HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

ARMIN HERBERT GERLACH APPELLANT

AND

CLIFTON BRICKS PTY LIMITED RESPONDENT

Gerlach v Clifton Bricks Pty Ltd [2002] HCA 22
30 May 2002
S43/2001

ORDER

1. *Appeal allowed with costs.*
2. *The orders of the Court of Appeal of the Supreme Court of New South Wales made on 28 April 2000 be set aside.*
3. *The matter be remitted to that Court to hear and determine the grounds of appeal other than those seeking to challenge the order dispensing with a jury.*
4. *The costs of the appeal to the Court of Appeal to be in the discretion of that Court.*

On appeal from the Supreme Court of New South Wales

Representation:

J M Ireland QC with J F Burn for the appellant (instructed by Gary Robb & Associates)

B W Rayment QC with A R Ashburner for the respondent (instructed by Hunt & Hunt)

CATCHWORDS

Gerlach v Clifton Bricks Pty Ltd

Appeals – Interlocutory orders – Interlocutory order dispensing with a jury in the trial of a civil matter – Leave to appeal against interlocutory order not sought – Action tried by judge alone – Later appeal against both final judgment and order to dispense with a jury – Whether order to dispense with a jury gave rise to a substantial wrong or miscarriage warranting an order for a new trial.

Practice and procedure – Interlocutory order – Entitlement of disaffected party to save up challenge as ground of appeal against final judgment.

Courts – Statutory conferral of discretionary powers – Need to exercise powers in accordance with the statutory grant – Need to afford liberal construction to powers conferred on courts.

Words and phrases – "substantial wrong or miscarriage".

District Court Act 1973 (NSW), s 79A.
Supreme Court Rules 1970 (NSW), Pt 51AA r 16.

1 GAUDRON, McHUGH AND HAYNE JJ. In 1989, the appellant sued the respondent, in the Supreme Court of New South Wales, for damages for personal injuries which he alleged that he had suffered in the course of his employment by the respondent. The proceedings were remitted for hearing in the District Court. Soon after the proceedings were instituted, the respondent took the necessary steps to require trial by a judge and jury.

2 The proceedings were fixed for trial in May 1998. A few days before the hearing, the appellant applied for, and obtained in the District Court (Judge Christie), an order, pursuant to s 79A of the *District Court Act* 1973 (NSW)[1], dispensing with the jury. The respondent did not seek leave to appeal against this order. The trial proceeded before another judge (Acting Judge Morrison), and the appellant obtained judgment for $390,000.

3 The respondent appealed to the Court of Appeal. By its amended notice of appeal it appealed "from the decision of Judge Christie on 15 May 1998 dispensing with the Jury and of Acting Judge Morrison in the substantive matter on 21 May 1998". The Court of Appeal (Priestley, Handley and Giles JJA) unanimously held that the order dispensing with the jury should not have been made. The Court set aside that order. Because, in its opinion, the order dispensing with the jury should not have been made, the Court of Appeal concluded that the action had "therefore not been tried according to law" and it set aside the judgment in the action and ordered that there be a new trial. The issue in this matter is whether the Court of Appeal was right to make the orders which it did.

Interlocutory orders and appeal against final judgment

4 In the course of a trial, and even before the trial commences, interlocutory orders may be made which affect the substantive rights of the parties. Rulings that are made in the course of trial about what evidence will be admitted are an obvious example. To adopt a rule that precluded challenging any interlocutory order except by an appeal against that order would provoke unnecessary multiplication and fragmentation of proceedings.

5 It is not surprising, then, that in at least some circumstances, a party may challenge the correctness of the final judgment entered in a matter on the ground

---

1 "In any action, the Court may order, despite sections 77, 78 and 79, that all or any questions of fact be tried without a jury." Section 79A was repealed by the *Courts Legislation Amendment (Civil Juries) Act* 2001 (NSW), Sched 1, item 4.

that some interlocutory decision was wrong. Again, evidentiary rulings provide the obvious example[2]. As was said, in a very early judgment of this Court[3]:

> "There is only one judgment of the Court appealed from … and on the appeal all grounds that were taken by the appellant in the course of the proceedings are open to him."

As Griffith CJ had said earlier, in the course of argument in *Nolan v Clifford*[4]:

> "On an appeal from a final judgment, all points raised in the course of the case are open to the unsuccessful party. If a point is decided against him on an interlocutory application, there is no need for him to keep on raising it."

In both *Nolan v Clifford* and *Crowley v Glissan* reference was made to *Maharajah Moheshur Sing v Bengal Government*[5] as authority for the proposition stated.

6 The proposition that any interlocutory order can be challenged in an appeal against the final judgment in the matter is often stated in unqualified terms[6]. The better view, however, is reflected in the formulation adopted in Spencer Bower, Turner and Handley[7] where it is said that "on an appeal from the final order an appellate court can correct any interlocutory order *which affected the final result*" (emphasis added).

---

2 *Bunning v Cross* (1978) 141 CLR 54 at 82 per Jacobs J.

3 *Crowley v Glissan* (1905) 2 CLR 402 at 403 per Griffith CJ.

4 (1904) 1 CLR 429 at 431.

5 (1859) 7 Moo Ind App 283 at 302 [19 ER 316 at 323]. Reference might also be made to *Jones v Gough* (1865) 3 Moo PCC (NS) 1 at 12 [16 ER 1 at 5]; *Forbes v Ameeroonissa Begum* (1865) 10 Moo Ind App 340 at 359-360 [19 ER 1002 at 1009]; *Sheonath v Ramnath* (1865) 10 Moo Ind App 413 at 423 [19 ER 1029 at 1032].

6 See, for example, *Nolan v Clifford* (1904) 1 CLR 429 at 431: "*all* points … are open".

7 *The Doctrine of Res Judicata*, 3rd ed (1996) at 79-80, par 170.

7 It is necessary to make the qualification, "which affected the final result", at least to reflect the well-established principle that a new trial is not ordered where an error of law, fact, misdirection or other wrong has not resulted in any miscarriage of justice. That principle, well established in the common law[8], is applied to appeals to the Court of Appeal of New South Wales by Pt 51AA r 16(1) of the Supreme Court Rules 1970 (NSW). That rule provides:

> "The Court of Appeal shall not order a new trial –
>
> (a) on the ground of misdirection, non-direction or other error of law;
>
> (b) on the ground of the improper admission or rejection of evidence;
>
> (c) where there has been a trial before a jury, on the ground that the verdict of the jury was not taken upon a question which the trial judge was not asked to leave to the jury; or
>
> (d) on any other ground,
>
> unless it appears to the Court of Appeal that some substantial wrong or miscarriage has been thereby occasioned."

8 Further, it may be that there are some kinds of interlocutory decisions made, other than in the course of the hearing which leads to entry of final judgment in the proceeding, which may present some other issues for consideration. There are circumstances in which an interlocutory decision must be treated as concluding an issue between the parties[9]. Whether all decisions of that kind may be challenged in an appeal against the final judgment in the proceeding is a question to which a general answer need not be attempted. It is enough to notice in this regard the decision of the Court of Appeal in New South Wales, in *David Syme & Co Ltd v Lloyd*[10]. It was held there that a ruling made in the separate trial of an issue (that the article published was capable of bearing the imputations pleaded in a claim for defamation) was open to challenge on appeal against a subsequent jury verdict. This conclusion is consistent with the qualified

---

8 *Conway v The Queen* (2002) 76 ALJR 358; 186 ALR 328.

9 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 245 per Mason CJ; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 642.

10 [1984] 3 NSWLR 346.

formulation of the relevant principle. It is, as we say, unnecessary to explore the limits of the principle.

The present case

9 As has been noted earlier, the respondent's appeal to the Court of Appeal sought to challenge both the order dispensing with a jury and the judgment entered at trial. The correctness of the order dispensing with a jury would be of significance to the parties if, and only if, the judgment was to be set aside and a new trial had. If the judgment was not set aside, any dispute about the order dispensing with a jury would be hypothetical.

