HIGH COURT OF AUSTRALIA

EDELMAN J

PETER MICHAEL DIMITROV PLAINTIFF

AND

THE SUPREME COURT OF VICTORIA & ORS DEFENDANTS

Dimitrov v The Supreme Court of Victoria
[2017] HCA 51
1 December 2017
S204/2017

ORDER

1. *The plaintiff's application for an order to show cause, filed 2 August 2017, be dismissed, pursuant to r 25.03.3(a) of the High Court Rules 2004 (Cth).*

2. *The plaintiff pay the costs of the third, fourth, ninth, tenth, 13th, 14th, 15th and 17th defendants.*

Representation

R E Dubler SC with Q A Rares for the plaintiff (instructed by Sasha Ivantsoff, Solicitor)

A C Archibald QC with F I Gordon for the third, fourth, ninth and tenth defendants (instructed by Allens Lawyers)

G K J Rich SC with B K Lim for the thirteenth to fifteenth defendants (instructed by Arnold Bloch Leibler)

T W Marskell for the seventeenth defendant (instructed by Moray & Agnew)

Submitting appearances for the first, second, eleventh, twelfth and sixteenth defendants

No appearance for the fifth to eighth defendants

CATCHWORDS

Dimitrov v The Supreme Court of Victoria

Practice and procedure – Original jurisdiction – Where plaintiff applied for order to show cause why prohibition, certiorari and injunction should not issue in respect of orders in Supreme Court of Victoria – Where orders of Supreme Court approved settlement by group proceeding plaintiffs with nunc pro tunc authority of group members – Where settlement deed purportedly released defendants in group proceedings from all claims – Where plaintiff contended orders made in federal jurisdiction beyond power as not involving a "matter" – Where various defendants to plaintiff's application sought dismissal or summary dismissal – Where plaintiff did not attempt to appeal impugned orders –Where some issues raised pending in District Court of New South Wales – Where issues raised in original jurisdiction would not arise if plaintiff sought leave to appeal in Supreme Court – Whether Court of Appeal of Supreme Court of Victoria has power to entertain an appeal – Whether appropriate to invoke original jurisdiction of High Court.

Constitutional law – Constitutional writs – Where plaintiff seeks constitutional writs against judge of Supreme Court of Victoria – Whether judge exercising federal jurisdiction acting as officer of Commonwealth for purposes of s 75(v) of Constitution and s 33(1)(c) of *Judiciary Act* 1903 (Cth).

Words and phrases – "appeals", "certiorari", "constitutional writs", "construction of settlement deed", "declaration", "extension of time", "federal jurisdiction", "group proceedings", "injunction", "leave to appeal", "officer of the Commonwealth", "prohibition", "settlement of group proceeding".

Constitution, ss 73(ii), 75(v).
Corporations Act 2001 (Cth), ss 58AA, 500(2).
Supreme Court Act 1986 (Vic), ss 17, 33V, 33ZC, 33ZF.
High Court Rules 2004 (Cth), r 25.03.3.

EDELMAN J.

Introduction

1 The plaintiff, Mr Dimitrov, brought an application for an injunction and constitutional writs, including an extension of time of approximately two years for the writ of certiorari, in the original jurisdiction of this Court. The application was filed on the eve of a hearing of related issues, more than two and a half years after the events upon which the application is based. It raises issues that were not raised before the primary judge. And the application was filed without seeking leave to appeal to the Court of Appeal of the Supreme Court of Victoria from the orders which the plaintiff seeks to quash.

2 Various defendants have applied for the dismissal or summary dismissal of the application to show cause. One basis upon which dismissal is sought by a number of the defendants is that the novel constitutional propositions raised by the application have no prospects of success. It is unnecessary to decide this point. The application should be dismissed because it is not appropriate for it to be determined by this Court. The proper course in the circumstances of this application is for the plaintiff to attempt to agitate these issues in the lower courts rather than raising them for the first time in this Court. Some of the issues that the plaintiff now seeks to raise, involving construction of a deed, are pending in the District Court of New South Wales. Other more novel issues could have been raised before the primary judge but were not. And they could be the subject, with leave, of an appeal to the Court of Appeal of the Supreme Court of Victoria. Indeed, if that route were taken, and if leave to appeal were granted, then other novel constitutional issues, and barriers to the relief sought by the plaintiff that would require long established decisions of this Court to be overturned, would not arise.

