

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

WONG & ORS

APPELLANTS

AND

SILKFIELD PTY LTD

RESPONDENT

Wong v Silkfield Pty Ltd [1999] HCA 48
9 September 1999
B26/1999

ORDER

1. *Appeal allowed with costs.*
2. *Set aside order 2 of the orders of the Full Court of the Federal Court of Australia made 20 November 1998, together with the declaration made by that Court, and in lieu thereof, save as to the direction by that Court as to the future conduct and procedure in the matter, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

D F Jackson QC with D A Savage for the appellants (instructed by Attwood Marshall)

B W Walker SC with J K Bond for the respondent (instructed by Clayton Utz)

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

CATCHWORDS

Wong v Silkfield Pty Ltd

Practice and procedure – Federal Court of Australia – Representative proceedings – Commencement – Misleading and deceptive conduct pleaded – Whether alleged common misrepresentation a "substantial common issue of law or fact".

Words and phrases – "substantial".

Federal Court of Australia Act 1976 (Cth), s 33C, Pt IVA.

Trade Practices Act 1974 (Cth), s 52.

- 1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ. This appeal is brought from the allowance by the Full Court of the Federal Court of Australia (O'Loughlin and Drummond JJ; Foster J dissenting¹) of an interlocutory appeal from a judge of that Court (Spender J). It presents an issue of construction of s 33C of the *Federal Court of Australia Act* 1976 (Cth) ("the Act"). This provision is included in Pt IVA (ss 33A-33ZJ) which is headed "REPRESENTATIVE PROCEEDINGS". Part IVA creates new procedures and confers upon the Federal Court new powers in relation to the exercise of jurisdiction with which it has been invested by another law made by the Parliament². In the present case the jurisdiction of the Federal Court was conferred by s 86 of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act") in respect of matters arising under that statute, relevantly s 52.

The facts

- 2 By their Application and Statement of Claim, both filed 24 October 1997, the appellants seek relief including a declaration that the respondent ("Silkfield") has engaged in misleading and deceptive conduct in respect of the sale or proposed sale of lots in a residential building known as "the Phoenician North Tower" situated at Broadbeach in the State of Queensland, and an award of damages pursuant to s 82 of the Trade Practices Act. The building comprises 166 strata title lots and contracts for 124 of the residential lots were entered into by Silkfield through the agency of Skye Court Pty Ltd ("Skye").
- 3 The Application states that it is brought by the appellants as a "representative party" and the group members to whom the proceeding relates are identified in par 4 of the Statement of Claim. They are all said to be persons who entered into contracts to purchase lots in the building from Silkfield, by or through the agency of Skye, prior to the date of registration of the plan in respect of the building and who were provided by Silkfield with a statement purportedly made pursuant to s 49 of the *Building Units and Group Titles Act* 1980 (Qld) ("the Building Units Act"). A list of the presently identified members of the group is annexed to the Statement of Claim and comprises 26 individuals.
- 4 Section 49 of the Building Units Act requires an original proprietor of land, the subject of a building units plan or a group titles plan which is registered or proposed to be registered, to give to the purchaser a written statement setting out

1 *Silkfield Pty Ltd v Wong* (1998) 159 ALR 329.

2 *Poignand v NZI Securities Australia Ltd* (1992) 37 FCR 363 at 364-365.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

2.

certain information. The appellants complain that, in the course of its agency on behalf of Silkfield, Skye represented to members of the group that, among other matters, the written statements delivered pursuant to s 49 ("the s 49 statements") were accurate whereas in truth they were inaccurate. It is alleged that each s 49 statement (which were in common form) failed to disclose (i) an agreement or agreements for the service and maintenance of lift facilities within the building between Silkfield and a third party and (ii) an agreement or agreements for the provision of a public carpark by the Gold Coast City Council made between Silkfield and that body.

5 The appellants appeal against a declaration made by the Full Court that³:

"[t]he proceedings as presently framed can only be continued as proceedings brought by [the appellants] on their own behalf".