10 In the Court of Appeal it had been contended that Judge Christie's exercise of the discretion to make an order dispensing with a jury had miscarried. (In the course of oral argument, in this Court, reference was made to a number of statements that Judge Christie had made in the course of the argument before him. Some of those statements, it might be thought, indicated an inappropriately firm predisposition against trial of civil actions by a jury. It was, however, not submitted in the Court of Appeal, or in this Court, that there was any want of procedural fairness in the hearing of the application to dispense with a jury and it is, therefore, not necessary to say more about them.) The first question for the Court of Appeal was not, as appears to have been supposed, whether Judge Christie's discretion had miscarried. It was whether, assuming the exercise of discretion to dispense with a jury had miscarried, that circumstance, standing alone, could warrant the conclusion that some substantial wrong or miscarriage had been thereby occasioned. If it had not, there was no power to order a new trial. Without an order for a new trial, a debate about the correctness of the order dispensing with a jury was wholly academic. The answer given by the Court of Appeal to this question lay in its conclusion that the action had not been tried according to law. But that is principally a statement of the conclusion it reached about the correctness of the order dispensing with a jury. As the terms of Pt 51AA r 16(1) make plain, it is not enough to point to some error of law to warrant ordering a new trial. More must be demonstrated – that some substantial wrong or miscarriage has been thereby occasioned.

11 The proposition that trial by judge alone, as opposed to trial by judge and jury, can amount, without more, to a substantial wrong to a party or to a miscarriage of justice is a startling proposition. It is true that, assuming the order dispensing with a jury should not have been made, a party to litigation has been wrongly deprived of the mode of trial which it *desired*. But that party has had a trial which, for present purposes, must be assumed to have been a trial according to law. No error in the *conduct* of that trial (as distinct from the mode of trial) has yet been established. And in any event the trial was by one of the modes of trial prescribed for disposition of litigation of this kind.

12 No doubt the dispute between the parties about whether the trial should be with or without a jury reveals that each had a different view of which mode of trial was preferable and of advantage to it. But the fact that, rightly or wrongly, parties have reached different views about that question does not demonstrate that a substantial wrong or miscarriage is suffered if one rather than the other mode of trial is adopted. Indeed, to hold that adopting one, rather than the other, available mode of trial does involve a substantial wrong or miscarriage necessarily entails the corollary that the party propounding the opposite contention would be exposed to a substantial wrong or miscarriage if that party's chosen mode of trial was not adopted.

13 It is not to the point to say, as was suggested in the course of oral argument, that the press of business in the Court of Appeal is so intense that a challenge to the correctness of the order dispensing with a jury should be left over to any appeal against final judgment. The principles governing the grant of leave to appeal against interlocutory orders are well established[11]. If those tests are met, leave to appeal against an interlocutory order, such as an order dispensing with a jury, should be given. If the tests are not met, leave should be refused. No doubt, in considering any application for leave to appeal against an order dispensing with a jury, proper account should be taken of the fact that, if the trial proceeds, the correctness of the order made on that application cannot then be questioned. If it is plain that wrong principle was applied by the judge considering the application, it may well be that leave should be granted. By contrast, if the alleged error is not so clear, due account would have to be taken of the fact that the parties are left with one of the two modes of trial provided by law. In such a case it may well be "impossible to assert that even if the judge's decision was erroneous any substantial injustice will be done"[12] by allowing the decision to stand. Further, the fact that the order dispensing with a jury was, in this case, made very close to the day fixed for the trial to begin is also not to the point. If the order was to be challenged, application could and should have been made to adjourn the trial.

14 Even if the order dispensing with a jury was wrong, that was not sufficient reason to order a new trial in this matter. It is, therefore, unnecessary to consider whether what are said to be principles established by the Court of Appeal's

---

11 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; *In re the Will of F B Gilbert (dec'd)* (1946) 46 SR (NSW) 318.

12 *Darrel Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401 at 410.

decision in *Pambula District Hospital v Herriman*[13] are consistent with the many decisions of this Court that deal with the construction of provisions in the form of s 79A of the *District Court Act*[14].

15 The appeal should be allowed with costs, the orders of the Court of Appeal set aside, and the matter remitted to that Court for it to hear and determine the grounds of appeal other than those seeking to challenge the order dispensing with a jury.

---

13 (1988) 14 NSWLR 387.

14 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505 per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ, 316 per Toohey and Gummow JJ; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81-82 [23] per Gaudron and Gummow JJ, 96-97 [66] per McHugh J (with whom Brennan CJ agreed on this point); *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 56-57 [112] per Gaudron J; *CDJ v VAJ* (1998) 197 CLR 172.

16 KIRBY AND CALLINAN JJ. This appeal[15] concerns the practice of New South Wales courts of dispensing with a jury in the trial of a civil action for which a party, with the right to do so, has summoned a jury.

The facts and order dispensing with a jury

17 Mr Armin Gerlach (the appellant) was employed by Clifton Bricks (Queanbeyan) Pty Ltd (the respondent). He claims that in 1983 he suffered an injury to his back in the course of his employment. In May 1985 his employment was terminated. Unemployed, he resorted to alcohol and prohibited drugs, allegedly to cope with back pain. This led to his arrest and conviction for involvement with drugs. Between 1993 and 1995 he served a term of imprisonment. He sued the respondent for damages for negligence as his employer.

18 The appellant's case was commenced in the District Court of New South Wales. The respondent disputed liability. One aspect of its case was a suggestion that the appellant had been dismissed on suspicion of involvement in the removal of thousands of bricks belonging to the respondent, the absence of which had been discovered by a stocktake. As well, there were disputes about whether the appellant had reported his alleged injury and whether his claimed incapacity for work was occasioned by that injury or by his excessive use of alcohol.

19 In the normal course of events, the appellant's action would have been heard before a single judge of the District Court. That is the mode of trial that applies to such a proceeding, except where the *District Court Act* 1973 (NSW) ("the Act") otherwise provides[16]. However, in accordance with the Act[17], the respondent filed a requisition for trial by jury. It paid the applicable fee. The proceedings were thereupon listed to be tried before a judge and a civil jury of four persons[18]. Eventually, the trial was set down for hearing in the District

---

15 From *Clifton Bricks Pty Ltd v Gerlach* unreported, Supreme Court of New South Wales (Court of Appeal), 28 April 2000 per Handley JA, Priestley and Giles JJA concurring; [2000] NSWCA 90.

16 eg the Act, s 77(5)(b).

17 The Act, s 78(1) as it then stood. The section has since been repealed by *Courts Legislation Amendment (Civil Juries) Act* 2001 (NSW), Sched 1 item 4. See now s 76A. The repeal does not affect the present matter.

18 cf Henchman, "The New South Wales Jury of Four Persons", (1959) 33 *Australian Law Journal* 235.

Court in Sydney on 19 May 1998. This was fourteen years after the alleged injury and nine years after the jury had been requisitioned.

20 On 15 May 1998, the "second last working day before the trial"[19], the appellant's legal representatives applied to the District Court, on motion, for an order dispensing with trial by jury. That motion was heard by Christie DCJ. The respondent opposed the order.

21 The transcript of the argument on the motion reveals that the appellant relied essentially upon two grounds. The first was that costs would be incurred to bring medical witnesses, particularly one from Canberra who reportedly intended to charge $3,000 a day for his time in Sydney. This witness also had difficulty in travelling to Sydney until later in the week. The second reason advanced (said to be more important) was the appellant's criminal record and sentence of imprisonment. It was submitted that this would cause prejudice to the appellant's case before a jury, whereas (as the appellant's counsel put it) a judge would disregard that fact if it did not bear on the personal injury issue.

22 In the course of the argument of the motion, Christie DCJ elicited the fact that the medical witness came from Melbourne, not Canberra, and was required to attend for cross-examination whatever the mode of trial. As to the criminal record, his Honour pointed out that evidence of the conviction and imprisonment might be excluded by the judge if it was irrelevant to the issues for trial. His Honour then made a number of observations indicating his disapproval of jury trial of civil actions. For example he said[20]:

> "… I'll tell you straight out, I would do away with all civil juries in the State, instantly and retrospectively. I think it leads to, quite frankly, perfectly obvious miscarriages of justice in these Courts every week, every single week. … I've been astounded here in the last six weeks calling this list, how many plaintiffs seek juries. I think it's prima facie evidence of professional negligence myself, for a plaintiff to seek a jury."