3 There are also basic difficulties with the plaintiff's application. Many necessary and proper parties have not been joined. The plaintiff made a considered decision not to join those parties, asserting, incorrectly, that the orders he seeks do not affect the rights of those parties or that those parties could only benefit from his application.

Background

4 The plaintiff was a group member of proceedings commenced in 2010 in the Supreme Court of Victoria pursuant to Pt 4A of the *Supreme Court Act* 1986 (Vic). The group action concerned various managed investment schemes. The

principal claim was that product disclosure statements were in contravention of Pt 7.9 of the *Corporations Act* 2001 (Cth)[1].

5 On 2 March 2012, an opt out notice was issued which stated that the lead plaintiffs in the group proceedings alleged that "they and Group Members suffered financial loss because the Responsible Entity, Great Southern Managers Australia Limited (GSMAL) and/or Great Southern Finance Pty Ltd ... among other things, made false, misleading and/or deceptive representations to them and to Group Members, in relation to the Great Southern managed investment schemes". The opt out notice provided as follows:

> "**What happens if you do not OPT OUT**
>
> If you are a Group Member and do not give notice to opt out by **4.00pm on 27 April 2012**, you will be taken to have not opted out. Accordingly, under Australian law, you will be bound by the outcome of the Great Southern Group Proceeding(s) which affects you and any settlement, judgment or determination made in it. If the Great Southern Group Proceeding(s) is unsuccessful, you will not be able to make claims in other proceedings in relation to the matters the subject of the Great Southern Group Proceedings."

6 After receiving advice from his solicitors, the plaintiff chose not to opt out of the proceedings. The plaintiff says that one reason why he chose not to opt out was that his solicitors did not explain to him that he may not be permitted to rely on defences or cross-claims that might otherwise have been available to him if the proceedings failed.

7 The proceedings were tried by Croft J over the course of almost a year, between 29 October 2012 and 24 October 2013[2]. Prior to judgment being delivered, the proceedings settled[3]. An application was made to Croft J to approve a deed of settlement executed by the parties on 23 July 2014 ("the Settlement Deed")[4]. The Settlement Deed, by cl 2.1, was conditional upon

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1 *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (In liquidation)* [2014] VSC 516 at [88].

2 *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (In liquidation)* [2014] VSC 516 at [2].

3 *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (In liquidation)* [2014] VSC 516 at [2].

4 *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (In liquidation)* [2014] VSC 516 at [7].

approval by the Supreme Court of Victoria under s 33ZF of the *Supreme Court Act*. It contained terms including the following:

> "4.1.4 The Lead Plaintiffs for and on behalf of themselves and all Group Members acknowledge and admit the validity and enforceability of the Lead Plaintiffs' Loan Deeds and the Group Members' Loan Deeds.
>
> ...
>
> 4.1.6 Each of the Lead Plaintiffs acknowledges and admits their liability to the BEN Parties to pay the Loan Balance under their Loan Deed.
>
> ...
>
> 4.1.10 The Lead Plaintiffs for and on behalf of themselves and on behalf of all Group Members release the BEN Parties and their Related Entities and Javelin and its Related Entities from all Claims.
>
> ...
>
> 4.1.13 Each of the BEN Parties and their Related Entities and Javelin and its Related Entities may plead this Deed as a bar or defence to any claim or action (including a claim for costs) brought by any of the Lead Plaintiffs, the Group Members or the M+K Counterclaim Claimants relating to a Claim."

8 On 14 August 2014, the plaintiff received a notice of the proposed settlement of the proceedings in the Supreme Court of Victoria. The notice explained that the proposed settlement required the approval of the Supreme Court of Victoria before it could take effect. The notice then explained that the Settlement Deed "is a legally binding document which will bind the parties and the Group Members to the terms of the Deed if it is approved by the Court and certain other conditions referred to in clause 2 ... are met".

9 The plaintiff did not seek orders that the settlement not be binding upon him. Instead, he and other group members opposed orders giving effect to the settlement. Their grounds for opposing orders giving effect to the settlement included that the enforceability clauses of the Settlement Deed would prevent group members from raising individual defences or counterclaims relating to their loans in the context of any subsequent debt recovery proceedings[5]. The plaintiff did not challenge the jurisdiction of Croft J as he now seeks to do. Nor

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5 *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (In liquidation)* [2014] VSC 516 at [110].

did he raise any of the issues of construction which are extant before the District Court and which he also seeks to amend his originating proceeding to raise in this Court.