6 At first instance, Spender J refused a declaration sought on a motion by Silkfield that it was "not open" to the appellants "to commence these proceedings as a representative proceedings under [Pt] IVA". That was the effect of the relief, more precisely expressed, granted by the Full Court on an appeal, by leave, from the decision of Spender J.

The legislation

7 The issue for this Court is whether the Full Court erred when it determined that the proceeding instituted by the appellants did not answer the criteria specified in s 33C for its commencement as a "representative proceeding". That term is defined in s 33A as meaning a proceeding commenced under s 33C. That section states that:

"33C(1) Subject to this Part, where:

- (a) 7 or more persons have claims against the same person; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common issue of law or fact;

3 *Silkfield Pty Ltd v Wong* (1998) 159 ALR 329 at 348.

3.

a proceeding may be commenced by one or more of those persons as representing some or all of them.

(2) A representative proceeding may be commenced:

(a) whether or not the relief sought:

- (i) is, or includes, equitable relief; or
- (ii) consists of, or includes, damages; or
- (iii) includes claims for damages that would require individual assessment; or
- (iv) is the same for each person represented; and

(b) whether or not the proceeding:

- (i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or
- (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members."

8 The originating process must answer requirements designed to show that the criteria in s 33C have been met. Section 33H provides:

"33H(1) An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required to be included:

- (a) describe or otherwise identify the group members to whom the proceeding relates; and
- (b) specify the nature of the claims made on behalf of the group members and the relief claimed; and
- (c) specify the questions of law or fact common to the claims of the group members.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

4.

- (2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members."

9 Nothing in Pt IVA affects the Court's powers under other provisions. Section 33ZG(b) so provides. No objection⁴ is taken to the interlocutory procedure adopted before Spender J to determine the question whether the appellants had met the conditions in s 33C for the commencement of the action as a representative proceeding.

10 The appeal turns upon the requirements in s 33C(1)(c) and s 33H(1)(c) and, in particular, upon the meaning of the phrase in par (c) of s 33C(1) "give rise to a substantial common issue of law or fact".

11 In *Carnie v Esanda Finance Corporation Ltd*⁵ this Court construed Pt 8 r 13(1) of the Supreme Court Rules 1970 (NSW). That sub-rule provided:

"Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

The Court determined that persons having separate causes of action in contract or tort may have "the same interest" in proceedings to enforce those causes of action within the meaning of this Rule. Order 6 r 13(1) of the Federal Court Rules is in the same terms as the New South Wales Supreme Court Rule. Part IVA provides its own more detailed regime. Like other provisions conferring jurisdiction upon or granting powers to a court, Pt IVA is not to be read by making implications or imposing limitations not found in the words used; this is so even if the evident purpose of the statute is to displace generally understood procedures⁶.

12 In particular, the scope of s 33C is not confined by matters not required by its terms or context; however, the terms must be construed and the context

4 See *Poignand v NZI Securities Australia Ltd* (1992) 37 FCR 363 at 364.

5 (1995) 182 CLR 398.

6 See *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313, 316; *Andjelic v Marsland* (1996) 186 CLR 20 at 39.

5.

considered⁷. Section 33C attempts to resolve issues which bedevilled representative procedures as they had been developed, particularly by courts of equity. This is apparent from the terms of s 33C(2). Thus, the relief may consist only of damages and may not include equitable relief and the proceeding may be concerned with separate contracts or transactions and involve separate acts or omissions. What is required is that the claims give rise to a common issue of law or fact which is "substantial".

Representative proceedings in equity

- 13 In construing this requirement it is convenient to have regard to the defects and uncertainties in the previous procedures developed by the courts. The origin and scope of the representative action in Chancery procedure was detailed by McHugh J in *Carnie*⁸. On the one hand, the principle was that all persons materially interested in the subject-matter of the suit ought generally to be made parties to it either as plaintiffs or defendants so as to settle the controversy by binding those interested to the final decree⁹. However, as Daniell put it¹⁰, in answering "the purpose of complete justice, care must be taken not to run into the opposite defect, viz, that of attempting to embrace in [the bill] too many objects", thereby risking a demurrer to the bill on the ground of multifariousness. On such a demurrer, a defendant might object to having been brought in as a party upon a record propounding a case on the basis that he had no connection with a significant portion of it. These demurrers were to be resolved as a matter of discretion, Sir George Jessel MR said, "upon considerations of convenience with regard to the circumstances of each particular case"¹¹.

