IN THE SUPREME COURT OF NEW ZEALAND SC 100/2012

[2013] NZSC Trans 20

**BETWEEN** **CREDIT SUISSE PRIVATE EQUITY LLC**

First Appellant

**CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP**

Second Appellant

**AND** **ERIC MERSERVE HOUGHTON**

First Respondent

**T E C SAUNDERS & ORS**

Second Respondent

**FIRST NEW ZEALAND CAPITAL**

Third Respondent

**FORSYTH BARR LIMITED**

Fourth Respondent

Hearing: 15 October 2013

Court: Elias CJ
McGrath J
Glazebrook J
Arnold J
Anderson J

Appearances: A S Olney and C J Curran for the Appellants
A J Forbes QC and P A B Mills with T Gavigan for the First Respondent
D J Cooper for the Second Respondent
D J McLellan QC for the Third Respondent

**CIVIL APPEAL**

**MR OLNEY:**
May it please the Court, Olney appearing for the two Credit Suisse appellants with Mr Curran.

**ELIAS CJ:**
Thank you Mr Olney, Mr Curran.

**MR FORBES QC:**
If the Court pleases, I appear with my learned friend Ms Mills and Mr Tim Gavigan, your Honour.

**ELIAS CJ:**
Thank you, Mr Forbes, Ms Mills, Mr Gavigan.

**MR COOPER:**
May it please your Honours, Cooper for the second respondents.

**ELIAS CJ:**
Thank you, Mr Cooper.

**MR McLELLAN:**
If the Court pleases, McLellan for the third respondent.

**ELIAS CJ:**
Thank you, Mr McLellan. Right. Mr Olney.

**MR OLNEY:**
Thank you, your Honour. The question we face is whether the claims of some or all of the represented shareholders are time-barred.

**ELIAS CJ:**
You say that, but if I can just say straight away, I have some difficulty understanding how that question, which is a substantive defence, has arisen for determination in

these proceedings. Can you explain that to me? There hasn't been an application for strike-out on that basis. There hasn't been a point of law set down for hearing before the trial.

**MR OLNEY:**

That's right. The question arose following the first Court of Appeal determination where the matter was stayed, and the question of whether or not the stay should be lifted and the matter proceed on a representative basis was remitted back to the High Court, and Court of Appeal gave directions as to a number of matters that the High Court could consider in determining whether it should continue on a represented basis and the conditions that might apply. The submission made in response to the plaintiffs' application to lift the stay and have the matter continue on a represented basis was that there was nothing the represented order could usefully achieve, because the represented persons were out of time to make any use of the *res judicata* on the common issues. They couldn't bring their individual claims.

**ELIAS CJ:**

So it was an argument against making the representation order?

**MR OLNEY:**

Yes.

**ELIAS CJ:**

But what do you seek from this Court? Because it occurs to me that the representation order need not determine the defence, the limitation defence, and I'm not sure how it properly arises for substantive determination.

**MR OLNEY:**

If the Court were to accept my first argument, I would ask the Court to make an order rescinding the representative order, which would leave Mr Houghton pursuing his personal claim solely for his own benefit. If the Court were to accept my second argument, which would then raise a question as to whether some or all of the shareholders may have opted in, in time, I would ask this Court to remit that question back to the High Court to be determined, because practically speaking if the number of represented shareholders who have opted in, in time is very small, it may be that there's insufficient to be achieved by the representative order and the plaintiff, who has the funder, may not want to proceed on that basis.

**ELIAS CJ:**

You say you're seeking to have the representative order rescinded but you're doing so on the basis that the limitation period prevents it operating in its terms, is that your principal argument?

**MR OLNEY:**

Yes, yes, it is.

**ELIAS CJ:**

But why should the Court not deal with whether a representative order was appropriate, leaving questions of limitation to be resolved in a properly constituted process?

**MR OLNEY:**

In my submission, the two go hand in hand. If the represented shareholders are out of time for the bringing of their individual claims, they can't make any use of any *res judicata* established on the common issues.

**ELIAS CJ:**

Well, I understand that, and perhaps you should just be allowed to develop your argument, but I want to flag that I'm concerned that we've got apples and pears here. We've got a substantive defence to a claim and we have procedural rules in terms of how claims may be pursued. It doesn't seem to me that a final determination of whether everybody can come in without running foul of the Limitation Act can be finally resolved in the proceedings as they're constituted before us at the moment. So you might want to come back to that at some stage.

**MR OLNEY:**

Thank you.

The question that has been posed, in my submission, arises specifically in the context of a claim, that is, Mr Houghton's claim, that gives rise to some issues that are common to both Mr Houghton and all represented shareholders, for example, whether the prospectus was objectively misleading, and some issues that are individual to Mr Houghton and each represented shareholder, for example, whether the individual was actually misled by something. My first argument is that the

representative status of the plaintiff and his claim doesn't result in those individual claims of the represented shareholders having been brought and he can't, as representative, prove and obtain damages on the individual claims of those various shareholders. In my submission, the limitation periods have continued to run on the individual claims of those shareholders unless and until they took the step of filing in a Court in the ordinary way. They haven't done so and those time limits have now expired.

As I'll develop the submission, I say that consequences recognised in the case law by law reform bodies that have specifically looked at this question and recognised this feature of the representative proceeding, and in the statutory class action regimes that exist around the world that have taken the step of, by legislation, modifying that aspect of the representative procedure, and by statute suspending time limitation periods.

The argument against me would have it that those cases are wrong, that the law reform bodies have misunderstood the law, and that the legislatures who have passed those regimes have done so redundantly and have solved a problem that doesn't exist. But in my submission, in fact, the law reform bodies, the cases, the legislatures, have it exactly right. Individual claims needed to have been brought, and they haven't, and now they can't be.

**ANDERSON J:**
What's the point of having a representative ability if it amounts to nothing? Your argument seems to me, at first blush, to be directly contradictory of rule 4.2.4. That says you may do it for the benefit or, on behalf of others in the same interest and your argument says you can't.

**MR OLNEY:**
Well, if what is sought in the representative action is a declaration that everyone is comfortable with as final relief, then that is what they get. If there are no individual issues involved, then there are no individual claims to follow and the proceeding resolves the whole issue through the representative mechanism and one plaintiff.

**ANDERSON J:**
It might resolve the issue of liability.

**MR OLNEY:**

Quite. Where we have a situation where in order to resolve liability we have some common issues and some individual issues, we face the question of how much work can the representative procedure do? The submission I'll develop is that the most it can do is achieve findings on the common issues. It's only common issues in respect of which a representative can represent others. They need that community of interest. The proposition I'm putting is that by using the representative procedure to establish a legal platform or a staging post for individuals to then go on and establish their damages without having to re-litigate those common issues is giving as much voice to the representative procedure as one can give without offending the core tenet, which is that it cannot operate where there is individual issues. That community of interest just isn't present.

**ANDERSON J:**

So what you're saying is – I mean, traditionally the notion of common interest was construed very tightly and so if there was any difference amongst the various parties with a claim, then you couldn't say there was a common interest. Now, all of that has been relaxed, but what you're saying is, it was relaxed, in a sense, in vain because you still have to – you can deal with the – you're allowed to have a representative action on a broader notion of common interest. It doesn't have to be an identity in all respects. But it really doesn't save very much because you've still got to launch your individual proceedings.

