, please - on your principal argument does it go as far as saying that unless a second-in-time plaintiff can bring the first-in-time action within 165, 166 or 171, there is no power in the court to stay the first-in-time action?

MR GLEESON: Not that far, your Honour, because the residual power is the power consistent with traditional *CSR v Cigna* and *Carron Iron* principle, which is that the second-filed action would have to point to some traditional juridical advantage which outweighs what is otherwise vexation or oppression. Let me take a practical example. If the first action did not offer security for costs, and the second did, that would be a matter that could be taken into account and probably would be decisive.

NETTLE J: Do you take *CSR* as extending to cases where the second-in-time action is started by a different plaintiff?

MR GLEESON: Yes, your Honour, because the underlying principle of *CSR* as expressed is that the question is whether complete relief in respect to the controversy is available in the first action. In the present case, there is nothing available in the *Komlotex* action which is not already available in the *Wigmans* action.

NETTLE J: It is just that in the older equity cases like *McHenry v Lewis*, where there were different plaintiffs but all suing for the same thing against, say, a delinquent company, it was said by Sir John Romilly that you would line up all the actions and decide on whatever basis appealed to you which was the preferable one to go first as the test case.

MR GLEESON: Your Honours, there are two matters I put in response to that. The first is that there were clear findings in *McHenry v Lewis* at the foot of page 401 and the top of page 402 that there were matters available in the second and the third action which were not available in the first action.

There were claims for breach of trust which were wider than the claims in the first action, so that we would classify *McHenry* as overlapping but not strictly duplicative.

Our second answer, your Honour, and perhaps the deeper answer, is that in terms of the factors which the court looks at when it lines up the matters - and I will take, for example, the judgment of the Master of the Rolls at page 404, they are the factors we submit are capable of examination in accordance with the traditional judicial method.

What is stark about the present approach is that the factor which the court is being asked to assess is very much, we would submit, the type of factor which this Court in *Brewster* indicated is not part of the court's role, at least under generally expressed language that we have in these statutes. What the court is being asked to do under this approach is to inquire into the plaintiff's side of the record and seek to ascertain which of several vehicles is likely, at the beginning of the matter, to produce the best result for the class at the end of the matter, assuming it to be successful. We would submit, your Honours, that in the traditional equity approach of *McHenry v Lewis* there has never been such an inquiry tasked to the court.

Your Honours, to complete that first matter, I should note for completeness that on page 130 of the book, in the order of the trial judge at order (6), the stay was sourced to two powers. The first is the general stay power in section 67 of the CPA; and the second is section 183, the provision the Court dealt with in *Brewster*.

You will not find in the Court of Appeal any analysis of the limits of the power under either of those provisions. You will certainly not find any defence of section 183 as a source of power for the present exercise. For like reasons to those given in *Brewster*, we would submit it does not provide such power.

As to section 67, could I ask your Honours to go to the President's judgment at paragraphs 93 to 94 on page 172 and what you will find in those two paragraphs is the proposition that for the court to engage in an exercise of selecting a vehicle which is likely to maximise the return to the group is supported by the just - limb of the "just, quick and cheap" guiding rule.

We would submit that the exercise done here has nothing to do with the just resolution of the real issues in the sense in which that guiding rule was adopted. That rule is about the court focusing on the real issues, and then making procedural directions which will get them to a hearing and then ultimately hear them in a way which is most likely to be just between the parties, quick and cheap in the sense of that legal costs and the court's

resources are not wasted on unnecessary issues. What you see in paragraph 93 is a very different concept of justice. You also see in paragraph 94 a concept of cheapness that we would submit goes beyond any traditional conception of managing the legal costs of the matter.

GORDON J: But, Mr Gleeson, is it not the view that the President's reasons for decision are dealing primarily with 58 of the *Civil Procedure Act*, and that that encompasses issues that are broader than those you were just referring to?

MR GLEESON: I think I missed your Honour's question, I am sorry.

