

Representative Actions in NSW Courts

The Honourable Justice Beech-Jones¹

The topic that I was asked to address was representative actions in New South Wales Courts. I can immediately eliminate the plural in that title.

With effect from 4 March 2011 the *Civil Procedure Act 2005* (NSW) “CPA” was amended by the insertion of a new Part 10 which governs the conduct of representative proceedings in the Supreme Court of New South Wales.² The same legislation operated to remove from the *Uniform Civil Procedure Rules* provisions similar to former Part 8 rule 13(1) of the *Supreme Court Rules* that was found in *Carnie and Anor v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 (“*Carnie*”) to accommodate what we now call “class actions”.³ The effect of the repeal of former UCPR 7.4 and 7.5 was to deny the District Court any basis to hear a representative action based on *Carnie*. So now when it comes to representative or class actions in NSW Courts the Supreme Court is it.⁴

Part 10 of the CPA adopts the opt out model found within Part IVA of the *Federal Court of Australia Act 1976* (Cth). Most of the provisions of Part 10 are the same as, or expressed in similar terms to, those provisions. In the second reading speech that accompanied the introduction of these provisions, the then Attorney-General described them as being “substantially modelled” on Part IVA.⁵

In the balance of this paper I am going to touch on some of the differences between the federal and NSW schemes both as a matter of substance and in their administration as well as highlight a couple of decisions of the Supreme Court that may be of interest. I should mention that I am not trying to emphasise the differences between the Courts handling these matters. To the contrary, the truly important matter to note is their similarities, an outcome that is sensible from a legal and public

¹ Supreme Court of New South Wales

² *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), No 135 of 2010, Schedule 6

³ UCPR 7.4 and 7.5 repealed by Schedule 6, clause 6.4 of No 135 of 2010. For a discussion of the provisions in force prior to those the subject of this paper: see M Legg, V McBride, S Clark, --- “The New South Wales Representative Proceeding: A Class Action Half-Way House” [2008] UWSLawRw 8; (2008) 12(1) University of Western Sydney Law Review 176

⁴ There is some scope for representative complaints to be made under the *Anti-Discrimination Act 1977* and if not resolved determined by the *Civil and Administrative Tribunal of New South Wales: Anti-Discrimination Act 1977*, s87A; *Civil and Administrative Tribunal Act 2013*, Sch 3, cl 10;

⁵ New South Wales Legislative Assembly, Parliamentary Debates (Hansard) 24 January 2010

policy perspective. From a legal perspective the superior Courts of the States and the Federal Court should strive to interpret and apply what is, in effect, uniform legislation in a consistent manner.⁶ From a public policy perspective differences between class action regimes are best avoided or at least minimised to reduce the capacity for litigants to gain some advantage perceived to be available under one regime compared to another. In its idealised form the Australian legal system should ensure that, within jurisdictional limits, there should be the same outcome for the same matter irrespective of which forum determines it.

At the time Part 10 of the CPA was enacted the then Attorney-General noted the addition of two “procedural rules” not found in Part IVA. The first is found in s 158(2) of the CPA which enables a person to commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the lead plaintiff and other persons have a claim against every defendant. This avoids the effect of the decision of the Full Court of the Federal Court in *Phillip Morris (Australia) Ltd and Ors v Nixon and Ors* [2000] FCA 229; (2000) 170 ALR 48.

The second addition was the inclusion of a specific provision, namely s 166(2), clarifying that it was permissible for representative proceedings to be brought on behalf of a limited group of individuals and not necessarily on behalf of all persons who might have a cause of action arising out of the relevant events against a particular defendant. This was consistent with the decision of the Full Federal Court in *Multiplex Funds Management Limited v Dawson Nominees Pty Ltd* [2007] 244 ALR 600. As many of you are no doubt aware, it is this line of authority that enables the represented group to be limited persons who have entered into a particular litigation funding agreement.

At the time of its enactment the most significant difference between the two sets of provisions was that Part 10 of the CPA had to be read together with the other provisions of the CPA, especially the provisions specifying the guiding principles for civil courts set out in ss 56 to 60 of the CPA. While there is scope for debate about how much change, if any, those provisions affected to the principles operating upon civil courts, the statutory emphasis on Courts considering the “efficient disposal of

⁶ *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 at 492

the business of the courts” and “the efficient use of available judicial and administrative resources” was clearly of significance to the largest superior court in the country. However any potential discrepancy in this regard was removed when ss 37M, 37N and 37P were inserted into the Federal Court of Australia 1976 with effect from 1 January 2010. They replicated ss 56 to 60 of the CPA.

