

KEYNOTE ADDRESS TO THE NSW YOUNG LAWYERS CIVIL LITIGATION SEMINAR

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INTRODUCTION

- 1 Concerns about excessive delays and costs of litigation exceeding the significance of the matters at stake in a dispute have been ongoing in the area of civil litigation. They have experienced renewed currency due to the phenomenon of “mega-litigation” – large commercial cases that consume vast amounts of court time and take over the lives of all involved.¹ Both courts and legislatures have attempted to address these concerns, to ensure that the overriding purpose of “just, quick and cheap”² dispute resolution is not hollow rhetoric, but is attained in practice.
- 2 The topics in today’s seminar present an overview of the current state of affairs in civil litigation, and look at where we are heading. They canvass some important recent developments, about which I will make a few observations.

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¹ See, eg, *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (No 6)* (2007) 63 ACSR 1; *Seven Network Ltd v News Ltd* [2007] FCA 1062; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 225 FLR 1.

² See, eg, *Civil Procedure Act 2005* (NSW) s 56.

CASE MANAGEMENT, AON V ANU AND THE ACCESS TO JUSTICE (CIVIL LITIGATION REFORM) BILL 2009

- 3 The first is that we are solidly in the era of case management. The notion that the judge is a mere passive arbiter who allows parties free reign to run their cases and to control the length and conduct of proceedings has received a collective rejection by law reform commissions, legislatures and the courts alike.³ Two recent developments confirming this were the High Court's judgment in *Aon Risk Services Australia Limited v Australian National University*⁴ handed down mid last year, and the Federal Government's Access to Justice (Civil Litigation Reforms) Amendment Bill 2009.⁵
- 4 *Aon v ANU* reviewed and confined the High Court's previous decision in *Queensland v JL Holdings Pty Ltd*⁶ - a case often cited by parties seeking late amendments to pleadings in support of submissions that the court must not deny them the opportunity to amend their claims to raise a real, arguable issue, on the basis that the opposing party could be adequately compensated by way of a costs order.
- 5 The facts of *Aon v ANU* involved the destruction of a number of ANU's properties by bushfires. ANU commenced proceedings against three insurers seeking indemnity for its losses. It then joined its insurance broker, Aon Risk Services, as a further defendant, alleging that Aon had failed to renew the insurance of some of ANU's properties, which the

³ See, eg, Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), 7; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000), [6.3]; Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008), 291; *Civil Procedure Act 2005* (NSW) s 56; and *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175.

⁴ (2009) 239 CLR 175.

⁵ Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth).

⁶ (1997) 189 CLR 146.

insurers claimed were not covered by the insurance policies. On the third day of a four-week trial, ANU settled its claim with its insurers. The sum secured by way of settlement presumably did not reflect the full replacement value of ANU's properties. ANU then sought an adjournment of the trial of its claim against Aon and applied for leave to amend its claim against Aon to allege a substantially different case – that, under a different contract of services, Aon had been obliged to ascertain and declare the correct values of the properties to the insurers and to advise ANU on certain insurance matters.

6 The trial judge allowed the amendment, a decision that was then upheld by the ACT Court of Appeal, subject to a further order that ANU pay Aon's costs occasioned by the late amendment on an indemnity basis. On further appeal, the High Court unanimously allowed Aon's appeal and dismissed ANU's application to amend its statement of claim.

7 *Queensland v J L Holdings*⁷ played a central part in the reasoning of the trial judge and the Court of Appeal. In that case, the majority of the High Court stipulated that "[j]ustice is the paramount consideration", and that case management, whilst relevant, should not be allowed to "prevail over the injustice" of precluding party from litigating a fairly arguable issue.⁸ "The ultimate aim of the court [is] the attainment of justice", stated Dawson, Gaudron and McHugh JJ, but in their Honours' opinion this was limited to justice as between the parties to the litigation only, without reference to outside considerations.⁹ It was also clear, from their Honours' citations from *Cropper v Smith*¹⁰ and *Clough v Frog*,¹¹ that matters which go to delay

⁷ Ibid.

⁸ Ibid 155 (Dawson, Gaudron, McHugh JJ).

⁹ Ibid.

¹⁰ (1884) 26 Ch D 700.

¹¹ (1974) 4 ALR 615.

and irregularity only, or are relevant only to costs, do not constitute injustice to the other party.¹² The decision in *Queensland v J L Holdings* produced the result that trial judges, who felt that a stage had been reached where further applications for indulgences should be refused, were nervous to do so because a successful appeal on this ground after trial may involve the parties in even greater delay and expense.¹³

8 In *Aon v ANU*, the High Court rejected the notion that case management principles are extraneous to the concept of “justice”.¹⁴ It found that *Queensland v JL Holdings* involved a different factual scenario, but insofar as the statements by Dawson, Gaudron and McHugh JJ suggested that case management considerations and questions of the proper use of court resources should be given limited weight when considering whether to give a party leave to amend its claim, they should not be regarded as authoritative.¹⁵ The proper approach is to look at the provisions of the relevant court rules¹⁶ and all of the circumstances of the particular case.

9 The ACT Court Procedures Rules had a mandatory provision that required the Court to allow necessary amendments of a document for the purpose of “deciding the real issues in the proceeding”.¹⁷ They also had a discretionary provision allowing the Court to permit amendment of pleadings “in the way it considers appropriate”.¹⁸ Further, they had an

¹² (1997) 189 CLR 146, 154.

¹³ John P Hamilton, ‘Thirty Years of Civil Procedure Reform in Australia: A Personal Reminiscence’ (2005) 26 *Australian Bar Review* 258, 265.

¹⁴ (2009) 239 CLR 175, 192 (French CJ); 213–4, 217 (Gummow, Hayne, Crennan, Kiefel, Bell JJ).

¹⁵ *Ibid* 182 (French CJ).

¹⁶ Prior to the High Court’s decision in *Aon v ANU*, Spigelman CJ in *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37, at [28]–[29], stated that although *Queensland v JL Holdings* remains binding authority with respect to applicable common law principle, provisions such as *Civil Procedure Act 2005* (NSW) ss 56ff enabled the courts of NSW to proceed unshackled by the restrictions of the common law.

¹⁷ Court Procedures Rules (ACT) r 501(a).

¹⁸ Court Procedures Rules (ACT) r 502(1).

overriding purpose statement, which codified case management considerations and required the rules to be applied in accordance with the object of “the just resolution of the real issues in civil proceedings with minimum delay and expense”.¹⁹ The High Court held, first, that the requirement to make amendments for the purpose of deciding “the real issues in the proceeding” does not impose some unqualified duty to permit the late addition of any claim. In ANU’s case, the real issues were to be determined by reference to the limited way in which ANU had deliberately chosen to frame its original claim against Aon, and its persistence in that limited approach up to the commencement of the trial.²⁰

- 10 Second, the High Court held that, in his exercise of discretionary power, the trial judge should not have given leave to amend. As French CJ stated:

The discretion is exercised in the context of the common law adversarial system as qualified by changing practice. But that is not a system which today permits disregard of undue delay. Undue delay can undermine confidence in the rule of law. To that extent its avoidance, based upon a proper regard for the interests of the parties, transcends those interests. Another factor which relates to the interests of the parties but transcends them is the waste of public resources and the inefficiency occasioned by the need to revisit interlocutory processes, vacate trial dates, or adjourn trials either because of non-compliance with court timetables or, as in this case, because of a late and deliberate tactical change by one party in the direction of its conduct of the litigation.²¹

Gummow, Hayne, Crennan, Kiefel and Bell JJ, after considering *Queensland v JL Holdings*, remarked:

To say that case management principles should only be applied “in extreme circumstances” to refuse an amendment implies that considerations such as delay and costs can never be as important as

¹⁹ Court Procedures Rules (ACT) r 21(1). See similar provisions in other Australian jurisdictions: *Civil Procedure Act 2005* (NSW) ss 56-8; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 1.14; *Supreme Court Civil Rules 2006* (SA) r 3; *Supreme Court Rules* (NT) r 1.10; *Rules of the Supreme Court 1971* (WA) O 1 rr 4A, 4B.

²⁰ (2009) 239 CLR 175, 193.

²¹ *Ibid* 189.

the raising of an arguable case, and it denies the wider effects of delay upon others.²²

- 11 These comments are significant. First, they demonstrate recognition by the High Court that the dictates of justice not only include giving parties a proper opportunity to plead the case, but may also place limits on repleading when delay and cost are taken into account. Eight years prior to *Aon v ANU*, Heydon JA (with the concurrence of Sheller JA and Studdert AJA) pointed out in the NSW Court of Appeal case of *Micallef v ICI Australia Operations Pty Ltd* (which I followed in determining whether to give leave to an application to amend a summons in one of my 2004 *Ingot* judgments²³) that when the majority in *Queensland v J L Holdings* said that “justice is the paramount consideration in determining an application such as the one in question”, they did not mean that “complete justice to the party in default is the paramount consideration”.²⁴ His Honour stated, “[i]t is questionable whether they were intending to create an absolute rule even in that field [of late amendment to a pleading], for that would be antithetical to the idea of a discretion.”²⁵ Where the default of one party prejudices the chances of achieving justice for others, it may be appropriate to refuse to exercise the relevant discretion in favour of the party in default.²⁶ His Honour said that the judgment of Kirby J in *Queensland v J L Holdings* “can be read as an extended analysis of the huge variety of factors which a court may have to take into account in arriving at a discretionary decision”.²⁷ Kirby J included as among these factors “the strain which litigation may place upon those involved...and the natural desire of most litigants to be freed, as quickly as possible, from the anxiety, distraction

²² Ibid 212.