10 The plaintiff's opposition to the settlement was unsuccessful. On 11 December 2014, Croft J made orders, pursuant to s 33V(1) of the *Supreme Court Act*, approving the settlement[6]. Order 1 of the orders of Croft J approved the Settlement Deed pursuant to s 33V(1) of the *Supreme Court Act*. Order 2 then provided:

> "The plaintiffs in the Group Proceedings have the authority of the 'Group Members' (as that term is defined in each of the Group Proceedings), *nunc pro tunc*, to enter into and give effect to the deed of settlement and the transactions contemplated thereby for and on behalf of the Group Members."

11 The plaintiff did not appeal from these orders.

12 On 16 March 2016, Bendigo and Adelaide Bank Ltd ("BABL"), as assignee of three loan agreements with the plaintiff and as one of the BEN parties referred to in the Settlement Deed, commenced recovery proceedings against him in the District Court of New South Wales. BABL obtained default judgment against the plaintiff on 23 September 2016. On 15 November 2016, the plaintiff sought to set aside the default judgment. His application was listed for hearing on 3 August 2017.

13 The plaintiff's intention, prior to his application in this Court, was to apply to set aside the default judgment against him. If the default judgment were set aside then one of the issues that he intended to agitate was whether the Settlement Deed operated as a bar to a defence and cross-claims which he sought to plead against the claims by BABL. He intended to apply to have those questions transferred from the District Court of New South Wales to the Supreme Court of New South Wales and then to the New South Wales Court of Appeal.

14 On 2 August 2017, the day before the hearing of the plaintiff's application to set aside the default judgment, the plaintiff commenced this proceeding in the original jurisdiction of this Court. His application to set aside the default judgment was adjourned pending the outcome of this proceeding. In this Court, the plaintiff seeks orders requiring the defendants to show cause why the following relief should not issue:

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6 *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (In liquidation)* [2014] VSC 516.

(1) a writ of prohibition to prohibit the first to third defendants from further proceeding on orders 1 and 2 made by Croft J on 11 December 2014 insofar as such orders purport to bind group members of the Settlement Deed in respect of their individual claims and defences not the subject of the common issues;

(2) a writ of certiorari, with an order extending time, directed to the first and second defendants, quashing or otherwise setting aside the orders of Croft J approving the Settlement Deed on 11 December 2014 insofar as the orders purport to bind group members to the Settlement Deed in respect of their individual claims and defences not the subject of the common issues; and

(3) an injunction to restrain the third defendant from proceeding on orders 1 and 2 made by Croft J on 11 December 2014 insofar as the orders purport to bind group members to the Settlement Deed in respect of their individual claims and defences not the subject of the common issues.

15 In broad terms the relief is concerned to ensure that the plaintiff will not be bound by the Settlement Deed with respect to his individual claims and defences against BABL. The basis upon which the plaintiff submitted that relief in this Court should issue raises at least four issues in circumstances where the plaintiff alleges that the Settlement Deed was not entered with his actual or ostensible authority:

(1) whether the orders of Croft J, in federal jurisdiction, involved a "matter" in circumstances including the lack of the plaintiff's individual claims, or any pleading or evidence concerning them, being before Croft J;

(2) whether the plaintiff was denied procedural fairness by the orders being made without pleadings or particulars, information, evidence, or agreed facts concerning his claims and, if procedural fairness was denied by the orders made, whether the orders were (i) beyond power or (ii) involved a non-jurisdictional error of law on the face of the record;

(3) whether the orders of Croft J went beyond the power provided for in the *Supreme Court Act* because that Act should be "read down ... so that the statute did not provide for the extinguishment of valuable rights without fair compensation"; and

(4) whether a writ of certiorari could issue to quash partially the orders of Croft J, with the effect that only part of the Settlement Deed is

> enforceable, on the alleged basis that to do so would be "co-extensive with the common law rights of the [BEN parties]".

16 The plaintiff also sought leave to amend his application to seek declarations, including that the orders of the Supreme Court of Victoria on their proper construction do not bind group members to the Settlement Deed in respect of their individual claims and defences not the subject of the common issues.

17 As I explain later, there are further issues raised by this application that would not arise if the plaintiff had appealed the orders made by Croft J. In particular, one basis upon which the constitutional writs are sought by the plaintiff would require him to show that Croft J, when exercising federal jurisdiction as a judge of the Supreme Court of Victoria, was an officer of the Commonwealth. That is a very controversial proposition.