GORDON J: That is all right. You seek to focus on this question of just and cheap, but when one reads the reasons for decision of the President his focus, is it not, is on section 58 of the *Civil Procedure Act* which entails questions and issues, facts and considerations of a much broader category.

MR GLEESON: Your Honour is correct that section 58 is the provision identified at paragraph 88, and in the terms of that provision that his Honour cites in subsection (2)(a), the dictates of justice are to be exercised having regard to, inter alia, sections 56 and 57. So we do not shy away from saying that section 58, the generally worded stay power, of itself does not fill the gap in power which arises within Part 10 itself. We also seek to submit that nothing - - -

GORDON J: Let us just break this down. You have accepted from Justice Nettle that you do not regard Part 10 as being a complete code on this issue, so that necessarily brings into play, does it not, these other provisions of the *Civil Procedure Act*?

MR GLEESON: Yes.

GORDON J: As well as to the extent necessary the relevant other principles that we have referred to in terms of competing actions, whether or not it is the *McHenry* line or the other lines to which you have referred.

MR GLEESON: Yes.

GORDON J: So what is the error in the reasoning of the Court of Appeal?

MR GLEESON: The error in the Court of Appeal is to regard it as part of the court's jurisdiction under those powers to be engaging in a speculative forward-looking exercise seeking to predict which of two matters is likely to produce more money for the plaintiffs on either a gross or a net basis, an exercise a court has never engaged in. That is the first error. The error in respect to ground 2 of our application can be seen at paragraph 32 of the

President's judgment where the argument we put, which is fairly recorded earlier at paragraph 29, has simply never been addressed, with respect. His Honour recognises at the end of paragraph 32 that:

> different [legal] teams might in fact secure different financial outcomes.

That was our point and yet the court went on to proceed to assume the outcomes would be the same. Once that is done, the entire exercise has been reduced to an arid exercise in mathematics.

NETTLE J: Mr Gleeson, you are out of time but can I ask you, appeal grounds appear to range more broadly than that in that they contend that the primary judge and the Court of Appeal were in error in adopting a multifactorial comparison, whereas what you seem to be saying now is that the only substantive error was including in the multifactorial comparison reference to the net or gross financial return to the prospective plaintiffs, assuming success.

MR GLEESON: Thank you, your Honour. It is fair to say that that aspect which has been brought into the multifactorial assessment is the key one that we focus upon.

NETTLE J: Does that mean that if leave were to be granted, you would seek to argue anything more than that the court is not entitled to take into account gross or net returns to prospective plaintiffs?

MR GLEESON: We would, your Honour, in the sense I sought to capture the *CSR v Cigna* point that if the second action is duplicative in the sense I have described, then it would be regarded as, prima facie, attracting the principles of vexation or oppression and it would bear an onus of outweighing that vexation or oppression by a matter capable of assessment under the judicial method. So that aspect we would also press.

NETTLE J: These grounds of appeal do not quite really engage with those two points, do they?

MR GLEESON: Your Honour, ground 1 is the ground upon which we seek to hinge each of those points, but they are the two points, boiled down.

NETTLE J: I see. All right. Thank you, Mr Gleeson.

MR GLEESON: May it please the Court.

NETTLE J: Ms Collins.

MS COLLINS: Your Honours, Mr Moore, it was proposed between us, would go next, if that is convenient to your Honours. It may be that I have very little to say.

NETTLE J: Yes, thank you very much. Yes, Mr Moore.

MR MOORE: Thank you, your Honour. We say that special leave should be refused for three reasons. The first is that the decision of the Court of Appeal is not attended by sufficient doubt. Secondly, contrary to the suggestion in the application for special leave, there is no inconsistency in approach that needs clarification from this Court and that the established principles are clear, and thirdly, the second proposed special leave ground does not support a grant because it simply concerns a contested factual issue of no general application.