²³ *Ingot & Ors v Macquarie & Ors* [2004] NSWSC 1219, [21]-[26].

²⁴ [2001] NSWCA 274, [63].

²⁵ Ibid.

²⁶ Ibid [64].

²⁷ Ibid [62].

and disruption which litigation causes”, and the possibility that “costs orders are not necessarily an adequate balm to the other party”.²⁸ His Honour stressed the need to retain flexibility, balancing in an appropriate way the various competing private and public considerations.²⁹

12 In *Aon v ANU*, the High Court stated that there is “an irreparable element of unfair prejudice in unnecessarily delaying proceedings”, which may not be compensated by a costs order.³⁰

13 I took the same view in my 2004 judgment in the *Ingot* proceedings, when dealing with an application by the plaintiffs for leave to amend, for the seventh time, their summons.³¹ I accepted the evidence of the plaintiff’s legal representative on why the plaintiffs wished to further amend, in circumstances where there was no suggestion that any new evidence or document had come to their attention, and where their legal advisers had asserted on oath during the hearing for the previous application for leave to amend that in substance the claim propounded by the fifth further amended summons was the claim that they were ready to take to trial. However, I concluded that if leave to amend were granted, the defendants would suffer prejudice in a number of ways.³² I concluded that no order for costs could be drafted that would completely compensate the defendants for costs wasted by reason of the further amendment (save one requiring the plaintiffs to pay the whole of the defendants’ costs to date). Some costs could be readily identified as thrown away by the amendments, such as the defendants’ preparation of their defences based on the structure of the fifth further amended summons, which structure was

²⁸ (1997) 186 CLR 146, 170.

²⁹ Ibid 172.

³⁰ Ibid 182 (French CJ).

³¹ *Ingot & Ors v Macquarie & Ors* [2004] NSWSC 1219.

³² Ibid [49]-[65].

completely changed in the proposed sixth further amended summons. But it was difficult to allocate the remainder of the costs incurred as either thrown away by the amendments or costs that would have been incurred in any event. Even if such an order could be drafted, it would take a considerable amount of time before the defendants could recoup the costs wasted. Furthermore, some of the defendants were individuals who had previously been represented by solicitors retained on their behalves by insurers under director and officers' liability policies. The insurers had purported to avoid the policies and had stopped advancing their defence costs. Those defendants were faced with the prospect of funding their own defences, and would have been forced to fund further work, on top of the work already completed, without being able to recoup their wasted expenditure for the existing work until some later time.

- 14 In addition, I concluded that the defendants would suffer prejudice of a kind that could not be compensated by any order for costs.³³ One of the amendments in the proposed sixth further amended summons made allegations striking directly at the honesty or probity of the respective defendants and individuals within them, alleging that they had contravened, or were involved in the contraventions by others of, various provisions of the *Corporations Law*. The events had occurred six years before the time of the application, and the granting of leave to amend would have pushed back yet further the trial date for proceedings that otherwise were substantially ready for hearing. The theoretical enhancement of the plaintiff's case by allegations of dishonesty or knowing breach of the law would have imposed substantial stress on those individuals, and caused prejudice to those individuals if those allegations could not be swiftly dealt with. On the other hand, I found that the

³³ Ibid [66]-[76].

plaintiffs would not have been prejudiced by refusal of leave to amend, as the amendments would not have given them a substantially greater prospect of success. Accordingly, I dismissed the application for leave to amend.³⁴

15 The second significant point of *Aon v ANU* is that it marks a shift away from the narrow view of “justice” in *Queensland v JL Holdings* to a broader understanding that includes the claims of other litigants and the public interest in achieving the most efficient use of court resources. A trial judge should not have regard only to the prejudice that may be suffered by an opposing party when considering applications for leave to amend, but should also take into account that the time of the court is a publicly funded resource, and the prejudice to other litigants awaiting trial dates or whose trial dates may be affected.³⁵

16 In ANU’s case, the application to amend had been made at the last hour, was inadequately explained, necessitated the vacation or adjournment of the dates set down for trial, and raised entirely new claims, not because of a mistake or recent events coming to light, but because of a purely strategic decision by ANU. In these circumstances, the High Court held, ANU should not have been allowed to amend its statement of claim against Aon.

17 The decision in *Aon v ANU* came at a timely moment as the Federal Government had, just two months earlier, given support to criticisms of *Queensland v JL Holdings*. In the explanatory memorandum to the Access to Justice (Civil Litigation Reforms) Amendment Bill, the Federal Government noted the “particular concern” expressed about the Federal

³⁴ Ibid[103].

³⁵ (2009) 239 CLR 175, 182 (French CJ).

Court's powers to case manage proceedings actively following *Queensland v JL Holdings*. The Access to Justice Bill, as stated in its explanatory memorandum, "amends the *Federal Court of Australia Act 1976* to strengthen and clarify the case management powers of the Federal Court to ensure more efficient civil litigation" and to "make clear that case management is a relevant consideration in the attainment of justice."³⁶ A key objective of the reforms is to "bring about a cultural change in the conduct of litigation so that, at the same time as resolving disputes justly, the following considerations are at the forefront":

- focussing the Court's, parties' and their lawyers' attention on resolving disputes as quickly and cheaply as possible;
- reducing the costs of litigation;
- allocating resources in proportion to the complexity of the issues in dispute;
- avoiding unnecessary delays; and
- management of the Court's judicial and administrative resources as efficiently as possible.³⁷

18 The amended *Federal Court of Australia Act* is now in force. It includes an overarching purpose statement similar in effect to section 56 of the NSW *Civil Procedure Act 2005*, and requires all parties to act consistently with the overarching purpose.³⁸ Section 37P of the amended Act gives a broad power to the Court to give directions about the practice and procedure to be followed in relation to any part of a proceeding and, without limiting this broad power, lists the kind of directions that may be given, which

³⁶ Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Bill 2009 (Cth), 1.

³⁷ Ibid.

³⁸ See Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 ss 37M, 37N.

include limiting the number of witnesses called or the number of documents that may be tendered in evidence.

- 19 The amendments are the latest in the gradual process of civil procedure reform that has occurred in Australia over the past 30 years, and in many ways codify what is already in practice in the courts. In contrast to the UK, where progress was relatively slower and a case management regime was implemented subsequent to recommendations made by the Woolf Report, case management techniques in each of the Australian jurisdictions developed rather organically through the courts' own initiatives in response to problems or challenges faced.³⁹
- 20 In the Supreme Court of New South Wales, recognition of the need for expedition and some acquaintance by the Bench with commercial practice led to the creation of a specialised commercial list, which was modelled at first on the Commercial Court of England established in 1895. The *Commercial Causes Act 1903* (NSW) was passed, which empowered the judge to require parties to identify the real issues at an early stage and to dispense with the normal rules of practice and procedure in order to ensure the speedy determination of those issues.⁴⁰
- 21 The practice of the Commercial Court in NSW was significantly transformed in the 70s and 80s under the aegis of judges such as Sheppard J and Rogers J (who became the first Chief Judge of the newly created Commercial Division of the Supreme Court in 1987).⁴¹ Sheppard J introduced into the Commercial List the practice of conducting civil

³⁹ John P Hamilton, above n 13, 258; J J Spigelman, 'Case Management in New South Wales' (Address to the Annual Judges Conference, Kuala Lumpur, Malaysia, 22 August 2006).

⁴⁰ J J Spigelman, above n 39.

⁴¹ John P Hamilton, above n 13, 261.

litigation upon a summons and affidavits, departing from the previous lengthy procedure of formal pleadings. This came from a recognition that, in matters where the issues were clear, there was little value in filing defences, replies and other pleadings. The move to the use of summons and affidavits saved parties from incurring unnecessary costs and ensured an earlier hearing.

22 Rogers J moved the Commercial Court in the direction of firm case management and the conduct of proceedings in accordance with directions, which might be contrary to rules or the received notions of procedure.⁴² In 1987, the *Supreme Court (Commercial Division) Amendment Act 1985* (NSW) created the Commercial Division as a separate Division of the Supreme Court of NSW to provide specialist expertise for the resolution of major commercial disputes and disputes of general commercial significance. Practice Note 39 governed the new practice and procedure for the Commercial Division. Rogers J, in explaining the Practice Note, stated that “[t]he essence of resolution of commercial disputes is speed”⁴³ and that the purpose of Practice Note 39 was to aid in the achievement of the objectives of “speedy, inexpensive and ... legally correct resolution of the real dispute between the parties”.⁴⁴

23 Key features of the Practice Note included:

- Increased out-of-court preparation. Parties were now required to consider mediation and settlement before coming to court;

⁴² Ibid 261.

