IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S8 of 1993

B e t w e e n -

MARTIN THOMAS WICKSTEAD, KIM SUZANNE MORRIS, JULIA STEVENSON and WILLIAM HENRY LANCASTER

Applicants

and

DOUGLAS JOHN BROWNE

Respondent

Application for special leave to appeal

DEANE J
TOOHEY J
GAUDRON J

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON FRIDAY, 30 APRIL 1993, AT 11.02 AM

MR J.M. SPENDER, QC: May it please Your Honours, I appear for the applicants and my learned friend, MR N.F. FRANCEY, appears with me. (instructed by T.D. Kelly & Co)

MS C.A. NEEDHAM: I appear for the respondent. (instructed by Minter Ellison Morris Fletcher)

MR SPENDER: Your Honours, we have some written submissions which are not short; I hope are not long; I believe will be helpful and some references as well of materials which we may, in the course of argument, be briefly referring. I hand up the materials and I would also hand - - -

DEANE J: What, the neither short nor long submissions?

MR SPENDER: The neither short nor long submissions, Your Honour, are on the way. I have them now. I hope that, unlike the curate's egg, they will not be found to be good only in part.

DEANE J: You might give us some warning, when you are going to hand up a long submission, so that - - -

MR SPENDER: Yes, Your Honour. It lengthened this morning, Your Honour - earlier this morning - as I was doing some redrafting. What we have sought to do is to set out in the first page the issues of public importance but the core issue is the approach that the Court of Appeal took to the existence of a remedy saying effectively that where there was a breach of fiduciary duty available, on one view of the facts, there was no room for any common law duty of care.

TOOHEY J: Is that the only basis, Mr Spender, upon which the majority refused to allow the common law claim to proceed?

MR SPENDER: Your Honour, the majority refused to allow the common law claim to proceed by a process of reasoning: first, pointing out certain difficulties, then coming to the conclusion that it was not open by reason of the fact that there was a fiduciary relationship and by reason of the fact that the applicants had only a beneficial interest in the funds.

TOOHEY J: Are you running those two propositions together?

MR SPENDER: They effectively, Your Honour - Their Honours put those two propositions. Perhaps, Your Honour, the easiest way to approach it might be to go directly to, first of all, what His Honour

Mr Justice Kirby had to say and then to look at what Their Honours had to say. The circumstances of the case are set out on page 2, and I should point out that Mr Justice Smart has reserved on strike-out applications brought by nine other defendants. I do not believe I need trouble Your Honours with the facts or the references to the pleadings, although we have identified them at page 3.

DEANE J: Did you say there are nine other applicants?

MR SPENDER: Precisely, Your Honour. There are 15 defendants. What happened was - - -

DEANE J: All fighting different cases?

MR SPENDER: The cases, Your Honour, are, in terms of pleading, the same.

DEANE J: But can they not all get together and have one case?

MR SPENDER: One would think so, Your Honour, but we are not in charge of the way in which they run their cases.

DEANE J: You would think somebody could call a meeting of the lawyers to call for volunteers to stand aside.

MR SPENDER: In these difficult times, Your Honour, it might be hard to find volunteers.

DEANE J: Yes, I say no more. Mr Spender, one problem that you have is that the form of question which would go to a Full Court of this Court, if you were to be granted leave, is not really an appropriate question for a Full Court of this Court to consider. In the sense, the question would not be whether there was a cause of action in negligence; it would effectively be whether it was arguable that there was a cause of action in negligence.

MR SPENDER: I entirely agree, Your Honour, yes.

DEANE J: Now, the Court of Appeal managed to deal with it on that basis and no doubt this Court could, but it really is not an appropriate question, on one approach, to take up the time of this Court at the expense of other matters because the answer that is given to it really tells no one anything at all. Well now, having said that, it is just something I wanted to identify for you.

MR SPENDER: Perhaps, Your Honour, I could answer that question or what Your Honour puts in this way, and I might have agreed too quickly with what Your Honour was saying: the position that the

court has arrived at is that there can be no duty of care owed, and what the court has said is that the only claim which is open - this was something which arose during the hearing before the Court of Appeal which had not been raised or looked at before - was one for participation in a breach of fiduciary duty.

The court drew a distinction, which is no doubt correct, between the tests applicable to the two matters; one being active participation in breach of fiduciary duty; the other being the absence of care according to an objective standard.