18 Four of the parties who seek that the application for an order to show cause be dismissed are the third, fourth, ninth, and tenth defendants[7]. They are collectively described as the "BEN parties". Another three parties who separately seek dismissal of the application are the 13th, 14th, and 15th defendants. They are former directors of companies within the Great Southern group, who are collectively described as the "Executive Directors". Finally, dismissal of the application is also sought by the 17th defendant, a former non-executive director.

The plaintiff's failure to appeal from the decision of Croft J

19 There is a long standing principle[8], reiterated recently by Nettle J, that "[g]enerally speaking, a litigant must exhaust its statutory rights of appeal before this Court will contemplate an application for mandamus or prohibition [or certiorari] directed to achieving a result that in substance may be obtained on appeal"[9]. It is usually inappropriate for the original jurisdiction of this Court to be invoked where the decision under challenge is a decision which is amenable to appeal, whether or not that appeal is subject to leave[10]. Although there are strong

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7 Bendigo and Adelaide Bank Ltd ("BABL"), ABL Nominees Pty Ltd, ABL Custodian Services Pty Ltd, and Pirie Street Holdings Ltd.

8 Hawes, *The Law Relating to the Subject of Jurisdiction of Courts*, (1886) at 316-317.

9 *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* (2016) 91 ALJR 1 at 8 [22]; 338 ALR 360 at 367; [2016] HCA 41.

10 *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* (2016) 91 ALJR 1 at 8 [22]; 338 ALR 360 at 367.

reasons for this principle, it is not absolute, as Nettle J recognised. For instance, exceptionally, the application might be entertained where a want or excess of jurisdiction by a federal judge is "clearly shown"[11], or where a constitutional issue should be heard immediately by the Court, such as where prohibition is sought to prohibit the exercise of a jurisdiction which it is asserted that federal judges do not have[12]. No such circumstance applies in this case. There may be doubt about whether a writ of prohibition or an injunction could restrain the relevant parties – including Croft J, who has performed all his duties – from "proceeding on" the orders of Croft J. But, whether or not there is any exception where it is apprehended that a tribunal might commit further acts in excess of its jurisdiction[13], until binding orders, particularly those of a superior court, are quashed a writ of prohibition could not issue to prohibit, and a permanent injunction could not restrain, persons from performing their duties and acting upon the orders[14]. A writ of certiorari to quash the orders of Croft J is therefore essential to the relief sought by the plaintiff. But orders could be made on an appeal, with leave, that would have the same practical effect as a writ of certiorari.

20 The plaintiff submitted that he should be permitted to bring this application in this Court's original jurisdiction because he seeks prohibition and an injunction, which have no time limit in this Court. In comparison, an extension of time is required if an application for leave to appeal[15] to the Victorian Court of Appeal is filed more than 28 days after the order from which

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11 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ; [1984] HCA 82.

12 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5.

13 *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456; [1920] HCA 83.

14 *Re Keely; Ex parte Kingham* (1995) 129 ALR 255 at 280; *Re Ruddock; Ex parte Reyes* (2000) 75 ALJR 465 at 468 [23]-[24]; 177 ALR 484 at 488; [2000] HCA 66; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants M31/2004* [2004] HCATrans 318 at lines 393-405; *Re Minister for Immigration and Multicultural Affairs; Ex parte Sithamparapillai* [2004] HCATrans 364 at lines 999-1017. See also *New South Wales v Kable* (2013) 252 CLR 118 at 133 [32]; [2013] HCA 26.

15 *Supreme Court Act* 1986 (Vic), ss 14A and 14B, introduced with effect from 10 November 2014 by the *Courts Legislation Miscellaneous Amendments Act* 2014 (Vic), s 4.

the appeal is brought[16]. One of the difficulties with this submission is that its premise is incorrect. In the circumstances of this case there is, effectively, a time limit also upon the relief sought by the plaintiff in this Court. The constitutional writ of certiorari is an essential precondition to the relief sought by the plaintiff and that writ is subject to a time limit of six months[17]. Although the time period for issue of the writ is longer than a time period within which to bring an appeal, in both cases the time period has been substantially exceeded and the considerations for an extension of time[18] are similar. The BEN parties properly accepted that it is neither necessary nor appropriate for this Court to consider the various arguments in favour of, or against, an extension of time in this case because those arguments are properly assessed if any application for leave to appeal is brought to the Court of Appeal with an application for an extension of time.