⁴³ Justice Andrew Rogers, ‘Commercial Dispute Resolution: Litigation and Arbitration in Australia’ (Paper delivered to the Australian Bar Association, 14 July 1988).

⁴⁴ Justice Andrew Rogers, ‘The New Practice and Procedure of the Commercial Division of the Supreme Court of New South Wales’ (Paper delivered to the Young Lawyers Section of the Law Society of New South Wales, 10 December 1986), 1.

- Control by judges over the progress of interlocutory steps. As soon as proceedings are instituted, a matter would come before a judge for directions, to ensure that an action progresses at an appropriate rate and that no unnecessary interlocutory steps are indulged in;
- To allow the judge to identify the real issues early on in a dispute, the judge could require parties to produce a statement of real issues; and
- Orders for discovery and interrogatories would only be made where it was clear that they were necessary.

24 The innovations of the Commercial Division continue today in the Commercial List. The current Practice Note for the Commercial List and Technology and Construction List⁴⁵ makes provision for an initiating Statement by a plaintiff and a Response by a defendant. These documents are required to set out in summary form:⁴⁶

- the nature of the dispute;
- the issues which are likely to arise;
- the contentions and response to contentions;
- the questions that either party considers are appropriate to be referred to a referee for inquiry and report; and
- any attempts to mediate and whether either party is willing to proceed to mediation at an appropriate time.

25 When proceedings are instituted, the matter comes before the List judge for the first Directions Hearing, where a timetable for preparation of the

⁴⁵ Supreme Court Practice Note Eq 3.

⁴⁶ Supreme Court Equity Division - Commercial List and Technology and Construction List, Practice Note SC Eq 3, [8]-[10].

matter for trial is set in considerable detail. The judge may make orders or directions in relation to matters including:

- the filing of a statement of agreed issues;
- the making of admissions;
- the appointment of a single expert or Court Appointed Expert;
- exchange of expert reports and the holding of conferences of experts;
- filing of list of documents and provisions of copies of documents; and
- service and filing of affidavits and statements of evidence by specified dates.

26 The practice of case management by giving directions has been extended to the general practice of the Supreme Court. Originally, Part 26 r 1 of the Supreme Court Rules was transformed to allow the court to give “from time to time and at any time” such directions “as appears convenient (whether or not consistent with the rules) for the just, quick and cheap disposal of proceedings”. Later on, the phrase “just, quick and cheap” was inserted into an overriding purpose rule in the Supreme Court Rules.⁴⁷ It retains its place today in section 56 of the *Civil Procedure Act 2005* (NSW).

27 The case management system in the Supreme Court of NSW places a principal focus on caseload management, not just management of individual cases. As Spigelman CJ explained in a 2006 address, “[e]ffective and efficient use of resources, in our experience, requires something more than managing individual cases for trial. It requires an overview which, in our experience, is best done by disaggregating the caseload into distinct

⁴⁷ Supreme Court Rules 1970, Pt 1 r 3 (now repealed).

categories which require different treatment based, to a significant degree, on specialised law and specialisation amongst legal practitioners.”⁴⁸ In addition to the Commercial and Technology and Construction Lists, the Supreme Court of NSW runs a number of other specialist Lists, each with its own Practice Note which tailors practice and procedure to the needs of the type of matters that are heard in that List. Each List has a number of sitting judges with particular expertise in that area, who may handle the interlocutory steps at various points in time. One advantage of this system is the ability to achieve a more equal distribution of workload among judges and the ability to set down earlier hearing dates as interlocutory applications may be heard by any available judge. In contrast, the Federal Court employs the individual docket system, whereby a case is allocated to a single judge who manages it from its inception and hears it at trial. There are pros and cons for both systems, which have been examined by independent reviews and commentators.⁴⁹ In the interests of time, I will not discuss these, but suffice it to say that the system employed by the NSW Supreme Court is suited to the high volume and particular types of matters that come before the Court, while the individual docket system is well suited to the highly varied, and often complex, matters that come before the Federal Court due to its broad jurisdiction.

⁴⁸ J J Spigelman, above n 39.

⁴⁹ See, eg, T Wright and C Sage, *The Federal Court Individual Docket System: A Post Implementation Evaluation* (2002); Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999), [10.50]; Australian Law Reform Commission, *Managing Justice*, above n 3, [7.6]; and Justice Ronald Sackville, ‘From Access to Justice to Managing Justice: The Transformation of the Judicial Role’ (Address to the Australian Institute of Judicial Administration Annual Conference, Brisbane Queensland, 12–14 July 2002), 14–17.

LITIGATION FUNDING

- 28 Few topics in recent years have excited as much controversy as litigation funding and, in particular, the rise of entrepreneurial litigation funding. Advocates for litigation funding argue that it is a means of enhancing “access to justice”,⁵⁰ of enforcing market protections and allowing consumers to hold recalcitrant corporations accountable for their misconduct and the harm they inflict, which would not otherwise be redressed.⁵¹ For critics, entrepreneurial litigation is an example of heinous commodification – an anathema that corrupts the court process and the prosecution of claims.⁵²
- 29 Litigation funding was traditionally prohibited at common law under the medieval doctrines of maintenance and champerty. Maintenance was the giving of assistance or encouragement to a party in litigation by a person who had no interest in the litigation or lawful motive justifying interference. Champerty was an aggravated form of maintenance, where a third party, with no relevant interest, funds another person’s litigation for profit. The rationale for the prohibitions was to prevent officials and

⁵⁰ See, eg, New South Wales Law Reform Commission, *Barratry, Maintenance and Champerty*, Discussion Paper No 36 (1994) [2.55]; John Walker, Submission to the Standing Committee of Attorneys General in response to the SCAG Discussion Paper: Litigation Funding in Australia, 11 August 2006; Bernard Murphy and Camille Cameron, ‘Access to Justice and the Evolution of Class Action Litigation in Australia’ (2006) 30 *Melbourne University Law Review* 399, 439; and John Walker, ‘Policy Issues in Litigation Funding’ (Paper presented at the Supreme and Federal Court Judges Conference, Hobart, January 2009), 24.

⁵¹ Edward F Sherman, ‘Consumer Class Actions: Who are the Real Winners’ (2004) 56 *Maine Law Review* 223, 231–2; *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 442, 450 and 468 (Kirby J).

⁵² *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 486 (Callinan and Heydon JJ); and see discussion in Vicki Wayne and Vince Morabito, ‘The Dawning of the Age of the Litigation Funder’ (2009) 28 *Civil Justice Quarterly* 389, 432–3.

nobles from abusing the court's processes by using litigation to harass vulnerable individuals, to suborn claims and to pursue worthless claims.⁵³

30 The latter half of the 20th century saw a changing of attitudes toward litigation funding. The historical concerns regarding maintenance and champerty were increasingly regarded as obsolete. Legislatures began to focus on the perceived public policy benefits of litigation funding, namely, that it was a means to increase "access to justice". In a 1994 Discussion Paper, the NSW Law Reform Commission observed that:

the considerations of public policy which once found maintenance and champerty so repugnant have changed over the course of time. The social utility of assisted litigation is now recognised and the provision of legal and financial assistance viewed favourably as a means of increasing access to justice.⁵⁴

31 Maintenance and champerty were abolished as crimes and civil wrongs by statute in the UK in 1967.⁵⁵ Similar legislation was passed in NSW in 1993, and in a number of other Australian jurisdictions.⁵⁶ A statutory exception to champerty was introduced in 1995 through the Corporations and Bankruptcy Acts in the context of insolvencies, which allowed administrators and trustees in bankruptcy to sell parts of the fruits of a claim in return for funding to conduct litigation. This led to the creation of a litigation funding industry for insolvency litigation.

⁵³ Peta Spender, 'After Fostif: Lingering Uncertainties and Controversies About Litigation Funding' (2008) 18 *Journal of Judicial Administration* 101, 103.

⁵⁴ NSW Law Reform Commission, *Barratry, Maintenance and Champerty*, Discussion Paper No 36 (1994) [2.55]

⁵⁵ *Criminal Law Act 1967* (UK) ss 13 and 14.

⁵⁶ *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) s 4. See also, *Law Reform (Miscellaneous Provisions) Act 1995* (ACT) s 68 and *Civil Law (Wrongs) Act 2002* (ACT) s 221; *Crimes Act 1958* (Vic) s 322A and *Wrongs Act 1958* (Vic); *Criminal Law Consolidation Act 1935* Sch 11 sub-ss 1(3) and 3(1).

