HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

PETER JAMES SPENCER APPLICANT

AND

COMMONWEALTH OF AUSTRALIA RESPONDENT

Spencer v Commonwealth of Australia [2010] HCA 28
1 September 2010
S87/2009

ORDER

1. *Special leave to appeal granted.*

2. *Appeal treated as instituted and heard instanter and allowed with costs.*

3. *The orders of the Full Court of the Federal Court of Australia made on 24 March 2009 be set aside and in lieu thereof it be ordered that:*

    (a) *The appeal be allowed with costs.*

    (b) *Orders 2 and 3 of the orders made by Emmett J on 28 August 2008 be set aside and in lieu thereof it be ordered that:*

        (i) *The respondent's motion of 26 July 2007 be dismissed.*

        (ii) *The respondent pay the applicant's costs of the motion.*

On appeal from the Federal Court of Australia

Representation

P E King with D H Godwin for the applicant (instructed by McKells)

S J Gageler SC, Solicitor-General of the Commonwealth with A Robertson SC and C L Lenehan for the respondent (instructed by Australian Government Solicitor)

Interveners

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell SC intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

P M Tate SC, Solicitor-General for the State of Victoria with S P Donaghue intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with S A McDonald intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

J K Kirk intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

B W Walker SC with L T Livingston intervening on behalf of NSW Farmers Association (instructed by NSW Farmers Association)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Spencer v Commonwealth of Australia

Practice and procedure – Federal Court of Australia – Summary judgment – Application by respondent to dismiss proceedings summarily under s 31A(2) of *Federal Court of Australia Act* 1976 (Cth) – Applicant claimed New South Wales legislation, said to be enacted pursuant to informal arrangements with Commonwealth, effected an acquisition of property other than on just terms – Applicant sought declarations that intergovernmental agreements, and Commonwealth legislation authorising them, were invalid under s 51(xxxi) of Constitution – Whether Court could be satisfied applicant had no reasonable prospect of successfully prosecuting proceeding – Effect of *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, delivered after decisions below, on prospects of success.

Statutes – Construction – Summary judgment – "no reasonable prospect".

Words and phrases – "no reasonable prospect".

Federal Court of Australia Act 1976 (Cth), s 31A.

FRENCH CJ AND GUMMOW J.

Introduction

1 On 12 June 2007, Peter Spencer, the owner of a farm at Shannons Flat in New South Wales, commenced proceedings against the Commonwealth in the Federal Court of Australia. Restrictions had been imposed on the clearing of vegetation on his farm by reason of the *Native Vegetation Conservation Act* 1997 (NSW) ("the NVC Act 1997") and the *Native Vegetation Act* 2003 (NSW) ("the NV Act 2003")[1]. He claimed that the restrictions constituted an acquisition of property from him other than on just terms and that the acquisition was made in furtherance of agreements between the State of New South Wales and the Commonwealth. He alleged that the Commonwealth laws which authorised those agreements, the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth) ("the Financial Assistance Act") and the *Natural Heritage Trust of Australia Act* 1997 (Cth) ("the Natural Heritage Trust Act")[2], were made for the purpose of acquiring property other than on just terms and were invalid by reason of s 51(xxxi) of the Constitution.

2 On 28 August 2008, Emmett J, on the Commonwealth's motion, made an order dismissing the proceedings pursuant to s 31A of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") on the basis that Mr Spencer had no reasonable prospect of successfully prosecuting the proceedings. His Honour also dismissed a motion for interlocutory injunctive relief filed by Mr Spencer. He held that there was no serious question to be tried as to whether Mr Spencer was entitled to the final relief which he claimed[3].

3 Mr Spencer was granted leave by a judge of the Federal Court to appeal from the decision of Emmett J and on 24 March 2009 the Full Court of the Federal Court dismissed his appeal with costs[4]. He applied for special leave to appeal to this Court. The application was adjourned pending delivery of the judgment of this Court in *Arnold v Minister Administering the Water Management Act 2000*[5]. On 23 February 2010, Gummow J directed that any proposed further or amended statement of claim that would be relied upon in the

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1 Hereafter referred to, collectively, as "the State Acts".

2 Hereafter referred to, collectively, as "the Commonwealth Acts".

3 *Spencer v Commonwealth of Australia* [2008] FCA 1256 at [212].

4 *Spencer v Commonwealth* (2009) 174 FCR 398.

5 (2010) 240 CLR 242; [2010] HCA 3. See [2009] HCATrans 126 at 748-749.

Federal Court, if further leave were given there, should be filed and served on or before Friday, 26 February 2010. A proposed further amended statement of claim was filed on 26 February 2010 and a revised version was filed on 26 March 2010. On 12 March 2010, Mr Spencer's application for special leave was referred, by order of Gummow, Heydon and Bell JJ, to an enlarged Full Court of this Court for argument as on appeal. Mr Spencer was given leave to amend his draft notice of appeal and summary of argument.

4 When the referred application for special leave came on for hearing on 16 June 2010, the Court invited counsel for Mr Spencer and for the Commonwealth to address it initially on the question whether the case had been a suitable one for the application of s 31A of the Federal Court Act. After submissions on that question, the Court adjourned the hearing and announced that it would either decide the application and make orders on the basis of the s 31A argument, or list the matter for further hearing at a date in the future. For the reasons that follow, the proceedings in the Federal Court were not appropriate for summary dismissal pursuant to s 31A. The case which Mr Spencer seeks to raise potentially involves important questions of constitutional law. It also involves questions of fact about the existence of an arrangement between the Commonwealth and the State of New South Wales which may justify the invocation of pre-trial processes such as discovery and interrogatories. The possible significance of those questions of fact has become apparent in the light of this Court's judgment in *ICM Agriculture Pty Ltd v The Commonwealth*[6], which had not been delivered when the primary judge and the Full Court delivered their judgments.

The statutes and agreements in contention

5 Salient features of the statutes and agreements referred to in the amended statement of claim considered by Emmett J are as follows:

1. *Financial Assistance Act*. The primary object of this Act is to "facilitate the development and implementation of integrated approaches to natural resources management in Australia"[7]. The Commonwealth may enter into an agreement with a State to provide financial assistance (by way of grant or otherwise) in respect of projects jointly approved by the relevant Commonwealth and State Ministers or specified in the agreement[8]. Such

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6 (2009) 240 CLR 140; [2009] HCA 51.

