CLASS ACTIONS
FINDING OPPORTUNITIES - DEALING WITH THE ISSUES

PAPER PRESENTED BY JOHN. E. ROWE
9TH FLOOR WINDEYER CHAMBERS, SYDNEY

McMULLIN v ICI

The prospects of this case were recognised by a very bright country solicitor (whose first love was droving), in that he identified the possibility of this class action.

The case was listed before Wilcox J, a very learned, erudite and practical judge in the Federal Court. His interpretation of the legislation and rulings set the way in which class actions would be run (at least until recently in the New South Wales Supreme Court). His rulings included:

1. No opt out until liability had been decided or admitted.
2. Separation of liability hearing, before hearing of individual claims.
3. The power to close the class was found in a general power.
4. He did not waste time on frivolous Notices of Motion.
5. Very aware of the protection of the rights of members of the class.

WINTERFORD v ASPEN
COLLIN v PFIZER

Both cases were commenced on the one Statement of Claim as they had the same common issues.

The solicitors are a competent middle sized Melbourne firm. A Salvation Army employee brought a client to them suffering from Parkinson's disease and had suffered the gambling side effects of the drug. The case was started in the Federal Court and group members included people in all states of Australia. The solicitor sought advice from a firm specialling in class actions and subsequently became the first legal firm to be publically listed, and were advised it would cost at least $10,000,000 to run the cases and they would lose. The solicitors wrote to all group members and advised they would no longer fund the proceedings and they should seek their own legal advice. One such group member was referred to me for advice and with his consent I contacted the solicitors, went to Melbourne and had a lengthy conference with them. My advice included:

1. They would win the case.
2. The costs would be less than $1,000,000.
3. There were solicitors in various states that would underwrite the costs for a share of the cases.

The solicitor spoke to interstate solicitors who indicated a willingness to co-operate with them. The solicitors then decided to run the case themselves.

The matter of *Collin* settled early.

The defendants in *Winterford* indicated intention to vigorously fight to the bitter end until confronted with discovery when they agreed to discuss settlement. Pfizer sent their "resolution lawyer" from the USA for two mediations, and it later settled without his interference.

The solicitor's fees were significant.

LAM v ROLLS ROYCE

Currently before Beech-Jones J in the New South Wales Supreme Court alleging negligence.

Breach of duty was admitted on the eve of orders for discovery.

The class consists of crew and passengers who suffered psychiatric trauma as a result of the catastrophic failure of the number two engine of a Qantas A380 out of Singapore. The passengers are from many different countries.

The breach in the manufacture occurred in the United Kingdom and the United Kingdom law is applied to the proceedings.

There are some significant differences in the UK law as to both non-economic loss and economic loss. The case has been moving slowly with numerous direction hearings.

The Court has made a number of orders that are different to what might be made in the Federal Court in including:

1. The class members provide particulars of their losses to enable the defendants to gauge the defendant's exposure.
2. Requiring members of the class to register before any admission of liability.

The conduct of the case has put unexpected costs imposts on the plaintiff's solicitors and has probably discouraged some members of the class.

At the time of writing a process of settlement of the individual cases has commenced.

DE JONG v CARNIVAL

Currently before Beech-Jones J.

The Federal Court and the Victorian Supreme Court have consistently refused to make orders that the group members contribute to security costs when the lead applicant is an impecunious individual without funding. The Court has always had the power to do so in appropriate case.

In *Kelly v Wilmot Forests Ltd (in liquidation)* [2012] FCA 1446 a group of wealthy people invested in the defendant to obtain a tax advantage. The defendant went into liquidation and a class action was commenced against the directors of the defendant and the banks that had supported the investment. The

banks had knowledge as to the wealth of the group members. The group members agreed to provide funds for the running of the action. The defendants applied to the Court for an order for security for costs. In the first instance the application was refused but on appeal, in its discretion, the Court granted the application in its inherent jurisdiction under section 33ZF.