**MR OLNEY:**

That's right. It has been relaxed to differing degrees in different jurisdictions, but I'm comfortable proceeding on the basis that New Zealand has got to the point where it's relaxed as far as it has been relaxed anywhere, which is to say we will allow the representative process to be applied to the common issues, and if there are individual issues to follow, well, we'll need to deal with those subsequently. But my submission is it's not in vain in the sense that the individuals are relieved of having to go back and re-litigate any of the common issues. That is to say, the efficiency gained of having the common issues determined once and for all has been achieved. We are left with individual issues to be determined, but that's always the case. Representative proceedings have never been able to address individual issues.

**GLAZEBROOK J:**

Can you just explain what the individual issues are in this case? Because we've got actions based on prospectus, haven't we?

**MR OLNEY:**

Yes.

**GLAZEBROOK J:**

So you're saying that each individual has to prove that they read the prospectus and relied on it. Is that the argument?

**MR OLNEY:**

Essentially causation, yes.

**GLAZEBROOK J:**

But the whole point of having a prospectus, isn't it, is that you're supposed to be able to rely on it, so do you think that – well, your argument obviously is that you have to individually say, "I individually read those parts of the prospectus. I individually relied on them," because in many instances people will be relying on the broker's advice. Presumably the brokers will have to rely on that. They will have to call the brokers and say the brokers decided this was a good idea because they'd individually read those bits of the prospectus. It's just that, really, isn't it the case that once you – if it's found against the directors on the prospectus doesn't actual liability for damages follow virtually automatically, unless there was something that was clearly shown that there was absolutely no reliance whatsoever on it? The whole point about the statutory regime is that it's there to be relied on.

**MR OLNEY:**

The statutory regime certainly says liability follows for losses by reason of the prospectus. But in my submission, that's causation. It may be that some investors read the prospectus and formed an understanding of the basis of it. Others may not have read it and relied on a broker who did or didn't, or a broker who formed an opinion about the quality of the investment based on other information. We have some shareholders in the group who are large institutions who have done their own research using their internal research teams, worked up their own valuations, who all may or may not have relied on different aspects of the prospectus to different extents. That's the individuality that, in my submission, is inescapable.

**ANDERSON J:**

It's sounding like a collateral appeal on whether the representation order should have been made when you haven't got leave to argue that.

**MR OLNEY:**

The representation order was made and the making of it was appealed at a time when time limits hadn't run. That appeal was unsuccessful.

**ELIAS CJ:**

That went to the Court of Appeal. Was there a application for leave to come here on that? I can't remember.

**MR OLNEY:**

No, there wasn't. At that stage people, everyone was still within the relevant time limitations. Had the plaintiff taken any one of a number of steps, this issue wouldn't have arisen. If they'd got on and held their opt-in process or had the shareholders joined or filed a protective proceeding, this issue wouldn't have arisen. In fact, the plaintiff did nothing and the limitation period ticked over, the limitation bar arose and this issue became live because that's when we faced the question of whether or not the stay should be lifted and the Court should allow the matter to continue on a representative basis. My submission at that point was that it shouldn't because there can now be no useful outcome achieved by doing so.

**GLAZEBROOK J:**

So because there was a stay issued by the Court, now you say, "Well, ha ha, they're now caught out by the limitation period." It's not an overly attractive argument.

**MR OLNEY:**

Well, the stay arose because the plaintiffs were in disarray. It was a stay of the plaintiffs' own making. Notwithstanding that the stay was in place, limitation issues were on the table and the plaintiff asked for a limited lifting of the stay to take certain steps to file an amended statement of claim and to run the opt-in process. Had the plaintiff applied also to add to those limited steps, the file of a protective proceeding – in fact, they wouldn't have needed the stay to be lifted for that – it would have been impossible to resist. But the plaintiff made its own election as to what steps it would

or wouldn't take to protect itself from these limitation consequences when they were on the table.

**GLAZEBROOK J:**

Well, actually, it's not this plaintiff that needs to be protected from the limitation context because this plaintiff has always been fine, so it's the other plaintiffs who were possibly relying on the fact that there was a stay but a representative order who hadn't taken the steps in the meantime but it's nothing to do with this plaintiff, is it?

**MR OLNEY:**

You're quite right, your Honour. I've used that phrase slightly loosely. We have a plaintiff. The plaintiff has sitting behind him, so to speak, a funder, a project manager, who takes a fee or is entitled to take a fee for the running of the litigation, the plaintiff and the represented shareholders are all represented by a solicitor and by barristers. But they – your Honour is absolutely right. They act to the extent they act in this proceeding through the plaintiff.

**ELIAS CJ:**

Where do we find the form of the representative order?

**MR OLNEY:**

In two places. The first order made is in the case on appeal, volume 2 tab 19. It's labelled volume 2 key documents.

**ELIAS CJ:**

This is the one that Judge Christiansen made which was set aside. So what's the operative one?

**MR OLNEY:**

That's found in the judgment of Justice French at tab 10 of that same volume, paragraph 224. So there's a reference at the beginning there to a condition that the statement of claim be amended. There was discussion at the hearing preceding this judgment about whether amendments could be made to a statement of claim to remove individual issues. As it turned out, those amendments were never pursued so we can put that to one side. There was a second plaintiff who sought also to be a representative on market purchases. The second plaintiff was really taken out at this stage and the order was that our current plaintiff, Mr Houghton, sues in a

representative capacity. B, the original order of Associate Judge Christiansen was rescinded, or at least parts of it were, and replaced by the opt-in procedure there. 225, it was envisaged that the opt-in process would happen quite quickly, on the 19th of December 2008. That date slipped and slipped and slipped and eventually –

**ELIAS CJ:**
Well, presumably it was extended in terms of the order that was made by the Judge.

**MR OLNEY:**
It was extended several times.

**ELIAS CJ:**
Yes.

**MR OLNEY:**
In the meantime, this judgment was appealed from by the defendants.

**ELIAS CJ:**
What's the final date?

**MR OLNEY:**
Well, the final date has now been set and passed. It was 30 May this year.

**McGRATH J:**
Mr Olney, if I can come back to rule 420.2.4, what you've said so far in relation to the same interest, are you advising us to read the expression with the same interest as carrying the meaning to the extent that they have the same interest. That's essentially what you're focusing on now.

**MR OLNEY:**
Yes.

**ANDERSON J:**
Isn't it really a case of saying, "Well, we have a representation order. This raises an issue of law, mainly, where a representation order has been made, does limitations continue to run against those who are represented?" That's just a legal issue, a matter of statutory interpretation. I was a bit concerned when I looked through your

submissions that one would find the right end of the stick, because it seemed to me that your submissions were directly contrary to the rule because the heart of your submissions is that, well, they still have to bring their own proceedings even though they're represented in a representation action. Now, what they have in common, what they allege in common is what one should be looking at because proof of a cause of action is different from whether it's brought and what its elements are, and the question is whether the essential ingredients of the causes of action have a commonality with other people who are represented, and if they assert yes, they do, and the representation order must be taken as given, the limitations must surely cease to run, because on their causes of action, which are pursued by representation, they're represented.