- 32 The abolishing Acts raised a problem, however. Section 4 of the NSW *Maintenance, Champerty and Barratry Abolition Act 1993* provides that “an action in tort no longer lies on account of conduct known as maintenance (including champerty).” However, section 6 provides that the Act “does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal”. This meant that a party could seek to invalidate a third party funding contract in the courts on the basis that it is to be treated as contrary to public policy or otherwise illegal, and seek a stay of proceedings to prevent the court from determining the dispute affected by the funding agreement.
- 33 The issue was addressed in the seminal 2006 High Court decision of *Campbells Cash and Carry v Fostif*, where the High Court was required to consider whether it was contrary to public policy and an abuse of process for a funder to seek out claimants and to finance the ensuing litigation on terms that would give it control of the proceedings and allow it to make a profit. In that case, the funding arrangement gave the funder a high degree of control over the proceedings. The funder had conducted an aggressive advertising campaign to seek out the claimants, retained the solicitors and forbade the solicitors from directly liaising with the litigants, who were treated as the funder’s clients. The majority of the Court (Gleeson CJ, Gummow, Hayne, Crennan and Kirby JJ) held that “none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process”.⁵⁷ Their Honours cited with approval the dicta of Mason P in the Court of Appeal that many people seek profit from assisting the processes of litigation and it is not surprising that a person who expends funds in litigation wishes to

⁵⁷ (2006) 229 CLR 386, 433-4 (Gummow, Hayne and Crennan JJ).

control the litigation.⁵⁸ In relation to champerty, Mason P observed that the public policy of the law had changed: “[t]he law now looks favourably on funding arrangements that offer access to justice as long as any tendency to abuse of process is controlled.”⁵⁹ In the High Court, the majority held that, as the legislature had abandoned a general rule against the maintenance of actions, there was no foundation for a conclusion that it is against public policy to seek out clients and promote litigation where otherwise there would be none.⁶⁰

34 Their Honours considered two concerns about litigation funding - fears about adverse effects on the litigation process and fears about the “fairness” of the bargain struck between the funder and the intended litigant.⁶¹ Gummow, Hayne and Crennan JJ concluded:

Neither of these considerations, whatever may be their specific application in a particular case, warrants formulation of an overarching rule of public policy that either would, in effect, bar the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement. To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears.⁶²

In their Honours’ view, the concern that the funder’s intervention could be inimical to the administration of justice could be “sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive

⁵⁸ Ibid.

⁵⁹ (2005) 63 NSWLR 203, 227 (Mason P, Sheller and Hodgson JJA concurring), cited with approval in (2006) 229 CLR 386, 425 (Gummow, Hayne and Crennan JJ).

⁶⁰ (2006) 229 CLR 386, 434 (Gummow, Hayne and Crennan JJ).

⁶¹ Ibid.

⁶² Ibid.

elements of the court's processes".⁶³ If lawyers undertake obligations that give rise to conflicting duties, any problems arising could be addressed by the existing rules regulating lawyers' duties to the court and to clients.⁶⁴ Secondly, the plurality rejected a role for the courts to assess whether a funding agreement is fair or not, as this assumes that "there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity."⁶⁵

35 Callinan and Heydon JJ, in dissent, were critical of the role of third party funders in court proceedings. Their Honours stated:

The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits. Courts are designed to resolve a controversy between parties who are before the court, dealing directly with each other and with the court: the resolution of a controversy between a party and non-party is alien to this role. Further, public confidence in, and public perceptions of, the integrity of the legal system are damaged by litigation in which causes of action are treated merely as items to be dealt with commercially.⁶⁶

In their view, the *Fostif* proceedings constituted an abuse of the court's process, that being the use of the court for some purpose other than that which it is intended by the law to effect.⁶⁷

⁶³ Ibid 435.

⁶⁴ Ibid.

⁶⁵ (2006) 229 CLR 386, 434-5 (Gummow, Hayne and Crennan JJ).

⁶⁶ (2006) 229 CLR 386, 487-8 (Callinan and Heydon JJ).

⁶⁷ Ibid 486.

36 A few points should be made. First, I am cautious about accepting without reservation the argument that litigation funding enhances “access to justice”. I assume that “access to justice” in this context means that litigation funding allows some meritorious claims that would otherwise be abandoned to be brought before the courts. This may be so in the case of class actions where the expense is too great to be borne by any one claimant, and in complex matters where the initial costs of investigation and collecting of expert evidence may be prohibitive.⁶⁸ There is also some merit in the argument that a litigation funder, as a repeat player, is well equipped with the expertise and experience to manage the conduct of a claim efficiently and to make the forensic decisions necessary to deal with determined and well-informed opponents.⁶⁹ However, there are limits to how far the “access to justice” argument can go. Commercial litigation funders apply stringent criteria when assessing whether a claim is viable for funding,⁷⁰ and the commercial reality is that it is unlikely that a funder will fund a claim where there is a risk that it will not recover its costs, or where the risks involved and the complexity of the forensic inquiry required make the claim uneconomic to pursue. Commercial funders handle the larger, more lucrative cases, leaving many smaller companies and individuals who will continue to face costs barriers to the enforcement of their legal rights.⁷¹ Furthermore, a funder will not take up a claim where

⁶⁸ Standing Committee of Attorneys-General, *Litigation Funding in Australia*, Discussion Paper, May 2006, 7.

⁶⁹ See *Fostif* [2005] NSWCA 83, [146] (Mason P).

⁷⁰ See, eg, John Walker, Susanna Khouri and Wayne Attrill, ‘Funding Criteria for Class Actions’ (2009) 32 *University of New South Wales Law Journal* 1032, for an explanation of the criteria that IMF (Australia) Limited applies in relation to class actions.

⁷¹ Bernard Murphy and Camille Cameron, ‘Access to Justice and the Evolution of the Class Action Litigation in Australia’ (2006) 30 *Melbourne University Law Review* 399, 439.

the relief sought is limited to injunctions, declarations or other non-monetary relief.⁷²

37 Secondly, a number of questions of principle remain after *Fostif*, which in turn pose questions for regulation:

- Is there a risk that the existence of a funding arrangement will inadvertently “corrupt” the court process? If so, when should the court intervene? What constitutes an abuse of process?
- How should conflicts of interest between the funder and the litigant be addressed? Is there a risk of the litigant’s lawyers being in a position where their own interests conflict with those of the litigant?
- Should a litigation funder who promotes litigation be directly liable for any costs ordered against the funded litigant? A related question is whether the funder should give security for any adverse costs orders.

Abuse of process and conflicts of interest

38 The intervention of a litigation funder poses a significant risk of inadvertently “corrupting” the trial process. Funders, who pay the costs of the litigation (such as lawyer’s fees, disbursements, project management and claim investigation costs) and have a substantial financial interest in the outcome of the litigation, will inevitably exercise some degree of control over the prosecution of the claim.⁷³ Conflicts of interest between

⁷² John Walker, Susanna Khouri and Wayne Attrill, above n 70, 1041.

⁷³ This can range from running the proceedings entirely and retaining and instructing the lawyers (as in *Fostif*), to allowing the lawyers to run the proceedings but managing the budget and maintaining some level of consultative role in the claim management.

the funder and the litigant can arise with respect to central matters such as settlement and withdrawal.⁷⁴ A funder may want the litigant to accept what the funder regards as a reasonable offer of settlement, whereas the litigant may wish to continue the matter.⁷⁵ If the proceedings are continued, the funder's investment in the claim may be at risk. If the matter proceeds to judgment and judgment falls below the sum in the settlement offer, the funder may receive a lower "success fee"; the overall return may also be diminished by adverse costs orders. Alternatively, a litigant may wish to settle too cheaply for the funder to make sufficient profit from its investment.⁷⁶ As Professor Vicki Waye explains, this conflict can arise because the client is not necessarily motivated by claim maximisation - for example, it might want to maintain its relationship with the defendant - whereas claim maximisation is the funder's primary motivation.⁷⁷

- 39 A situation may arise where the litigant wishes to withdraw from the proceedings for whatever reason, but a litigation funder will want the proceedings to continue until settlement or judgment because of its considerable investment in the claim.⁷⁸ In these situations, the litigant's legitimate interests may be ignored or subordinated to those of the funder.

⁷⁴ Vicki Waye, 'Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs' (2008) 19 *Bond Law Review* 225, 237.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ In her empirical research into the practices of various Australian professional funders, Professor Vicki Waye gives an example where this happened. The funder revealed that the solicitor involved in the matter was forced to resign because of its conflict between its fiduciary duties to the client and its contractual duties to the funder. The matter was withdrawn and the funder lost its investment. As a result of the experience, the funder stated that it was going to make clearer in future funding arrangements that the litigant cannot terminate without liability in damages unless legal advice is available to say that the prospects of the action are not good. See Vicki Waye, *Trading in Legal Claims: Law, Policy and Future Directions in Australia* (2008).