7 *CDJ v VAJ* (1998) 72 ALJR 1548 at 1556, 1565; 157 ALR 686 at 697, 709; *Pelechowski v The Registrar, Court of Appeal* (1999) 73 ALJR 687 at 694, 700-701, 711-712; 162 ALR 336 at 346, 354-355, 369-370.

8 (1995) 182 CLR 398 at 427-429. See also the judgments of French J in *Zhang v Minister for Immigration* (1993) 45 FCR 384 at 400-403 and of Souter J in *Ortiz v Fibreboard Corporation* 67 USLW 4632 at 4636-4637 (1999).

9 Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity*, 2nd ed (1847) at 2-3.

10 *The Practice of the High Court of Chancery*, 5th ed (1871), vol 1 at 283.

11 *Coates v Legard* (1874) LR 19 Eq Cas 56 at 59.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

6.

14 The strict application of the rule as to the presence of all necessary parties led, as the authorities referred to by McHugh J in *Carnie*¹² show, to a relaxation. For example, a plaintiff might sue on behalf of himself and all the others of a class, of which he was one, on the allegation that they were too numerous all to be made parties¹³. However, difficulties with this procedure arose where each of the members of the class had a distinct demand in equity. Thus, demurrers were allowed in respect of representative actions by shareholders who complained of misrepresentations in the prospectus upon which they had relied. This was because, whilst the prospectus may have been false, the case of each person deceived would be peculiar to himself and would depend upon its own circumstances¹⁴. The parallel with the present litigation and the advantages under Pt IVA will be apparent.

15 The representative procedures outlined above were utilised in aid of claims to equitable relief where rights, titles and interests protected in equity were at stake. Different considerations applied in the auxiliary jurisdiction of equity to representative procedures in actions in tort, where the rights of the plaintiffs were clearly legal and the relief sought was damages. In the United States, before the introduction in 1938 of the present Federal Rules of Civil Procedure and in particular r 23¹⁵, there was much discussion as to whether the bill of peace, as understood in English equity, provided a model for class actions in tort, but without

12 (1995) 182 CLR 398 at 427-429. See also the judgments of Chancellor Kent in *Wendell v Van Rensselaer* 1 Johns Ch 344 at 349-350 (1815) and of Story J in *West v Randall* 29 Fed Cas 718 at 721-722 (1820).

13 Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 1 at 172.

14 *Jones v Garcia del Rio* (1823) 1 Turn & R 297 [37 ER 1113]; *Croskey v Bank of Wales* (1863) 4 Giff 314 at 330 [66 ER 726 at 732-733]; *Hallows v Fernie* (1868) LR 3 Ch App 467 at 471; Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity*, 2nd ed (1847) at 41-42; Spencer Bower, *The Law Relating to Actionable Non-Disclosure*, (1915) at 538-539; *Kerr on Fraud and Mistake*, 7th ed (1952) at 541; cf *Beeching v Lloyd* (1855) 3 Drew 227 [61 ER 890].

15 This provided for "Class actions" in all cases, whether formally denominated legal or equitable. See Weinstein, "The Effect of Equity on Mass Tort Law", in Goldstein (ed), *Equity and Contemporary Legal Developments*, (1992) 668 at 695-701.

7.

jury trial. In particular, there was a controversy as to what was involved in a requirement of a community of right, title and interest in the subject-matter¹⁶.

- 16 Lord Chelmsford LC said in *Sheffield Waterworks v Yeomans*¹⁷ that "strictly speaking" the "rights" of the plaintiffs, by which his Lordship meant their legal rights, had to be identical but that it would be sufficient if their rights depended upon the same question. In that litigation this question was the validity of certain certificates. Speaking for the United States Supreme Court, Field J regarded as sufficient "numerous parties having distinct interests originating in a common source"¹⁸.