**MR OLNEY:**

A couple of responses to that. Firstly, it's been agreed by the parties that there are both common and individual issues that need to be determined before liability can be established or relief given in the form of damages.

**ANDERSON J:**

For example, in relation to liability?

**MR OLNEY:**

Yes.

**ANDERSON J:**

What?

**MR OLNEY:**

For example, the fact that a shareholder has been, in fact, misled.

**ANDERSON J:**

That's a question of proof. You get through that by bringing along every shareholder as a witness.

**MR OLNEY:**

It's a question of proof, and it needs to be proved in respect of each shareholder. That's why the parties have identified that as an individual issue, not a common issue.

**ELIAS CJ:**

But if one looks at the terms of the representation order made, the Judge has made an order which is not subject to appeal, so it stands, that Mr Houghton sues in a representative capacity for shareholders who purchased shares on 4 June and who suffered a loss on their investment. Why isn't that sufficient to constitute the proceedings for all in that class, leaving only first ascertainment of who is in that class but the proceedings are properly instituted, and secondly questions of proof, as has been put to you?

**MR OLNEY:**

It might be helpful, perhaps, if I track how matters developed following the –

**ELIAS CJ:**

Well, is there an answer to that?

**MR OLNEY:**

The simple answer is that it was appealed and in the course of the –

**GLAZEBROOK J:**

Sorry, what was appealed?

**MR OLNEY:**

This judgment of Justice French.

**GLAZEBROOK J:**

Yes, and the appeal was dismissed.

**MR OLNEY:**

Yes, and in the course of the argument, it developed that the appropriate scope for the representative aspect of this case may be the common issues, which would need to be identified excluding the individual issues, and the Court observed that it may be appropriate that there be a process to identify which were the common issues and which were the individual ones so that we could establish what *res judicata* would be established by Mr Houghton in his capacity as representative and how that may impact on limitations. What then followed was a process agreed by the parties

whereby they identified which issues were common and which were individual, and that was –

**ELIAS CJ:**

Is there any sort of document we can be taken to, because I'm finding this very confusing, to see what it is we're dealing with? So you say that there was an application by the parties. Do we have a copy of that?

**MR OLNEY:**

Yes. The easiest way of doing that is probably to go to volume 3 of the case on appeal at tab 20. The plaintiff had brought application seeking for the issue of –

**GLAZEBROOK J:**

Can we perhaps just get the sequence of this? So there's the representative order made, so we've got this judgment that we're looking at just now with the representative order, then what happened? That was appealed, wasn't it?

**MR OLNEY:**

That was appealed, and in the course of that appeal –

**GLAZEBROOK J:**

No, no, don't tell me in the course of anything just at the moment, sorry. So that was appealed. Now, where's the – is that the judgment that we're dealing with now, the appeal judgment, or is that one of the earlier ones?

**MR OLNEY:**

That's an earlier one.

**GLAZEBROOK J:**

All right. So we have – that was appealed and where's the appeal judgment? I'm sorry, I'm just trying to understand the sequence.

**MR OLNEY:**

That's in the case on appeal volume 2 tab 12.

**GLAZEBROOK J:**

So we've got the representative order tab 10.

**ELIAS CJ:**

Is this what's referred to as number one?

**MR OLNEY:**

Yes.

**GLAZEBROOK J:**

That was the stay, wasn't it?

**MR OLNEY:**

It was.

**GLAZEBROOK J:**

All right. And then –

**McGRATH J:**

If I can just ask which paragraphs.

**MR OLNEY:**

Fourteen.

This is the idea that there may be a declaration of liability with individual claims to establish individual damage to follow. I think it's fair to say –

**ELIAS CJ:**

Isn't that sequencing of trial, though?

**MR OLNEY:**

Well, it's identifying that where we have a split of common issues and individual issues the representative aspect of the procedure can only attach to the common issues and the establishment of a *res judicata* for the benefit of all on those is of some benefit, and so it's worthwhile identifying those and understanding what the scope of the *res judicata* will be, as the establishment of a legal platform by which shareholders can then bring their individual claims to follow. The other relevant paragraph is paragraph 20, a reference to the fact that it's important to identify the issues so as to understand the scope of the *res judicata* arising and the limitation implications of that.

**ELIAS CJ:**

So this was the one that determined – this was the judgment that dismissed the appeal from the making of the representation order, so these paragraphs are setting out what has to be looked at. Where's the determination?

**MR OLNEY:**

The decision starts at paragraph 109 and 110. The remission back to the High Court of the question of if and if so on what terms the stay should be lifted so the matter could proceed, including on a representative basis.

**GLAZEBROOK J:**

Well, most of that was to do with the litigation funding arrangements, and that was the main reason for the stay because at that stage from memory they were very uncertain as to what those funding arrangements were or even if there were any, I think, with the benefit of hindsight, probably is more to the point.

**MR OLNEY:**

The cost was also very much an issue.

**ELIAS CJ:**

I don't see what's left to be determined about the representation order.

**GLAZEBROOK J:**

Because this did actually say the representation order was appropriate. That was what it said. It dismissed the appeal. It just had a stay because there were aspects of that. Nothing to do with actually paragraph 14 or paragraph 20.

**MR OLNEY:**

Yes, and the question of whether the stay should be lifted and if so on what terms went back to the High Court and it was in that context that it was argued that the stay ought not to be lifted on terms that allowed the representative aspect to continue, because that would be fruitless.

**ELIAS CJ:**

What was the stay that was granted?

**MR OLNEY:**

The stay was initially granted –

**ELIAS CJ:**

I thought it was all tied up with the litigation funding.

**GLAZEBROOK J:**

It's relatively difficult to argue, isn't it, to argue having had an appeal dismissed against a representation order that the High Court can then actually say, "Well, now I've decided the representation order isn't appropriate," because wouldn't the High Court be bound by the Court of Appeal decision, which in fact had the stay there for specific reasons to do with the amendment to the statement of claim, the fixing up of the litigation funding arrangements and probably security for costs tied into that. What other reason would there be?

**MR OLNEY:**

Circumstances change, is the answer to that.

**GLAZEBROOK J:**

So the argument is because the limitation period had kicked in – so when did it kick in? Can you give me the date again, sorry?

**MR OLNEY:**

There wasn't a precise date. The end of May or the beginning of June 2010 is when the six year –

**GLAZEBROOK J:**

And so the next judgment was after that period, was it, the one you were taking us to?

**MR OLNEY:**

Yes.

**GLAZEBROOK J:**

Right, so you're now taking us to the application for a split trial.

**MR OLNEY:**

Yes. So taking on board the observations in the Court of Appeal, the plaintiff applied for a split trial, split as between liability and quantum. In the context of that debate there was argument about whether that worked, because liability necessarily engaged with these individual issues.

**McGRATH J:**

Individual reliance?

**MR OLNEY:**

Yes, among others, but that certainly being the most important. What's set out in paragraph 1 of this minute is the consensus that emerged as a consequence.

**ELIAS CJ:**

Sorry, which minute are we at now?

**MR OLNEY:**

Tab 20 of volume 3.

**ELIAS CJ:**

But these are all about managing a proceeding that is properly instituted in representative form.

**MR OLNEY:**

Yes. It's also a process by which the parties in the Court were identifying the scope within which the representative aspect would operate. The parties were identifying that which would – those matters on which a *res judicata* would arise.