40 In *Fostif*, the majority stated that existing doctrines of abuse of process could sufficiently address any adverse effects on the process of litigation. Whether proceedings funded by a litigation funder are an abuse of process depends on whether the intervention of that funder “has corrupted or is likely to corrupt the processes of the court to a degree that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process”.⁷⁹ However, it is uncertain what conduct warrants court intervention, and what is the degree of control that is permitted on the part of the funder.⁸⁰ Two years earlier, the Full Court of the Supreme Court of Western Australia in *Clairs Keeley (a firm) v Treacy*⁸¹ stated that “[i]t is not acceptable for the litigation to be pursued in such a way that the interests of the plaintiffs are subservient to those of the funder. That would be an abuse of process.”⁸² In that case, the Court was concerned that the funding agreement operated as a de facto assignment to the funder of the plaintiff’s causes of action. However, Mason P later, when *Fostif* was before the Court of Appeal, stated that he disagreed with the “categorical thrust of these two sentences”, and that “a measure of control is essential if the funder is to ...protect its own interests”.⁸³ The High Court ultimately held that a funder could maintain a high degree of control. The standard of proving improper monopolisation of proceedings and abuse of process is high, especially where the litigant has a genuine and viable cause of action.

41 It appears that if a litigant is not fully informed about the effects of the funding arrangements, courts may intervene. In *Clairs Keeley*, the Full Court of the Supreme Court of Western Australia granted a stay of

⁷⁹ (2005) 63 NSWLR 203, 234, cited with approval in (2006) 229 CLR 386, 424.

⁸⁰ See discussion in Rachael Mulheron and Peter Cashman, ‘Third Party Funding: A Changing Landscape’ (2008) 27 *Civil Justice Quarterly* 312.

⁸¹ [2004] WASC 277.

⁸² *Ibid* [71].

⁸³ (2005) 63 NSLR 203, 235.

proceedings on the basis that the lawyers had breached their fiduciary duty to the litigants by failing to disclose that they would obtain a success fee of 25 per cent above their normal fee. The lawyers had a direct contract with the funder, took all instructions from the funder, and did not appreciate the nature and extent of their duties to the litigants in the conduct of litigation and their role in preventing an inappropriate level of control of the litigation by the funder.⁸⁴ However, the stay was lifted once the litigation agreement was rectified and the information was disclosed to the litigants.⁸⁵

42 The lack of regulation of funding arrangements and uncertainty about what conduct is impermissible is problematic. As Professor Peta Spender argues, it could work as an obstacle to access to justice by increasing satellite litigation by defendants attempting to establish systemic abuse.⁸⁶

43 A related question for regulation is how to address conflicts of interests. As Callinan and Heydon JJ pointed out in *Fostif*, unlike solicitors and counsel, funders are not officers of the court and do not owe ethical duties to the court. If solicitors breach their ethical duties, the court may impose heavy sanctions on them. In contrast, funders are not reflected on the court file and their appearances are not announced in open court. They play “more shadowy roles” than lawyers, and it is less easy for the court to supervise litigation where one side only has a nominal party and the true controller of that side of the case is beyond the court’s direct control.⁸⁷

⁸⁴ *Clairs Keeley (A Firm) v Treacy* [2003] WASCA 299.

⁸⁵ *Clairs Keeley (A Firm) v Treacy* [2005] WASCA 86.

⁸⁶ Peta Spender, above n 53, 108-9.

⁸⁷ (2006) 229 CLR 386, 487.

44 Some protections, external to the court, currently exist under statute. For example, if a funder registers for an Australian Financial Services Licence, on the basis that litigation funding is a financial product or service, then the funder must meet certain obligations under Part 7 of the *Corporations Act 2001* (Cth), including making "adequate arrangements for the management of conflicts of interest."⁸⁸

45 Mr John Walker from IMF (Australia) Ltd, which holds an Australian Financial Services Licence, has given examples of clauses in IMF's funding agreement for multi-party actions that deal with conflicts of interest.⁸⁹ Generally, IMF gives day to day instructions to lawyers, but the litigant may override the instructions given by IMF by itself giving instructions to the lawyers. The exception is in relation to settlement. If the litigant wants to settle the claims or proceedings for less than what IMF considers appropriate, or does not want to settle the claims or the proceedings when IMF considers it appropriate for the litigant to do so, then IMF and the litigant must seek to resolve their difference of opinion by referring the matter to counsel for advice on whether, in counsel's opinion, settlement of the claims (and the terms of any such settlement) is reasonable in all of the circumstances. The opinion of counsel is final and binding on both the litigant and IMF.

⁸⁸ *Corporations Act 2001* (Cth) s 912A(1)(aa). In the context of class actions, a particular funding arrangement may constitute a managed investment scheme under Chapter 5C of the *Corporations Act 2001* (Cth), as found by a majority of the Full Federal Court in the particular facts of the recent case of *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 (Sundberg and Dowsett JJ, Jacobson J dissenting). In this circumstance, the funder (or the litigant's lawyers), as the "responsible entity" for operating the scheme, would be under a duty to "act in the best interests of the members [of the scheme] and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests": see *Corporations Act 2001* (Cth) s 601FC(1)(c).

⁸⁹ John Walker, above n 50, 14-5.

46 The conflicts of interest clause also provides that if the litigant's lawyers believe that they may be in a position of conflict with respect to any obligations they owe to IMF and those they owe to the litigant, then the lawyers "*may* seek instructions from [the litigant], which instructions will override those that may be given to IMF; give advice to the litigant and take instructions from [the litigant], even though such advice and instructions may be contrary to IMF's instructions; and refrain from giving IMF advice and from acting on IMF's instructions, where that advice or those instructions may be contrary to [the litigant's] instructions".⁹⁰

47 However, as many academics have argued, the information asymmetry between the litigant and its lawyers means that the litigant may not have the resources to monitor its lawyers; the lawyer is potentially an unreliable agent; and may prefer its own interests over those of the litigant.⁹¹ This is not implausible as many law firms have close and continuing relationships with particular litigation funders, with whom they work in a series of matters and on whom they are dependent for their fees. One solution, as suggested by Justice Keane, is to introduce a regulatory framework for commercial funding that requires a demarcation between the lawyers who advise the funder in relation to the prospects of a proposed litigation and the lawyers who actually run the case if it is pursued.⁹² However, the question of how these problems should be addressed is ultimately one for the legislature.

⁹⁰ Ibid.

⁹¹ Vicki Waye, above n 74, 228.

⁹² Justice P A Keane, 'Access to Justice and Other Shibboleths' (Paper presented at the JCA Colloquium, Melbourne, 10 October 2009), 31.

Liability for costs orders and security for costs

- 48 Another question is whether the litigation funder who promotes litigation should be directly liable for any costs ordered against the funded litigant, and the related question of whether it should give security for any adverse costs orders.
- 49 The question was considered in *Jeffrey & Katauskas v SST Consulting*,⁹³ which arose out of a case that had come before me at first instance.⁹⁴ The facts involved a construction company, Rickard Constructions, suing another company which had provided technical services for the construction of a pavement for a container terminal at Port Botany. Rickard Constructions entered into a deed of charge with the funder, SST Consulting, to secure advances from SST Consulting for the purpose of prosecuting the proceedings. Under the deed of charge, SST Consulting was entitled to receive, in addition to the amount of costs advanced, a success fee if the litigation succeeded. It did not give Rickard Constructions an indemnity against liability for costs in the proceedings. At all material times Rickard Constructions was unable to meet any potential adverse costs order. The litigation failed and, after recourse to amounts paid as security for costs, the defendant was left with a shortfall under an order for the payment of costs. By that time, Rickard Constructions had gone into administration.
- 50 The defendants made an application to me for an order for the costs of the trial against SST Consulting and its directors, pursuant to section 98(1)(a) of the *Civil Procedure Act 2005 (NSW)* and UCPR r 42.3(2)(c). Section

⁹³ *Jeffrey & Katauskas v SST Consulting; Jeffrey & Katauskas Pty Limited v Rickard Constructions Pty Ltd (Subject to Deed of Company Arrangement)* (2009) 239 CLR 75.

⁹⁴ *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724.

98(1)(a) of the *Civil Procedure Act 2005* (NSW) states that "subject to rules of the court and to this or any other Act, ...costs are in the discretion of the court." This power is limited by UCPR r 42.3(1), which states that "the court may not, in the exercise of its powers and discretions under section 98...make any order for costs against a person who is not a party." An exception to the prohibition is in r 42.3(2)(c), which allows the court "to make an order for payment, by a person who has committed contempt of court or an abuse of process of the court, of the whole or any part of the costs of a party to proceedings occasioned by the contempt or abuse of process". Therefore, to succeed, the applicants had to show that the funder's conduct amounted to an abuse of process of the court.

51 The applicants alleged that the funder had abused the court's process because it was largely responsible for funding the litigation in circumstances where:

- had the litigation been successful, it stood to recover (in priority over other creditors of the plaintiff), amounts advanced by it to the plaintiff, together with a "success fee"; and
- it had what was described as "control" or "effective control" of the litigation (because it could turn off the funding tap); but
- it had no liability, by way of indemnity or otherwise, to satisfy any costs order that might be made against Rickard Constructions.