7 Financial Assistance Act, s 3.

8 Financial Assistance Act, s 5(1).

an agreement must include provisions relating to "the conditions subject to which payments under the agreement are to be made"[9]. There is provision for repayment by the State, or for deduction of payments made from future payments, where a condition set out in the agreement has not been fulfilled. There is also provision for performance audits[10].

2. *Natural Heritage Trust Act*. This Act established a fund called the Natural Heritage Trust of Australia Reserve[11], now known as the Natural Heritage Trust of Australia Account. One of the purposes of the Account is the Natural Vegetation Initiative[12], the primary objective of which is "to reverse the long-term decline in the extent and quality of Australia's native vegetation cover" by, inter alia, "conserving remnant native vegetation"[13]. The Account can be used to provide funds for the grant of financial assistance to a State on conditions to be set out in a written agreement between the Commonwealth and the State[14].

3. *Agreement between the Commonwealth of Australia and the State of New South Wales, 31 October 1997*. This agreement sets out the "roles and responsibilities of the Commonwealth and New South Wales for the delivery of the objectives of the Natural Heritage Trust and any associated programs". One of those programs is "Bushcare: The National Vegetation Initiative". The State of New South Wales undertook as part of that program to "prevent inappropriate native vegetation clearing". It undertook to enact native vegetation conservation legislation. The agreement provided for Commonwealth funding from the Natural Heritage Trust, subject to the agreed objectives defined in Attachment A to the agreement being progressively met.

4. *NVC Act 1997*. This New South Wales statute imposed controls and restrictions on the clearing of native vegetation from land within the State of New South Wales. Generally speaking, clearing was not permitted unless a development consent was provided and the clearing accorded

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9 Financial Assistance Act, s 7(b).

10 Financial Assistance Act, ss 8 and 9.

11 Natural Heritage Trust Act, s 4.

12 Natural Heritage Trust Act, s 8(a).

13 Natural Heritage Trust Act, s 10(a).

14 Natural Heritage Trust Act, s 19(2).

with a regional vegetation management plan or a native vegetation code of practice[15].

5. *Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, 3 November 2000*. Under this agreement, the Commonwealth undertook to provide $700 million over seven years for measures to address salinity and water quality problems, including the implementation of controls on land clearing, particularly in priority catchments or regions. The sum was to be matched by State and Territory financial contributions. Compensation to assist adjustment where property rights were lost would be addressed in developing catchment/regional plans. Although compensation was said, in the agreement, to be the responsibility of the States and Territories, the Commonwealth would consider additional funding over the $700 million for that purpose.

6. *Agreement between Commonwealth of Australia and State of New South Wales Relating to the National Action Plan for Salinity and Water Quality, 17 May 2002*. Under this agreement, the State of New South Wales undertook to expedite completion of regional vegetation management plans under the NVC Act 1997. The parties agreed to each allocate $198 million for implementation of the National Action Plan for Salinity and Water Quality in New South Wales. They also agreed that compensation to assist adjustment where property rights were lost would be addressed in developing catchment/regional plans and that the Commonwealth would consider making an additional contribution for that purpose.

7. *Bilateral Agreement between the Commonwealth of Australia and the State of New South Wales to Deliver the Extension of the Natural Heritage Trust, 14 August 2003*. This agreement recited New South Wales' commitment to the "conservation, rehabilitation and protection of significant native vegetation and ecological communities against land clearance and resource degradation". It also made reference to matching funding arrangements between the Commonwealth and the State. There was no reference to compensation for loss of property rights. The agreement recited the intention of the Commonwealth and the State to work as "joint investment partners" with the community and other stakeholders in natural resource management activities.

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15 NVC Act 1997, ss 18 and 21.

8. *NV Act 2003*. This Act repealed the NVC Act 1997 but, like it, provided wide-ranging restrictions on the clearing of native vegetation.

The state of the pleading before the primary judge

6 The statement of claim passed through a number of iterations leading up to the amended statement of claim considered by Emmett J in his decision to dismiss the proceeding pursuant to s 31A. Mr Spencer's case, as then pleaded, depended upon his contentions that the Natural Heritage Trust Act, the Financial Assistance Act and the intergovernmental agreements were invalid to the extent that they effected or authorised acquisitions of property from him other than on just terms within the meaning of s 51(xxxi) of the Constitution. The property so acquired was said to include carbon sequestration rights. A carbon sequestration right comprises a right to the "legal, commercial or other benefit … of carbon sequestration by any existing or future tree or forest on the land after 1990". It is so defined by s 87A of the *Conveyancing Act* 1919 (NSW) and deemed by s 88AB of that Act to be a profit à prendre[16].

7 Important elements of the pleading appeared at pars 9.1 to 9.3 of the amended statement of claim. After referring to the Commonwealth Acts and the intergovernmental and bilateral agreements, Mr Spencer alleged:

> "9.2 Further or alternatively, the said legislative provisions formed part of a scheme or device designed to avoid or overreach the restrictions on the exercise of law making powers by the Respondent under Constitution section 51(xxxi) such that if the said acquisitions of the Applicant's land and/or carbon rights in particular were carried out by the Respondent itself by direct initiative it would be required to provide just compensation to all persons whose property was acquired by such laws, including the Applicant.
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> 9.3 In the premises the laws and arrangements were made for the purpose of taking property other than on just terms including the property of the Applicant and are invalid pursuant to Constitution section 51(xxxi) and are not otherwise justified by any other provision thereof."

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16 See generally Butt, "Carbon sequestration rights – a new interest in land?", (1999) 73 *Australian Law Journal* 235; Hepburn, "Carbon Rights as New Property: The benefits of statutory verification", (2009) 31 *Sydney Law Review* 239.