**GLAZEBROOK J:**

Well, is that right? Because isn't the actual issue what was the scope of the representative order and whether the parties agreed or disagreed on what was in it is actually irrelevant? The actual issue is what the representative order covered. So the fact the parties thought there was something about individual claims and that you might each formally be joined as plaintiffs to the current proceedings is actually irrelevant, isn't it? It's whether they needed to be and what the representative claim covered on its terms. An unappealed representative order – well, appealed but dismissed but unappealed here.

**MR OLNEY:**

If the consequence of all of this is that there still needs to be individual claims for damages brought and determined, then we face the question of whether or not those claims can be brought when they come to be brought –

**GLAZEBROOK J:**

We understand the issue. The issue, though, you're being asked to address is why those individual claims are not encompassed within the form of the representative order as made. So you're presupposing that they're not encompassed in that, in which case your argument obviously, as to limitation, would succeed in relation to the individual claims.

**ELIAS CJ:**

Well, it's still hypothetical. Nobody's filed these individual proceedings, and if they do they'll be faced with a defence of limitation.

**MR OLNEY:**

Yes, they will. But the question arose on the lifting of the stay whether it was in anyone's interest, really, to wait until that point in time to find out the answer. In essence, really, I suppose I brought that issue forward by arguing that the stay shouldn't be lifted because the limitation consequences will mean that there's no point in the proceeding going forward on a representative basis.

**ELIAS CJ:**

But how can you deal with a substantive defence by procedural directions? Why didn't you apply to – well, you couldn't have applied to strike out the representation claim because it's filed within time. Isn't that the end of the matter that we are seized of? Isn't everything else just talk?

**MR OLNEY:**

It's a question for the Court whether or not in the circumstances it's appropriate that the representative procedure be used. There are a number of cases in there. *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) was one. *Taspac Oysters Ltd v James Hardie* & Co Ltd Ltd [1990] 1 NZLR 442 (HC) was another. The Court says, "Well, from what I can understand of this proceeding at the moment, it is appropriate but individual issues may emerge later that make it not appropriate. Circumstances may change." In this case, circumstances did change in that our proceeding was stayed

and the question arose whether or not it was appropriate to lift that stay and have the matter proceed on a representative basis in circumstances where the limitation bar had arisen.

**GLAZEBROOK J:**

But if it hadn't been stayed, the circumstances would have changed just the same if we hadn't had a myriad of individual claims. So the fact that this stay was there is totally irrelevant to this issue because the change, you say, arises from the end of May 2010. So even if this had been a completed proceeding or be tried during May 2010, you would have said as soon as the bell rang that the situation had changed and the representation order should be lifted at that stage.

**MR OLNEY:**

I may have. The question may have arisen differently. I may have sought to ask the Court to revise the representation order at that point.

**GLAZEBROOK J:**

At the point that everybody's relied on the fact there is a representation order.

**MR OLNEY:**

They've elected to proceed on that basis rather than another basis. That's correct.

**GLAZEBROOK J:**

Well, they've elected on the basis of the Court saying they can so elect.

**MR OLNEY:**

They were also on –

**GLAZEBROOK J:**

In fact, the Court probably wouldn't have been overly thrilled if there had been however many shareholders there were individual actions filed, would they?

**MR OLNEY:**

It's a feature of our rule-based system that if represented persons wish to preserve their position for limitation purposes on their individual claims they need to take a step, and it may be that they file a single protective proceeding all listed as plaintiffs and that be stayed, or it may be that they asked to be joined as plaintiffs to this

proceeding and then it be case managed much in the same way, much in the same form as it is now where the common issues are determined first and then we turn to the individual issues. They're relieved of having to take that step in jurisdictions where we have a statute that suspends limitation, but absent that, yes, they would have needed to take that step.

**GLAZEBROOK J:**

So if the Court had been faced with individual shareholders asking to join this representative action, I imagine the Court would have said, "No, there's no need because there is already a representative action and we don't want this representative action cluttered up. You either take individual actions or you wait for the representative action to be decided." Because that's the point of the rule, isn't it?

**MR OLNEY:**

That's exactly the position that the Court faced in O'Sullivan where the time bar had not yet run. It was clear that the representative process could be used to establish a *res judicata* on the common issues. This was a prospectus representation case, as well. Individual claims would need to follow. There was a question about whether or not the appropriate course was to have all the shareholders joined to that proceeding and then case management, so the common issues were done first. Meanwhile, the individuals could really sit quietly in the wings and then the individual issues would be dealt with. Or a separate protective proceeding be filed and stayed and that was left to the plaintiff to choose. The Court had no difficulty entertaining either option as impractical.

**McGRATH J:**

Just on the face of the order of Justice French, paragraph 224, I would have thought that that issue had really been decided, that she – that they were permitted to sue, so the representative nature of the action related to the shareholders who purchased shares to suffer the loss. So wasn't that really signalling that such individual shareholders could later become joined if that were necessary. But the action had been brought or the persons had sued because someone had moved on their behalf.

**MR OLNEY:**

Yes. The plaintiff had certainly sued.

**McGRATH J:**

Yes, they sued on their behalf, and if you ask, "Whose behalf?" you get the answer from Justice French in paragraph 8.

**MR OLNEY:**

I quite agree. That addresses the "who". My submissions are directed at the "what". What is it that the plaintiff can do on behalf of those identified people.

**ELIAS CJ:**

But if you had problems with that, shouldn't you have been appealing this on the basis that this order was too wide?

**MR OLNEY:**

We addressed the scope of the representative process a different way.

**ELIAS CJ:**

Yes. I'm just thinking also that the rule itself is about the same interest in the subject matter in the proceeding. It's not an entire – it's the same interest but it's a looser concept than you seem to be arguing for.

**MR OLNEY:**

I'm arguing for the most liberal interpretation, that a common interest in a question of fact or law is sufficient. There are jurisdictions where the same interest test is applied much more strictly where the Courts say it's necessary for the group to have the same cause of action and to all share equally in the relief that can be granted and that's a much more restrictive approach.

**ELIAS CJ:**

You're not arguing for that.

**MR OLNEY:**

No, no. If this proceeding was before, for example, the UK Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 [2011] Ch 345 which applies that strict approach. It may be that there's no representative order at all.

**ELIAS CJ:**

Yes, but we have a representative order. When I asked you what we're seized of here, I'm sorry, I'm being tedious old-fashioned in this. I usually like to see that there's some application so that I know what the scope of the argument is. You've taken us to this minute which all seems to be about mode of trial downstream issues predicated on there being a properly-constituted representative action, the class of which is described by the order in paragraph 224.

**MR OLNEY:**

Yes. What we were starting to do was go down the process by which the parties had, by agreement, identified which issues are common and which issues are individual.

**ELIAS CJ:**

I understand that, and that's a sensible thing to do to work out subsequent matters that could properly be the subject of direction, mode of trial, or even splitting the proceedings or something like that, but how does it bite on the point that you're asking us to decide here? You said that you want – I thought that you had wanted an order rescinding the representative order on the basis that it infringes limitation points. Is that what you're asking us to do?