52 I considered the existing authorities to determine the meaning of "abuse of process" in this context and concluded that the legislature should not be assumed to have had in mind any particular categorisation of the concept of abuse of process, but intended it to encompass the range of recognised

categories.⁹⁵ Further, I concluded that applicants had to show that the abuse of process had already occurred. The application was for a non-party costs order after the conclusion of the proceedings, and was to be distinguished from applications for a stay at the outset of proceedings, where the relevant inquiry is whether the litigation funding arrangement is *capable* of amounting to an abuse of process and the focus is on the risk that an abuse of process *will* occur.⁹⁶

53 The applicants' argument appeared to proceed on the basis that if there were control coupled with absence of liability for costs, there was abuse of process. However, they did not seek to demonstrate that there had been any material lack of restraint, excess, manipulation, carelessness or other misconduct in the way that the proceedings were run. Nor did they seek to demonstrate that any such misconduct flowed from the involvement of the funder. As the applicants failed to demonstrate that any relevant abuse of process had in fact occurred, I dismissed their applications.

54 The applicants sought leave to appeal to the NSW Court of Appeal. Leave was granted, but the Court dismissed their appeal. The High Court then granted special leave to appeal against the orders of the NSW Court of Appeal for one of the defendants, Jeffrey & Katauskas (J & K). The appeal was dismissed by a majority composing of French CJ, Gummow, Hayne and Crennan JJ, Heydon J dissenting.

55 In the High Court, the appellant submitted that the funder engaged in an abuse of process "by funding the proceedings and/or by assisting the assignment and prosecution of invalidly assigned bare causes of action

⁹⁵ Ibid 740.

⁹⁶ Ibid

...by an insolvent plaintiff without provision to the plaintiff of an indemnity against a costs order in favour of successful defendants".⁹⁷

56 The High Court held that, following *Campbells Cash and Carry*, an agreement by a non-party, for reward, to pay or contribute to the costs of a party in instituting and conducting proceedings is not, of itself, an abuse of the court's processes. The question of whether the failure of a funder to provide an indemnity for any costs awarded against the party funded constituted an abuse of process could not be answered by reference to decided cases. Cases such as *Knight v FL Special Assets Ltd*⁹⁸ were decided in the exercise of the general discretion of the court to award costs against non-parties. In *Knight*, Mason CJ and Deane J recognised a general category of case in which such orders should be made, being "circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation".⁹⁹ However, those cases did not require the characterisation of non-party funding arrangements as an abuse of process, whereas the requirements of UCPR r 42.3 meant that J & K had to show abuse of process.¹⁰⁰

57 The High Court found that there was no evidence of an abuse of process. The mere combination of circumstances of a plaintiff being unable to meet an adverse costs order and the provision to that plaintiff of funds to litigate by a person who would not be liable to meet an adverse costs order could

⁹⁷ (2009) 239 CLR 75, 91.

⁹⁸ (1992) 174 CLR 178.

⁹⁹ *Ibid* 192-3.

¹⁰⁰ (2009) 239 CLR 75, 83.

not be said, as the appellants had submitted, to render the prosecution of the proceedings “seriously and unfairly burdensome, prejudicial damaging”. There was no evidence that the funding arrangement had any bearing on the merits of the proceedings or the way in which the proceedings were conducted. Rickard Constructions was not a nominal plaintiff and it was not suggested that the proceedings were conducted by or in the name of that company for any improper purpose.¹⁰¹

58 Further, the High Court stated that the proposition that those who fund another’s litigation must put the party funded in a position to meet any adverse costs order is too broad a proposition to be accepted and has no doctrinal root.¹⁰²

59 I favour the introduction of a rule that, where a party is being funded by a litigation funder, the court may make such orders as it thinks just in the circumstances of the particular case for the provision of security for costs by the litigation funder, and for payment by the litigation funder of the costs, in whole or in part, of any party to the proceedings. Such a rule was considered by a committee of judges acting under the auspices of the Council of Chief Justices of Australia and New Zealand as part of a proposal that some minimalist rules of court relating to litigation funding should be made.¹⁰³ However, the committee ultimately did not agree to the proposal, on the basis that the courts should not make rules in relation to litigation funding, in the absence of any legislation on the matter.¹⁰⁴

¹⁰¹ Ibid 96–7.

¹⁰² Ibid 98.

¹⁰³ The Hon Justice Kevin Lindgren, ‘Some Current Practical Issues in Class Action Litigation’ (2009) 32 *University of New South Wales Law Journal* 900, 904.

¹⁰⁴ Ibid.

Regulation

60 The Standing Committee of Attorneys-General (SCAG) has considered some form of regulatory framework in relation to litigation funding. In May 2006, it released a discussion paper, raising a number of policy concerns including the vulnerability of consumers in litigation funding arrangements and the inadequacy of protections to deal with conflicts of interest.¹⁰⁵ Submissions were made, and received, but to date nothing has eventuated. In September of last year, the Federal Attorney-General launched the Commonwealth's Strategic Framework for Access to Justice in the Federal Civil Justice System,¹⁰⁶ which flagged litigation funding in the context of class actions as an area for consideration. It will be interesting to see what eventuates from it.

COMMERCIAL ARBITRATION AND PROPOSED AMENDMENTS TO THE UNIFORM COMMERCIAL ARBITRATION ACTS

61 The topic I want to focus on is the recent proposed amendments to the uniform Commercial Arbitration Acts - the nationally consistent legislation governing domestic arbitration in Australia. The intention behind arbitration is that, with disputes that have a large technical factual matrix (such as disputes arising from construction or technology matters), parties may choose an individual or tribunal specially skilled in the subject matter of the contract to hear and weigh the competing evidence.

¹⁰⁵ Standing Committee of Attorneys-General, *Litigation Funding in Australia*, Discussion Paper, May 2006.

¹⁰⁶ Commonwealth Attorney-General's Department, *Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce Attorney General's Department*, September 2009.

Problems with domestic arbitration

- 62 However, the common view is that arbitration in Australia has failed to develop as a comparatively quick and cheap dispute resolution process. Rather than being a faster, less formal, commercial alternative to litigation, arbitration has been criticised as an adjunct to litigation¹⁰⁷ – “litigation-lite” – mirroring too much court procedures without having the full coercive powers of the court (for example, to compel discovery or the attendance of witnesses and ensuring the preservation of assets).
- 63 Under the *Commercial Arbitration Act* of each State, arbitrators have wide powers to control the conduct of arbitral proceedings. Section 14 of the Acts empowers arbitrators to conduct proceedings “in such manner as the arbitrator ... thinks fit”, subject to the terms of the arbitration agreement. Section 19(3) states that, unless the parties agree, the arbitrator “is not bound by the rules of evidence but may inform himself in relation to any matter in such manner as he thinks fit.” Section 37 confers on the arbitrator the power to require parties at all times to do all things to enable a just award to be made. The real advantage is that arbitrators, in theory, are able to streamline the processes that are usually adopted in court to suit the case at hand, provided that the rules of natural justice are complied with.¹⁰⁸
- 64 Despite this, arbitrators have all too often failed to take advantage of the procedural efficiencies that arbitration potentially confers. The omnipresent threat of misconduct charges has resulted in a reluctance on the part of arbitrators to depart from the norm of litigation procedure and to intervene when it is appropriate to do so without prejudicing a party’s

¹⁰⁷ A A de Fina, ‘What is Wrong with Arbitration?’ (1996) 12 *Building and Construction Law Journal* 389.

¹⁰⁸ *Commonwealth v Cockatoo Dockyards Pty Ltd* (1995) 36 NSWLR 662.

case in the conduct of the proceedings.¹⁰⁹ As the experienced arbitrator A A de Fina observes in his article "What is Wrong with Arbitration?", legal practitioners often adopt the full panoply of formal trial procedures for the course of an arbitration.¹¹⁰ These include delaying tactics such as requests for particulars, interrogatories, disputes about disclosure of documents, and insisting on the formal steps of examination in chief, cross-examination and re-examination as would be conducted under formal rules of evidence. As a matter of general practice, arbitrators when faced with challenges as to the admissibility of evidence or to particular witnesses will admit all evidence or hear the witnesses, but qualify that the weight to be applied to such evidence or evidence adduced by such witnesses would be a matter for consideration in the determination of the matter.¹¹¹ This means that a party might be put to answering a case that it otherwise would not be required to answer, thereby extending the length, and cost, of proceedings.¹¹²

65 The experience seems to be similar in the UK. In a speech delivered in the Banco Court in 2005, the eminent English QC Arthur Marriott lambasted the way in which the UK's *Arbitration Act*, despite giving arbitrators very considerable power over the running of an arbitration, was not producing radically new procedures. He observed:

The practitioners dominate the arbitral processes in the same way that they have dominated litigation, and to the same end. ...Cost...is going up by leaps and bounds. ...All of the problems of excessive disclosure, the excessive use of experts and excessive costs which have plagued the costs, plague the arbitral process for the same reasons.¹¹³

¹⁰⁹ A A de Fina, above n 107, 397.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Arthur Marriott, 'Breaking the Dispute Resolution Deadlock: Civil Litigation and ADR in the United Kingdom and Beyond' (2006) 17 *Australian Dispute Resolution Journal* 157, 163.