21 However, the plaintiff submitted that he had, and has, no power to bring an application for leave to appeal because the usual power of an affected person to appeal[19] has been extinguished by s 33ZC of the *Supreme Court Act*. That section provides as follows:

> "(1) On an appeal by the plaintiff on behalf of group members and in respect of the judgment to the extent that it relates to questions common to the claims of group members, the parties to the appeal are the plaintiff, as the representative of the group members, and the defendant.
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> (2) On an appeal by a sub-group representative party on behalf of sub-group members in respect of the judgment to the extent that it relates to questions common to the claims of sub-group members, the parties to the appeal are the sub-group representative party, as the representative of the sub-group members, and the defendant.
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> (3) On an appeal by the defendant in a group proceeding, other than an appeal referred to in subsection (4), the parties to the appeal are—

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16 *Supreme Court Act* 1986 (Vic), s 14B; Supreme Court (General Civil Procedure) Rules 2015 (Vic), r 64.05.

17 High Court Rules 2004 (Cth), r 25.06.1.

18 *Re Commonwealth of Australia; Ex parte Marks* (2000) 75 ALJR 470 at 474 [16]; 177 ALR 491 at 496; [2000] HCA 67.

19 *Supreme Court Act* 1986 (Vic), s 17(2); *Cuthbertson v Hobart Corporation* (1921) 30 CLR 16 at 25; [1921] HCA 51; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 48 [137]; [2010] HCA 19.

(a) in the case of an appeal in respect of the judgment generally—the defendant and the plaintiff as the representative of the group members; and

(b) in the case of an appeal in respect of the judgment to the extent that it relates to questions common to the claims of sub-group members—the defendant and the sub-group representative party as the representative of the sub-group members.

(4) The parties to an appeal in respect of the determination of a question that relates only to a claim of an individual group member are that group member and the defendant.

(5) If the plaintiff or the sub-group representative party does not commence an appeal within the time provided, another member of the group or sub-group may, within a further 21 days, commence an appeal as representing the group members or sub-group members, as the case may be.

(6) If an appeal is brought from a judgment of the Trial Division in a group proceeding, the Court of Appeal may direct that notice of the appeal be given to such person or persons, and in such manner, as that court thinks fit.

(7) Section 33J does not apply to an appeal.

(8) The notice of appeal must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members."

22 The plaintiff's submission is effectively that s 33ZC has abolished the appeal rights that the plaintiff would otherwise have had. Section 17(2) of the *Supreme Court Act* provides that "[u]nless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge of the Court". The plaintiff's submission is that s 33ZC has "expressly provided" that no appeal will lie to the Court of Appeal. The effect of such a provision would be significant. It would mean that orders made under s 33V would bind persons who were not before the Court and those persons would be deprived of any right to appeal the orders.

23 The plaintiff's submission should not be accepted. Unlike other provisions in the *Supreme Court Act*, s 33ZC does not say that "an appeal does not lie"[20].

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20 Cf *Supreme Court Act* 1986 (Vic), ss 17A(4) and 17A(6).

Rather, s 33ZC assumes the operation of usual appellate provisions, and modifies those provisions for group proceedings by providing for procedural formalities such as the persons who are to be the parties to the appeal, representative appeals, the persons to whom notice of the appeal is to be given, and the contents of the notice of appeal. Any doubt about this construction is dispelled by the description of the provision as part of a regime concerned only with appeal procedure, not appeal rights, in (i) the Explanatory Memorandum to the 2000 Bill that introduced into the *Supreme Court Act* Pt 4A, containing s 33ZC[21], and (ii) the Australian Law Reform Commission's report that led to the 1991 Bill that introduced into the *Federal Court of Australia Act* 1976 (Cth) the provisions which were substantially replicated in that Part of the *Supreme Court Act* containing s 33ZC[22].

24 The plaintiff submitted that s 33ZC(1) and s 33ZC(4) expressly provide that an appeal will not lie by any affected individual. There may be different constructions about the effect of those provisions. But on any reasonable construction they do not make express provision to remove the power to bring an appeal. On one possible construction, the effect of those provisions is simply to provide for the persons who will be parties to the appeal to the extent that it "relates to" questions common to the claims of group members[23] or sub-group members[24] and the persons who will be parties to an appeal in respect of a question that "relates only to" a claim of an individual group member[25]. In other words, to the extent that an appeal "relates to" questions common to all group members or sub-group members, then the appeal by the lead plaintiff is brought in a representative capacity. If the lead plaintiff does not bring the appeal within the time provided then another group member or sub-group member may do so within a further 21 days[26]. On the other hand, to the extent that a question does not "relate to" the common claims of group members, but "relates only to" the

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21 Victoria, Legislative Council, Courts and Tribunals Legislation (Miscellaneous Amendments) Bill 2000, Explanatory Memorandum at 7.