**MR OLNEY:**

Yes. The question of whether or not it was appropriate to lift the stay and allow the matter to proceed on a representative basis, given that limitation bars have arisen, that's in the High Court decision is in the case on appeal volume 2 tab 11.

**ELIAS CJ:**

Do you have an application that was made at that time?

**MR OLNEY:**

It was the plaintiff's application for the stay to be lifted.

**ELIAS CJ:**

And you joined issue with that?

**MR OLNEY:**

Yes.

**ELIAS CJ:**

Do we have a notice of opposition?

**MR OLNEY:**

Tab 24 volume 3.

**ELIAS CJ:**

Because these are the documents that constitute the issue that's come up through to us, is it?

**MR OLNEY:**

Yes.

**ELIAS CJ:**

There's an application which you haven't taken us to, but this is your opposition?

**MR OLNEY:**

Yes.

**GLAZEBROOK J:**

So the application was to lift this stay?

**MR OLNEY:**

That's right. And the application is in the tab before that, at 23.

**ELIAS CJ:**

So where's the point that you're now advancing in this notice of opposition?

**GLAZEBROOK J:**

It does at paragraph 7 the individual issues.

**MR OLNEY:**

Paragraph 6, "To the extent that the plaintiff seeks to pursue the pleaded claims, it seeks relief on behalf of those who have opted in. Such claims and relief are subject to statutory time limits," which have expired.

**ELIAS CJ:**

And did you file a statement of defence raising limitation as a defence to the representative claim?

**MR OLNEY:**

The statement of defence raises the limitation defence to the plaintiff's claim.

**ELIAS CJ:**

Yes. Can you take me to that, too?

**McGRATH J:**

That is to Mr Houghton's claim?

**MR OLNEY:**

Yes. It's tab –

**GLAZEBROOK J:**

That must be a different limitation.

**MR OLNEY:**

It's a different limitation, but there is no question that Mr Houghton filed his personal claim in time.

**McGRATH J:**

Yes.

**ELIAS CJ:**

And then the amended pleading after he'd been given the right to bring the claim on a representative basis –

**GLAZEBROOK J:**

Where are the pleadings?

**MR OLNEY:**

Volume 1.

**GLAZEBROOK J:**

I've got the second amended statement of claim.

**MR OLNEY:**

Yes. There is a more particularised, now third amended statement of claim, but the thrust is the same.

**GLAZEBROOK J:**

Where's the limitation defence?

**MR OLNEY:**

Tab 4 is the second and third defendants' defence. The second affirmative defence limitation he has pleaded –

**ELIAS CJ:**

So is this the defence to the claim as reconstituted after the representation orders were made?

**MR OLNEY:**

Yes.

**ELIAS CJ:**

So the reference to those he purports to represent are to those who are under the representation order, are they?

**MR OLNEY:**

Yes.

**McGRATH J:**

You're also maintaining the defence in respect of the plaintiff individually.

**MR OLNEY:**

Yes, I am.

**McGRATH J:**

I thought you just said there was never any question.

**MR OLNEY:**

I am in a formal sense, but that issue need not detain us too long.

**McGRATH J:**

You've never taken the view that the plaintiff personally was out of time?

**MR OLNEY:**

No.

**McGRATH J:**

So we're not to read paragraph 54 in that way?

**MR OLNEY:**

No. There is an issue of uncertainty in the respect of the Fair Trading Act because of the subjective/objective element, but it needn't hold us up.

**ELIAS CJ:**

So this is where you joined issue on the substantive point of limitations?

**MR OLNEY:**

Generally on the claim. That's right.

**ELIAS CJ:**

Yes. So that remains to be resolved.

**MR OLNEY:**

Yes.

**ELIAS CJ:**

Well, how do we get from there, which is either a matter for trial or a matter for determination ahead of trial if you make an application, to this point?

**MR OLNEY:**

Well, I took your Honours to the plaintiffs' application to lift the stay. I opposed that on a number of grounds, including that it would be fruitless to allow the matter to proceed on a representative basis because the represented claims were out of time. The judgment on that matter is at tab 11 of volume 2.

**McGRATH J:**

That's the one that's marked "privilege" but it deals with stay as well, is that right?

**GLAZEBROOK J:**

No, there's so many of them it might be something else. No that's something else, tab 10.

**ARNOLD J:**

Is it one under tab 14?

**GLAZEBROOK J:**

It's not tab 10 because that's the representative order.

**ARNOLD J:**

It's got things stay for limited purpose.

**MR OLNEY:**

My apologies. Tab 16, this is the judgment on the application to lift the stay.

**ELIAS CJ:**

And this is the judgment from which the Court of Appeal decision which is the subject of appeal comes, yes?

**MR OLNEY:**

Exactly.

**ELIAS CJ:**

Yes.

**MR OLNEY:**

The passage dealing with the issue of time running for the represented shareholders starts at paragraph 123. And the core of Her Honour's reasoning is at 129.

**McGRATH J:**

So she relies on *Cameron v National Mutual Life Association of Australasia Limited (No 2)* (1992) 1 Qd R 133 (QSC) and *Fostif Pty Limited v Campbells Cash & Carry Pty Limited* [2005] NSWCA 83, (2005) 63 NSWLR 203 as well?

**MR OLNEY:**

Yes.

**GLAZEBROOK J:**

You just take a blanket view don't you that the individual claims have to be proved in some way because – so either that's right or wrong in the terms of the representative order. You're not suggesting, as I understand it, that there might be something that comes up with some of these individual claims that means individually, because of matters that might come up later, the representative claim mightn't have been appropriate? It's just a blanket argument?

**MR OLNEY:**

Yes.

**GLAZEBROOK J:**

Because I can understand the argument, perhaps that it's, that this was too early to be deciding of substantive defence in the light of the lifting of a stay but yours was a point of principle but didn't need trial effectively?

**MR OLNEY:**

Exactly.

**GLAZEBROOK J:**

Because I can understand cases that it might need trial but yours – that isn't your position here, it's either in or out and so you would say it is appropriate to decide it at this stage and in this context?

**MR OLNEY:**

Yes.

**GLAZEBROOK J:**

And you raised it in any event so you probably did so because that's what you thought?

**MR OLNEY:**

That's exactly what were arguing.

**GLAZEBROOK J:**

Yes.

**ELIAS CJ:**

But my concern is really although the Judge has purported to deal with it as a substantive matter, whether she should have done so, whether that is the appropriate forum in order to, in which to decide these questions of limitation? Because she could equally have said, the stay is going to be lifted because although it's being suggested there are limitation defences, those defences can be run.

**MR OLNEY:**

That would have been one way of dealing with it. The way the argument was put was more fundamental, that the representative rule is a procedural device and the question was whether it was appropriate in this case and we were arguing that as a matter of law, we had this time limitation issue that meant that circumstances were inappropriate for deployment of the representative.

**ELIAS CJ:**

Well I can understand that but it does seem to me that as indeed Anderson J said to you almost at the beginning of the hearing that it seems that in substance what you are doing is seeking to set aside the representation order that has been made?

**MR OLNEY:**

The final conclusion that is inescapable from my argument is that there is no useful purpose that this representative order can serve, beyond establishing a *res judicata* on the common issues that cannot now be converted through the mechanism of individual damages claims into relief for those individual shareholders.

**GLAZEBROOK J:**

Can you just remind me what the date of that first *Houghton (No 1)* was?