- 17 The equity court interfered in such cases not necessarily to protect equitable rights, titles and interests, but upon what Isaacs ACJ identified as "a totally different head of equity"¹⁹, namely the prevention of a multiplicity of actions to vindicate the legal rights involved. Ashburner expressed the matter as follows²⁰:

"Where a man set up a general exclusive right at law, and the persons who controverted it with him were so numerous that he could not quiet the right by one or two actions at law, he was entitled to file a bill in equity against some of his opponents, sufficient in number to provide for a fair trial. This was called a bill of peace. The Court of Equity then directed an issue to determine the right, and, if the issue was determined in favour of the plaintiff, the court made a declaration of his right, and restrained, if necessary, the defendants and all other parties in the same interest from interfering with it. On the same principle, where a number of persons claimed one and the same right against one man, they or some of them on behalf of themselves and all the others were entitled to file a similar bill²¹."

16 Chafee, "Bills of Peace with Multiple Parties", (1932) 45 *Harvard Law Review* 1297; *Pomeroy's Equity Jurisprudence*, 5th ed (1941), vol 1, §§243-275.

17 (1866) LR 2 Ch App 8 at 11.

18 *Sharon v Tucker* 144 US 533 at 542 (1892).

19 *Angelides v James Stedman Hendersons Sweets Ltd* (1927) 40 CLR 43 at 66.

20 *Ashburner's Principles of Equity*, 2nd ed (1933) at 7-8.

21 *Baker v Rogers* (1729) Sel Cas t King 74 [25 ER 230]; *Mayor of York v Pilkington* (1737) West t Hard 293 [25 ER 946]; *Lord Tenham v Herbert* (1742) 2 Atk 483 [26 (Footnote continues on next page)]

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

8.

- 18 Part IVA establishes a regime which supplants these procedures, but the phrase in par (c) of s 33C(1) "a substantial common issue of law or fact" gives rise to issues of construction which reflect the disparate interests which the old procedures had sought to accommodate.

The decision of the Full Court

- 19 In the Full Court, O'Loughlin and Drummond JJ emphasised that, whilst Pt IVA was introduced in response to Report No 46 of the Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, it did not adopt all the recommendations made by the Commission. In particular, their Honours emphasised that the requirement that the common issue be "substantial" was a departure made by the Parliament. Their Honours said²²:

"The imposition of this requirement demonstrates a clear intention on the part of the [P]arliament to restrict the wider availability of the representative procedure recommended by the [Australian] Law Reform Commission, the better to achieve the objectives of the new procedure.

By rejecting the Commission's proposal in this respect, [P]arliament showed that it intended that a common issue would be justification for the use of the new procedure only where it was an issue *with some special significance for the resolution of the claims of all the group members*. It is by reference to the objectives of Pt IVA of the Act that we consider the evaluative judgment whether a common issue is a substantial one must be made. In our opinion, those objectives cannot be achieved unless determination of the issue or issues common to the claims of all group members is *likely to have a major impact on the conduct and outcome of the litigation*." (Emphasis added)

ER 692]; *Sheffield Waterworks v Yeomans* (1866) LR 2 Ch App 8; *Commissioners of Sewers v Glasse* (1872) LR 7 Ch App 456.

22 (1998) 159 ALR 329 at 343-344.

- 20 In the second reading speech of the Bill for the *Federal Court of Australia Amendment Act 1991* (Cth), which introduced Pt IVA, the purposes of the Bill were identified as follows²³:

"The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.

The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions."

- 21 With respect to this statement of purpose, O'Loughlin and Drummond JJ used the phrases "some special significance for the resolution of the claims" and "likely to have a major impact on the conduct and outcome of the litigation"²⁴. Later in their joint judgment their Honours gave two further formulations. They said²⁵:

"Determination of the issue may not necessarily result in resolution of the whole of the group members' claims or even of an element of those claims such as the liability of the respondent to all. But where such an issue can be seen, in the circumstances of the particular case, to be *a matter the resolution of which will have a major impact on the litigation because it is an issue at the core of the dispute* between the respondent and each group member, then it can properly be described as being a 'substantial' common issue." (Emphasis added)

23 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3174-3175.