22 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 102-103.

23 *Supreme Court Act* 1986 (Vic), s 33ZC(1).

24 *Supreme Court Act* 1986 (Vic), s 33ZC(2).

25 *Supreme Court Act* 1986 (Vic), s 33ZC(4).

26 *Supreme Court Act* 1986 (Vic), s 33ZC(5).

claim of an individual group member, then the individual brings the claim in a personal capacity[27].

25 On this construction, to the extent that any proposed appeal by the plaintiff relates to questions common to the claims of group members or sub-group members then, as no appeal has been brought by the lead plaintiff, the plaintiff can bring an application for leave to appeal in a representative capacity[28]. To the extent that any question on a proposed appeal by the plaintiff does not relate to questions common to the claims of group members or sub-group members, then the plaintiff can bring an application for leave to appeal in his personal capacity[29].

26 The plaintiff then submitted that it would be inutile for him to seek leave to appeal because his appeal would be unsuccessful as the Court of Appeal would be likely to follow two of its earlier decisions[30]. There is a tension between this submission and the plaintiff's submission that the two decisions of the Court of Appeal are "plainly wrong" in light of the decision of this Court (considered in the latter decision of the Court of Appeal) in *Timbercorp Finance Pty Ltd (In liq) v Collins*[31]. Even more fundamentally, the plaintiff neglected to mention that the central constitutional issue concerning the jurisdiction of Croft J that the plaintiff now seeks to raise in this Court was not considered in the two decisions of the Court of Appeal. In any event, even if there were a very strong prospect that an appeal, subject to leave, would be decided adversely to the plaintiff, that is not a strong reason for this Court to consider the issue for the first time, in its original jurisdiction, particularly since the jurisdictional issues that the plaintiff seeks to raise were not raised before Croft J and could have been raised.

27 It may be arguable that s 73(ii) of the Constitution permits a "leap frog" appeal to this Court in exceptional cases, subject to the requirement of special leave to appeal in s 35 of the *Judiciary Act* 1903 (Cth). But the plaintiff does not seek special leave to appeal to this Court by this route. He is right not to do so. Such a leap frog application for special leave would rarely be appropriate where there is an appellate jurisdiction of an intermediate court of appeal.

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27 *Supreme Court Act* 1986 (Vic), s 33ZC(4).

28 *Supreme Court Act* 1986 (Vic), s 33ZC(5)**.**

29 *Supreme Court Act* 1986 (Vic), s 33ZC(4).

30 *Byrne v Javelin Asset Management Pty Ltd* [2016] VSCA 214; *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd* (2017) 118 ACSR 592.

31 (2016) 259 CLR 212; [2016] HCA 44.

Issues that would be unnecessarily raised in this Court

28 Putting to one side the delay and associated questions of leave to appeal, there are significant advantages for the plaintiff, and the efficiency and efficacy of the conduct of these proceedings generally, if the plaintiff were to proceed by way of an application for leave to appeal to the Court of Appeal. The application in this Court's original jurisdiction introduces new, and novel, issues that would never arise if the usual appellate route were followed, potentially culminating in an application for special leave. Those unnecessary issues are as follows.

29 It can be assumed that Croft J was exercising federal jurisdiction when making orders to give effect to his approval of the Settlement Deed. The plaintiff's notice of a constitutional matter in this Court asserts that Croft J, as a judge of the Supreme Court of Victoria exercising federal jurisdiction, was acting as an officer of the Commonwealth for the purposes of s 75(v) of the Constitution and s 33(1)(c) of the *Judiciary Act* 1903 (Cth)[32]. This requires the decision of this Court in *R v Murray and Cormie; Ex parte The Commonwealth*[33] to be overruled. In that case the submission was rejected by a majority comprised of Isaacs, Higgins, Gavan Duffy, and Rich JJ. Isaacs J said[34]:

> "The Constitution, by Chapter III, draws the clearest distinction between federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilize the judicial services of State Courts recognizes in the most pronounced and unequivocal way that they remain 'State Courts.' No reference is made to State Judges. Federal jurisdiction may be entrusted to State Courts, and, if so, the Judges of those Courts exercise the jurisdiction not because they are 'officers of the Commonwealth'—which they are not—but because they are State officers, namely, Judges of the States. An 'officer' connotes an 'office' of some conceivable tenure, and connotes an appointment, and usually a salary. How can it be said that a State Judge holds a Commonwealth office? When was he appointed to it? He holds his position entirely under the State; he is paid by the State, and is removable by the State, and the Constitution knows nothing of him personally, but recognizes only the institution whose jurisdiction, however conferred, he exercises."