**MR OLNEY:**

December 2009.

**GLAZEBROOK J:**

So that's just five months or so before May 2010?

**MR OLNEY:**

Yes.

**GLAZEBROOK J:**

So in fact the same issue was going to arise then because in a trial like this, even if there hadn't been a stay, there's no way that it would've been completed and allowed individual actions to be filed by May 2010, so if this argument is an argument that means the representative order shouldn't have been made, then it should have been made at number 1, because it's nothing to do with the stay, it's to do with the limitation period; the point that I was making earlier –

**MR OLNEY:**

That's right.

**GLAZEBROOK J:**

– so it was an argument that wasn't made.

**MR OLNEY:**

Because the issue hadn't arisen at the time –

**GLAZEBROOK J:**

Well no the issue was going to arise though before the trial could possibly have been brought on because December 2009 up to May 2010, even assuming that there weren't funding issues, there's just no way a trial of this type would actually have been set down and finished by May 2010.

**MR OLNEY:**

That's absolutely right. But it wouldn't have arisen had the plaintiff take one of the of, taken one of the protective steps.

**GLAZEBROOK J:**

No, I understand the argument. Well, I'm not sure about that really, well I suppose you'd say that it's – if they take one of those protective steps then it's still worth having the common object, I understand the argument.

**ELIAS CJ:**

And just finally to wrap up how it got here, although you've said that what you're seeking is an order rescinding the representative order, in fact in the proceedings as they were constituted you were opposing the interim stay of proceedings, presumably you were, you're really seeking to have the stay made permanent?

**MR OLNEY:**

My position at that stage was if the stay was to be lifted, it was to be on the basis that there be no representative aspect because that, was by that stage redundant. The –

**ELIAS CJ:**

So they just continued as individual proceedings is that –

**MR OLNEY:**

With Mr Houghton so –

**GLAZEBROOK J:**

And you really didn't have any argument about the stay remaining in respect of that subject to the litigation funding arrangements and whatever the –

**MR OLNEY:**

That's right, so it's subject to security and costs and that sort of stuff being sorted, Mr Houghton's claim could proceed.

**ANDERSON J:**

What would have the strategic response to receiving three and a half thousand individual claims and having did offend?

**MR OLNEY:**

Depending quite how it was put. If the application was that the three and a half thousand plaintiffs be joined as plaintiffs in this proceeding, then that would have required case management which, I daresay, would have resulted in the common issues, whether the prospectus was objectively misleading, whether the due diligence defence was made out would be decided first. And that wouldn't require any active steps from those plaintiffs. Once those issues were determined, if they were determined in favour of the plaintiffs, we would then turn to a process for

addressing the individual issues, which is exactly the same process we have now with the –

**GLAZEBROOK J:**
They would have been entitled, all of them, to separate representation though. Nobody could have forced them to rely on Mr Houghton if they'd filed individual proceedings, sensibly of course though they would have done, one assumes but –

**MR OLNEY:**
That's right, they were there and had opted in contractually on the basis that the funder and Mr Gavigan and the mechanism around that would do their work for them, but they'd elected to be participating in that passive way. But your Honour's quite right, if one of them had decided that the issues to them were sufficiently important, that they wanted separate representation then they could have done so. The need for any active representation, I daresay, wouldn't have arisen until we got to the individual issues.

**ARNOLD J:**
So just let me understand this, did – you just said that if they had issued, joined into the current proceeding within time, the process would have been developed exactly as you have now, common issues and individual issues. So nothing changes in a, in the way that this matter's going to be resolved. The critical point though is they've missed the deadline so they're out?

**MR OLNEY:**
Yes.

**ARNOLD J:**
It seems very odd to me.

**MR OLNEY:**
The – it's a distinction between the joinder process and the representative process, you're absolutely right. And indeed the representative process was developed as an alternative to joinder. The two processes are both the mechanism for enabling common issues to be addressed in the one proceeding and the need for common issues is part of the joinder test of course, and to harness the efficiency in that sense. But they do have distinguishing features that derive from the fact that in joinder

everyone's a party and in the representative proceeding they're not. There's the cost consequences that differ, the obligation to give discovery –

**ARNOLD J:**

But being a party is not the essential issue isn't it? I mean do you accept that under the Limitation Act the issue is when the proceedings are brought?

**MR OLNEY:**

The bringing of a proceeding, yes quite and one of the distinctions and the crucial one for this matter is that by joining as a plaintiff, one is bringing one's claim; by being represented one is not bringing one's claim, the representative –

**ARNOLD J:**

So that's really the point that we have to determine –

**MR OLNEY:**

Yes.

**McGRATH J:**

But you've got to deal with the Australian cases on that point don't you?

**MR OLNEY:**

Sorry Sir?

**McGRATH J:**

The Australian cases, you have to deal with on that point?

**GLAZEBROOK J:**

But -

**McGRATH J:**

Cameron and –

**MR OLNEY:**

Yes Cameron –

**GLAZEBROOK J:**

But you do accept you're bringing a representative claim on the common issues, so you do accept in terms of the Limitation Act, that you are bringing a claim even though you haven't had joinder by the representative action?

**MR OLNEY:**

Yes, if matters were allowed to continue –

**GLAZEBROOK J:**

So, but in terms of – so you just said that you're not bringing a claim if you're part of a representative action but in fact you do accept you're bringing a claim if you're part of a representative action. What you say is that it's limited to the common issues?

**MR OLNEY:**

No I accept that as a represented shareholder you get the benefit of this wider *res judicata*. You don't have to be a party to get the benefit of the *res judicata*.

**GLAZEBROOK J:**

Well but you have to be accepting that the limitation doesn't run on those common issues because if you don't accept that then you can't get the benefit of a *res judicata* can you, so you have be accepting that the limitation doesn't run because you've brought an action in a represented capacity –

**MR OLNEY:**

No.

**GLAZEBROOK J:**

– through the representative shareholder. Well then how does *res* – if not, how does *res judicata* get round the limitation period?

**MR OLNEY:**

The finding on the common issues in Mr Houghton's claim by virtue of the representative order will bind all the parties to this proceeding and by into the representative order, all of the represented shareholders.

**ANDERSON J:**

I suppose if Mr Houghton succeeds on this claim in terms of his pleading, a Court might say everyone in the same position as Mr Houghton is entitled to relief, which is only a matter of arithmetic and a bit of hard work, as the relief sought is framed. A finding might say, I've heard sufficient proof from so many other people, it allows them to recover within the scope of the findings but I find that there are some people who don't get enough by way of *res judicata* to get relief and so on, it's conceivable isn't it – theoretically?

**MR OLNEY:**

No.

**GLAZEBROOK J:**

Well you could also have a finding that says you don't need to prove reliance on prospectors because the very scheme of the Act says that as soon as you have a prospectus out there that you don't have to prove reliance on individual items of it, you don't even have to prove reliance on the prospectus because the whole statutory scheme says as soon as there's a prospectus out there people are entitled to assume that the investment is something that has complied with whatever it needs to comply with and the Securities Act and that's enough. So there's an automatic giving of damages as soon as you have – I'm not saying that would be the case but it is conceivable that that would be –

**MR OLNEY:**

Mmm.