One set of differences between the two schemes follows from the differences between the *Federal Court Rules 2011* and the *Uniform Civil Procedure Rules*. I have not read the *Federal Court Rules* in a long time but, by way of an example, on a brief perusal, Part 20 of the *Federal Court Rules* concerning discovery is significantly different to UCPR 21 which essentially removes general discovery and limits discovery to specified categories.

The most obvious and important difference between the New South Wales and Federal schemes for representative actions is the limitations on the Federal Court’s jurisdiction exposed by the High Court’s decision in *Re Wakim; Ex parte McNally & Anor* [1999] HCA 27; 198 CLR 511 (“Wakim”). The Federal Court’s accrued jurisdiction enables it to hear and determine non-federal claims that bear the necessary relationship to claims arising under federal law.⁷ However *Wakim* established that the Federal Court does not have jurisdiction over a matter that solely involves non-federal claims even if State legislation such as the cross vesting legislation⁸ purports to confer it on the Federal Court. I would expect that this limitation may be of real concern to those who bring and finance representative actions. The time and resources devoted to these actions is presumably so significant that they cannot risk commencing proceedings only to have them later fail on a jurisdictional issue especially after a limitation period has expired. As an illustration of this, many of the class actions in the Common Law Division arise out of natural disasters such as bushfire or flood. It would take some truly ingenious thinking to construct a “non colourable” federal claim out of such events.⁹

⁷ *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457

⁸ In this state the *Jurisdiction of Courts (Cross-vesting) Act 1987*

⁹ *Burgundy Royale Investments Pty Ltd & Ors v Westpac Banking Corporation & Ors* (1987) 18 FCR 212 at 219; Allsop J: “Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002”; (2002) 23 Australian Bar Review 29

Practical Matters

Let me just explain some practical aspects of how the Supreme Court deals with class actions. Can I start by referring you to the Supreme Court practice note SC Gen 17, which concerns representative actions as well as the class action page on the Court's website which sets out information about various class actions before the Court.¹⁰ What I am about to say is only by way of supplement to those documents.

As a general rule, the trial divisions of the Supreme Court, that is the Equity Division and the Common Law Division, do not operate docket systems. Most cases within those Divisions are not case managed by a judge from the time of their commencement. The volume of cases within the Court is simply too large to facilitate judicial case management of every case assuming that was considered desirable. That said, some of the Equity Division Judges do case manage a pool of cases that they are scheduled to hear. Occasionally the management of complex civil cases within the Common Law Division is allocated to a particular judge. Also a great deal of case management is undertaken by judges presiding over the specialist lists such as the Commercial List and the Defamation List.

However, the Court recognises that representative actions must be managed by a judge from the beginning. So on the filing of an initiating process a return date before a presiding judge will be allocated. The first return date is usually 42 days after the date of filing.¹¹ Within each division there are three judges allocated to manage representative actions, the respective Chief Judge and Justice Garling and myself in the Common Law Division and Justices Ball and Sackar in the Equity Division. Other judges in the two Divisions are sometimes allocated to case manage a particular class actions and all the judges are available to conduct a substantive hearing of some part of them.

Obviously I cannot speak about individual cases that are currently before the Court but I can say that all the judges who case manage representative actions have a strong preference for allocating a hearing date for common issues as soon as possible. Under this approach the parties must ensure the necessary procedural steps are undertaken before the trial date rather than wait for them to be completed

¹⁰ http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_classaction/sco2_class_action.aspx

¹¹ SC-Gen 17 at [5.2]

and then allocate a hearing date. I have case managed a representative action in which, for reasons I will not elaborate upon, a hearing date could not be allocated early. Sure enough the litigation's procedural aspects took on a life of their own.

Another matter that the judges who manage these cases wish to emphasise, and this is borne out by the case law, is that there is a strong preference not to reserve judgment on interlocutory decisions. Instead the preference is to make the decision and move on. Often, during the course of a directions hearing in a representative action I, and as I understand it the other Judges, will simply indicate what must be done and expect the parties to draft a direction to give effect to it. If the parties want reasons for some such order they need to ask for them. Given that there is now a very significant number of class actions before the Supreme Court what is interesting is the relatively few number of interlocutory judgments on procedural matters of any length that have been published. Views on that may differ but I consider it to be a good thing.