If arbitration does not deliver the efficiencies it promises, Marriott warned, the arbitral community will face “the very risk of pricing itself out of the marketplace.”¹¹⁴

66 These concerns have not escaped SCAG, which late last year, circulated a draft new uniform Commercial Arbitration Bill, modelled on the UNCITRAL Model Law on International Commercial Arbitration. The Bill is supplemented by additional provisions as deemed necessary or appropriate for the domestic commercial arbitration scheme. The changes bring the various State acts governing domestic arbitration in line with the *International Arbitration Act 1974* (Cth) and international practice, and remove the previous uncertainty arising from the current operation of dual legislative regimes. SCAG expressed the “compelling need to progress reform of domestic commercial arbitration legislation to ensure that it provides a cost effective and efficient alternative to litigation in Australia.”¹¹⁵

67 Whilst the reforms should be applauded, I hope that I can be forgiven for being somewhat sceptical about their being the “great leap forward” for domestic arbitration. Arbitration has a long way to go before it could be said to be “a cost effective and efficient alternative to litigation” and the preferred forum for parties. The experience of international arbitration has shown that the cost benefits can be illusory; arbitration *may* minimise costs, but that depends in large part on the rigour of the tribunal, the terms of the arbitration agreement and the attitudes of the parties.¹¹⁶

¹¹⁴ Ibid.

¹¹⁵ Standing Committee of Attorneys General, *Reform of the Uniform Commercial Arbitration Acts - Issues Paper* (2009).

¹¹⁶ JJ Spigelman, ‘Transaction Costs and International Litigation’ (Speech delivered to the 16th Inter-Pacific Bar Association Conference, Sydney, 2 May 2006).

68 Proponents of arbitration argue that the processes available in the Supreme Courts of Australia are, by and large, not suitable for disputes involving factually or technically complex matters. The criticism is that it is difficult to get these matters set down and, when they are, the hearing date can be a significant time after the conclusion of the interlocutory steps. This can take years to complete, and trials may not commence until many years after the initiating process.¹¹⁷

69 From my experience both at the bar and on the bench, commercial disputes are able to proceed expeditiously in the Supreme Courts of NSW and Victoria, where the specialist Commercial Lists have procedures for fast tracking pre-trial processes and bringing a matter quickly to hearing. As I noted earlier, judges in the Commercial List have wide powers to give directions to the parties to complete certain steps by set dates, and any available judge in the Commercial List may hear an interlocutory application, meaning that hearing dates in the interlocutory stages are not dependent on the workload and availability of a particular judge. The same applies to construction disputes, which also have their own specialist List, as mentioned below.

70 A matter that I case-managed from its inception and heard last year, *RHG v BNY Trust Company Australia*,¹¹⁸ illustrates well the expedition and efficiency of the Commercial List. The matter involved a highly contested interlocutory dispute, complex issues dealt with in the hearing and a long judgment from me. From the initiation of the proceedings in late August,

¹¹⁷ Andrew Stephenson, 'Creating Efficient Dispute Resolution Processes: Lessons Learnt From International Arbitration' (2004) 20 *Building and Construction Law* 151, 151.

¹¹⁸ *RHG Mortgage Securities Pty Limited v BNY Trust Company of Australia Limited*, Supreme Court of NSW, Proceedings No 50152/09.

to the interlocutory hearings, the trial in November and then judgment in December, the matter was disposed of in about four months. In September, I made directions for the parties to exchange lists of categories of documents for discovery by a certain date, such lists to identify any documents or categories to be discovered as a matter of priority.¹¹⁹ The parties were to give discovery of Priority Documents by 11 September, and discovery of remaining documents thereafter. From mid September until early October, the plaintiffs and defendants were to file and serve all affidavits and expert reports upon which they proposed to rely at trial. On 23 October, Hammerschlag J as the Commercial List Judge listed the matter for hearing on 30 November, and directed the parties to file and serve, by 27 November, written overview submissions outlining relevant principles of law, identifying authorities proposed to be relied upon and summarising the facts for which the parties would contend at trial; and a folder containing a chronology, dramatis personae, a list of all the statements filed by each party which that party proposes to read, and a note of all objections to the statements filed by the other party and of the precise grounds of objection.¹²⁰ The matter proceeded on 30 November 2009 for hearing, which lasted four days, and I delivered the judgment on 17 December. The matter was not arbitrable, but I doubt that domestic arbitration could have resolved a matter of that scale any more speedily.

71 Another general criticism has been that the highly technical subject matter of some disputes renders them unsuitable for litigation before a judge who may not have the requisite technical expertise to understand or assess the expert evidence given. On the other hand, it is argued, experts such as engineers may be appointed as arbitrators to determine disputes. In “sniff

¹¹⁹ Ibid. See Associate’s Record of Proceedings 1/9/2009.

¹²⁰ Ibid. See Associate’s Record of Proceedings 23/10/09.

and smell arbitrations”, where the matter in issue is usually the quality of goods, the arbitrator may inspect the goods in question and apply his or her own expertise to determine whether or not they are up to the standard required. Two points may be made. The first is that, these days, only someone who has significant experience in conducting arbitrations and is familiar with legal processes can realistically conduct an arbitration. This is usually a solicitor or barrister who has substantial experience in the subject matter of the dispute, or a retired judge. Where non-legal experts are appointed as arbitrators, they usually sit as a member of a panel. Convening a panel will inevitably be more costly by virtue of having to pay the fees of a greater number of arbitrators.

72 The second point is that the specialist Technology and Construction List in the Supreme Court of NSW and the Building List in the Supreme Court of Victoria are well equipped to deal with highly technical disputes. The NSW Supreme Court Rules for many years have had provisions for referring the whole or part of proceedings to independent referees. Part 20 r 14 of the current UCPR allows the Court, “at any stage of the proceedings”, to “make orders for reference to a referee appointed by the court for inquiry and report by the referee on the whole of the proceedings or on any question arising in the proceedings.” The referees are sometimes experts – for example, engineers – and are often retired commercial judges. They operate under the supervision of, but with minimal interference from, judges of the Commercial and Technology and Construction Lists. Referees’ reports will only be rejected or modified, under the power of the Court in Part 20 r 24, in limited circumstances. I set out the relevant principles for the adoption of referee reports in my judgment in *Chocolate Factory Apartments v Westpoint Finance*,¹²¹ which has been approved by the

¹²¹ [2005] NSWSC 784, [7].

Court of Appeal. Generally, where a report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a disposition towards acceptance of the report.¹²² The Court will not interfere with the referee's findings of fact where there is factual material sufficient to entitle the referee to reach the conclusions he or she did, and particularly where the disputed questions are in a technical area in which the referee enjoys an appropriate expertise. To do otherwise would be to negate both the purpose and the facility of referring complex technical issues to independent experts for enquiry and report. The Court will generally only reject a report if it reveals some error of principle, absence or excessive jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding.¹²³ However, this is rare. The referees in NSW are widely regarded as having particular skills such that, as noted by Spigelman CJ in an address to the Malaysian Annual Judges Conference, building disputes from all over Australia are brought to the Technology and Construction List in the NSW Supreme Court.¹²⁴

Proportionate liability

73 A significant disadvantage of arbitration generally, which is not addressed by the proposed Commercial Arbitration Bill, relates to the apportionment of liability between concurrent wrongdoers. The existence of alleged concurrent wrongdoers is not uncommon in disputes involving claims of economic loss, such as building disputes and disputes involving breaches of a contract for the sale of goods. However, it is uncertain whether the

¹²² Ibid.

¹²³ Ibid.

¹²⁴ JJ Spigelman, above n 39.

various State proportionate liability regimes apply to arbitrations conducted under the uniform *Commercial Arbitration Acts*. Moreover, even if proportionate liability legislation does extend to arbitration, the alleged concurrent wrongdoers who are not parties to the arbitration agreement cannot be bound by the submission to arbitration, without their consent, and accordingly are not bound by any subsequent arbitral award that makes liability findings against them.

74 In NSW, proportionate liability is dealt with in Part 4 of the *Civil Liability Act 2002* (NSW). Section 34 states:

34 Application of Part

(1) This Part applies to the following claims (*apportionable claims*):

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,

(b) a claim for economic loss or damage to property in an action for damages under the Fair Trading Act 1987 for a contravention of section 42 of that Act.

It is uncertain whether the word “action” refers only to proceedings in a court or whether it extends to arbitral proceedings.

75 Section 35 states:

35 Proportionate liability for apportionable claims

(1) In any proceeding involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant’s responsibility for the damage or loss, and

(b) the court may give judgment against the defendant for not more than that amount.