Now, on that approach and the way in which the court has handled the matter, it means that the plaintiffs are not able to put forward a claim in negligence and must prove active participation by each of the defendants in a breach of fiduciary duty. One might surmise that the answer one might get would be that the actions of the defendants were not participation in any breach of fiduciary duty. These were done by other people or beforehand. Accordingly, even though they might be affixed with knowledge and an understanding that there had been a breach, that funds were at risk and that, in fact, the funds had been borrowed, so to speak, by the company itself, that they could say that they had no duty.

Now, if I understand Your Honour Justice Deane correctly, what we would say is that that is a most important question to put to the Full Court for this reason: first, so far as this case is concerned, or have I misunderstood Your Honour?

DEANE J: I was not suggesting to the contrary. What I was suggesting to you was that if leave were granted and you succeeded on an appeal, the best you would be entitled to expect would be, as it were, a judgment corresponding with that of Justice Kirby in the Court of Appeal. Now, that judgment, in terms of the relevant question of law, really tells one nothing.

MR SPENDER: It does say this, however, Your Honour, and if I could just - - -

DEANE J: What it says is it is arguable, but there are great legal difficulties facing the present applicants to succeed on the argument, but they should have been allowed their day in court.

MR SPENDER: I would have thought, Your Honour, that there was another position that the Full Court could take and that was this, that it could say that in

appropriate circumstances such a duty of care can exist, not just that it arguably might exist.

DEANE J: But that is the type of exercise which we are constantly learning is ill advised. It is much better to deal with these questions, particularly in the area of negligence, on ascertained facts. Well now, I am not suggesting it is an insuperable obstacle in your path; it is something that does militate against a grant of leave though.

MR SPENDER: As to that, Your Honour, we would answer in this way: what the court has done was to say, "Well it is not open to you to mount this sort of action, specifically by reason of the demarcation which the court draws between equitable actions" - if I can use that expression - "and actions at common law". That affects, of course, not just this action but every other action when a plaintiff might wish to say, in not dissimilar circumstances, that there is or should be a right at common law against the personal defendants, the personal agents.

DEANE J: Mr Spender, without indicating that you are in front at this stage, as it were, I think the Court would be assisted by hearing what Ms Needham has to say.

MR SPENDER: If Your Honour pleases.

MS NEEDHAM: Your Honours, with respect, I would adopt the observations which have been made by Your Honour that this case is an inappropriate vehicle for such an appeal and to determine this issue.

DEANE J: There are problems about it but, I mean, in terms of the administration of justice and the rights of the applicants, we must address the question whether, in a context where the proceedings were going to trial and where the relevant issues of fact in a negligence action would largely be covered in any event, it was appropriate to stop the claim in negligence from going to a hearing. If the answer to that question is in the affirmative - and we are dealing, of course, with an arguable case - the difficulties involving an appeal to this Court are important but they may not provide an answer.

MS NEEDHAM: Yes, Your Honour. Well, addressing that matter then, if I could hand up an outline of submissions. Paragraph 1 goes to broader discretionary factors and then paragraphs 2 through to 4 I have addressed these other matters.

TOOHEY J: Is it clear, Ms Needham, that the addition to this cause of action would add considerably to the length of the trial?

MS NEEDHAM: With respect, Your Honour, it would for the reason that, as the history of the summary judgment application shows, the Court of Appeal, I think, has spent approximately four days already hearing legal submissions mainly directed to the negligence issue. So that if the matter were to go - and I think there were two days before the Master and one day before His Honour Mr Justice Grove, so that, presumably, if the negligence issue were to go back for trial, and bearing in mind that in the proceedings there are 15 defendants, of which my client is only the fourth defendant, and no doubt, in dealing with the legal issues, as it applied to the different facts in each case it would certainly prolong the hearing, in my estimation.

TOOHEY J: Do you mean by reference to the evidence to be called or the argument, once the evidence was in?

MS NEEDHAM: In relation to both, Your Honour. Certainly the legal argument will take some time. We have already spent many days arguing that and no doubt it will start afresh if it goes back to the trial judge.

DEANE J: But if it did go back to the trial judge, since the negligence claim was there, he would deal with the factual matters but in a context where this Court would have only said it was arguable and there was a judgment of the Court of Appeal saying negligence was not open, would it really take much time before the trial judge?