24 (1998) 159 ALR 329 at 344.

25 (1998) 159 ALR 329 at 345.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

10.

Their Honours concluded²⁶:

"In the present case, there is only one question, viz, that concerning the accuracy of the representations made in the common form s 49 statement given to all that is both a live issue and common to the claims of all group members, identified as well as unidentified. However, there is no reason to think that *litigation of this common issue would be likely to resolve wholly or to any significant degree the claims of all group members.*" (Emphasis added)

22 The formulation advanced in this Court by Silkfield identifies the presence of a substantial common issue of law or fact, the resolution of which is "by reason of its dominance or other kind of importance for the claims of all group members, likely to have a major impact on settling the disputes of all group members". It is submitted that, of its nature, this requirement "involves an evaluation of the relative significance of the putative common issue of law or fact".

23 In his dissenting judgment in the Full Court, Foster J said²⁷:

"In my view, the word 'substantial' indicates no more than that the common issue should not be a merely trivial one but should be of weight and significance. It need not be a 'major' issue. Once its existence is demonstrated then the representative party, having otherwise complied with s 33C, is entitled to commence the representative proceedings. The fact that they may later be terminated by order of the [C]ourt is not to the point."

24 His Honour's reference in the last sentence is to s 33N. This states:

"33N(1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:

- (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or

26 (1998) 159 ALR 329 at 345-346.

27 (1998) 159 ALR 329 at 333-334.

11.

- (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
- (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

(2) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the respondent except with the leave of the Court.

(3) Leave for the purposes of subsection (2) may be granted subject to such conditions as to costs as the Court considers just."

25 An example of the application of s 33N is provided by the decision of French J in *Zhang v Minister for Immigration*²⁸. His Honour gave judgment by way of declaratory relief upon the common issue and then, pursuant to s 33N(1), ordered that the proceeding not continue as a representative proceeding under Pt IVA. Reference also may be made to the "safeguards" provided elsewhere in Pt IVA. For example, the Court may substitute for a representative party another group member (s 33T). It may, for the purpose of determining an issue which relates only to the claims of one member, permit that member to appear (s 33R).

26 At a stage when a question arises under these provisions, particularly s 33N, it is more likely that issues will have been clarified and, if there be pleadings, have been joined. One difficulty with the various formulations by the majority of the Full Court of the construction of par (c) of s 33C(1) is that they postulate the evaluation of the issues at a stage in litigation well beyond the threshold at which s 33C operates. That provision is concerned with the commencement, not subsequent conduct, of litigation using the procedures provided in Pt IVA. In terms, s 33C(1) looks to the claims made by seven or more persons against the same person, being claims which are in respect of, or arise out of, the same, similar or related circumstances, and asks whether claims so understood give rise to a substantial common issue of law or fact. How in the present case, to apply terms used by the majority in the Full Court²⁹, could one sensibly ask whether the issue

28 (1993) 45 FCR 384.

29 (1998) 159 ALR 329 at 345.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

12.

with respect to the s 49 statements "can be seen, in the circumstances of [this] case, to be a matter the resolution of which will have a major impact on the litigation because it is an issue at the core of the dispute between [Silkfield] and each group member" so that it may properly be described as being a "substantial" common issue?

"Substantial" common issue

27 The term "substantial" may have various shades of meaning. Having regard to the context, it may mean "large or weighty" or "real or of substance as distinct from ephemeral or nominal"³⁰. Some assistance for the present case may be derived from authorities construing provisions in the form of that rule considered in *Carnie*. This rule provided for the commencement of proceedings by numerous persons having "the same interest in any proceeding". In *Carnie*, Mason CJ, Deane and Dawson JJ³¹ expressed the view that to equate the meaning of the phrase "same interest" with a common ingredient in the cause of action by each member of the class might not adequately reflect the content of the statutory expression. Their Honours said that the expression may extend "to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings". Brennan J³² and McHugh J³³ were of opinion that a plaintiff and the represented persons had "the same interest" when they had a community of interest "in the determination of any substantial question of law or fact that arises in the proceedings". Toohey and Gaudron JJ³⁴ treated as sufficient "a significant question common to all members of the class", to be determined by the grant of declaratory relief.