The following matters were considered relevant:

(a) Whether there is reason to believe that the applicants will be unable to pay the respondents costs if so ordered, that is, whether the applicants are impecunious?
(b) Whether the applicant's insufficiency of means is caused by the conduct which is the foundation of the action?
(c) The promptness of the application and the stage of the proceedings at which an application for security is brought.
(d) Whether the proceedings has become bogged down with "interminable and expensive interlocutory applications" for which the applicants bear a responsibility?
(e) The strength and bona fides of the applicants' claim for relief from the respondents.
(f) Whether the applicants have been deliberately selected as "persons of straw", in order to immunise from costs orders group members of substantial means?
(g) Whether the proceeding is essentially defensive in nature?
(h) Whether the applicants are suing for someone else's benefit?
(i) The characteristics of the group members. For example do they include corporations or natural persons, and are they rich or poor?
(j) Whether someone who stands to benefit from the litigation is funding the applicants?
(k) Whether security would have been ordered if separate actions had been brought by the group members?
(l) Whether an order for security would stifle the action and shut the applicants out from pursuing an arguable claim?

In *De Jong* Beech-Jones J ordered the plaintiff to contact the group members to ascertain whether they were willing to contribute to security for costs and how much. And I have no precedent for such an order. Clearly it would have the effect of dissuading some group members from continuing in the class.

At the time of writing HH has not delivered a judgment on a security for costs application by the defendant.

RADIATION CAUSING CANCER

This is a case that is presently under investigation to ascertain whether or not such a case can be mounted.

Sand mining for heavy metals and rare earths has been pursued in Australia since the 1930s.

Monazite is a rare phosphate mineral that is very heavy and contains thorium. Thorium is radioactive and can be used as nuclear fuel and in nuclear weapons. In the early days of sand mining the monazite was not extracted and was left in the tailings. As a result of the process it was brought to the surface rather than being covered deep in the sand for millennia. The occupational health issue of thorium is radiation.

In the mid 1980s voluntary codes of practice were introduced to protect workers from the radiation from mining sands.

On 13 May 1982 John W. Gofman, M.D.Ph.D, Professor Emeritus, medical physics University of California, wrote in relation to radiation and human health, inter alia:

> *"You can deal with the problem very simply if you follow a few simple rules.*
> *(a) There is no safe dose of radiation. Even background radiation can be expected to produce cancer and leukaemia in proportion to the radiation dose.*
> *(b) The risk from radiation is cumulative.*
> *(c) Children are far more sensitive to radiation induced cancer than are adults."*

In a small country town in the north-eastern part of New South Wales in a street where the houses adjoin and have been built on tailings from sand mining, there have been 30 cases of fatal cancer with eight cases in one family. This is an alarming statistic.

At law the issue will be causation.

In 2000 a researcher named Barry Finette carried out research on children suffering cancer in Toms River. He had previously ascertained that examination of DNA could detect the presence of coal dust in the DNA. He was one of the first researchers in an area of science referred to as bio epidemiology or molecular epidemiology. Since then there has been significant advances in identifying how various carcinogens affect the DNA. One such research has identified how radiation may damage the DNA.

If the evidence shows that the victim has been:

1. Exposed to excessive (that is more than background) radiation; and
2. Evidence is available to confirm damage to DNA which, in my view, would amount to an injury; then
3. Arguably one may overcome the issue of causation even if, at that time, the effect of the radiation hasn't caused the victim to develop cancer but only significantly increased the likelihood of he or she doing so.

Many possible class actions involve a concentrated area of research with the knowledge of the issues. Frequently many such enquiries do not initially lead to a level of confidence that would allow the commencing of a class action. On the other hand, if one intends such enquiries lead to a successful class action, then the effort is worth it.

At the time of writing we are awaiting a response from a scientist as to whether exposure to excessive radiation can be detected on DNA.

J.E. ROWE
9 WINDEYER CHAMBERS
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