30 Higgins J also held that a District Court of New South Wales judge exercising federal jurisdiction "remains an officer of New South Wales, selected

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32 Separate issues, and other obstacles, are raised by any reliance upon s 76(ii) of the Constitution and s 33(1)(a) or s 33(1)(b) of the *Judiciary Act* 1903 (Cth).

33 (1916) 22 CLR 437; [1916] HCA 58.

34 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 452.

by New South Wales, paid by New South Wales, removable by New South Wales, responsible to New South Wales"[35]. He continued[36]:

> "the fact that additional powers have been conferred upon that Court by the Commonwealth Parliament no more makes the Court, or the Judge, an officer of the Commonwealth than the gift of a rifle by the British Government to a Belgian soldier would make the latter a British soldier."

31 Likewise, Gavan Duffy and Rich JJ also rejected the submission, saying that "[t]he Constitution draws a clear distinction between federal Courts and Courts invested with federal jurisdiction ... and contains nothing which suggests that Judges of Courts invested with federal jurisdiction should be regarded as officers of the Commonwealth"[37].

32 The plaintiff submitted that the authority of the decision in *R v Murray and Cormie; Ex parte The Commonwealth* is diminished for the reason, curious from the perspective of the operation of precedent, that it has stood for a century. The plaintiff also submitted that the decision "does not sit well with" more recent authority, namely the decisions of *In re Anderson; Ex parte Bateman*[38] and *Kirk v Industrial Court (NSW)*[39]. Neither of those cases casts doubt upon the decision in *R v Murray and Cormie; Ex parte The Commonwealth*.

33 In *In re Anderson; Ex parte Bateman*[40], this Court considered an application for an order for prohibition directed to a judge of the Family Court of Western Australia. The judge of that State court was exercising federal jurisdiction under the *Family Law Act* 1975 (Cth). Gibbs ACJ (with whom Stephen, Jacobs, Murphy, and Aickin JJ agreed) held that the judge was not "and could not constitutionally be, a member of a federal court set up under Ch III of the Constitution"[41]. His Honour therefore considered that the case fell directly within the authority of the decision in *R v Murray and Cormie; Ex parte The*

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35 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 464.

36 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 464.

37 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 471.

38 (1978) 53 ALJR 165; 21 ALR 56.

39 (2010) 239 CLR 531; [2010] HCA 1.

40 (1978) 53 ALJR 165; 21 ALR 56.

41 *In re Anderson; Ex parte Bateman* (1978) 53 ALJR 165 at 165; 21 ALR 56 at 57.

Commonwealth[42]. His Honour said it was "impossible to see any ground on which that decision can be distinguished from the present case"[43]. He concluded that this Court lacked original jurisdiction to deal with the matter. As for the decision in *Kirk v Industrial Court (NSW)*[44], that case did not consider whether a judge of a State court, when exercising federal jurisdiction, could be an officer of the Commonwealth. There may, however, be questions about the authority and operation of *R v Murray and Cormie; Ex parte The Commonwealth* in light of this Court's decision in *Rizeq v Western Australia*[45]. But no submissions were made about that latter case on this point.

34 A further unnecessary issue which is generated by the plaintiff's originating application may be whether leave to proceed against the fifth and twelfth defendants is required and, if so, whether there is power for this Court to grant that leave. Section 500(2) of the *Corporations Act* 2001 (Cth) provides as follows:

> "After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes."

35 The "Court" is defined in s 58AA of the *Corporations Act* to mean any of the following courts: (i) the Federal Court; (ii) the Supreme Court of a State or Territory; (iii) the Family Court of Australia; and (iv) a court to which s 41 of the *Family Law Act* 1975 (Cth) applies because of a proclamation made under s 41(2) of that Act. The High Court is not a "Court" within the meaning of s 58AA.

36 On one view, s 500(2), on its proper construction, is concerned only with actions or civil proceedings in the courts defined in s 58AA. But the plaintiff did not develop an argument in those terms. His submission was that s 500(2) must exclude the High Court because otherwise "it would curtail the constitutional jurisdiction of the High Court under ss 75 and 76 of the Constitution". This submission appears to rely upon an implied constitutional constraint upon legislative power, which requires Parliament not to reduce judicial review in this Court below a minimum standard as recognised in *Plaintiff S157/2002 v The*

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42 *In re Anderson; Ex parte Bateman* (1978) 53 ALJR 165 at 165; 21 ALR 56 at 57.