8 He pleaded the passage of the State Acts, that he had been prevented and restricted from clearing native vegetation on his land by reason of those Acts and the refusal of the State of New South Wales to grant permission for such clearing pursuant to particular provisions of those Acts. Those provisions were said to have effected an acquisition of his property. He then alleged:

> "13. The acquisition of the Applicant's property as described in paragraphs 2 and 10 to 12 of this statement of claim occurred pursuant to or as the result of the operation or effect of a law of the Commonwealth as set out in paragraphs 4 and 5 of this Statement of Claim with respect to the acquisition of property otherwise than on just terms from a person inter alia the Applicant for a purpose in respect of which the Parliament of the Commonwealth has power to make laws …"

9 Mr Spencer alleged that, by reason of the State Acts, his property had been rendered commercially unviable and that the State of New South Wales had offered to purchase the land at market value. He had evidentiary support for the claim that his land was commercially unviable. An affidavit sworn by Mr Spencer, which was before Emmett J, exhibited a letter dated 5 July 2007 from the New South Wales Rural Assistance Authority stating its finding that his farming enterprise was not commercially viable because of his inability to clear native vegetation under the NV Act 2003. The Authority, in accordance with the requirements of the Farmer Exit Assistance component of the New South Wales Government's Native Vegetation Assistance Package, forwarded advice of the Authority's assessment to the Nature Conservation Trust of New South Wales.

The decision of the primary judge

10 His Honour dismissed Mr Spencer's claim on the basis of what appeared on the face of the Commonwealth Acts, the State Acts and the intergovernmental agreements referred to in the statement of claim.

11 In coming to his conclusion on the s 31A application, his Honour found:

> 1. There was a serious question to be tried as to whether the detriment suffered by Mr Spencer resulting from the restrictions imposed by the State Acts constituted an acquisition in respect of his farm. Whether the restrictions imposed by the State Acts were such as to constitute an acquisition might depend upon "detailed evidence of value"[17].

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17 [2008] FCA 1256 at [149].

2. Neither of the Commonwealth Acts, by its direct, legal and practical operation, affected any vested proprietary right or cause of action of Mr Spencer in any way[18].

3. Neither of the Commonwealth Acts authorised the making of any agreement with a State "requiring the State to acquire property on unjust terms as a condition of receiving a grant of financial assistance from the Commonwealth". The Acts were not laws with respect to the acquisition of property under s 51(xxxi) of the Constitution[19].

4. The 1997 agreement[20] did not "require or affect or authorise the exercise of any discretion under the State Statutes to refuse development consent for the clearing of native vegetation on any land"[21].

12 His Honour did not determine a Commonwealth objection to Mr Spencer's standing to challenge the validity of the Financial Assistance Act and the Natural Heritage Trust Act, which reduced to the proposition that Mr Spencer would be subject to the State Acts (which were not under challenge) even if the Commonwealth Acts were held to be invalid[22].

13 His Honour concluded that there was no serious question to be tried or, "[p]utting it the other way", that there was no "reasonable prospect" that Mr Spencer would succeed in obtaining the final relief that he claimed in the proceeding[23]. In relation to Mr Spencer's claim for interlocutory relief, his Honour also expressed the obiter opinion that the balance of convenience did not warrant the grant of an injunction[24].

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18 [2008] FCA 1256 at [155].

19 [2008] FCA 1256 at [158].

20 See above at [5].

21 [2008] FCA 1256 at [172].

22 [2008] FCA 1256 at [178]-[180]. The Commonwealth also argued, in the alternative, that Mr Spencer's claims did not give rise to a "matter" within the meaning of Ch III of the Constitution.

23 [2008] FCA 1256 at [193].

24 [2008] FCA 1256 at [210].

The decision of the Full Court

14 The Full Court dismissed Mr Spencer's appeal on 24 March 2009, several months before the hearings in this Court of *ICM* and *Arnold*. The leading judgment in the Full Court was written by Jagot J, with whom Black CJ and Jacobson J agreed. Her Honour held that Mr Spencer's case faced three fundamental problems which he was unable to overcome. They were[25]:

1. This Court's decision in *Pye v Renshaw*[26] concerning the operation of s 51(xxxi) and s 96 of the Constitution.

2. The decision of the New South Wales Court of Appeal in *Arnold v Minister Administering the Water Management Act 2000*[27] which was indistinguishable from the present case.

3. Mr Spencer's acceptance of the validity of the State Acts which had the consequence that, even if the Commonwealth Acts and intergovernmental agreements were invalid, the NV Act 2003 would continue in force as the source of the prohibitions and restrictions of which he complained.

15 Her Honour rejected the submission that the Commonwealth/State arrangements in this case were a mere device to circumvent s 51(xxxi), which could be impugned on the basis that the Commonwealth could not do indirectly that which it could not do directly[28]. This, her Honour said, overlooked the operation of s 96 of the Constitution and the clear statement in *Pye*[29]. There was no direct legal link between the Commonwealth and State Acts analogous to that in *P J Magennis Pty Ltd v The Commonwealth*[30].

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25 (2009) 174 FCR 398 at 406 [15].

26 (1951) 84 CLR 58; [1951] HCA 8.

27 (2008) 73 NSWLR 196.

28 (2009) 174 FCR 398 at 408 [21].

29 See (1951) 84 CLR 58 at 83, where the Court rejected the argument that "the Commonwealth is not authorized by s 96 or any other provision of the Constitution to provide money for a State in order that the State may resume land otherwise than on just terms".

30 (1949) 80 CLR 382; [1949] HCA 66.

16 The decisions of the primary judge and of the Full Court of the Federal Court applied s 31A(2) of the Federal Court Act to defeat Mr Spencer's claim. It is necessary to consider the correct approach to the application of that provision.

Federal Court Act, s 31A

17 Section 31A(2) of the Federal Court Act provides:

> "The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
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> (a) the first party is defending the proceeding or that part of the proceeding; and
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> (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding."

A proceeding need not be "hopeless" or "bound to fail" for it to have no reasonable prospect of success[31]. Section 31A(1) provides for a party prosecuting a proceeding to obtain summary judgment against a respondent. The section does not limit any other powers that the Court has[32].