23 Counsel for the respondent told Christie DCJ that such considerations were irrelevant to the exercise of his discretion. Counsel resisted reference to the expense of calling the medical witness from interstate. He reminded the judge

---

19 *Clifton Bricks Pty Ltd v Gerlach* [2000] NSWCA 90 at [11]. The trial was listed for hearing on a Tuesday, the motion was heard on the preceding Friday.

20 Transcript of *Gerlach v Clifton Bricks Pty Ltd* unreported, District Court of New South Wales, 15 May 1998 per Christie DCJ at lines 154-165.

that the discretion had to be exercised by reference to considerations specific to the case.

24 Christie DCJ reserved his decision on the motion. He gave his ruling later the same day. He acknowledged the need for what he described as "exceptional circumstances [to be shown], as distinct from circumstances which may arise in many cases"[21]. He referred to the interstate medical witness and concluded that he should exercise his discretion in favour of the appellant, whilst acknowledging that the case was, as he described it, "line-ball" and said that the appellant had only "marginally convinced" him. He returned to his opinion that "civil cases should no longer proceed before juries"[22]. He said that this was "only a personal view" and that he did not act on that view in the present or in other cases. He went on[23]:

> "I think that the Courts have to take some steps, where it is appropriate, to attempt to minimise the time occupied in cases and to attempt to minimise the enormous cost of litigation … It goes without saying the case would, of course, be more expeditiously dealt with without a jury, but that is so in every case and that cannot be a ground for granting the application."

The suggestion that the appellant's criminal conviction, and the prejudice it might involve in front of a jury, could constitute a reason that might be taken into account in acceding to the application, was rejected by Christie DCJ.

25 The result was that the jury was dispensed with. The case was ordered to proceed before a judge sitting alone on 19 May 1998. So it did. The respondent did not request an adjournment of the trial to permit it to contest the interlocutory order of Christie DCJ immediately. However, no party disputed the statement in the reasons of the Court of Appeal that "there was then nothing that the appellant could realistically have done to challenge that order before the trial"[24]. In effect, the respondent saved the point up, if it should need it, for any appeal that might follow the trial.

---

21 *Gerlach v Clifton Bricks Pty Ltd* unreported, District Court of New South Wales, 15 May 1998 per Christie DCJ at 1.

22 *Gerlach v Clifton Bricks Pty Ltd* unreported, District Court of New South Wales, 15 May 1998 per Christie DCJ at 1.

23 *Gerlach v Clifton Bricks Pty Ltd* unreported, District Court of New South Wales, 15 May 1998 per Christie DCJ at 1-2.

24 *Clifton Bricks Pty Ltd v Gerlach* [2000] NSWCA 90 at [9].

26 The trial was heard by a different judge of the District Court, Morrison ADCJ. He was unimpressed with the arguments concerning the appellant's criminal conviction and alleged dishonesty. He found in the appellant's favour on the issue of liability. He entered judgment for the appellant in the sum of $390,000.

The decision of the Court of Appeal

27 From this judgment, the respondent appealed to the New South Wales Court of Appeal. Its first ground of appeal complained that Christie DCJ had erred in dispensing with the jury. There were other grounds of appeal relating to the findings of negligence and the quantification of damages. In the way the matter developed in the Court of Appeal, the latter grounds of appeal were not considered. The respondent succeeded on the first ground.

28 In giving the reasons of the Court of Appeal, Handley JA, with Priestley and Giles JJA concurring, held that it was open to the respondent to pursue its challenge to Christie DCJ's interlocutory order. He concluded that the principle to be applied was that stated by the Court of Appeal in *Pambula District Hospital v Herriman*[25], which governed the decision of Christie DCJ on the motion. Although stated in respect of an order dispensing with a Supreme Court jury, it had been held[26] (and was not contested in this Court) that the same approach would be required by the legislation governing orders dispensing with a jury in the District Court.

29 The suggestion that the added costs and delays occasioned by having to call an interstate medical witness (and certain other witnesses who lived in the country) was a ground for dispensing with the jury in the present case left Handley JA unimpressed. His Honour said that these were "simply the particular consequences in this case of the general consequences of trial with a jury in every case"[27]. He pointed to the fact that the motion had been brought very late. He described the course embarked upon by the appellant and his legal advisers as "a high risk strategy" which involved "the chance that it would cause the trial to miscarry"[28].

---

25 (1988) 14 NSWLR 387 ("*Pambula*").

26 *Langford v Turnbull* unreported, Supreme Court of New South Wales (Court of Appeal), 29 May 1990 per Kirby P, Meagher and Handley JJA.

27 *Clifton Bricks Pty Ltd v Gerlach* [2000] NSWCA 90 at [8].

28 *Clifton Bricks Pty Ltd v Gerlach* [2000] NSWCA 90 at [11].

30 In Handley JA's opinion, Christie DCJ should not have made the order dispensing with the jury. It had led to the result that "the action against the appellant has therefore not been tried according to law"[29]. In Handley JA's view, it was impossible to conclude that a jury trial could not have produced a different result. No discretionary reason existed to deny relief. In the result, the judgment of the District Court was set aside, as was the order of Christie DCJ dispensing with the jury. The appellant's motion to the District Court was dismissed. The proceedings were returned to that Court for retrial. Unless a later order were validly made by the District Court dispensing with the jury, upon grounds different from those which had convinced Christie DCJ, or unless this Court were to intervene, the consequence of the foregoing orders would be that, in accordance with the respondent's requisition, the re-trial of the appellant's action would take place before a civil jury.

The issues

31 In the way that the appeal to this Court was argued the following issues arise for decision:

(1) Was it open to the respondent, in its appeal to the Court of Appeal, to challenge the interlocutory order of Christie DCJ dispensing with the jury for the trial of the appellant's action in the District Court? (The interlocutory appeal point);

(2) If it was, did the Court of Appeal's decision upon that challenge miscarry because it had failed to consider, or erroneously considered, whether a "substantial wrong or miscarriage" had been occasioned warranting an order for a new trial[30]. (The miscarriage point);

(3) If not, did the Court of Appeal err in following its own earlier authority in *Pambula*[31], having regard to the principles later stated by this Court in *Knight v K P Special Assets Ltd*[32] and *Patton v Buchanan Borehole Collieries Pty Ltd*[33]? (The judicial discretion point); and

---

29 *Clifton Bricks Pty Ltd v Gerlach* [2000] NSWCA 90 at [10].

30 Supreme Court Rules 1970 (NSW) Pt 51 r 23; Pt 51AA r 16.

31 (1988) 14 NSWLR 387.

32 (1992) 174 CLR 178.

33 (1993) 178 CLR 14.

(4) Assuming that the principle in *Pambula* or some other principle was applicable to control the exercise of the discretion of Christie DCJ to dispense with the jury, did the Court of Appeal err in holding that his Honour had erroneously exercised his discretion in dispensing with the jury as he did? (The exercise of discretion point).

The applicable legislation

32 The meaning, and intended operation, of the provisions of the Act governing the powers of a judge of the District Court to dispense with trial by jury, where a jury has been summoned to try an action, can be understood best after a reminder of the history of jury trials of civil proceedings.

33 In England, for more than five hundred years, jury trial was commonly observed in civil cases. There were some exceptions, principally in the "very limited classes of cases assigned to the Chancery Court"[34]. Such cases apart, trials before juries were very common, indeed standard. This fact, like other features of English legal practice, is reflected in the Constitution of the United States which still provides for such jury trials[35].

34 Following a report of the common law commissioners in England in 1853, and notwithstanding the passage in the 1870s of the *Judicature Acts*, the right to jury trial was substantially maintained for contested issues of fact in civil causes. Only the manpower shortage due to the First World War led, in 1918, to a temporary interruption[36]. When in 1933 the right to jury trial of civil causes was substantially restored in England[37] provision was made, nonetheless, for a general discretion in a judge to determine whether the trial is to be "with or without a jury"[38]. It was because the legislation was so stated that the judicial power to dispense with the jury in England was sometimes inaccurately

---

34 *Ford v Blurton* (1922) 38 TLR 801 at 805 per Atkin LJ; cf *Ward v James* [1966] 1 QB 273 at 290.