My learned friend defined today a notion of a duplicative action. It is worth noting that falling within our learned friend's definition of a duplicative action would be an action brought by a group member individually, on their own account, who decides that they wish to seek to sue the defendant in their own action and possibly not even being aware that a class action has commenced because, of course, they only receive notice of that when notice is given pursuant to the opt-out provisions.

My learned friend says that that would necessarily involve duplication and attract a prohibition on two, as we understand it, entirely freestanding grounds. The first is general principles arising from what has been referred to as traditional stay jurisprudence and the second is that there is something in the scheme of Part 10 that would prohibit that second action. We say that neither of those consequences flow from either of those sources and I want to just give a moment explaining that in a little more detail.

Just before I do that, there was a second aspect of the submission this morning that I wanted to make at the outset which was that my learned friend, Mr Gleeson, concedes that security would be the basis for the statute between two actions legitimately. That concession is properly made and must be correct.

But our learned friends wish to say that advantages in funding arrangements, which would of course advantage the plaintiff and group members, cannot be considered under that assessment and we say that no proper reason has been demonstrated for why a question of security which could advantage a defendant can be considered but a question of funding arrangements, which advantage group members, cannot be considered or are somehow beyond the power of the court to consider by operation of stay

principles or Part 10 and when the matter is addressed that way we say that nothing is left of the principle.

Now, as identified by the Court of Appeal, there are two difficulties with the applicant's proposition in relation to traditional stay jurisprudence. The first is that the principle advanced by the applicant, drawn primarily from multinational litigation, has bound up in it, of necessity, in order to have the effect that the applicant needs for the present proceedings, a proposition that a first-in-time action prevails over a second-time action unless the first action is clearly inappropriate.

Now, why do we say that? The first is unless a first-in-time action has some presumptive validity, then nothing follows in the circumstances of the second case – the present case. The second is that unless the test is clearly inappropriate, rather than say more appropriate, then again nothing follows because what her Honour the learned trial judge undertook was an assessment of which matter was more appropriate. So our learned friend really needs both of those propositions in order for his case to have any effect.

We submit that as analysed by the Court of Appeal, the proposition that underlies that is not correct even in the context of multinational litigation. Rather, the order in which proceedings are commenced is but one factor and not necessarily a very significant factor and the Court of Appeal analysed that in the decision of his Honour the President at paragraphs 59 and following at application book 162.

In those paragraphs, 59 through to 61, there is reference to a number of authorities where the order of proceedings commenced when it is described as not a very significant factor and, indeed, even *Henry v Henry* 185 CLR 571, a decision relied upon by the applicant, immediately after the passage cited by the applicant - at 591 is the passage cited, but immediately after that passage the plurality observed that the fact that one or other proceedings is, prima facie, vexation oppressive does not determine the question of in effect which proceedings should be stayed. Elsewhere their Honours list the order of commencement of proceedings as just one of a number of factors, at pages 592 to 593, as again, the learned President observed in the present matter.

Now, I have mentioned that our learned friends concede today, and conceded before the Full Court, that a second commenced action offered better security than a first commenced action and that might be a legitimate basis for allowing the second action to go ahead. In light of that concession, we would say that if security can distinguish between matters by reason of its effect on the…..there is no reason why funding commission

rates would not also be matters that distinguish between proceedings and it therefore follows that there is simply no inflexible rule based on first filing.

The second difficulty, we submit, with the applicant's approach is that the traditional multijurisdictional context is simply not analogous to the present case. That is so for a number of reasons. The first is that the proceedings here were all in one court before one judge. Unlike the position in multijurisdictional litigation, it is not necessary to find an abuse in order for the court to manage what should occur with the proceedings.

Ample power arose from section 58 of the *Civil Procedure Act*, the terms of which are set out in paragraph 88 of the judgment of his Honour the President at page 170 of the application book which provides that in issuing a stay the court must seek to act in accordance with - - -

NETTLE J: Mr Moore, I am sorry to interrupt. Could you direct yourself to your microphone, please?