18 Section 31A was introduced into the Federal Court Act by the *Migration Litigation Reform Act* 2005 (Cth)[33]. Despite the reference in the title of the amending Act to migration litigation, the section is of general application. In his Second Reading Speech, the Attorney-General explained the purpose of the amendment[34]:

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31 Federal Court Act, s 31A(3).

32 Federal Court Act, s 31A(4).

33 Similarly worded provisions were introduced into the *Judiciary Act* 1903 (Cth) (s 25A) and the *Federal Magistrates Act* 1999 (Cth) (s 17A) by the same amending legislation.

34 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 March 2005 at 3. As to the lack of utility of s 31A in migration cases see *White Industries Aust Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 298 at 311 [58] per Lindgren J.

> "The bill … strengthens the power of the courts to deal with unmeritorious matters, by broadening the grounds on which federal courts can summarily dispose of unsustainable cases."

Referring to the general application of the provision, the Attorney-General described it as "a useful addition to the courts' powers in dealing with any unsustainable case"[35].

19 The adoption of the provision for summary judgment reflected in s 31A was recommended in 2000 by the Australian Law Reform Commission ("ALRC")[36]. Although not initially accepted by the Government[37] the recommendation was revisited in a Departmental Strategy Paper in December 2003, inspired in part by "the growth in the volume of unmeritorious litigation in the Federal Court and the [Federal Magistrates Court] over the last few years, particularly in migration cases"[38]. The Strategy Paper ultimately recommended the adoption of the ALRC's recommendation and was referred to in the Second Reading Speech for the Migration Litigation Reform Bill 2005[39].

20 The criterion for summary dismissal of proceedings under s 31A was derived from a British precedent, r 24.2 of the Civil Procedure Rules ("the CPR"). That rule introduced the criterion "no real prospect" of succeeding on, or successfully defending, the claim or issue. It implemented a recommendation made in 1996 in the Woolf Report that in England and Wales there be a merging of existing procedures for summary judgment, summary determination of a point

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35 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 March 2005 at 3.

36 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89, (2000) at 520 [7.212] and Recommendation 94.

37 Attorney-General's Department, *Australian Law Reform Commission Report, Managing Justice: A review of the federal civil justice system, Government Response to Recommendations*, (2003) at 45.

38 Attorney-General's Department, *Federal Civil Justice System Strategy Paper*, (2003) at 228.

39 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 March 2005 at 3.

of law and the striking out of pleadings disclosing no cause of action[40]. The recommendation was explained in the Woolf Report thus[41]:

> "The test for making an order would be that the court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue. A party seeking to resist such an order would have to show more than a merely arguable case; it would have to be one which he had a real prospect of winning. Exceptionally the court could allow a case or an issue to continue although it did not satisfy this test, if it considered that there was a public interest in the matter being tried."

21 In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)*, Lord Hope of Craighead discussed[42] the scope of the inquiry on an application for summary disposition under r 24.2 of the CPR[43]:

> "The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf

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40 Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, (1996) at 123 [32]-[33].

41 Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, (1996) at 123 [34].

42 [2003] 2 AC 1 at 260 [94]-[95] and see also *Swain v Hillman* [2001] 1 All ER 91 at 92-93 per Lord Woolf MR.

43 [2003] 2 AC 1 at 260-261 [95].

> said in *Swain v Hillman*, … that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

22 In the Federal Court and in the Court of Appeal of Queensland, the criterion of a "reasonable prospect" of success has been understood in analogous statutory settings to mean a "real" rather than "fanciful" prospect[44]. This exegesis adds little to the words of s 31A. The section authorises summary disposition of proceedings on a variety of bases under its general rubric. It will apply to the case in which the pleadings disclose no reasonable cause of action and their deficiency is incurable. It will include the case in which there is unanswerable or unanswered evidence of a fact fatal to the pleaded case and any case which might be propounded by permissible amendment. It will include the class of case in the longstanding category of cases which are "frivolous or vexatious or an abuse of process". The application of s 31A is not, in terms, limited to those categories.

23 Accepting that there are a number of ways in which s 31A may be applied to empower the Federal Court to dismiss a proceeding, it is to be distinguished, in its application to deficient pleadings, from rules (such as O 11 r 16 of the Federal Court Rules) which provide for the striking out of pleadings. As Lindgren J said in *White Industries Aust Ltd v Federal Commissioner of Taxation*[45]:

> "evidence may disclose that a person has or may have a 'reasonable cause of action' or 'reasonable prospects of success', yet the person's pleading does not disclose this. In such a case O 11, r 16 empowers the Court to strike out the pleading but … s 31A(2) would not empower the Court to give judgment for the respondent against the applicant. A failure after ample opportunity to plead a reasonable cause of action may suggest that none exists and therefore that the applicant has no reasonable prospects of success, but the existence of a reasonable cause of action and the pleading of a reasonable cause of action remain distinct concepts."

24 The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action[46] or on the

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44 *White Industries Aust Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 298 at 312 [59] and cases there reviewed; *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 235 per Williams JA.

45 (2007) 160 FCR 298 at 309 [47]. See also *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* (2008) 252 ALR 41.

46 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-130 per Barwick CJ; [1964] HCA 69.

basis that the action is frivolous or vexatious or an abuse of process[47]. The same applies where such a disposition is sought in a summary judgment application supported by evidence. As to the latter, this Court in *Fancourt v Mercantile Credits Ltd* said[48]:

> "The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried".

More recently, in *Batistatos v Roads and Traffic Authority (NSW)*[49] Gleeson CJ, Gummow, Hayne and Crennan JJ repeated a statement by Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde*[50] which included the following:

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways[51], but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."

There would seem to be little distinction between those approaches and the requirement of a "real" as distinct from "fanciful" prospect of success contemplated by s 31A[52]. That proposition, however, is not inconsistent with the

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47 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; [1949] HCA 1.

48 (1983) 154 CLR 87 at 99; [1983] HCA 25. See also *Webster v Lampard* (1993) 177 CLR 598 at 602-603 per Mason CJ, Deane and Dawson JJ; [1993] HCA 57.

49 (2006) 226 CLR 256 at 275 [46]; [2006] HCA 27.

50 (2000) 201 CLR 552 at 575-576 [57]; [2000] HCA 41.