28 Clearly, the purpose of the enactment of Pt IVA was not to narrow access to the new form of representative proceedings beyond that which applied under

30 *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 382 per Deane J; *Hembury v Chief of the General Staff* (1998) 72 ALJR 1209 at 1213; 155 ALR 514 at 520.

31 (1995) 182 CLR 398 at 404.

32 (1995) 182 CLR 398 at 408.

33 (1995) 182 CLR 398 at 427.

34 (1995) 182 CLR 398 at 421.

regimes considered in cases such as *Carnie*³⁵. This suggests that, when used to identify the threshold requirements of s 33C(1), "substantial" does not indicate that which is "large" or "of special significance" or would "have a major impact on the ... litigation" but, rather, is directed to issues which are "real or of substance".

29 The circumstance that proceedings which pass the threshold requirement of s 33C may later be terminated as representative proceedings, by order made under s 33N, confirms rather than denies such a construction of s 33C(1). Further, as Foster J pointed out³⁶, the broadening provisions in sub-s (2) of s 33C emphasise the width of the entitlement conferred by s 33C(1) to commence a representative proceeding.

30 Foster J noted that the only issue of fact which could be common to all members of the postulated group, identified and unidentified, would be that raised in the statement of claim respecting the representation as to the accuracy of the s 49 statements³⁷. His Honour, like Spender J at first instance, regarded the identified common issue as "substantial" in the necessary sense. This was because the allegations involved were serious and significant and detrimental misrepresentations were claimed. It was not to the point that, in the final resolution of the litigation, this might not prove to be the "major" or "core" issue. It was not necessary to show that litigation of this common issue would be likely to resolve wholly, or to any significant degree, the claims of all group members.

31 The Statement of Claim alleged various misrepresentations made by Skye for the purposes of promoting sales of lots in the building, and consequent contraventions of s 52 of the Trade Practices Act. The issue respecting the s 49 certificates was but one of these matters. However, on the face of the Application and the Statement of Claim, the issue was one of substance.

32 Spender J correctly refused the declaration sought on the motion by Silkfield, and the Full Court erred in upholding the appeal and granting relief to Silkfield.

35 See also *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 at 251.

36 (1998) 159 ALR 329 at 333.

37 (1998) 159 ALR 329 at 331.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

14.

Relief under s 33N

- 33 In its motion, Silkfield had claimed in the alternative an order pursuant to s 33N that the proceedings no longer continue under Pt IVA. Spender J dismissed the motion in its entirety. However his Honour observed:

"There will always be a large degree of evaluation concerning commonality and non-commonality of issues and ultimately, if because of the extent of non-common issues, representative proceedings in the assessment of the court are not the preferable means of dealing efficiently and effectively with the claims, the court will no doubt terminate the representative nature of the proceedings in the exercise of the discretion conferred by s 33N(1)(d) of the [Act]."

- 34 In the Full Court, Silkfield renewed its claim for an order pursuant to s 33N. However the majority of the Full Court did not deal with the matter, in view of the approach that their Honours took with respect to s 33C(1)(c). Foster J said as to the order sought under s 33N³⁸:

"It is too early to make any of the decisions called for by that section. Even if I had some doubt in this regard, I would not be disposed to disturb [Spender J's] decision. It was a decision made in exercise of a discretion and nothing has been shown to indicate that there was any miscarriage in its exercise."

- 35 Despite some feints in the course of oral submissions by Silkfield, the truth is that the sole ground of appeal in this Court is that the majority of the Full Court erred in their construction of s 33C, and there is no cross-appeal or notice of contention by Silkfield. In any event, Foster J's observations were plainly correct with respect to the s 33N point.

Orders

- 36 The appeal should be allowed with costs. Order 2 of the orders of the Full Court made 20 November 1998 should be set aside, together with the declaration made by the Full Court. In place thereof, save as to the direction by the Full Court as to the future conduct and procedure in the matter, it should be ordered that the appeal to the Full Court be dismissed with costs.

38 (1998) 159 ALR 329 at 334.