That said I will just mention some judgments of the Court on certain topics that may have resonance.

Competing Representative Proceedings

One topic that can cause blood pressures to rise concerns the treatment of competing representative proceedings. In *Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd* [2016] NSWSC 17 (“AET”) Ball J grappled with two representative actions that involved overlapping classes of debenture holders, the Creighton proceedings and the Smith proceedings. The Creighton proceedings involved an open class defined as all persons who held debentures in the defendant at a particular date.¹² The Smith proceedings involved a “closed class” defined as all persons who held debentures in the defendant at a particular date and who had signed a funding agreement with the funder.¹³ It seems that everyone in the closed class in the Smith proceedings fell within the open class in the Creighton proceedings.¹⁴ The claims made in each proceeding were similar but not identical such that it was possible one could succeed and the other could not.

¹² AET at [5]

¹³ AET at [11]

¹⁴ AET at [24]

Also the measure of loss claimed in each proceeding was different.¹⁵ The defendant sought a stay of one or other of the proceedings.

One of the parties submitted that the Court should adopt the Canadian practice and select only one of the proceedings to continue. They proposed various criteria to make the selection including the experience of the practitioners acting for each representative plaintiff, the size of each class and the terms of the funding arrangements.¹⁶ Justice Ball rejected that approach noting that in the Canadian jurisdictions there is a requirement that the Court certify the action as suitable to proceed.¹⁷ Instead, his Honour resolved the matter by inquiring whether the maintenance of the action was vexatious and oppressive. Justice Ball did not accept that, merely because two representative actions are brought against the same defendant in respect of the same subject matter, then that necessarily renders the maintenance of both proceedings vexatious and oppressive.¹⁸ However His Honour did find that the interests of justice would not permit a defendant to face two or more such class actions “with overlapping class members”.¹⁹ His Honour instanced the problem faced by a defendant in seeking to settle to two class actions where different cases are propounded on behalf of the same persons.²⁰

Justice Ball identified three means of addressing this dilemma, namely consolidate both proceedings into one, only permit one of them to proceed or prevent debenture holders from being members of more than one class.²¹ Justice Ball noted that none of the parties sought the first option and his Honour rejected the second. In relation to the second option, his Honour had been invited to consider the respective merits of the each action, its funding model and legal representatives but declined to do so.²² His Honour stated that it was not desirable that the Court make a choice between competing proceedings that individually are both properly brought and that it was preferable that class members make that decision.²³ Instead Justice Ball chose the third option of preventing members of one class from being members of

¹⁵ *AET* at [16]

¹⁶ *AET* at [20]

¹⁷ *AET* at [21]

¹⁸ *AET* at [22]

¹⁹ *AET* at [25]

²⁰ *AET* at [25]

²¹ *AET* at [26].

²² *AET* at [29] to [42]

²³ *AET* at [29]

the other. His Honour ensured this by providing that debenture holders who were a member of both classes would have an option to opt out of both but, if they opted out of neither, they would be taken to have opted out of the Creighton Open Class.²⁴

The problem of competing representative actions in an insurance context arose in two proceedings commenced to recover losses from one of the Blue Mountains Bush fires that occurred in October 2013 (see *Johnston v Endeavour Energy* [2015] NSWSC 1117; “Johnston”). In one proceeding, the Johnston proceedings, proceedings were commenced against an energy distributor on behalf of all persons who suffered loss or injury including personal injury, property damage or economic loss resulting from a particular fire.²⁵ In the other proceedings, referred to by Garling J as the insurer’s proceedings, proceedings were commenced on behalf of 565 named individuals who were said to have suffered loss and damage from the fire and who were not members of the represented class in the Johnston proceedings. Each of the named individuals was insured and their respective insurer had paid out at least some amount for a claim of property or economic loss. The insurer was claiming to be entitled to commence the proceedings either in the exercise of rights of subrogation or rights conferred by the contract of insurance.