51 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 per Barwick CJ.

52 In *A v Essex County Council* [2010] 3 WLR 509, the criterion of "real prospect of success" was variously equated to whether the plaintiff "could succeed at a trial", whether there was a "triable issue" and whether there was the "least doubt": at 523 [44] per Lord Clarke of Stone-cum-Ebony JSC, 541 [119] per Baroness Hale of Richmond JSC, 544 [133] per Lord Brown of Eaton-under-Heywood JSC and 552 [163] per Lord Kerr of Tonaghmore JSC.

proposition that the criterion in s 31A may be satisfied upon grounds wider than those contained in pre-existing Rules of Court authorising summary dispositions.

25 Section 31A(2) requires a practical judgment by the Federal Court as to whether the applicant has more than a "fanciful" prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law. But where the success of proceedings is critically dependent upon a proposition of law which would contradict a binding decision of this Court, the court hearing the application under s 31A could justifiably conclude that the proceedings had no reasonable prospect of success.

26 Where an application under s 31A requires consideration of apparently complex questions of fact, then the caution uttered by Lord Hope is relevant[53]. The importance of those considerations is amplified if the case involves resolution of issues of law and fact, or mixed law and fact.

27 The present case was one which involved important questions of public and constitutional law and potentially complex questions of fact.

Issues of law and fact to be determined

28 Mr Spencer alleged in his amended statement of claim the existence of a scheme or device to which the Commonwealth and the State of New South Wales were parties and which was designed to avoid the "just terms" constraint on the exercise of the legislative power of the Commonwealth under s 51(xxxi) of the Constitution. The Commonwealth laws and "arrangements" were said to have been made "for the purpose of taking property other than on just terms including the property of the Applicant".

29 In *ICM* reference was made to the possibility of grants of financial assistance pursuant to s 96 of the Constitution supported by informal arrangements between governments setting out the conditions upon which such grants were made[54]. An informal arrangement, referred to in *Gilbert v Western*

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53 See above at [21].

54 (2009) 240 CLR 140 at 168 [37]-[38] per French CJ, Gummow and Crennan JJ.

Australia[55], explained the alteration, after judgment had been given in *Magennis*, of a New South Wales statute under consideration in the latter case. That alteration "decoupled" the State statute from the Commonwealth/State agreement, which had supported the finding of invalidity in *Magennis*. The alteration had the result that the relevant Commonwealth legislation survived challenge in *Pye*.

30 In the joint judgment of French CJ, Gummow and Crennan JJ in *ICM*, their Honours observed, of the Ministerial correspondence disclosed in *Gilbert*, that[56]:

> "The assumption being made was that the terms and conditions attached to a s 96 grant may sufficiently be disclosed in an informal fashion, falling short of an intergovernmental agreement of the kind seen in this case in the Funding Agreement. It is unnecessary to consider whether that reflected a correct understanding of s 96 and of its relation to s 61 of the *Constitution*."

Their Honours further observed[57]:

> "that the legislative power of the Commonwealth conferred by ss 96 and 51(xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms."

31 The question that arises is whether Mr Spencer's pleading left open the possibility, requiring factual exploration and possible amendment, of an informal arrangement between the Commonwealth and the State of New South Wales conditioning the relevant Commonwealth funding upon acquisition by the State of Mr Spencer's property rights on other than just terms. On the face of the pleading before Emmett J and the Full Court that possibility was open, even if not fully formulated or adequately particularised. Given the existence of the Commonwealth Acts and the relevant intergovernmental agreements, it is likely that there are negotiations and communications between the Commonwealth and the State of New South Wales, records of which might flesh out or cast light upon the practical operation of the Commonwealth and State funding arrangements. Documentary and electronic records of such negotiations and

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55 (1962) 107 CLR 494 at 505 per Dixon CJ, Kitto and Windeyer JJ; [1962] HCA 7.

56 (2009) 240 CLR 140 at 168 [38].

57 (2009) 240 CLR 140 at 170 [46].

communications may be amenable to discovery and ancillary processes in the Federal Court which could be invoked by Mr Spencer.

32 It is not necessary for present purposes to determine whether a law of the Commonwealth, providing for grants to be made to a State under s 96 of the Constitution, or for agreements under which such grants could be made, might be characterised by reference to informal arrangements between the Commonwealth and the State as a law with respect to the acquisition of property. There are complex and difficult questions of both law and fact raised by that possibility, which was at least open on the amended statement of claim before the primary judge.

33 By his proposed further amended statement of claim filed on 26 March 2010, Mr Spencer alleges, after pleading the intergovernmental agreements:

> "34. Each of the said agreements … or one or more of them were unconstitutional agreements in that by the terms thereof the [State of New South Wales] has expressly or impliedly agreed to make and adopt measures with respect to the acquisition of property of inter alia the Applicant otherwise than on just terms in consideration of the payment of moneys by the [Commonwealth] to it.
>
> 35. Further or alternatively the said agreements and the payments and receipt of benefits thereunder from inter alia the Applicant comprised a joint venture between the [Commonwealth and the State of New South Wales] for the acquisition of property other than on just terms.
>
> 36. Pursuant to the said agreements and/or induced by the [Commonwealth] and/or in furtherance of the joint venture at the request of the [Commonwealth] the [State of New South Wales] made legislative and other measures which had the effect or consequence of acquiring the Plaintiff's land without just terms."

34 In fairness to the primary judge and the Full Court, it must be acknowledged that their decisions were made before this Court delivered judgment in *ICM*. In the light of *ICM*, and even the current rather stunted version of Mr Spencer's pleading in relation to "scheme or device", it could not be said, for the purposes of s 31A(2), that he has no reasonable prospect of successfully prosecuting the proceedings. The pleading in that respect raised the possibility of particularisation and/or amendment. That is not to say that, even on the proposed further amended statement of claim, he has a strong case. It is sufficient to say that it is not fanciful, and therefore not a case which he has no reasonable prospect of successfully prosecuting.

Conclusion

35 For the preceding reasons the following orders should be made:

1. Special leave to appeal granted.

2. Appeal treated as instituted and heard instanter and allowed with costs.

3. The orders of the Full Court of the Federal Court of Australia made on 24 March 2009 be set aside and in lieu thereof it be ordered that:

   (a) The appeal be allowed with costs.