**GLAZEBROOK J:**

– an argument that would succeed on the scheme of the securities regime. And then there's no individual issues.

**MR OLNEY:**

And there have been attempts to cast a representative order in that way to try and layer a greater platform for relief, or indeed damages on a representative basis. In –

**GLAZEBROOK J:**

Well this goes fairly far towards that doesn't it in terms of the terms on which it's made?

**MR OLNEY:**

It goes as far as it can, yes we've identified the common and the individual issues.

**GLAZEBROOK J:**

Well no you have but it may be the Crown, the Court and the – decides that there isn't actually anything that's individual, it's an automatic response from the finding of the misrepresentation in the prospectus for anybody who bought in that initial public offering.

**MR OLNEY:**

There is no claim put on that basis.

**GLAZEBROOK J:**

Well they might decide they want to later, I'm not sure.

**ANDERSON J:**

Well the Court might very well say, when the prospectus is put out, it's put out for the purpose of enticing people to take up the initial public offering, that's it's very purpose, people are targeted at. And unless it's proven otherwise we can assume that people did purchase in reliance on what was put out. I mean as a sensible commercial response?

**MR OLNEY:**

Even if that was the starting assumption, my response to that would be that it's rebuttable at trial, yes. And in order – it's still an individual question about whether a shareholder did or didn't rely, whether one starts from a presumption that they did or a presumption that they didn't, one still needs to test that issue individually.

**GLAZEBROOK J:**

Well unless it goes as far as I say that as soon as you have a prospectus out there you, the scheme says reliance is assumed and it's not rebuttable. Or if it's rebuttable it's because there's been some other failing -

**MR OLNEY:**

Mmm.

**GLAZEBROOK J:**

– ie they haven't been given an investment statement.

**MR OLNEY:**

Yes, I suppose we could have that argument but my response –

**GLAZEBROOK J:**

Well you may well be.

**MR OLNEY:**

And my response to it would be that the Securities Act, the Fair Trading Act still say that in order to be entitled to relief, "One must have suffered loss by reason of."

**GLAZEBROOK J:**

Well you have because the prospectus has been put out there, without the prospectus you couldn't possibly have bought the shares. Because you can't issues without a prospectus.

**MR OLNEY:**

But if one –

**GLAZEBROOK J:**

So by reason of the prospectus, the very reason that the shares are out there, you've suffered a loss –

**MR OLNEY:**

But if one –

**GLAZEBROOK J:**

– not difficult on the statutory language.

**MR OLNEY:**

Yes but if one hasn't been misled by the prospectus –

**GLAZEBROOK J:**

Doesn't matter whether you've been misled or not. The only reason you've taken those shares is because of the prospectus. If the prospectus is wrong then you've suffered loss as a result of taking the shares.

**MR OLNEY:**

You've certainly suffered loss as a result of taking the shares –

**GLAZEBROOK J:**

Which wouldn't have been there but for the prospectus, so if you have a "but for" test, causation is met.

**MR OLNEY:**

But if you bought the shares, notwithstanding what was in the prospectus –

**GLAZEBROOK J:**

Too bad, too bad.

**MR OLNEY:**

– there's no causation I would say.

**GLAZEBROOK J:**

Yes there is because if you have a "but for" test there is no way you could buy those shares without the prospectus being on the market because you cannot put shares on the market without a prospectus. So "but for" the prospectus you wouldn't have the shares.

**ANDERSON J:**

It rather seems that the tortuous path that has led this issue before this Court over so many years has raised it prematurely. We were talking about hypothetical situations that are meant to be dealt with at trial.

**MR OLNEY:**

The question though of whether or not it's appropriate that there be a representative order –

**ANDERSON J:**
It's a dead issue.

**MR OLNEY:**
– at any stage. Well –

**ANDERSON J:**
It's there and it's not before us.

**MR OLNEY:**
It's there but as the proceeding develops, it's entirely appropriate that the Court can see the, consider whether it remains a proceeding that's suitable for representative treatment and if so, to what extent.

**ELIAS CJ:**
Well you're effectively seeking to stay the proceedings to the extent, as you say in your notice of opposition, that they are statute-barred. We've interrupted you a great deal and it has in fact been very helpful for me Mr Olney. Where, what would you like to take us to now, were you intending to take us to the Australian cases or –

**MR OLNEY:**
Can I do that perhaps, lay out the two streams of authority –

**ELIAS CJ:**
Yes.

**MR OLNEY:**
Perhaps if I start with the ones I rely on. The, if I start with *Prudential Assurance Co Limited v Newman Industries* Limited [1979] 3 All ER 507 (Children) first, it's in the bundle of authorities, volume 2 at tab 26. Very briefly the company Newman sought the approval of its shareholders to a transaction and published to its shareholders a circular describing the transaction. A group of shareholders took issue with the fact that the circular was on their view, tricky and misleading. Prudential was one of those shareholders that was the named plaintiff. And they sought, Prudential sought to represent others. The judgment, if your Honours turn to page 511 under the heading of "Jurisdiction" there's the order not dissimilar in terms to our old rule 78 which turned into rule 4.24.

**ELIAS CJ:**

I can't remember, did it change materially?

**MR OLNEY:**

No.

**ELIAS CJ:**

No.

**MR OLNEY:**

Strictly speaking it was rule 78 when this proceeding was commence.

**ELIAS CJ:**

Yes.

**MR OLNEY:**

And I don't think anyone suggests that, the difference is immaterial. What follows then is the history of the rule and to the discussion I was having earlier, the reflection of the fact that it developed as an exception to the compulsory joinder rule in the Courts of Chancery. And then a discussion of the debate that was had over time about the same interest test and the strictness with which that was applied.

I draw your Honour's attention to the discussion on page 517. There is the *Lord Aberconway v Whetnall* (1918) 87 LJ Ch 524(Ch) case. Again, that was a misrepresentation case and Justice Vinelott highlights that judgment as a neat demonstration of the fact that the representative order can't deal with individual issues.

**McGRATH J:**

It's the extract at the top you're referring to?

**MR OLNEY:**

Yes. People have subscribed to a fund and then it was alleged that they were adduced to subscribe by misrepresentations and the claim was brought on a representative basis and the representative order failed because the Court said, well, there could be any number of reasons why these people subscribed other than being

misled by the representations made, and that was a precluded use of the representative proceeding.

His Honour then goes on at 518 to discuss the *Jones* case where workers in a coalmine sued for not being able to go to work on account of there being safety breaches in the mine, and at the bottom of page 518 His Honour identifies that the approach there was to, on a representative basis, allow a representative of the workers to establish whether there was a breach of statutory duty that prevented the mine from operating on the basis that if that matter was determined in favour of the plaintiffs, any individual workman could then bring his individual claim for lost wages. But whether it was the closure of the mine that prevented that worker going to work was an individual issue, because the Court recognised there might be other reasons why the worker couldn't go to work on that day.

Then at 520, His Honour identifies three core principles which, in my submission, I at 310 summarise as the justice principle. These factors need to be satisfied if the representative process is to function, and they're identified there.

The first is that the representative process shouldn't confer on any represented person a right that he or she couldn't assert in separate proceedings or bar a defence that could be asserted against that represented person. Secondly, there must be an interest shared in common. That's the same interest element. Thirdly, the representative plaintiff must be in a position to adequately advance the common issues.