MS NEEDHAM: Yes, it would, Your Honour, because there will be other issues, of course, that would be relevant to be raised, both factual and legal.

DEANE J: I mean, the argument about negligence?

MS NEEDHAM: In relation to that limited issue, it is my estimate that it would be reargued in full. That is the way that the applicants have conducted the litigation so far. I would not expect that it would be a short submission. Dealing with other factual issues which could be raised: of course, there would be an issue of foreseeability which would arise in relation to a negligence plea which does not arise in relation to the equitable ground which relies on active intervention by the defendant with knowledge of either a breach of trust or breach of fiduciary duty. So that the equitable ground is more narrowly defined and perhaps better defined and it does require proof of

notice and it requires proof of some active intervention by the defendant.

In contrast, if the negligence ground were to proceed to trial, there would be issues of proximity; issues of foreseeability, in particular, the foreseeability of the risk of loss to the applicants which would involve, no doubt, an inquiry as to whether or not my client was or ought to have been aware at at least four different points of time - because there were at least three different reviews of the three applicants' investments - whether my client was aware at, at least three different points of time and perhaps four different points of time, whether he ought to have known that the company was likely to go into financial difficulty and into provisional liquidation. That is a very wide ranging factual inquiry which would be thrown up by the *Elections case* and would certainly belong - - -

TOOHEY J: Ms Needham, is that cause of action, the cause of action that is sought to be pleaded against your client, pleaded only against your client? In the action with which we are immediately concerned?

MS NEEDHAM: I do not appear for any of the other defendants but my understanding is that it is basically the same type of pleading.

MR SPENDER: That is so. I think it is common in all cases.

MS NEEDHAM: However, they may diverge because, of course, in this case - - -

TOOHEY J: I am sorry, I am not clear as to the answer. I am speaking only of the immediate action for the present, not the other actions that are on foot. In relation to the immediate action, is that cause of action pleaded against other defendants?

MS NEEDHAM: In this action, Your Honour?

TOOHEY J: In this action, yes.

MS NEEDHAM: I think the answer to that is no, because the pleading against my client at the moment seeks to raise the issue of negligence. He is the fourth defendant. There are 15 other defendants. I understand, although I have no personal knowledge of this, that the pleadings against the other defendants are substantially in similar terms.

DEANE J: So, negligence is raised against the other defendants?

MS NEEDHAM: My understanding is that that is so.

TOOHEY J: And then if one moves from this action to the other actions that are on foot, it would seem that that cause of action is extant against some defendants in the other actions?

MS NEEDHAM: At the present time, Your Honour, it is, however, as I understand it, some of the other defendants have followed my client's lead and have made an application for summary judgment also and are seeking to have the claim against them in negligence dismissed. That matter went before His Honour Mr Justice Smart approximately one year ago. His Honour has reserved on that matter and I understand is awaiting the outcome of Your Honours' decision today.

So that in practical terms it seems to be that His Honour Mr Justice Smart will follow Your Honours' lead today and so that all 15 defendants ought to be facing the same issues if it goes to trial and that if the special leave application fails today, it seems likely that His Honour Mr Justice Smart will also strike out that part of the pleading against the other defendants which seeks to raise the issue of negligence which, in my respectful submission, is an unarguable issue, not just in law but on the facts, and therefore none of these defendants ought to be subjected to an extensive and lengthy hearing, with the attendant costs.

My client being an individual, Your Honours, who made the summary judgment application at a time when the other matters, the equitable grounds on which the applicants ultimately succeeded before the Court of Appeal, had simply not been raised in any manner at all - my client, after taking legal advice, after considering the pleadings, in the circumstances where no particulars had been provided for a period of approximately - well, over three years, despite written requests by his solicitors - made a judgment that he would succeed in his summary judgment application and did so until the matter had been before the Court of Appeal and the Court of Appeal had effectively reserved its decision.

So that, in my respectful submission and notwithstanding what was said by the learned President in the Court of Appeal, it is simply unjust to my client to expose him to a prolonged hearing which may be made even longer if the same issue is agitated against 14 other defendants, purely on the basis that if there is a remotely arguable point, it ought to be argued. There is no reasonable prospect of success on this aspect, in my respectful submission, for the reasons that -

the distinction must be drawn between one of the applicants, Mrs Stevenson, and the other three applicants, Mr Wickstead, Miss Morris and Mr Lancaster.