MR MOORE: I am sorry.

NETTLE J: Could you speak more closely into your microphone. We are having some trouble hearing you.

MR MOORE: I am very sorry, your Honour. Can you hear me clearly now?

NETTLE J: Perfectly, thank you.

MR MOORE: I am sorry. I may have obscured it with the piece of paper. At page 170 of the application book, in paragraph 88, the court sets out the terms of section 58, which of course provides that:

> whether to make any order or direction for the management of proceedings, including:
>
> . . . stay of proceedings . . .
>
> the court must seek to act in accordance with the dictates of justice.

Then section 58(2) sets out a broad range of matters that the court may have regard to, including the final matter:

> such other matters as the court considers relevant in the circumstances of the case.

We say that section 58 mandates how judges of the Supreme Court are to determine inter alia stay application and provide that matters of the broadest sort may be taken into account in that calculus. To the extent it is helpful to look at common law analogues - - -

GORDON J: Before you go to those, Mr Moore, may I ask a question about that catalogue?

MR MOORE: Yes.

GORDON J: As you know, and has been referred to in at least some of the submissions, we do not have a certification process provided by Part 10 and the other schemes that have been set up around Australia.

MR MOORE: Yes.

GORDON J: In a sense, what has been adopted by both the Federal Court and now the New South Wales Court of Appeal has been a form of certification, or at least a mechanism to try and deal with certification. They have done so by reference, in effect, to this catalogue of considerations, arguably some of them which are set out in Part 10, but would seem to include the matters that you have just taken us to in section 58.

MR MOORE: Yes.

GORDON J: Is that an appropriate way of looking at it, and is that, in a sense, a question for the Court?

MR MOORE: We would submit no, and - - -

GORDON J: No to what?

MR MOORE: No to your Honour's proposition "is that an appropriate way of looking at it", because there is an important distinction between the certification procedure, which is no action can proceed unless it has been certified, and the present proceeding is that there is clearly going to be an action that proceeds, the only question is whether, if there is more than one action, and there is therefore an issue of overlapping proceedings, which issue arises under the common law - it arises in a variety of contexts - what principle would guide the court as to whether to resolve that.

There is nothing wrong or problematic about the court having regard to differences between the proceedings in order to determine whether the overlap could be removed and if so in what way. But importantly in that context also, your Honour, and another distinction between the certification

procedure, is as the Court of Appeal recognised, in Australia there are a wide variety of mechanisms for dealing with an overlap but the approach adopted in the present case is just one mechanism. Other mechanisms include consolidation, include class closure of one of the matters, or declassing a matter. There are a wide variety of remedial responses to any difficulty that might be thrown up by overlapping group members which distinguish - - -

GORDON J: That may be an answer to Mr Gleeson's suggestion that you have these - that the failure of a group member to access or bring an action either under 166, 167 or otherwise of the Act is itself not a complete answer because over the last few years that this regime has been in place there have been different mechanisms adopted by different judges in order to deal with competing actions.

MR MOORE: Yes, quite. If our learned friend's proposition is taken to its logical extreme he would have to say that all of those mechanisms were wrong, were invalid, because the only correct way that a court can approach the matter is to say there is the first-in-time matter and now is there any reason to say that the first-in-time matter is clearly inappropriate. So no provision - - -

GORDON J: I think that is why – that is possibly why Mr Gleeson's argument now is much more focused, at least from what I had understood when I read the papers, to something which is a consideration of, in effect, competing funding terms.

MR MOORE: Quite, and we do say that when reduced to that very narrow focus it disappears into nothing because there is no proper principle identified to distinguish why the court can, for example, look at other matters such as security but not funding terms in deciding which is the matter that should be going forward or - - -

NETTLE J: Is there not this difference? When courts traditionally in Chancery and now look at security for costs and the capacity to provide it, they are looking out for the interests of the defendant, balancing up the equation as it were?