A solicitor acting on instructions from the insurers purported to serve opt out notices removing the persons named in the schedule in the insurer’s proceedings from the class in the Johnson proceedings.²⁶ A dispute then arose as to his authority to do so, the resolution of which would determine the composition of each class. The insurers’ representatives asserted that the insurers had a right under the relevant insurance policies to take recovery actions on behalf the insureds to whom payments had been made and that carried with it an obligation to claim all of the insured’s losses whether insured or not as well as the right to exercise opt out rights on their behalf in the Johnston proceedings.²⁷ This was disputed by the representative plaintiff in the Johnson proceeding.

To determine those contentions Garling J had to consider the extent of an insurer’s right to subrogate on behalf of the insured and then consider the rights conferred by

²⁴ *AET* at [45]

²⁵ *Johnston* at [4]

²⁶ *Johnston* at [10]

²⁷ *Johnston* at [147]

the individual insurance policies. His Honour concluded that, absent a contractual right, the doctrine of subrogation does not confer on an insurer the right to prevent an insured taking proceedings to recover damages from a third party and, if an insurer has not covered the whole of the insured's loss, the insured retains the right to recover the whole loss as a litigating plaintiff.²⁸ In this case a significant number of the policies²⁹ did not confer any right upon the insurer to prevent the insured taking action to recover the uninsured losses that were sought in the Johnson proceedings.³⁰ Consequently the opt out notices were found to be invalid.³¹

The outcome of *AET* and *Johnson* was that in both cases two representative actions arising out of the same event were allowed to proceed. One question that arose in each was how a hearing of common issues would be conducted. As I understand it, in each case, the relevant judge either made, or foreshadowed making, orders that are often made when differently represented plaintiffs bring such cases. This often includes orders that the proceedings be heard together and various procedural directions designed to prevent two cross-examinations on the same topic. It could also include an order limiting the recovery of costs by two representative plaintiffs where their cases overlap but that is a point that I will not develop in the abstract.

Two first instance cases do not establish a trend. However one theme common to both decisions is a strong reluctance on the part of the Court to express a preference for one properly commenced representative action over another, much less one set of lawyers conducting a representative action over another.

Security for Costs

Another topic I wanted to briefly mention concerns applications for security for costs made against the representative plaintiff or group members in class actions. The reason I will be brief is that the judgments in the Supreme Court of New South Wales that discuss this topic are two of my own namely *De Jong v Carnival PLC* [2016] NSWSC 347 ("*De Jong No 1*") and *De Jong v Carnival PLC (No 3)* [2016] NSWSC 1461 ("*De Jong No 3*"). Generally judges should not discuss their own judgments in any detail in order to avoid any risk of that discussion becoming a substitute for the

²⁸ *Johnston* at [172] to [174]

²⁹ So called "Group 1" policies

³⁰ *Johnston* at [248]

³¹ *Johnston* at [261]

judgment itself. So I will do no more than sketch what was decided, with the overriding caveat that nothing in this discussion is meant to add to what those judgments state.

In the *De Jong* litigation the group members were passengers who paid for tickets on a cruise ship originally bound for New Caledonia but which travelled to Melbourne and Hobart instead. The cruise ship operator was sued on the basis that its conduct in changing destinations from the published itinerary was a breach of the passengers' contracts or of the terms implied into those contracts by the *Competition and Consumer Act 2010* (Cth).

The lead plaintiff did not have the benefit of an indemnity from a funder or the like. In *De Jong No 1* I accepted an argument that the Supreme Court did not have the power to award security for costs against the group members. However I found that the Court could make an order for security against a lead plaintiff.³² I ordered that steps be taken to ascertain the willingness and capacity of group members to contribute to a fund to meet any order that might be made against the lead plaintiff. Ultimately in *De Jong No 3* I ordered that security for costs be provided.

I will just make four observations about these judgments.