The word "court" is defined in section 3 as including "tribunal, and in relation to a claim for damages means any court or tribunal by or before which the claim falls to be determined." The word "tribunal" in this context does not appear to refer to an arbitral tribunal, but rather refers to a tribunal created by statute and which has under that statute coercive powers (for example, the Building Tribunal or, in NSW, the Consumer, Trader and Tenancy Tribunal). This is because section 38 of the *Civil Liability Act 2002* (NSW) provides that "[t]he court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim". It would be extremely odd for "court" in this context to include an arbitral tribunal as such a power of joinder had never previously existed in relation to arbitration. Arbitration is a matter of contract, and in the absence of consent a party cannot be required to submit to arbitration any dispute. To hold a non-party bound by the arbitration agreement would go against the very principle of arbitration.

76 Nevertheless, as I have argued elsewhere,¹²⁵ in my view Part 4 of the *Civil Liability Act* is applicable to arbitral proceedings as between the parties to the arbitration agreement. The general principle is that arbitrators must determine disputes according to law, and this would include any proportionate liability legislation that would apply in the courts. Some support for this approach may be obtained from the decision of the High Court in *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture*.¹²⁶ In that case, it was held, among other things, that an arbitrator had power to award interest on the amount of the award. The basis for this holding was that interest would have been recoverable in a court and the parties by their submission had, by implication, given the arbitrator

¹²⁵ The Hon Justice Robert McDougall, 'Proportionate Liability in Construction Litigation' (2006) 22 *Building and Construction Law* 394, 395-6.

¹²⁶ (1981) 146 CLR 206.

authority to determine all differences between them according to law. Mason J (with whom Murphy J agreed) said that a reference to arbitration of "all differences arising out of" a policy of insurance "contemplates that all such differences shall be arbitrated in the light of the general law applicable to the subject matter in dispute". Thus, his Honour said, the effect of the submission was to give the arbitrator power to award interest conformably with section 94 of the *Supreme Court Act 1970* (NSW). Stephen J stated that "arbitrations must determine disputes according to the law of the land" (although exceptions exist relating to such things as equitable relief). In that case, his Honour held "that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable had the matter been determined in a court of law."

77 However, the more significant problem is the practical one that, even if an arbitrator applies proportionate liability provisions, the jurisdiction of the arbitrator is limited to reducing the liability of the respondent. As I stated earlier, consent is the cornerstone of arbitration. The arbitrator has jurisdiction only insofar as it is conferred by the terms of the submission to arbitration. Unless the alleged concurrent wrongdoers consent to be joined to the arbitration proceedings, the arbitrator does not have jurisdiction to apportion liability in a way that is binding on persons that the respondent points to as having some responsibility for the claimant's loss or damage, let alone make orders that give the claimant enforceable rights against those persons. This means that the claimant must resort to pursuing its remedies against the alleged concurrent wrongdoers in the courts. The result is multiple proceedings and the consequent certainly of increased cost, and risk of inconsistent decisions. In such a situation, the preferable

(and cheaper) option for the claimant is to have all of its claims litigated in the one court proceeding, rather than opt for arbitration.

Benefits of arbitration

78 Nevertheless, parties may choose arbitration for a number of real advantages it confers. The main advantage is that, in contrast to litigation which is conducted in open court, arbitration is a private process. This generally means that it must also be confidential, if the parties have provided for confidentiality by express agreement.¹²⁷ Parties can keep confidential the existence of the arbitration, the subject matter of the dispute, the conduct of the arbitration, the evidence, internal deliberations of the tribunal and the outcome. In commercial disputes, this may be of great significance to the parties as the subject matter of the dispute may be trade secrets or intellectual property which the parties, despite feuding with each other, recognise is in their mutual interests to keep out of the public domain.

79 Section 27F of the Commercial Arbitration Bill 2009 (NSW) states that “[a]n arbitral tribunal must conduct the arbitration proceedings in private”. Section 27G provides that “[e]very arbitration agreement is taken to provide that the parties and arbitral tribunal must not disclose confidential information”. Disclosure is permitted in limited circumstances, set out in section 27H. The arbitral tribunal also has the discretion to allow disclosure of confidential information in circumstances outside of one of the statutory exceptions, if one of the parties refers the question to the tribunal. The decision of the tribunal may be appealed to a court, which

¹²⁷ See *Esso Australia Resources v Plowman* (1995) 183 CLR 10, where the High Court held that, unless the parties agree otherwise, arbitration is private but not confidential. There is no implied term of confidentiality on the basis of business efficacy.

may order disclosure “if it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed” and “the disclosure is no more than what is reasonably required to serve the other considerations.” But the general rule, once the Bill is enacted, will be that arbitration is confidential.

- 80 The other main advantage is party autonomy. Parties have the ability to decide or influence the selection of the decision-maker and to agree on the procedures to be adopted by the tribunal. This might lead to lengthy pre-hearing skirmishes about procedural rules. But where parties have a continuing relationship, procedural issues might also be resolved quickly and tailored to the particular case.

Cultural change and international best practice

- 81 If arbitration is to be an efficient forum for the resolution of parties’ disputes, a cultural shift in the conduct of arbitral proceedings is needed. Practitioners have argued that domestic arbitration needs to move away from being a poor imitation of litigation and to take advantage of its very great potential for procedural efficiencies, as permitted by the arbitrator’s wide power to conduct the arbitral proceedings as he or she sees fit.¹²⁸ One positive outcome of the proposed Commercial Arbitration Bill is that, if enacted, its uniformity with the regime for international commercial arbitration might motivate the adoption in domestic arbitration of

¹²⁸ A A de Fina, ‘Project Disputes - Conduct and Management of Large Arbitrations in Minerals and Energy Projects’ (2008) 24 *Building and Construction Law Journal* 306, 310; and Andrew Stephenson, ‘Creating Efficient Dispute Resolution Processes: Lessons Learnt From International Arbitration’ (2004) 20 *Building and Construction Law Journal* 151, 153.

international best practice and techniques which have been effective in international arbitration.

82 These practices include:

- Limiting the time for hearings, by stipulating, for example, that the arbitral proceedings be conducted on a “stop clock” basis. In international arbitration, some arbitral institution rules provide time limits for dealing with cases. For example, article 6 of the ICC Rules of Arbitration provides a limit of six months. Time limits require parties to limit themselves to short openings and cross-examinations of witnesses, as any wasted time will compromise the party’s presentation of its case;¹²⁹
- Designing a dispute resolution process before the dispute arises, when parties will not be as concerned with tactical considerations and will not be certain as to who will be the claimant and the respondent in any future disputes. Early agreement will prevent delaying tactics once a dispute arises;¹³⁰
- Including in an arbitration agreement a list of arbitrators from which the parties may choose once the dispute arises. This will allow the parties at the outset to choose arbitrators who are likely to promote an efficient process or an arbitrator with particular technical knowledge and substantial experience in a particular industry, and may reduce the likelihood of the use of challenges to the arbitrator as a delay tactic once a dispute arises;¹³¹
- Making “pleadings” in a narrative form, which is the common practice in international commercial arbitration. This avoids the

¹²⁹ Stephenson, above n 128, 158.

¹³⁰ Ibid 153.

¹³¹ Ibid.

time consuming procedure of requesting further and better particulars, amendments, questions and answers, in order to identify the issues in the matter;¹³²

- Requiring statements of the case and evidence in chief be submitted in writing and delivered early in the process;¹³³
- Limiting discovery in some manner, for example, that discovery be made in accordance with the proportionality principle (although the level of discovery will in practice be determined by the arbitrator);¹³⁴ and
- Limiting the amount of expert witness evidence (for example, a party may only call one witness for each area of expertise).

83 Ultimately, the effectiveness of domestic arbitration will depend on the commitment of the parties to the expeditious resolution of their dispute and the rigour of the particular arbitrator.

CONCLUSION

84 In 1988, Justice Rogers remarked:

It used to be that the informality and speed of the arbitral process, handled by persons experienced in the field, gave an overwhelming advantage over the court process encrusted, as it was, with archaic pleadings and slow, if methodical, elucidation of the evidentiary material. ... Today, it is the curial process that is leading the advance towards speedy despatch and it is the arbitral process that is lagging behind.¹³⁵

¹³² A A Fina, 'Project Disputes - Conduct and Management of Large Arbitrations in Minerals and Energy Projects', above n 128, 310.

¹³³ Stephenson, above n 128, 160.

¹³⁴ Ibid 161.

¹³⁵ Justice Andrew Rogers, 'Commercial Dispute Resolution: Litigation and Arbitration in Australia' (Paper delivered to the Australian Bar Association, 14 July 1988).

85 When his Honour spoke, a quiet revolution in relation to the practice of litigation was in progress. That revolution has continued with the courts building on the reforms introduced and overseen by his Honour. I have no doubt that the process of change will continue and that the courts will be careful to monitor their procedures to ensure that the just, quick and cheap identification and resolution of the real issues in dispute is a reality, not merely a pious wish.