MR MOORE: Yes.

NETTLE J: Whereas under this regime they are looking solely at the interests of the plaintiff to see how much money they can screw out of the defendant.

MR MOORE: Well, that is not quite what happened in this case, your Honour, because what our learned friend has not referred to is that the

differences in security were one of the bases on which her Honour the trial judge distinguished between matters. So her Honour used the difference in security which was something that benefited the defendant to prefer our action and our learned friend's action over the other two actions that were before the court.

NETTLE J: His big point seems to be that the judge is not allowed to make an assessment of net or gross returns to plaintiffs; that that is inconsistent with the judicial task and process.

MR MOORE: Yes, that does now seem to be his big point, and we would submit that in light of the recognised role of the court, in effect having regard to the interests of group members, it has been described as something associated with a protective jurisdiction, analogous to that, there is nothing wrong with the court, in serving that role, in looking at the question of which of these matters will produce the best return for members.

Of course one consequence which is overlooked by our learned friend's submissions of the fact that there might be more than one matter offering viable attractive terms is that that very competition can and has driven down the rates of funding commission in the market that are available which is of course a good outcome for plaintiffs and group members and not a bad outcome for defendants because it has no impact on the amount that defendants would be willing to pay.

The only person who suffers from that competition is the funding industry itself and this Court and other courts have constantly reminded us that we should pay no regard to their interests in this calculus and this assessment.

NETTLE J: Yes, thank you very much, Mr Moore.

MR MOORE: So I was dealing with the common law analogues from *McHenry v Lewis*. We would say that that case recognises, in a non-limiting way, the wide variety of considerations that we have taken into account and the principle from that case is simply you want to get all the actions together, you want to look at all of the considerations as to which is the best action to go forward, including matters that, as your Honour Justice Nettle observes, might be to the benefit of the defendant but also matters that might be to the advantage of the plaintiff, or the people who the plaintiff represents under the equitable suit. An analogous approach would be taken in this case and, indeed, was taken by her Honour on the present proceedings.

The second reason why there is no appropriate analogue to the multijurisdictional context is it is inapt in proceedings before one judge in

one court to seek to impose some clearly inappropriate test. The reasons for this are discussed by his Honour the President at paragraph 48, at application book 158. In particular, as discussed in the decision of *Voth* at pages 558 to 559, a rationale for the clearly inappropriate test is that it avoids potentially invidious comparisons with and commentary upon the merits of the courts and procedures in other jurisdictions. No such factor is applicable here, and it is not apparent why such a test would apply by analogy.

A third point of distinction, of course, is that the actions were brought by different plaintiffs. The parties are not the same, the group members are not parties, and there is a clear distinction drawn in the legislation between the status of a representative party or the lead plaintiff and group members.

A fourth reason that the analogy does not hold wood is that when our learned friends say that it is prima facie vexatious and oppressive, an important question is, vexatious and oppressive to whom? The party supposedly oppressed by the duplication, AMP, was not the party that applied for any stay and Ms Wigmans obviously was not being vexed or oppressed. Indeed, on the factual findings of the trial judge, she was being advantaged.

The attempted translation in the present circumstances of notions of abuse of process is therefore, we submit, inapt. Rather, the application for a stay falls to be determined by the general principles of section 58 of the *Civil Procedure Act* and in that calculus the interests of lawyers and funders have no role to play.

Could I then turn briefly to the statutory provisions? The applicant relies upon those as a separate freestanding basis for the proposition; however, those provisions are facilitative. The short point is that none prevents the filing….. There is nothing in the scheme of Part 10 that prevents there from being more than one proceedings against the same defendant.

A key provision relied upon by the applicant is section 171 which permits the substitution of the representative party. But, in the absence of 171, the representative proceedings is brought by a plaintiff as the representative party. It is the plaintiff's proceedings. It is his or her proceedings to either continue or not continue as they see fit. It is understandable why there might be sections specifically dealing with this because it might be thought to be undesirable that after two years of litigation, for example, a plaintiff could simply walk away, thus disadvantaging the positions of group members.