   (b) Orders 2 and 3 of the orders made by Emmett J on 28 August 2008 be set aside and in lieu thereof it be ordered that:

      (i) The respondent's motion of 26 July 2007 be dismissed.

      (ii) The respondent pay the applicant's costs of the motion.

36 HAYNE, CRENNAN, KIEFEL AND BELL JJ. We agree that special leave to appeal should be granted, the appeal treated as heard instanter and allowed with costs, and consequential orders made in the terms proposed by French CJ and Gummow J. We write separately principally because of the issues that are presented by the application of s 31A of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). It is necessary to begin, however, by saying something about the proceedings which give rise to the application to this Court.

The proceedings

37 The applicant instituted proceedings in the Federal Court of Australia claiming, amongst other relief, declarations that each of the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth) and the *Natural Heritage Trust of Australia Act* 1997 (Cth) was invalid to the extent to which it effected or authorised the acquisition of certain property from him other than on just terms within the meaning of s 51(xxxi) of the Constitution. He further claimed declarations that certain intergovernmental agreements were likewise invalid.

38 At first instance, Emmett J held[58] that the applicant had no reasonable prospect of obtaining any of the relief which he claimed against the Commonwealth, and granted the Commonwealth's motion that the proceeding be summarily dismissed pursuant to s 31A of the Federal Court Act. The Full Court of the Federal Court (Black CJ, Jacobson and Jagot JJ) dismissed[59] the applicant's appeal against the order for summary dismissal.

39 A critical step in the reasoning at first instance[60], and in the Full Court[61], was that the applicant could identify no Commonwealth law with respect to an acquisition of property because no law of the Commonwealth required or permitted the imposition of a term or condition of a grant of financial assistance under s 96 of the Constitution binding the State to acquire property otherwise than on just terms. Whether that proposition is right need not be, and is not, examined in these reasons.

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58 *Spencer v Commonwealth of Australia* [2008] FCA 1256.

59 *Spencer v Commonwealth* (2009) 174 FCR 398.

60 [2008] FCA 1256 at [154]-[155].

61 (2009) 174 FCR 398 at 405 [14], 413 [30]-[31].

40 Having regard to this Court's decision in *ICM Agriculture Pty Ltd v The Commonwealth*[62], delivered after the Full Court's decision in this matter, it cannot now be held that the applicant "has no reasonable prospect of successfully prosecuting the proceeding"[63]. Whether, or how, ss 51(xxxi), 61 and 96 intersect where there is an informal arrangement or understanding between the Commonwealth and a State, falling short of an intergovernmental agreement, was expressly left as an open question by three members of the majority in *ICM*[64].

The applicant's claims

41 The applicant's statement of claim was amended several times in the Federal Court, and he now proposes further amendments to his pleading to take account of what was decided in *ICM*. The pleading, in all its forms, both past and proposed, lacks precision and specificity. Whether, for that reason, it is properly described as embarrassing was not examined in argument and is not considered in these reasons. The Commonwealth's motion was not directed to the adequacy of the applicant's pleading; the Commonwealth sought summary dismissal of the proceeding.

42 The general nature of the applicant's complaint can be discerned from the several versions of his statement of claim that have been filed, but the legal basis for his complaint is not so easily identified. The general nature of the complaint may be described as follows.

43 The applicant claims that some or all of his interests in freehold and leasehold farming land were acquired, other than on just terms, when prohibitions or restrictions on his clearing native vegetation on the land were imposed under the *Native Vegetation Conservation Act* 1997 (NSW) and, later, the *Native Vegetation Act* 2003 (NSW). More particularly, he claims that the rights to the carbon sequestration and carbon abatement effects that are provided by the existing vegetation on the land have been acquired. He further claims that the acquisition has come about as a result, or through the implementation, of the two Commonwealth Acts whose validity he challenges, and what he has variously described as "a cooperative statutory and administrative framework,

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62 (2009) 240 CLR 140; [2009] HCA 51.

63 *Federal Court of Australia Act* 1976 (Cth), s 31A(2)(b).

64 (2009) 240 CLR 140 at 168 [38] per French CJ, Gummow and Crennan JJ.

arrangement or partnership between the [Commonwealth] and the State of New South Wales in performance of the [Commonwealth's] commitments under [the] *United Nations Framework Convention [on] Climate Change*", some express or implied agreement between the Commonwealth and the State, or a "joint venture" between the Commonwealth and the State.

44 He alleges that between 1997 and 2003, pursuant to the *Natural Resources Management (Financial Assistance) Act* 1992 and the *Natural Heritage Trust of Australia Act* 1997, several bilateral agreements were made between the Commonwealth and New South Wales, and an intergovernmental agreement made between the Commonwealth and the States and Territories to establish a national framework for management and use of land in Australia.

45 In one version of his statement of claim, the applicant alleged that the impugned Commonwealth Acts formed part of what was described as "a scheme or device designed to avoid or overreach the restrictions on the exercise of law making powers … under … s 51(xxxi)". Although expressed in different ways, this kind of allegation might be thought to underpin the applicant's claims for declarations of invalidity. It appears to be an idea of scheme or device[65] that finds reflection, perhaps its foundation or elaboration, in the repeated use in the applicant's pleading of terms like "partnership" and "joint venture", as well as the references to express or implied agreements. But whether or not that is so, it is evident that the applicant seeks to mount a case having two principal elements. First, that there has been some arrangement or understanding made or reached between the Commonwealth and New South Wales beyond what appears in the relevant Acts and intergovernmental agreements. Second, that by or under that arrangement or understanding, some relevant connection can be drawn between the Commonwealth making a grant or grants of money to New South Wales under s 96 of the Constitution and the State exercising its legislative and other powers in the manner, and with the consequences, of which the applicant complains.