Mrs Stevenson's application is in a totally different factual category. What the applicants seek to allege is that when these clients of the Trustees Executors and Agency Company invested funds with the company, their investments went, from time to time, before a board of review - a New South Wales board of review. There was an initial review which decided where their funds would be placed and then there were subsequent reviews at certain monthly - I think it was six-monthly intervals - perhaps a year interval. All of the evidence in the court below was that Mrs Stevenson's investments never had time to come before the board of review, even for the initial review. So that my client had no participation whatsoever in relation to the manner in which her funds were invested. That came about because her funds were invested very shortly before the company did in fact go into provisional liquidation.

So, there is no factual basis whatsoever, in my respectful submission, for a negligence case by that applicant. As to the other three applicants, there was some evidence before the court below, which is referred to in the Court of Appeal's judgment, that their investments had come up before the board of review at which, according to my client's own evidence, he acted as minute secretary and no more. He simply presented, in a physical sense, files to the board. He then awaited the board's decision. His unchallenged evidence was that he was not asked any questions and had no input whatsoever in relation to the way in which their funds were invested. But when the board of review had made its decision he recorded this as minute secretary on the paperwork.

GAUDRON J: Is there not some difficulty about simply proceeding on the basis of the evidence thus far?

MS NEEDHAM: There is some difficulty, yes, Your Honour, as was highlighted by the majority judgment in the Court of Appeal and I accept that. However, there has been a fairly extensive airing of the evidence by now.

GAUDRON J: Have particulars been provided?

MS NEEDHAM: The applicant did provide some particulars the day before the third occasion, I think, when the matter went before the Court of Appeal.

GAUDRON J: Now, why would one not proceed on the basis of particulars provided, rather than the state of the evidence, if the matter were to come before this Court?

MS NEEDHAM: Perhaps historically, Your Honour, because this was an application for summary judgment on the evidence and we did not resile from dealing with the evidence.

GAUDRON J: I have some difficulty with the notion of summary judgment on the evidence, I must say. More particularly, in circumstances in which the evidence has not been fully explored. I think the basis of summary judgment must lie somewhere other than in the nature of the evidence adduced on that application.

MS NEEDHAM: The respondent's case perhaps took on the higher burden. He did not seek to confine his argument to the pleadings. The pleadings, as they stood, in my respectful submission, would not disclose a cause of action anyway because there is no reasonably proximate relationship between the respondent and the applicants such as could give rise to a duty of care. What is alleged is that he sat by essentially at the board of review meetings when - - -

GAUDRON J: Is that alleged in the particulars? Is that all that is alleged in the particulars?

MS NEEDHAM: It is not. That has never been particularized, Your Honour. The case has never been fully particularized and still is not, in my respectful submission. It will, I expect. The equitable ground on which the applicant succeeded in the Court of Appeal needs to be repleaded as well, or needs to be pleaded. It was not pleaded in the statement of claim.

Your Honour sees the way in which it has been pleaded in the appeal book at about page 4, paragraphs 23 and 24.

GAUDRON J: The difficulty with your submission about your client sitting by as minute secretary is that that seems to be at odds with the equitable cause of action that has been identified and if we are to take into account what you say now, that just does not seem to march in harmony with the situation that has developed.

MS NEEDHAM: Your Honour, that is precisely one reason why, in my respectful submission, the law of negligence should not intrude into an area where the law of equity has, over centuries, developed

well-understood and well-established principles to effect justice between the parties.

GAUDRON J: I was not talking about the legal principles not marching in harmony. I was talking about the assumed factual substratum and its relevance to the motion to strike out.

MS NEEDHAM: Yes. I am afraid I may not have understood Your Honour's point.

GAUDRON J: It is this: it must be assumed for the purposes of the equitable pleadings which stand that there was knowledge and you now seek to resist the application on the basis that your client was no more than a minute secretary.

MS NEEDHAM: Yes.

GAUDRON J: Now, there is a factual conflict between what is assumed for the purposes of the equitable cause of action and what you are putting as the basis for the strike out stand.