35 United States Constitution, VIIth Amendment: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…"

36 *Ford v Blurton* (1922) 38 TLR 801 at 805.

37 By the *Administration of Justice (Miscellaneous Provisions) Act* 1933 (UK).

38 *Administration of Justice (Miscellaneous Provisions) Act* 1933 (UK), s 6.

described as an absolute one[39]. Certain exceptions were preserved for trial by jury in so-called "reputational" cases. Moreover, the judge was empowered to order that any matter requiring prolonged examination of documents and so forth might be tried by judge alone[40].

35 Partly because of the language of the legislation under which civil juries were revived in England and partly because of attitudes that had developed during the interregnum following their abolition in that country, judicial elaborations of the applicable legislation introduced in England notions that an applicant for jury trial had to show "special circumstances". This was so although such requirements were not, as such, part of the legislative prescription[41]. The judicial approach in England also appears to have been influenced by judicial policy. Until very recently juries were commonly thought to be unfavourable to defendants and insurers; if judges decided damages actions, there was a greater potential for consistency than if juries did so[42]. In this way, following the interruption to longstanding practice, judicial attitudes to jury trials of civil causes in England began to change.

36 With the establishment of the Australian colonies, it was natural for the free settlers from England to desire jury trial both for criminal and civil cases. The delay in introducing that mode of trial was a major source of friction with the colonial governors. The first provisions for trial by jury in civil causes, both in New South Wales and Van Diemen's Land, have been described elsewhere[43]. Once juries were introduced, at least so far as New South Wales was concerned, they became the ordinary mode of trial. Thus "all actions at law and civil issues of fact … and all damages and sums of money recoverable" were to be assessed by jury[44].

---

39 *Ward v James* [1966] 1 QB 273 at 291-293 referring to *Hope v Great Western Railway Co* [1937] 2 KB 130.

40 *Administration of Justice (Miscellaneous Provisions) Act* 1933 (UK), s 6.

41 See *Watts v Manning* [1964] 1 WLR 623; [1964] 2 All ER 267; *Hennell v Ranaboldo* [1963] 1 WLR 1391; [1963] 3 All ER 684; *Sims v William Howard & Son Ltd* [1964] 2 QB 409.

42 cf *Pambula* (1988) 14 NSWLR 387 at 396.

43 *Caledonian Collieries Ltd v Fenwick* (1959) 76 WN (NSW) 482 at 488-490; Henchman, "The New South Wales Jury of Four Persons", (1959) 33 *Australian Law Journal* 235.

44 *Jury Act* 1912 (NSW), s 29.

37 Provision was eventually made for the parties to agree to dispense with a jury in proceedings before the Supreme Court of the colony[45]. Even then, a judge might at any time order that all or any of the issues of fact be tried with a jury "if it appears to him to be expedient"[46].

38 In the District Court of New South Wales it was long provided that in actions where the amount claimed exceeded a specified sum, the plaintiff or defendant could require that a jury be summoned to try the claim[47]. Indeed, provision was made for the judge to so order although the parties had not made such a requisition[48]. Such provisions reflected the practice that was observed in New South Wales before the enactment of the comprehensive legislation of the 1970s governing the Supreme Court and the District Court. That legislation can only be fully understood if viewed against the background of the law that preceded it.

39 As to the District Court, provision was made in the Act of 1973 for the summoning of a jury. Relevantly, the provision read:

> "78(1) In any action (other than an action to which section 79 applies), where the amount claimed exceeds $100, any party may, within the prescribed time, by filing a requisition for trial with a jury and paying the fee prescribed by the regulations made under section 150 require that a jury be summoned to try the action, and a jury shall be so summoned".

40 Section 79 of the Act, to which reference is there made, made special provision in relation to what are described in the marginal notes as "running down cases". However, even then, relevantly to the proceedings such as the present, s 79(4) made it clear that the section did not apply to an action for damages in respect of bodily injury to any person where the action "is based upon an act, neglect or default of the defendant for which, if proved, he would, as the employer of that person and not otherwise, incur liability to the plaintiff".

---

45 *Supreme Court Procedure Act* 1900 (NSW), s 3(1).

46 *Supreme Court Procedure Act* 1900 (NSW), s 3(2).

47 District Courts were first established in New South Wales in 1858. See *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 473 [118].

48 *District Courts Act* 1912 (NSW), s 90(1).

41 In short, as originally enacted in 1973, the Act substantially continued in the District Court of New South Wales the facility of jury trial inherited from the predecessor legislation governing District Courts in that State. Where a special exception was intended, it was provided for in terms[49]. Similar provisions were made in the *Supreme Court Act* 1970 (NSW)[50].

42 In 1987, a suggestion was made by a judge of the Supreme Court of New South Wales that a power to dispense with jury trial was needed wider than that provided under the *Supreme Court Act* 1970 (NSW). The judge was concerned with a case where the parties could not agree to dispensing with the jury but the plaintiff was dying of an asbestos-related condition. The judge called for the conferral of "an unfettered discretion to order trial by judge alone … to accommodate cases in need of an urgent hearing", except in the limited classes of case where jury trial was specifically prescribed[51]. This suggestion was picked up by the Parliament of New South Wales. It enacted Bills to amend the legislation governing both the Supreme Court and the District Court[52]. Introducing the amendments, the State Attorney-General described the decline in the use of civil juries in most parts of Australia (although not Victoria)[53]. He referred to the judicial proposal for law reform. And he described the new provision in the Bill as one designed to confer a discretion on a judge of each court "to order that a trial proceed without a jury"[54]. However, the Attorney-General emphasised that "the right of a party to a common law action to elect … to have a matter tried by a jury will continue, but subject to this new discretion which will allow a court to direct otherwise … In exercising this discretion, the court will be able to have regard to all relevant circumstances and be able to

---

49 See the history as described in *Pambula* (1988) 14 NSWLR 387 at 397.

50 s 87.

51 *Peck v Email Ltd* (1987) 8 NSWLR 430 at 435. See *Supreme Court Act* 1970 (NSW), s 88 (since repealed by the *Courts Legislation Amendment (Civil Juries) Act* 2001 (NSW) Sched 2 item 1). As to defamation in New South Wales see now *Defamation Act* 1974 (NSW), s 7A.

52 *Supreme Court (Amendment) Act* 1987 (NSW); *District Court (Amendment) Act* 1987 (NSW).

53 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 September 1987 at 13657.

54 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 September 1987 at 13659 (with respect to the District Court of New South Wales).

make a decision consistent with the needs of justice in each particular case"[55]. With respect to the District Court, the new provision, s 79A of the Act, was enacted[56]. It read:

> "In any action, the Court may order, despite sections 77, 78 and 79, that all or any questions of fact be tried without a jury".

Interlocutory appeals

43 *Privy Council practice*: The first issue in this appeal is whether it was open to the Court of Appeal to disturb the judgment entered in the District Court by Morrison ADCJ because of a suggested error in the earlier decision of Christie DCJ. This point was not expressly taken in the grounds of appeal to this Court. However, as it was fully argued and because in our view it fails, we see no reason why it should not be dealt with.

44 It is an established rule of practice, not recent but dating back at least to the early decisions of the Privy Council on appeal from colonial courts, that objections to interlocutory orders will not be lost if not immediately prosecuted by an interlocutory application for leave to appeal. Such complaints could be saved up to be raised in objection to the final judgment in the proceedings between the parties, provided the ground was still relevant to that judgment.

45 In *Maharajah Moheshur Sing v Bengal Government*[57], the Privy Council considered what was in the nature of a preliminary objection to a ground of appeal. The objector submitted, in effect, that a party, wishing to appeal from interlocutory decree, was obliged to prosecute an application for leave to appeal against that decree immediately. Their Lordships rejected the objection. They held that, in an appeal from a decree adjudicating upon the entire suit, the propriety of any interlocutory decree made in the course of the suit, even if acquiesced in and submitted to at the time, could be called into question. Giving the advice of the Privy Council, Dr Lushington explained why (in absence of express legislation to the contrary) this rule should be followed[58]:

---

55 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 September 1987 at 13658.