The issues presented by the applicant's claims

46 The Commonwealth does not admit that there is any scheme or device; it does not admit that there is any relevant arrangement or understanding beyond what appears in the relevant intergovernmental agreements and applicable

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65 Cf *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 140 CLR 140 at 169-170 [44] per French CJ, Gummow and Crennan JJ, 199 [139] per Hayne, Kiefel and Bell JJ.

legislation; it does not admit that there is any partnership or joint venture with the State. Two points follow. First, there is a factual question presented by the applicant's allegations. Is there any arrangement or understanding beyond what appears in the relevant intergovernmental agreements and applicable legislation? Second, if there is, what is its constitutional relevance?

47 The decisions at first instance, and in the Full Court, proceeded from the premise that the existence of any arrangement or understanding of the kind apparently relied on by the applicant was constitutionally irrelevant. But, as has been pointed out, that question was expressly reserved for future consideration by three members of the majority in *ICM*[66], and cannot be regarded as foreclosed from argument. It is neither necessary nor appropriate to examine the strength of the argument. It is enough to say that neither the factual question that has been identified, nor the associated constitutional question, can or should be answered at this stage of the proceeding.

48 The factual question depends upon what evidence is adduced. What evidence is adduced may well be affected by what is revealed by further interlocutory processes in the proceeding. The constitutional question may be affected by, even depend upon, the resolution of the factual question. Even if it is not directly affected by what particular facts are found, it is not a question suitable for determination on a summary judgment application.

Summary judgment – Federal Court Act, s 31A

49 This was not a case in which the Federal Court could be satisfied that the applicant had "no reasonable prospect of successfully prosecuting the proceeding"[67].

50 Consideration of the operation and application of s 31A of the Federal Court Act must[68] begin from consideration of its text. So far as relevant to this matter, s 31A provides:

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66 (2009) 240 CLR 140 at 168 [38] per French CJ, Gummow and Crennan JJ.

67 Federal Court Act, s 31A(2)(b).

68 See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9], 89 [46]; [2001] HCA 49; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15], 111-112 [249]; [2001] HCA 56; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 206 [30], 240-241 [167]-[168]; [2005] HCA 58; *Weiss v*

(Footnote continues on next page)

"(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Court has apart from this section."

Two aspects of these provisions are to be noted.

51 First, the central idea about which the provisions pivot is "no *reasonable* prospect" (emphasis added). The choice of the word "reasonable" is important. If s 31A is to be seen as deriving from r 24.2 of the Civil Procedure Rules 1998 of England and Wales, its provisions underwent an important change in the course of their translation from that jurisdiction to this. The English rule speaks of "no *real* prospect"; s 31A speaks of "no *reasonable* prospect". The two phrases convey very different meanings.

52 Second, effect must be given to the negative admonition in sub-s (3) that a defence, a proceeding, or a part of a proceeding may be found to have no

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The Queen (2005) 224 CLR 300 at 312-313 [31]; [2005] HCA 81; *Stingel v Clark* (2006) 226 CLR 442 at 458 [26]; [2006] HCA 37; *AK v Western Australia* (2008) 232 CLR 438 at 455 [52]-[53]; [2008] HCA 8; *Gassy v The Queen* (2008) 236 CLR 293 at 300 [16]; [2008] HCA 18; *Cesan v The Queen* (2008) 236 CLR 358 at 394 [126]; [2008] HCA 52; *CTM v The Queen* (2008) 236 CLR 440 at 446 [5]; [2008] HCA 25.

reasonable prospect of successful prosecution even if it cannot be said that it is "hopeless" or "bound to fail". It will be necessary to examine further the notion of "no reasonable prospect". But before undertaking that task, it is important to begin by recognising that the combined effect of sub-ss (2) and (3) is that the enquiry required in this case is whether there is a "reasonable" prospect of prosecuting the proceeding, not an enquiry directed to whether a certain and concluded determination could be made that the proceeding would necessarily fail.

53 In this respect, s 31A departs radically from the basis upon which earlier forms of provision permitting the entry of summary judgment have been understood and administered. Those earlier provisions were understood as requiring formation of a certain and concluded determination that a proceeding would necessarily fail. That this was the basis of earlier decisions may be illustrated by reference to two decisions of this Court often cited in connection with questions of summary judgment: *Dey v Victorian Railways Commissioners*[69] and *General Steel Industries Inc v Commissioner for Railways (NSW)*[70].

54 In *Dey*, the defendants moved for summary judgment on the grounds that the action was frivolous, vexatious and an abuse of process. In a passage often later cited, Dixon J said[71] that "[a] case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury". What Dixon J meant by "very clear" was identified by his observation[72] that "once it appears that there is a *real question* to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process" (emphasis added). And there would be a "real question" unless the defendant could "show that it was *so certain* that [the question] must be answered in the [defendant's] favour that it would amount to an abuse of the process of the court to allow the action to go forward for determination according to the appointed modes of procedure"[73] (emphasis added). The test identified by

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69 (1949) 78 CLR 62; [1949] HCA 1.

70 (1964) 112 CLR 125; [1964] HCA 69.

71 (1949) 78 CLR 62 at 91.

72 (1949) 78 CLR 62 at 91.

73 (1949) 78 CLR 62 at 90.

Dixon J in *Dey* can thus be seen to be a test requiring certain demonstration of the outcome of the litigation, not an assessment of the prospect of its success.

55 In *General Steel Industries*, Barwick CJ pointed out[74] that previous decisions about summary termination of actions on the motion of a defendant had been given in cases in which the so-called "inherent" jurisdiction of a court to protect itself and its processes from abuse had been invoked, and in cases where the defendant had relied upon a particular rule of court permitting the court to strike out pleadings or dismiss an action on it being shown that a pleading "does not disclose a reasonable cause of action"[75] or the action "being shown by the pleadings to be frivolous or vexatious"[76]. The material available to the court might differ, depending upon which power was invoked, but all the cases emphasised the need for "exceptional caution" in exercising a power to dismiss an action summarily. As Barwick CJ also pointed out in *General Steel Industries*[77], the test to be applied was expressed in many different ways, but in the end amounted to different ways of saying[78] "that the case of the plaintiff is so *clearly* untenable that it cannot *possibly* succeed" (emphasis added). As that formulation shows, the test to be applied was one of demonstrated certainty of outcome.