In the absence of an express power to substitute plaintiffs, to turn it into someone else's proceedings, to say it is not your proceedings any more, it is another plaintiff's proceedings, would be a drastic step under conventional principles. So, of course, that power exists. But that express power to change plaintiffs in a particular proceedings does not apply for the bringing of a separate proceeding by a different plaintiff with a different pleading, different legal representatives and so on.

For example, section 171 says nothing about the ability of a person to bring their own personal action against the defendant, raising the claims that they want to raise in the manner they want to raise them, and it is very difficult to see why section 171 would be said to prohibit such a course by necessary implication.

That, we submit, is the high point of the implications that would be drawn from the statutory scheme. The only other provision that might perhaps be alleged to be apprised of the relevant implication is the opt-out provision. However, that and other provisions identified by the applicant simply gives effect to a scheme that group members do not have to opt into a particular proceeding. It does that by requiring notice and the scheme operates that group members are given notice and the right to opt out. If they do not opt out after the date to opt out, they are taken in effect to be bound. However, prior to that date they are not bound because they can always opt out once they are notified.

So, for those reasons, we say there is nothing in the statutory scheme that excludes the process taken in the present case and subsequently one would need to be expressed if there was to be such a restriction. May it please the Court.

NETTLE J: Thank you, Mr Moore.

MS COLLINS: Your Honours, there is nothing I would wish to add to what we have said in writing. If it please the Court.

NETTLE J: Thank you, Ms Collins. Anything in reply, Mr Gleeson.

MR GLEESON: Your Honours, four points. Firstly, your Honour Justice Nettle asked me whether ground of appeal 1, on page 179, needed to be better tailored to capture the argument I have made this morning. Could I refer your Honours to special leave question 1, which is at the foot of that page, including the concluding words of that question, which I submit does narrow and tailor the point that we seek the Court to consider.

NETTLE J: Yes.

MR GLEESON: Secondly, in response to the question your Honour Justice Gordon asked of Mr Moore, we do submit that what is at the heart of this case is that, given we all agree we do not have the express statutory certification or carriage motion procedure, and instead the court is discerning the limits on generally-expressed powers such as section 58 or section 67, then the critical question becomes what are the relevant factors which may or may not be taken into account and can Australian courts do a carriage motion of the breadth that we see in the US and Canada. It is that question which, as tailored by the special leave question 1, we seek to ask the Court to consider.

Thirdly, your Honours asked Mr Moore is there a difference between a court assessing security and a court doing the exercise that has been done here. There is a radical difference. The difference is in part, as your Honour Justice Nettle put in argument, that the court is not doing justice between the parties. It is, as we would put it, delving into one side of the record and involving itself in the vehicle so as to produce the highest return for the members.

Our final proposition, your Honours, is that, having regard to what this Court said in *Brewster*, particularly in paragraph 47 in the plurality, supported by your Honour Justice Nettle at paragraph 125, and your Honour Justice Gordon in the concluding words of paragraph 143, there must be a substantial question to be raised about the difference between a court making interlocutory orders designed to bring a matter to a just and fair hearing between the parties, and a court involving itself in the economics of a proceeding. May it please the Court.

NETTLE J: Thank you. In this matter there will be a grant of special leave. Mr Gleeson, would the matter be capable of being dealt with in the space of a day?

MR GLEESON: Yes, your Honour. For our part we think that is correct.

NETTLE J: Thank you. Mr Moore?

MR MOORE: We do not disagree with that, your Honour.

NETTLE J: Thank you. Counsels' instructing solicitors will need to engage with the Registrar for directions which are in standard form. Thank you.

The Court will adjourn now briefly.

AT 11.57 AM THE MATTER WAS CONCLUDED