56 *District Court (Amendment) Act* 1987 (NSW).

57 (1859) 7 Moo Ind App 283 [19 ER 316]. See also *Jones v Gough* (1865) 3 Moo N S 1 at 12 [16 ER 1 at 5].

58 (1859) 7 Moo Ind App 283 at 302-303 [19 ER 316 at 323].

> "We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory Order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory Orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication."

46 The *Maharajah Moheshur Sing Case* was applied soon after in *Forbes v Ameeroonissa Begum*[59]. In the same year, in *Sheonath v Ramnath*[60] the principle was reaffirmed in the judgment of the Privy Council explained in the reasons of Sir James Colvile. *Sheonath* was a case where there had been a preliminary objection to the entitlement of a judge to refer a decision to arbitration by arbitrators selected by him against the will of, and in spite of repeated remonstrances by, the appellant. The issue before the Privy Council was whether, the arbitration having duly taken place, the appellant could persist with an objection to the reference to arbitration or whether he was limited to disputing the ensuing award. The Privy Council concluded that the point was fully open to the appellant. This was so although "he has in terms appealed only against the final decision of the Civil Judge and the confirmation of it by the Judicial Commissioner"[61]. The reasons of the Privy Council continued[62]:

> "The appeal is, in effect, to set aside an Award which the Appellant contends is not binding upon him. And in order to do this he was not bound to appeal against every Interlocutory order which was a step in the procedure that led up to the Award."

---

59 (1865) 10 Moo Ind App 340 at 346 [19 ER 1002 at 1004].

60 (1865) 10 Moo Ind App 413 [19 ER 1029] ("*Sheonath*").

61 (1865) 10 Moo Ind App 413 at 423 [19 ER 1029 at 1032].

62 (1865) 10 Moo Ind App 413 at 423 [19 ER 1029 at 1032].

47 Having decided that no power was vested in the judge to refer the decision to arbitrators nominated by the court against the protest of a party and whilst expressing regret at "the necessity of re-opening this litigation"[63], their Lordships allowed the appeal. They did so despite their findings that[64]:

> "It is not improbable that the decrees impeached give no more to the Respondent that upon a proper adjustment of the accounts will be found to be his due. But the result has been reached by referring a question which involves a compromise of the strict legal rights of the parties, to Arbitrators who were not duly authorized to determine it. The consent of the Appellant was essential both to the form of the issue, and the *constitution of the Tribunal* that was to decide it. It was wholly wanting to the one; if given at all to the other it was, at most, a qualified consent."

The analogies between *Sheonath* and the present appeal, which also concerns the constitution of the decision-making tribunal, are obvious.

48 *Australian authority and practice*: From the earliest days of this Court, the sensible appellate practice instituted by the Privy Council in the foregoing cases has been followed. In *Nolan v Clifford*[65] the principle was stated during argument as expressing the rule which this Court would follow. It was expounded in judicial reasons in the following year in *Crowley v Glissan*[66]. It has been referred to since as an accepted rule of this Court's practice[67]. It is regularly followed in other Australian appellate courts[68]. It is a sensible practice. We should not cut it down.

49 Suggestions were made in argument that the rule should be confined to cases where the interlocutory point in question determined the outcome of the

---

63 (1865) 10 Moo Ind App 413 at 427 [19 ER 1029 at 1034].

64 (1865) 10 Moo Ind App 413 at 427 [19 ER 1029 at 1034] (emphasis added). See also *Sugden v Lord St Leonards* (1876) 1 PD 154 at 208-209.

65 (1904) 1 CLR 429 at 431.

66 (1905) 2 CLR 402 at 403-404.

67 *Bunning v Cross* (1978) 141 CLR 54 at 82.

68 eg *Smith v Tabain* (1987) 10 NSWLR 562 at 565-566; *National Employers Mutual General Insurance Association Ltd v Manufacturers Mutual Insurance Ltd* (1989) 17 NSWLR 223 at 231.

case. Clearly, the point will need to be relevant to the disposition of the case for otherwise it will be a futility to intervene and no appellate court would give it credence. However, the rule permitting adverse interlocutory orders to be contested in an appeal against a final judgment should not be narrowly confined. This approach is sanctioned by one and a half centuries of judicial practice spanning virtually the entire period since appeal, as a creature of statute, became common to our legal system[69]. The principle is also supported by many practical considerations. Interlocutory appeals can often cause great injustice to parties who are less well resourced than those who pursue them. They can be misused by those with "a long purse"[70] to prevent others from securing justice in an early trial of the substantive issues. They can lead to a plethora of appeals and further interlocutory hearings that needlessly raise the costs and delay the conclusion of litigation[71].

50 The Privy Council practice arose in the circumstances of the expenses and delays involved in taking colonial appeals to London. Now, new but in some ways similar considerations reinforce the old rule. Many cases, hotly contested at interlocutory stages, are later settled. Even when pursued to judgment, parties commonly learn the wisdom of selecting their most arguable points to contest. In this way, appellate courts, with congested lists, are spared needless hearings. They are fortified in their resolve to resist unwarranted and premature intervention that, of its nature, would otherwise commonly have to be afforded under great pressure of time.

51 Reasons of authority, principle and policy therefore combine to support the conclusion which the Court of Appeal reached in this appeal. In its appeal against the final judgment of the District Court, it was open to the respondent to prosecute the objection that it maintained to the interlocutory order dispensing with the jury that it had summoned to try the case. The grounds of appeal to the Court of Appeal included a ground based on that objection. The point had been reserved in the trial court. Apart from everything else, this Court should accept the statement of the Court of Appeal that it was impracticable for the parties to secure relief from the order made by Christie DCJ effectively one business day before the trial of the proceedings. The decision concerned the constitution of

---

69 cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322-323 [73]-[74]; 160 ALR 588 at 609-610; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 288 [55].

70 *In re the Will of F B Gilbert (Dec'd)* (1946) 46 SR (NSW) 318 at 323.

71 *Tepko Pty Ltd v Water Board* (2001) 75 ALJR 775 at 806-807 [168]-[171]; 178 ALR 634 at 675-676.

the tribunal to try the appellant's action. The Court of Appeal was therefore correct to deal with the ground before it. In doing so it was supported both by abundant legal authority and by good sense.

Miscarriage of justice

52 *The applicable Rules of Court*: It was then suggested that the Court of Appeal had erred in failing to consider whether there had been a "substantial wrong or miscarriage" before setting aside the judgment of the District Court and ordering a retrial. This argument was advanced, in part, on the basis of the Rules of the Supreme Court of New South Wales and, in part, by reference to judicial authority in Victoria where analogous questions had been considered.

53 In the Rules of the Supreme Court of New South Wales, Pt 51AA r 16 provides that the Court of Appeal shall not order a new trial unless a "substantial wrong or miscarriage has been … occasioned"[72]. It is not absolutely clear that the rule refers to orders for a new trial in the District Court. Although the provision is expressed in general terms, it is arguable that the relevant rule, being one concerned with the Supreme Court, is intended to apply only to orders for a new trial in that Court. On the other hand, the *Supreme Court Act* 1970 (NSW) may suggest a more general operation of the rule[73]. Furthermore, it appears to have been applied to courts other than the Supreme Court[74]. We shall assume that this is the way the sub-rule is intended to operate and that the Court of Appeal, including in relation to an order for retrial in the District Court, must be satisfied that "some substantial wrong or miscarriage" has been occasioned by the error of law or other ground detected by it.

54 In *Balenzuela v De Gail*[75] this Court examined both the common law rule governing orders for a new trial and the rules applicable in jurisdictions which had adopted "the judicature provision in widening the discretion of the court" and

---

72 These rules apply to proceedings which commenced in the Court of Appeal before 1 September 1997. The previous rules were to similar effect: see Supreme Court Rules, Pt 51 r 23. The terms of Pt 51AA r 16 are set out in the joint reasons of Gaudron, McHugh and Hayne JJ at [7].

73 See eg *Supreme Court Act* 1970 (NSW), s 105(b).

74 See eg *Escobar v Spindaleri* (1986) 7 NSWLR 51 (on appeal from the Compensation Court of New South Wales); *Steedman v Baulkham Hills Shire Council [No 2]* (1993) 31 NSWLR 562 (on appeal from the Land and Environment Court).