56 Because s 31A(3) provides that certainty of failure ("hopeless" or "bound to fail") need not be demonstrated in order to show that a plaintiff has no reasonable prospect of prosecuting an action, it is evident that s 31A is to be understood as requiring a different enquiry from that which had to be made under earlier procedural regimes. It follows, of course, that it is dangerous to seek to elucidate the meaning of the statutory expression "no reasonable prospect of successfully prosecuting the proceeding" by reference to what is said in those earlier cases.

57 Likewise, it is dangerous to apply directly what has been said in the United Kingdom about the application of a test of "no real prospect" or what has been said in United States decisions about summary judgment. The United

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74 (1964) 112 CLR 125 at 129.

75 High Court Rules 1952 (Cth), O 26, r 18(1).

76 High Court Rules 1952, O 26, r 18(2).

77 (1964) 112 CLR 125 at 129.

78 (1964) 112 CLR 125 at 130.

Kingdom cases are directed to a different test. The controversies in the United States about what is sufficient to resist a motion for summary judgment, reflected in the recent decisions of the Supreme Court of the United States in *Ashcroft v Iqbal*[79] and *Bell Atlantic Corp v Twombly*[80] and in that Court's earlier decision in *Conley v Gibson*[81], turn upon the requirements of the Federal Rules of Civil Procedure applied to a system of "notice" pleading. The notion of what is not a "plausible" claim, discussed in *Iqbal* and *Twombly*, may in some cases overlap, but does not coincide, with the notion of "no reasonable prospect".

58 How then should the expression "no reasonable prospect" be understood? No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content. Nor can the expression usefully be understood by the creation of some antinomy intended to capture most or all of the cases in which it cannot be said that there is "no reasonable prospect". The judicial creation of a lexicon of words or phrases intended to capture the operation of a particular statutory phrase like "no reasonable prospect" is to be avoided. Consideration of the difficulties that bedevilled the proviso to common form criminal appeal statutes[82], as a result of judicial glossing of the relevant statutory expression, provides the clearest example of the dangers that attend any such attempt.

59 In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described (with or without the addition of intensifying epithets like "clearly", "manifestly" or "obviously") as "frivolous", "untenable", "groundless" or "faulty". But none of those expressions (alone or in combination) should be understood as providing a sufficient chart of the metes and bounds of the power given by s 31A. Nor can the content of the word "reasonable", in the phrase "no reasonable prospect", be sufficiently, let alone completely, illuminated by drawing some contrast with what would be a "frivolous", "untenable", "groundless" or "faulty" claim.

60 Rather, full weight must be given to the expression as a whole. The Federal Court may exercise power under s 31A if, and only if, satisfied that there is "no reasonable prospect" of success. Of course, it may readily be accepted that

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79 173 L Ed 2d 868 (2009).

80 550 US 544 (2007).

81 355 US 41 (1957).

82 *Weiss* (2005) 224 CLR 300 at 312-318 [31]-[47].

the power to dismiss an action summarily is not to be exercised lightly. But the elucidation of what amounts to "no reasonable prospect" can best proceed in the same way as content has been given, through a succession of decided cases, to other generally expressed statutory phrases, such as the phrase "just and equitable" when it is used to identify a ground for winding up a company. At this point in the development of the understanding of the expression and its application, it is sufficient, but important, to emphasise that the evident legislative purpose revealed by the text of the provision will be defeated if its application is read as confined to cases of a kind which fell within earlier, different, procedural regimes.

61 HEYDON J. On 28 August 2008, when Emmett J dismissed the applicant's proceedings, *Pye v Renshaw*[83] was thought to be an obstacle to their success. The same position applied on 24 March 2009, when the Full Court of the Federal Court of Australia dismissed an appeal against the orders of Emmett J. But on 9 December 2009, *ICM Agriculture Pty Ltd v The Commonwealth*[84] was decided. A majority of this Court concluded that, notwithstanding *Pye v Renshaw*, the legislative power of the Commonwealth conferred by s 96 and s 51(xxxvi) of the Constitution does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms[85]. Further, three members of the Court placed a question mark over the validity of legislation relating to an "informal arrangement" providing for Commonwealth funding to a State if it acquires property on unjust terms[86]. The applicant has pleaded facts which might attract a conclusion favourable to him if that question is answered against validity. Discovery of documents might assist him to establish those pleaded facts.

62 Emmett J acted pursuant to s 31A(2) of the *Federal Court of Australia Act* 1976 (Cth). Whatever the construction of that provision, it is clear that had the courts below been aware – which obviously they could not have been – of what was to be said in *ICM Agriculture Pty Ltd v The Commonwealth*, they would not have viewed an order under s 31A(2) dismissing proceedings as appropriate. That is a sufficient reason for making order 1, order 2 and order 3(a) and (b)(i) of the orders which the other members of the Court wish to make. Contrary to the opinion of other Justices, it is not necessary to consider the correct approach to s 31A. If it were, it would also be necessary to hear submissions from the parties on the subject. Apart from some remarks at the end of the applicant's oral reply on the subject of whether a s 31A order was interlocutory, and two tentative sentences about the width of the power conferred by s 31A, the parties have not advanced any submissions about it. It is therefore both unnecessary and undesirable to say anything on that subject.

63 I also favour order 3(b)(ii) of the orders favoured by other members of the Court for the following reasons. That is the order which would normally be made, unless there were some reason for an order less generous from the applicant's point of view. In this Court the applicant has consistently sought that order – in his draft Notice of Appeal, in his revised draft Notice of Appeal, in his written submissions, and in his oral reply. The respondent has consistently

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83 (1951) 84 CLR 58; [1951] HCA 8.

84 (2009) 240 CLR 140; [2009] HCA 51.

85 (2009) 240 CLR 140 at 165-170 [31]-[46] and 206 [174].

86 (2009) 240 CLR 140 at 168 [37]-[38].

contended that the application for special leave should be refused with costs, or, if the special leave application were granted, that the appeal should be dismissed with costs. The respondent never addressed the question of what costs order in relation to the Notice of Motion of 26 July 2007 should be made in the event, which has now come to pass, that special leave is granted and the appeal allowed.