MS NEEDHAM: Thank you for that, Your Honour, yes. In my respectful submission, there is not because the knowledge that is required under the *Barnes v Addy* principle is knowledge of a breach of trust or fiduciary duty. My client denies that he had knowledge of any such breach of trust or fiduciary duty and, indeed, he has put on some evidence which was not challenged in cross-examination saying precisely that. That appears in his affidavit which is part of the annexure to Mr Kelly's affidavit and which appears in the appeal book at page 111, that is paragraphs 13 and 15 of an affidavit. Perhaps working backwards, in paragraph 15, my client says that far from him having any knowledge that there was anything untoward about these sort of investments, he had his own young children's money - - -

GAUDRON J: Yes, but the difficulty is why does one approach it on the basis of the evidence? Why does not one approach it on the basis that there is an allegation implicit in what has happened, of knowledge?

MS NEEDHAM: Yes. I accept, Your Honour, that that is the correct approach, with respect, and that has not been pleaded, of course, because the equitable ground was never pleaded. It arose during argument in the Court of Appeal. It was first raised by His Honour Mr Justice Handley and it went from there. All that is pleaded, as Your Honour sees on page 4 of the appeal book, is the statement of claim,

paragraphs 23 and 24, and that is as far as the whole matter has gone.

In paragraph 23 it is alleged that each of the defendants owed:

> a duty of care to take reasonable steps to ensure that his funds were handled in a proper trustee and/or fiduciary manner -

and in accordance with the terms of the powers of attorney. In paragraph 24, it is alleged that:

> In breach of and in reckless disregard of such duty -

namely, the negligence duty -

> the Defendants and each of them caused, permitted and/or allowed TEA to apply such funds for its own purposes -

that is in other investments - non-trustee investments. So, as Your Honour sees, that is a long way from pleading any assistance with knowledge in a dishonest and fraudulent design by the company. Indeed, much of it is inferential and clearly, those paragraphs were at first intended to plead negligence and not equitable grounds. But if it is assumed, and it does seem now to be common ground, that eventually the equitable ground will have to be pleaded and it will have to be particularized, and when that is done that must be done conformably with the relevant principles, so that it must be alleged that there was knowledge and, of course, there is some argument about whether that means actual or constructive notice.

GAUDRON J: If that is so, then what is it, apart from the question of your client having been no more than a minute secretary, that makes paragraphs 23 and 24 unarguable?

MS NEEDHAM: The matters, Your Honour, are those which are identified in the submissions, paragraphs 2, 3 and 4. Perhaps I could address those. I have really covered paragraph 2 already, but it would be a useless exercise for Mrs Stevenson's allegations of negligence to go to trial because there is no prospect that there will be any factual support for them.

Turning then, in paragraph 3, to the factual evidence of the other applicants, I think I have told Your Honours, in short, what it is expected that the applicants' case will be and that evidence is at the moment very weak: that Mr Browne was not

in any way in charge of that division of the company which handled these persons' investments. They were in what was called the agency division of the company, the manager of which was a Mr Bampton. My client was in an entirely separate division of the company which was called the Trust Division and that dealt with deceased estates essentially. So, he had no authority or control over the applicants' investments. There was no dealing by him with any of their funds. There was no, so it would appear, and it is not alleged, that he gave any advice in relation to the way in which their funds would be invested; and his conduct did not in any way produce, it is respectfully submitted, the situation which eventuated.

So that there is no relationship between my client and any of the applicants which is sufficiently proximate to give rise under the law of negligence to a duty of care, bearing in mind two matters: the first is that this is a case of an alleged omission and, secondly, it is a case of alleged economic loss, two categories where the courts' willingness to extend an obligation of reasonable care is very circumscribed. The courts are very reluctant to extend those two categories of negligence. And this is a case where you have both of those features: an alleged act of omission, a failure to warn in circumstances causing allegedly economic loss.

So that what the applicants seek is for the Court to allow argument that there should be established a novel category of the law of negligence in this situation and there is no reason in policy or principle why the courts would do so. It would need to come, with respect, to this Court again to establish such a category finally and there is, of course, authority against it. Those were the authorities which were referred to in the majority judgment in the Court of Appeal to which I will now take Your Honours.

DEANE J: You can take it that we have read the judgments. Of course, the basis on which you succeeded in negligence before the Court of Appeal was on the legal and not the factual proposition and that really is what we are concerned with.