75 (1959) 101 CLR 226.

the decision of Cussen J in *Holford v Melbourne Tramway and Omnibus Co Ltd*[76] was noted[77]. The distinguished judge in that case had said[78]:

> " … the rule is very little different from the view which was taken by the Courts before the *Judicature Act*. The Courts would not necessarily direct a new trial if the misdirection was on an immaterial or collateral matter, or if the trial resulted in a verdict against the person in whose favour the misdirection operated, or if the misdirection was in respect of a pure question of fact, and the Judge's attention was not called to the mistake. But it is an error to think there never can be a wrong or miscarriage unless it can be shown that the jury were in fact influenced in giving their verdict by a misdirection."

55 The opinions of this Court in *Balenzuela* were to the same effect. Windeyer J remarked[79]:

> "We were pressed with the view that a new trial is always a most 'deplorable result'[[80]]. But whenever there has been a significant error in law it is a necessity of justice, to be deplored but not refused … A new trial cannot be refused just because the court thinks the jury's verdict right, any more than a new trial can now be granted merely because the court thinks the verdict wrong … [A] new trial is, within limits, a discretionary remedy to be applied only if the court thinks there has been a miscarriage of justice. But [where] there has been an error in law; and the court must assume that it has, or may have, resulted in a miscarriage of justice, for a party has a right to have his case tried according to law."

In support of these propositions Windeyer J referred to, amongst other cases, *Hocking v Bell*[81]. He affirmed his agreement with Dixon CJ that the common law principles were "not so far apart as might appear" from the rules under the Judicature system.

---

76 [1909] VLR 497.

77 (1959) 101 CLR 226 at 232-233.

78 [1909] VLR 497 at 526.

79 (1959) 101 CLR 226 at 243-244.

80 His Honour was referring to *Dakhyl v Labouchere* [1908] 2 KB 325 at 327.

81 (1945) 71 CLR 430 at 499. See *Balenzuela v De Gail* (1959) 101 CLR 226 at 244.

56 If an error is shown in the reasons for dispensing with the jury summoned by the respondent, it would be an error of law that involves the misapplication of the discretion reposed in the judge of the District Court. It would then be a bold assertion to suggest that the judge's decision did not affect the outcome of the trial. Who could ever know? As in *Sheonath*[82], dispensing with the jury fundamentally altered the constitution of the tribunal of fact-finding to which the respondent was entitled and which it had requisitioned in accordance with law.

57 We take this to have been the purpose of the reference by the Court of Appeal to *Stead v State Government Insurance Commission*[83]. In that case this Court pointed out that not every departure from the rules of natural justice at a trial entitles a party adversely affected to a new trial. In that sense, *Stead* concerns a problem different from that raised by the present appeal. But in *Stead* this Court showed itself resistant (as it had earlier been in *Balenzuela*) to the notion that because such an error might have been immaterial to the actual result, the outcome of the trial was unaffected and therefore that a new trial would be a futility. The Court in *Stead* concluded that for a party to secure an order for a new trial, that party, otherwise entitled by an error of law (natural justice), need only show the *possibility* of a different outcome.

58 In the present case a party, advised by experienced lawyers, requisitions a jury. It contests the attempt to dispense with jury trial. It prosecutes an appeal against an order that did so. It defends its assertions in this Court. In such a case appellate judges should be extremely circumspect before substituting their own opinions for those of the party concerned. Judges need to exhibit a proper degree of modesty about their own assessments of such questions when measured against the perceived wisdom of professional experience to which Christie DCJ referred as being so apparent that it should be known and acted upon by all legal practitioners practising in the field.

59 *Upholding the alternative mode of trial*: It was secondly suggested that the judgment entered by Morrison ADCJ overcame and repaired any defect in the order of Christie DCJ. This was so because the law of New South Wales provides two modes of trial in civil causes – with a jury and without. On that basis, so it was argued, the outcome of the trial could not itself be labelled a "miscarriage" nor a "substantial wrong" so long as one such type of trial was employed. To say otherwise would be to reflect impermissibly upon a mode of trial for which Parliament had provided.

---

82 (1865) 10 Moo Ind App 413 [19 ER 1029].

83 (1986) 161 CLR 141 at 147 cited in *Clifton Bricks Pty Ltd v Gerlach* [2000] NSWCA 90 at [10] per Handley JA.

60 Some support for this proposition appears in a decision of the Full Court of the Supreme Court of Victoria in *Darrel Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd*[84]. That was a case in which the defendant insurer, in a belated defence, raised for the first time an allegation of material non-disclosure by the plaintiff. With its reply, the plaintiff sought an order for trial by jury. A Master so provided. However, his order was set aside by a single judge. That judge concluded that the plaintiff had not discharged the onus of satisfying him that the trial should be by jury. The judge concluded that trial by judge alone would be more satisfactory. The Full Court dismissed an application for leave to appeal from this order. Winneke CJ, speaking on behalf of the Court, said[85]:

> "[W]e have to consider whether the plaintiff has shown that substantial injustice will result from allowing the order to stand, assuming it to have been an erroneous order. In determining that matter it has to be borne in mind that the system of justice in force in this State provides for two methods or modes of trial, namely, trial by judge and jury, or trial by judge without jury. In a system of justice providing those two modes of trial it must be assumed that each is a satisfactory mode of trial and one which is calculated to produce a fair trial of the action according to law. In such circumstances, even if the learned judge's decision was wrong and is permitted to stand, the plaintiff still has left open to it one of the two methods of trial provided by the system of administration of justice in force in this State."

61 There are several reasons why the principle in *Darrel Lea* (if it can be so described) is inapplicable to the present appeal. First, the operative legal rule is different. Under the Act applicable to the trial of the present proceedings, a party in a case of this type had the right to requisition a jury and it had done so. The onus was clearly on the party seeking to dispense with the jury to establish that such an order should be made. In *Darrel Lea* the plaintiff had initially opted for trial by judge alone and only later sought a jury. The discretion reposed in a judge of the Supreme Court under the law then applicable in Victoria, was at large. It was categorised by the primary judge in that case as "absolute, so far as a judicial discretion can be so described"[86]. "[T]he plaintiff had no right, or

---

84 [1969] VR 401 ("*Darrel Lea*").

85 [1969] VR 401 at 410.

86 *Darrel Lea* [1969] VR 401 at 405 referring to O XXXVI r 7(a) Rules of the Supreme Court of Victoria.

entitlement as of right, to trial by jury."[87] That was not the position of the respondent in the present proceedings.

62 Secondly, whilst it is true that, in New South Wales, under the Act, there were two modes of trial available in the District Court – one with and one without a jury – it would be to substitute the opinion of appellate judges for the legal rights of parties under the Act, to say that one mode was as good as another. Each mode of trial might involve an endeavour to reach just and lawful outcomes. But where a party has the *right* to summon a jury, and has exercised that right, it is not for courts to say that a judge-alone trial is as good as a jury trial, involves no injustice and that the party should be content with its outcome. The vigour with which these and many other parties pursue, and resist, a jury trial is an indication that parties simply do not agree with such a judicial assessment. Indeed they might find such an assessment startling. In a case having the factual features of this, we can understand why that would be so.

63 In earlier times it was plaintiffs who pressed for jury trial and defendants who resisted them[88]. The wheel has turned full circle. Yet in each case, it is the parties who seek to advance their perceived interests. Judges should not ignore their perceptions. It can be assumed that the legal advisers have much greater experience in the outcomes of District Court trials today than the Justices of this Court do. As this Court has repeatedly described it, the jury is the "constitutional" mode of trial for questions of fact[89]. Where, by law, it is a party's right, relevant reasons are needed for dispensing with it.

64 With the decline of the number of civil jury trials, the congestion of court lists and pressures of court management[90], it is not surprising that some judges, in jurisdictions where civil juries remain, would be sympathetic to motions to dispense with the jury. It may equally be expected that appellate courts would then have a function to protect from unlawful deprivation of a jury those who have requisitioned jury trials and who maintain their legal entitlement. A State Parliament could abolish completely any entitlement to a civil jury trial (as

---

87 [1969] VR 401 at 409.