First, although there are some differences between the provisions concerning costs found in Part 10 of the CPA and the *Federal Court of Australia Act*, both of *De Jong No 1* and *De Jong No 3* follow recent Federal Court authority on this topic specifically a succession of judgments in the *Kelly v Willmott Forests* litigation.³³

Secondly, the critical factors that were found to justify an order that security be provided was the nature and extent of the loss said to have been suffered by the group members in the form of disappointment arising from a holiday that did not meet expectations³⁴ or lost opportunity to book a different holiday and the respective burdens imposed on the parties that might flow from success and failure in the proceedings.³⁵

³² *De Jong No 1* at [52] to [53]

³³ *Kelly v Willmott Forests Ltd (in liquidation)* [2012] FCA 1446; *Kelly v Willmott Forests Ltd (in liquidation) (No 2)* [2013] FCA 732; *Kelly v Willmott Forests Ltd (in liquidation) (No 3)* [2014] FCA 78

³⁴ *De Jong No 1* at [63] to [64]

³⁵ *De Jong No 1* at [65]

Thirdly, the approach in *De Jong No 1*, *De Jong No 3* and *Kelly v Willmot* requires that, once a determination is made that an order for security is prima facie justified, then inquiries should be made of the group members to ascertain their willingness and capacity to make a contribution to an order for security for costs. This is undertaken as part of the consideration of whether making an order for security would stifle the litigation. It must be said that this approach can be cumbersome and has the potential to cause considerable delay in the proceedings. In another representative action in which for costs was sought, Ball J declined to embark on this process concluding that the plaintiffs had a sufficiently strong case against the defendant to justify a conclusion that security was not warranted.³⁶

Fourthly, consistent with the approach in the relevant Federal Court decisions, the amount of security that was ordered in *De Jong No 3* was much less than was sought by the defendant.³⁷ This was so because it was determined that to order the full amount would require a contribution from group members that was disproportionate to the amounts they sought to recover.

Other Decisions about group members

Finally, I will just bring to your attention two other decisions of mine in the *Lam v Rolls Royce* litigation. I am doing so only because they appeared to have generated more discussion in the legal blogosphere than I anticipated. *Lam* is a representative action in which a number of persons aboard an international flight out of Singapore claim damages for nervous shock when the plane's engine caught fire in mid-air and the flight had to return to land. The defendant was the manufacturer of the engine. The group was defined as those persons on board who suffered nervous shock. One practical difficulty in identifying who amongst the passengers was a member of the group was that some of the overseas passengers on the flight were difficult to contact especially when their bookings were made through overseas travel agents.

In *Lam v Rolls Royce PLC (No 3)* [2015] NSWSC 83 ("*Lam (No 3)*"), I made orders to give effect to what is sometimes described as "class closure". I adopted the

³⁶ *Paul Baker as Plaintiff Representative of 165 Plaintiff Group Members v The Partnership of Anne Patricia Larter Alan Jones, Miraleste Pty Ltd t/as USG Partner and Leigh Johnson t/as STC Sports Trading Club* [2016] NSWSC 1194 at [15] to [21]

³⁷ *De Jong No 3* at [29] to [31]

approach of Forrest J of the Victorian Supreme Court in *Matthews v SPI Electricity Pty Ltd* 2013 VSC 17 ("*Matthews*")³⁸ who explained that "[c]lass closure is a different concept to that of a closed class" in that it is an order that requires "group members to identify themselves by a certain point in time as having an interest in any judgment or proposed settlement" failing which "any subsisting entitlement to damages of the group members relating to the claim may be extinguished."

In *Lam (No 3)* I determined that passengers with overseas contact details who did not register with the plaintiff's solicitors would be removed from the class.³⁹ I also determined that passengers with Australian contact details who did not register with the plaintiff's solicitors were to remain in the class, but they could not participate in any settlement or resolution without the leave of the Court.⁴⁰ Later in *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 at [10], I held that s 183 of the CPA enables the Court to make orders dismissing group members' claims, including orders dismissing them in advance of a determination of the representative plaintiff's case. This power was utilised against Australian group members who had not notified any interest in making a claim. Some of the commentaries appear to regard that step as controversial.⁴¹

Cautionary Note

Finally let me finish on a negative point. None of the cases to which I have referred have been considered on appeal. In fact it does not appear that any provision of Part 10 of the CPA has ever been considered by the Court of Appeal. How these decisions and decisions of the Federal Court on the equivalent provisions to Part 10 of the CPA will fare in the Court of Appeal is not a matter for me to speculate upon.

³⁸ at [23]

³⁹ *Lam (No 3)* at [29] to [30]

⁴⁰ *Lam (No 3)* at [31]

⁴¹ See for example <http://www.kwm.com/en/au/knowledge/insights/rolls-royce-class-action-proceedings-change-practice-closure-20160926>; http://www.jonesday.com/Australian-Court-Closes-Class-11-11-2016/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original