43 *In re Anderson; Ex parte Bateman* (1978) 53 ALJR 165 at 165; 21 ALR 56 at 57.

44 (2010) 239 CLR 531.

45 (2017) 91 ALJR 707; 344 ALR 421; [2017] HCA 23.

Commonwealth[46], *Bodruddaza v Minister for Immigration and Multicultural Affairs*[47], and, most recently, *Graham v Minister for Immigration and Border Protection*[48]. Again, this submission raises issues that may not arise if the usual course of an appeal, with an associated application for leave under s 500(2), were followed.

Conclusion

37 None of the issues raised by the plaintiff might ever come before this Court. In the plaintiff's District Court application to set aside the default judgment against him, he proposes to argue one of the issues he now seeks to raise in this Court, namely that some of his defences and cross-claims have not been released by the Settlement Deed. The District Court, which is seized of the pleadings and any proposed amendments, is the appropriate place for that issue to be resolved in the first instance. Indeed, the plaintiff initially proposed to litigate the underlying issues against BABL in the District Court. That would have been the most efficient method of proceeding. To the extent that the plaintiff might wish to bring, concurrently, a challenge to the orders of Croft J (including on a basis that was not raised before his Honour) then that challenge would appropriately be brought by way of an application for leave to appeal. It may be that the most efficient approach would be for the hearing of any application for leave to appeal to be deferred for consideration, if necessary, until after the District Court proceedings are concluded. But, whether or not that is so, it is not appropriate in this case to pause the litigation in order to invoke the original jurisdiction of this Court. To do so would fragment the litigation and have the effect that this Court is "deprived of the signal benefit of the lower courts' consideration of the issues raised between the parties"[49]. A matter in the original jurisdiction of this Court would also raise potentially large issues, including seeking to overturn long established authority of this Court, which would not otherwise arise by an appellate route.

38 There is also a basic defect in the plaintiff's application. The plaintiff initially submitted that it is unnecessary for him to join any other group members to his application because the relief that he seeks could only benefit group members. That is incorrect. The Executive Directors refer, for example, to those group members who are entitled to a waiver of accrued interest under the

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46 (2003) 211 CLR 476; [2003] HCA 2.

47 (2007) 228 CLR 651; [2007] HCA 14.

48 (2017) 91 ALJR 890; 347 ALR 350; [2017] HCA 33.

49 *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* (2016) 91 ALJR 1 at 8 [22]; 338 ALR 360 at 367.

settlement. They might wish to preserve those rights, and hence might wish to maintain that the settlement is valid, particularly if they have legal advice that their claims are weak or untenable. The possibility is enhanced in relation to the group members who are described as the "M+K Clients". Those persons are entitled to a payment of $20 million under the Settlement Deed. The plaintiff then submitted that other group members would be unaffected by the orders he sought if Croft J's orders were only partially quashed so that the group members maintained their rights arising from the Settlement Deed, but were released from their obligations. Even assuming, without deciding, that a power exists to grant certiorari partially quashing an order, at the very least it is doubtful that this Court could make such an order where its effect would be to rewrite the Settlement Deed for which approval was given. Further, even if such an order were likely, the other group members would still be necessary and proper parties.

39 These circumstances all tell strongly in favour of dismissal of the application. Against this, the plaintiff submitted that he is impecunious and that his grant of funding to raise these issues might be exhausted if they cannot be commenced now in the High Court. The plaintiff's submissions invite speculation, without foundation, about his precise present financial position as well as about the reasons, financial or otherwise, why the plaintiff did not take other available legal courses earlier. In any event, it is not helpful to speculate on the plaintiff's financial position in relation to legal representation, including matters raised by the BEN parties such as how the plaintiff paid for the services of his present solicitor before a grant of government funding. Nor is it helpful to speculate upon whether his funding might have been confined to raising these matters in the original jurisdiction of this Court rather than by the usual route of an appeal and application for special leave. It suffices to say that this is not a sufficient basis for this application to be heard now in this Court.

40 The plaintiff's application dated 2 August 2017 for an order to show cause is dismissed under r 25.03.3(a) of the High Court Rules 2004 (Cth). The plaintiff should pay the costs of the application of the third, fourth, ninth, tenth, 13th, 14th, 15th, and 17th defendants.