88 A feature of the cases noted in *Pambula* (1988) 14 NSWLR 387 at 406.

89 *David Syme & Co v Canavan* (1918) 25 CLR 234 at 240; *Hocking v Bell* (1945) 71 CLR 430 at 440; cf *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346 at 373 per Lord Wright.

90 *Sali v SPC Ltd* (1993) 67 ALJR 841 at 849; 116 ALR 625 at 636; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 153, 171.

occurred in South Australia[91]). Or Parliament could confine that entitlement to limited cases so as to exempt cases such as the present. Following the hearing of the present appeal the New South Wales Parliament enacted a Bill designed to curtail civil jury trials both in the Supreme Court and the District Court[92]. The amending Act commenced operation on 18 January 2002[93]. It provides some evidence of an acceptance by that Parliament of the law applied by the Court of Appeal in the present case. If the law were as the appellant suggested, the amending Act would have been unnecessary.

65 Unless the Court of Appeal intervened in a case such as the present, effectively, the interlocutory order dispensing with the jury would be final. A party dissatisfied with the judge's order would be faced in every case with the supposed *Darrel Lea* principle. There would then be no effective sanction against inappropriate and unlawful deprivation of the right to jury trial for which the law provides. We cannot accept such a withdrawal of judicial protection of established legal rights. It would not be warranted by the actual decision in *Darrel Lea*. The peculiarities of the facts of that case, and the special provision of the superseded Rules of Court considered there, have led to that ruling being revised and confined by the Court of Appeal of Victoria[94].

66 To a suggestion that *Darrel Lea* stands for a general proposition that once a party has had a trial, it has lost its right to complain about the mode of trial, we would answer in the words of the Privy Council in 1865[95]. We regret the reopening of this litigation. However, (if the ground is made good) it is necessary because it concerns the constitution of the tribunal which by law was authorised to decide the case. This Court should not depart from that principle. Least of all should it do so to substitute judicial opinions about a particular mode

---

91 *Juries Act* 1927 (SA), s 5.

92 *Courts Legislation Amendment (Civil Juries) Act* 2001 (NSW).

93 By that Act, the *District Court Act* 1973 (NSW) is amended. A new s 76A is included which provides that certain civil actions are to be tried without a jury "unless the Court orders otherwise". Such an order is only available where the Court "is satisfied that the interests of justice require that the action be tried by a jury". The former ss 78-79A of the Act are repealed. A transitional provision provides that the amendments do not apply to actions "commenced but not finally determined" before 18 January 2002. The present is such a case.

94 *Victoria v Psaila* unreported, Supreme Court of Victoria (Court of Appeal), 29 November 1999 at [25] per Brooking JA; [1999] VSCA 193.

95 *Sheonath* (1865) 10 Moo Ind App 413 at 427 [19 ER 1029 at 1034].

of trial for the legal rights of parties and the considered advice of their legal representatives as to those rights.

The judicial discretion

67 *The Pambula decision*: Having expressed the foregoing conclusions it is necessary, in the view that we take, to consider the appellant's challenge to the decision in *Pambula*[96]. That decision must be understood in the context of many cases in which, despite the provisions of the Act (and of the *Supreme Court Act* 1970 (NSW) expressed in like terms), judges had dispensed with jury trial seemingly because it was more congenial and convenient for them to sit alone without a jury. The judges' professional experience may have been outside jury trials. And the excuses given for such decisions typically included the press of business, the suggested additional costs, hearing time, delay and inconvenience incurred in jury trials and the fact that judges, making such orders, perceived judicial decisions to have a greater uniformity, predictability and susceptibility to appellate scrutiny than the verdicts of juries.

68 Before *Pambula*, reasons of these kinds were commonly advanced by judges to justify their orders dispensing with jury trial[97]. The purpose of the majority approach in *Pambula* was to correct this over-ready dispensation with civil juries and to bring the exercise of the discretion, permitted by the 1987 amendments, back to the language in which, and purposes for which, that discretion had been conferred.

69 The holding in *Pambula* is orthodox. Indeed, the appellant did not contest the basic proposition upon which the majority reasoning in *Pambula* rested. Nor could he. That proposition says no more than that, where a discretion is conferred by statute, it must be exercised in accordance with the language by which it is conferred and to achieve the purposes for which the power has been granted. To talk of "absolute" judicial discretions, at least where such discretions are conferred by an Australian statute, involves a contradiction in terms. Absolute discretions are a form of tyranny.

70 All repositories of public power in Australia, certainly those exercising such power under laws made by an Australian legislature, are confined in the performance of their functions to achieving the objects for which they have been

---

96 (1988) 14 NSWLR 387.

97 See eg *Smoje v Trend Laboratories Pty Ltd* unreported, Supreme Court of New South Wales, 27 May 1988 per Cole J, referred to in *Pambula* (1988) 14 NSWLR 387 at 408.

afforded such power. No Parliament of Australia could confer absolute power on anyone. Laws made by the Federal and State Parliaments are always capable of measurement against the Constitution. Officers of the Commonwealth are always answerable to this Court, in accordance with the constitutional standard[98]. Judges within the integrated judicature of the Commonwealth are answerable to appeal and to judicial review. This does not mean that a discretionary power given to a judge, should be narrowly confined[99] or hemmed about with restrictions and limitations, whether called principles or "guidelines" or anything else[100]. But it does mean that there are legal controls which it is the duty of courts to uphold when their jurisdiction is invoked for that purpose.

71 The appellant pressed his submission that *Pambula* had been wrongly decided. We disagree. As we read the subsequent cases, the *Pambula* principle has not proved inflexible. Cases have occurred where orders have been made, and upheld, dispensing with juries[101]. Similarly, cases have been decided where such orders have been set aside[102].

72 *Legal controls on repositories of power*: The simple propositions for which *Pambula* stands are that, under the Act, a plaintiff who has lawfully requisitioned a jury does not have to justify retention of the jury; that the state of the court's list does not, as such, authorise depriving a party entitled to a jury of that right; and that to sustain a discretionary order dispensing with the jury something more than the general features of jury trial (implicit in the statutory retention of that mode of trial) must be shown. A party applying for such an order must demonstrate grounds in addition to "considerations of a universal

---

98 Constitution s 75(v).

99 cf *House v The King* (1936) 55 CLR 499 at 504-505.

100 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; *Gronow v Gronow* (1979) 144 CLR 513 at 524, 530; *Norbis v Norbis* (1986) 161 CLR 513 at 518-519.

101 eg *Forbes Services Memorial Club Ltd v Hodge* unreported, Supreme Court of New South Wales (Court of Appeal), 8 March 1995 per Kirby P, Priestley and Cole JJA; *Nankervis v Ulan Coal Mines Ltd* unreported, Supreme Court of New South Wales (Common Law Division), 24 August 1999 per Wood CJ at CL; [1999] NSWSC 899.

102 eg *Combined Excavations & Supplies Pty Ltd v Bowis* unreported, Supreme Court of New South Wales (Court of Appeal), 30 October 2000 per Spigelman CJ, Heydon JA and Davies AJA; [2000] NSWCA 298.

character relevant to jury trials as such"[103]. As Samuels JA expressed it, "singular circumstances" and "[s]pecific difficulties" must be shown which, in the particular case, make it appropriate to proceed in a non-jury trial and thus to dispense with the jury[104]. A judicial distaste for a mode of trial provided by the Act is not enough. Indeed, it is irrelevant.

73 The power of dispensation with the jury, appearing in (the now repealed) s 89(1) of the *Supreme Court Act* 1970 (NSW) and s 79A of the Act, which was applicable to these proceedings, conferred a discretion that fell to be exercised in a context of other provisions of the respective Acts, including those that conferred defined entitlements to requisition a jury to try the action. The amending legislation referred, in express terms, to those other provisions by which the right to jury trial was preserved. In such circumstances, it was elementary that the legislation operated in a way that gave effect to all of its provisions. The exception had to be reconciled with the general rule. To have treated the exception as granting an "absolute discretion" would have been to ignore the general rule and thus to make a basic legal error.