MS NEEDHAM: Very good. If I can turn to the relevant authorities then, Your Honour.

DEANE J: I think, again, you can assume that we are generally familiar with the authorities. Your task, if you want to pursue it, is to sustain the proposition that it is not arguable that a duty of care could arise in the context of the equitable

principles, which strikes me as a very difficult task.

MS NEEDHAM: In that broad form, I accept it would be, Your Honour, but what the respondent - - -

DEANE J: But that is what the majority of the Court of Appeal have held.

MS NEEDHAM: Yes. Your Honours are familiar then with the Privy Council's opinion in the *China Bank case* and the Court of Appeal's decision in the - - -

DEANE J: If there is anything in particular that you would like to point us to, feel quite free to do so of course.

MS NEEDHAM: Very good. Well, perhaps it is sufficient then - I take it, as Your Honours are familiar with these cases - they are the three decisions, and reliance is also placed on that line of territory, Your Honours, in relation to the obligations of company directors where the courts have fairly steadfastly said for a great number of years that where the principles of equity have developed and where remedies are available, that is more or less the scope of it and the law of negligence need not intrude and ought not to intrude into these new areas.

It is, in my respectful submission, unarguable, for the reasons in paragraph 4, that any court would accept that a duty of care will arise in this case as pleaded and I think I have set them out in as much detail - I do not wish to speak to them any further. If it please, Your Honour.

DEANE J: Thank you, Ms Needham. Ms Needham, can I raise this with you: as I pointed out to Mr Spender, if leave is granted in this case the question on the appeal will not be is there a right of action, because the likely approach would be that it is inappropriate for the Court to deal in a definitive matter with those questions without knowing the facts in the context in which the question arises. That means that the question would be, effectually, is it arguable and, if it is, should the action in negligence have been struck out in a context where the equitable actions were going to hearing.

Well now, I am asking you, but it concerns Mr Spender as much: I am concerned that if leave were granted and an appeal were heard on that question, it would involve a great amount of legal costs for no ultimate final result from the parties' point of view. The point of my query is

that this Court is, of course, acquainted with what the issue is. We have read the papers. Well now, if we were to grant leave, would your client be in favour of this Court proceeding immediately to dispose of the appeal?

MS NEEDHAM: I will seek instructions.

DEANE J: You do not have to answer the question now, in that it is something that we could give you time to consider if we reach that. Mr Spender, I would address the same question to you and, needless to say, do not need an answer now.

What we propose to do is stand this matter down the list now so both sides can consider what approach they would want the Bench, as presently constituted, to take in the event that leave is granted. I should indicate that what I had in mind was if leave were granted, dealing with the matter on the argument and the submissions that have been presented to date, if the parties wish to dispose of the appeal. Otherwise, of course, if leave is granted and the parties want to have a full argument on whether it is arguable or not, the matter can just take its ordinary turn in the list. I should stress that I am not indicating a final decision that leave should be granted.

Justice Toohey points out to me that I should have indicated that the basis on which we would deal with the appeal, if it did come to that, would be whether or not the approach adopted by Justice Kirby was the correct one.

Mr Spender and Ms Needham, feel free to mention the matter at any time.

AT 11.45 AM THE MATTER WAS ADJOURNED
UNTIL LATER THE SAME DAY

UPON RESUMING AT 12.43 PM:

MR SPENDER: Your Honour, we are content and very happy to adopt the proposal that Your Honour has suggested. I think, this morning, I omitted to hand in page 11 of my medium length submissions, Your Honour, and if I could hand up page 11 to be added to those submissions.

DEANE J: Thank you, Mr Spender. What is your position, Ms Needham?

MS NEEDHAM: If it please Your Honour. The respondent is also content for this Court to proceed to the appeal and does not wish to put any further submissions except to say something very shortly on the matter of costs.

DEANE J: One approach to the question of costs would be, if leave were granted, the appeal allowed along the lines indicated by Justice Kirby, that the costs in this Court should await the outcome of the claim in negligence in the sense that if Mr Spender's clients were to succeed in negligence, it would be difficult to see why they should not get their costs. On the other hand, if Mr Spender's clients were to fail on the claim in negligence, there would be a great deal to be said for the view that your client should get costs. Well now, that is said without any discussion with other members of the Bench. It would seem to me to be a possibly just approach to costs if we did reach that stage.