74 The appellant complained that the *Pambula* principle had become encrusted with rigid applications. There is no evidence of this in the cases to which this Court was referred. He also complained that, in practice, it was difficult to distinguish considerations of "universal character" from "singular circumstances" and "specific difficulties". It is true that such considerations may sometimes merge into each other. What was required was a judgment of fact and degree. Because differences were to be expected appellate intervention was restrained[105]. But it is not unusual for courts to have to perform such tasks. All that *Pambula* did was to remind judges that, when they acted as repositories of a statutory power, they were controlled by the terms of the grant. However much they might dislike jury trial or find the alternative more congenial and convenient, they were bound to proceed with a jury when one had been lawfully summoned, unless particular circumstances special to the case permitted dispensing with the jury. Any complaints about the continuance of jury trial, as such, had to be expressed to Parliament[106]. Meanwhile, the continuation of that

---

103 *Pambula* (1988) 14 NSWLR 387 at 407.

104 *Pambula* (1988) 14 NSWLR 387 at 413.

105 cf *Combined Excavations & Supplies Pty Ltd v Bowis* [2000] NSWCA 298 at [13] per Spigelman CJ.

106 After the decision of the Court of Appeal in the present matter the Parliament of New South Wales reconsidered this subject and enacted the *Courts Legislation Amendment (Civil Juries) Act* 2001 (NSW). See above, these reasons at [64].

mode of trial, subject to exceptions in particular cases, had to be respected, for it was part of the law.

75 *The later decisions in* Knight *and* Patton: The appellant submitted that the foregoing propositions had been overtaken by two decisions of this Court which, he suggested, reinforced a contradictory line of authority that could not stand with *Pambula*. In *Knight v F P Special Assets Ltd*[107] this Court was concerned with provisions of a Queensland law conferring on the Supreme Court of that State the power to award costs. The question was whether the power extended to ordering costs to be paid by a non-party. The Court concluded that such power was conferred by the Rules of Court that were expressed in general terms. In their reasons, Mason CJ and Deane J emphasised the need to interpret the words of statutory provisions according to their natural and ordinary meaning and not to impose unnecessary limits upon a statutory jurisdiction conferred in wide language[108]. In her reasons, Gaudron J remarked that it was "contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant"[109]. Inherent in the grant of the power to a court was the presupposition that the power would be exercised judicially. This warranted "the most liberal construction" of the power because such a requirement would exclude the possibility that the power might be exercised "arbitrarily or capriciously or to work oppression or abuse"[110].

76 We respectfully agree with the principle stated in *Knight*. It has been cited and applied in many decisions, including our own[111]. But none of the judges said, (nor could they have intended) that a conferral of jurisdiction and power was totally uncontrolled simply because the repository of the power was a court.

---

107 (1992) 174 CLR 178.

108 (1992) 174 CLR 178 at 191 applying *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 at 979.

109 (1992) 174 CLR 178 at 205 applying *Hyman v Rose* [1912] AC 623 at 631; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 290.

110 (1992) 174 CLR 178 at 205.

111 eg *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 199-200 [39], 226 [130]; *CDJ v VAJ* (1998) 197 CLR 172 at 201 [110]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423 [110]; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 479 [134]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 33 [159]; 185 ALR 1 at 45.

The words of the grant chart the ultimate boundaries of the power. Courts and judges can sometimes misunderstand or misuse power. It is the function of appellate courts, in such cases, to bring the repository, whether a court or otherwise, back to the grant. Courts uphold the rule of law. They are not themselves exempt from conforming to its limitations.

77 It was then said that *Pambula* was inconsistent with the decision in *Patton v Buchanan Borehole Collieries Pty Ltd*[112]. That case concerned s 79A of the Act, under consideration here. *Patton* corrected a view of the Court of Appeal which had held that that section was only available to be exercised before the trial had commenced[113]. This Court concluded that the section should be given a wide ambit and treated as applicable at any time, including during the trial. Both Gaudron J[114] and McHugh J[115] referred to the procedures that might need to be followed where a trial had commenced with a jury that was later dispensed with. Each of the Justices in *Patton* referred to *Knight's Case*[116] to explain the error in the Court of Appeal's construction of s 79A of the Act. In effect, the Court of Appeal had construed the section as if it contained a proviso governing the time of its availability.

78 There is nothing in *Patton* that contradicts the principle stated in *Pambula*. That principle is unconnected with the timing of the exercise of the discretion provided by s 79A. It does not import impermissible provisos. *Pambula* simply reminds the repository of the power about the constraints expressed in the grant. This Court should be slow to interfere in considered decisions of intermediate courts concerning matters of practice and procedure of local application[117]. It should be particularly restrained in such matters where, as here, legislation has been enacted that will significantly alter the legal foundation for such rulings in the future.

---

112 (1993) 178 CLR 14 at 17.

113 This was a view that had been stated in *G & J Shopfittings & Refrigeration Pty Ltd (In Liq) v Lombard Insurance Co (Aust) Ltd* (1989) 16 NSWLR 363, which was disapproved in *Patton* (1993) 178 CLR 14 at 22.

114 (1993) 178 CLR 14 at 22-24.

115 (1993) 178 CLR 14 at 32.

116 *Patton* (1993) 178 CLR 14 at 17 per Mason CJ, Deane and Dawson JJ, 23 per Gaudron J, 28 per McHugh J.

117 *General Motors-Holden's Pty Ltd v Moularas* (1964) 111 CLR 234 at 252.

79 The proposition that *Pambula* has been overruled by *Knight* or *Patton* or was otherwise wrong in principle should be rejected.

The exercise of discretion

80 The final issue concerns whether, assuming that *Pambula* is confirmed, the Court of Appeal erred in holding that the order of Christie DCJ had amounted to an invocation of universal considerations as distinct from a proper consideration, within the broad discretion which his Honour enjoyed as a judge of a court, of factors special to the case before him.

81 The strong language in which, during argument, Christie DCJ expressed his opposition to jury trial of civil proceedings would naturally make an appellate court examine his Honour's decision in this case with added vigilance. It is true that Christie DCJ reserved his decision. The interval for reflection was only a matter of hours. It is true that his Honour stated that he had merely expressed a "personal view" about civil juries and that it had not influenced his decision in this case. But even then, he went on to refer to the "enormous cost of litigation", thereby suggesting that jury trial contributed unreasonably to such cost. It is true that there are some inefficiencies in civil jury trials. But there are also countervailing advantages. Precisely because their verdicts are unpredictable, juries tend to promote settlement. Jury verdicts in civil actions also tend to promote finality[118]. The practical necessities of jury trials also tend to discourage undue length of proceedings which has lately become a feature of much civil litigation. The remarks of Christie DCJ are therefore disputable. Despite his Honour's denial, they tend, with respect, to suggest that his Honour remained unrepentant and adhered to the strong opinions that he had stated when the motion had been before him earlier in the day.

82 Because Christie DCJ rejected as irrelevant the way that a jury might treat the appellant's criminal convictions, the ultimate ground for his Honour's order was the simple fact that a medical witness had to come from interstate. Some other lay witnesses also had to come from the country. These were, in a sense, matters special to the particular case before the court. But they were completely unconvincing considerations for the order that followed. The respondent had made it clear that the interstate medical witness would be required to attend, whatever the mode of trial. For simple forensic reasons the lay witnesses would also probably be required. With every respect, the notion that conducting the trial before a jury would render appropriate arrangements for such witnesses

---

118 cf *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 286-287 [52]-[53].

difficult or impossible, lacks all conviction. One is therefore left with no reason for the order but Christie DCJ's dislike of civil jury trial.

83 As this consideration was incompatible with the provisions of the Act that continued to provide for jury trial and the right of parties to summon juries to try their cases in defined cases in the New South Wales District Court, it was a consideration incompatible with the law as stated in *Pambula*. More to the point, it was incompatible with the scheme of the Act as it then stood. The Court of Appeal was right to intervene to correct the erroneous order that Christie DCJ had made. It was correct to set aside the judgment which followed a trial before a tribunal other than that to which the respondent was entitled in terms of the Act.

Orders

84 The appeal should therefore be dismissed with costs.