MS NEEDHAM: Well, that is the respondent's submission, in effect, Your Honour, and we would simply further - - -

DEANE J: You would, no doubt, have put it a lot better than I did, Ms Needham.

MS NEEDHAM: I doubt that, Your Honour. But, Your Honour, we would also respectfully submit that the orders as to costs in the Court of Appeal should be unchanged on the same basis because they have already been phrased in such a way that they are dependent on the outcome of the negligence issue.

DEANE J: Is there anything you can say about that, Mr Spender?

MR SPENDER: So far as costs here are concerned, Your Honour, that is entirely up to Your Honours. I would not add anything. So far as the costs below, Your Honour, the orders were framed so as to reflect, as it were, the way in which the result emerged and as to costs there, we would submit that the ordinary order would have been that in the event that Your Honours grant special leave and allow the appeal in the manner indicated, that the costs below should be awarded in favour of the applicants without the mathematical combinations that Their Honours went into.

DEANE J: Yes, except the judgment of Mr Justice Kirby in the Court of Appeal was on the hypothesis or was greatly influenced by the consideration that the

case was going forward to trial on the claims that were not advanced by your client previously. I do not think we should take undue time on it, but what you say does not carry compelling force so far as I am concerned.

MR SPENDER: That is true, Your Honour. What I would say, very quickly, in answer to that is that the matter that attracted His Honour Mr Justice Handley had not attracted anybody's attention up until about the second day of hearing - the first or second day of hearing before the Court of Appeal. In the event that the matter had simply gone ahead on the negligence issue in any event, then the same issues effectively, so far as a substratum of facts is concerned, would have to be ventilated and what is - - -

DEANE J: A lot depends, of course, on the basis on which you would succeed. If an essential step in the reasoning which leads to your success, if success you do enjoy, is that the matter is going to trial anyway on the matters raised by Mr Justice Handley, there is not all that much conviction in your argument, if I might say so.

MR SPENDER: We will be advancing both propositions, Your Honour, in the event that Your Honours grant leave and allow the appeal. Let me say we certainly will not be resiling from the proposition which His Honour Mr Justice Handley has introduced into the proceedings.

DEANE J: We will stand the matter down until 2 pm when we will give a decision on the leave application. If leave is granted, we will then hope to dispose of the appeal, including the question of costs.

MR SPENDER: If Your Honour pleases.

AT 12.49 PM THE MATTER WAS ADJOURNED
UNTIL LATER THE SAME DAY

UPON RESUMING AT 2.17 AM:

DEANE J: The Court considers that there should be a grant of special leave to appeal in this case.

In the course of argument, there was discussion with counsel about the appropriate course to be followed in the event that there was a

grant of special leave to appeal. In circumstances where the question on an appeal will not be whether the applicants had a good cause of action in negligence but whether the circumstances of the case were such that the claim in negligence should be struck out on a preliminary application, it is apparent that the appropriate course is for the appeal to be disposed of immediately if the members of the Court, as presently constituted, have formed a clear and unanimous view that the claim in negligence should be allowed to proceed to trial. We have formed such a clear and unanimous view.

Accordingly, with the consent of both sides, we proceed immediately to deal with the substance of the appeal. As we have indicated, we have come to a clear conclusion that in all the circumstances of this case, including the circumstance that the action against the respondent will be proceeding to trial on other counts in any event, the claim in negligence should not have been struck out.

We note that we are in general agreement with the reasons given by Justice Kirby in the Court of Appeal for that conclusion and that we do not dissent from His Honour's acknowledgement of:

> "the force of the considerations which Handley and Cripps J.J.A. have collected to demonstrate that the [applicant's] cause of action in negligence faces serious legal difficulties and, accordingly, may fail".

We grant special leave to appeal. We allow the appeal. We vary order 4 of the orders made by the Court of Appeal by deleting therefrom the word "negligence" and the comma which follows it. We order that the costs of the appeal to this Court (including the application for special leave to appeal) be reserved on the basis that there will be an order for costs in the applicants' favour in the event that they are ultimately successful in their claim in negligence and that there will be an order for costs in the respondent's favour in the event that that claim ultimately fails.

In all the circumstances, we do not interfere with the order as to costs made in the Court of Appeal.

AT 2.20 PM THE MATTER WAS ADJOURNED SINE DIE