I think it's fair to say that those core justice principles have been universally accepted.

What follows immediately after is a discussion of how the limitation rules address the position of represented people. Counsel for the second and third defendants urge that the amendment should not be allowed because if it were allowed the period of limitation available to the class represented would be enlarged. I've started the second sentence under the heading "discretion".

In my judgment, the answer to that argument is that given by counsel for the plaintiff, namely that the Limitation Act 1939 would continue to operate in the same way as it would have operated if no order had been made in the representative action. Any

member of the class will have to bring his or her own action to establish damage within six years from the date when the cause of action accrued. The only effect of an order in favour of the plaintiff in its representative capacity will be that the issues covered by that order will be *res judicata*.

**GLAZEBROOK J:**
So you say that that's saying that limitation still runs in respect of the common issues but it's *res judicata*? It doesn't make any sense to me because either limitation runs or it doesn't.

**MR OLNEY:**
Well, limitation runs on claims, I would say, and it's the claims for damages of the individual persons that time is running against.

**GLAZEBROOK J:**
Well, limitation doesn't just run on claims. It runs on any action brought.

**MR OLNEY:**
Yes, which subsumes one or more claims.

**ELIAS CJ:**
What was the amendment that was being sought here? Was it to make it a representative action?

**MR OLNEY:**
Yes. It had been commenced as a derivative action that was being turned into a representative action

**ELIAS CJ:**
Right. So then, doesn't what Justice Vinelott says have to be seen in that context, what he says here? Because the proceedings haven't been constituted as representative proceedings so the Limitation Act still had to apply to the individual proceedings.

**MR OLNEY:**

Yes. I don't think there was any suggestion that time had run at this point. The objection was that by bringing people within the scope of the representative order it would have the effect of re-starting time or enlarging time for them to bring their –

**ELIAS CJ:**

Enlarge it from six to 12 years prospectively, do you mean?

**MR OLNEY:**

Yes, and His Honour was giving comfort. Don't worry, time is running exactly as it has always been running on those individual claims. At the top of 521, the effect of allowing the plaintiff to sue in a representative capacity is that if those allegations are proved, any member of the class will be entitled to rely on the judgment as *res judicata*. The amendment, therefore, does not add causes of action. It allows a common element in the causes of action for all members of the class to be established in one representative action. If your Honours are interested, the form of declaration that was arrived at is set out under the heading "the form of the amendment" at the end of the report.

**ELIAS CJ:**

All right, thank you. We'll take the adjournment now.

**COURT ADJOURNS 11.34 AM**

**COURT RESUMES: 11.52 AM**

**MR OLNEY:**

Just before I resume with the substance of the argument, there was one reference I thought I'd usefully give the Court. I characterised the application to lift the stay as an opportunity to revise the representative order in the circumstances at the time and there are two references in the first Court of Appeal judgment that I'll give your Honours that give content to that.

The first is at paragraph 40. "If the representation order is granted in whatever form, the Judge must maintain as the case develops, a continuous appraisal of whether it should be sustained, varied or rescinded."

**ELIAS CJ:**

Sorry are you talking about the judgment under appeal?

**MR OLNEY:**

No, no this is the first Court of Appeal judgment of 2009 –

**ELIAS CJ:**

The first one, yes. And remind me again, where do we find that?

**MR OLNEY:**

It's at tab 12 –

**ELIAS CJ:**

Yes, thank you.

**MR OLNEY:**

– of volume 2.

**GLAZEBROOK J:**

And what paragraph was it sorry?

**MR OLNEY:**

Paragraph 40. The second half of the paragraph, "If the representation order is granted in whatever form, the Judge must maintain as the case develops, a continuous appraisal of whether it should be sustained, varied or rescinded. The more the Judge learns about the case, the more discriminating and confident that continuing appraisal will be. Indeed all elements of the representation and security orders and the approval of the funder and its terms should be regularly reviewed."

The other reference is paragraph 111 of that same judgment. "We envisage that once the new draft pleading is tended there will be a hearing in the High Court to determine whether the interim stay should be lifted so that the pleading can be filed. Such lifting would not necessarily be unconditional and might be limited to a specific purpose such as the filing of the amended statement of claim. Conditions of the lifting of the stay might include changes to the representation order and changes to the litigation funding arrangement either to exclude Mr Gavigan's funding company or to put in place new directions, taking into account various matters to do with funding

arrangements." And I thought those references were helpful to the Court where the application to lift the stay –

**ELIAS CJ:**
No they are extremely helpful, thank you.

**MR OLNEY:**
Can I turn then to the next judgment *O'Sullivan v Challenger Managed Investments Limited* [2007] NSWSC 383, (2007) 214 FLR 1 which is in the same bundle of authorities that we were in before at tab 24, a decision of White J. This is also a case in which there were clearly common and individual issues. It was a prospectus misrepresentation case. At page 3 of the report, down the bottom, your Honours will see "BC" that was the division, there was the declaration sought as to whether or not there was a breach of statutory obligations by the prospectus and separately damages and then a recognition in the originating process that was issued at paragraph 5 that the declaration was to attach to common issues and that was to be the focus of the representative aspect of the proceeding and the various declarations are set out there.

At page 9 of the report under the heading "Relief beneficial to all" this was the core of the debate between the parties; "Whether it was appropriate to fashion a representative order that would give on a representative basis a declaration only on the common issues, separately from the question of damages which would be left to individuals to pursue individually." The defendant's argument was that although nominally the claim for a declaration was made purportedly on behalf of the plaintiff for herself and for the represented persons, the only relief she could properly claim was damages. Argued that the plaintiffs and the represented persons' claims for damages were distinct and individual to each of them. "The plaintiff could not claim damages as a representative of other persons who claimed to have relied upon the misrepresentations made in the prospectus and to the extent she purported to do so the proceedings should be dismissed or struck out." The counter-argument put by the – sorry senior counsel for the defendant submitted that, "The claim for declaratory relief was her plussage which would not disguise the fact that the proceedings were in substance brought to recover the separate monetary losses claimed by the plaintiff, in each represented person."

What then follows is a survey of the history of the development of the rule. And then on page 14 of the report, that same passage from, brought out of *Aberconway v Whetnall* that your Honour saw in *Prudential* and then at line 44, "His Lordships observations point to a feature of representative proceedings which tends to be overlooked, that is that the represented persons do not become parties by virtue of being represented. It is for this reason that they are not liable to pay the defendant's costs. Counsel for the plaintiff disclaimed any suggestion that if the proceedings continued as representative proceedings under the relevant rule, no damages could be awarded to the represented persons unless and until they established that they had relied upon the alleged misrepresentations or that they otherwise established a causal relationship between their loss –

**GLAZEBROOK J:**
Sorry I seem to have lost you.

**MR OLNEY:**
At line 45, "Counsel for the plaintiff disclaimed any suggestion that if the proceedings continued as representative proceedings under rule 7.4 –

**GLAZEBROOK J:**
Sorry, thank you.

**MR OLNEY:**
– no damages could be awarded to the represented persons unless and until they established that they had relied upon the alleged misrepresentations or that they otherwise established a causal relationship between their loss and the alleged misleading conduct of the defendant. This highlights the inter-relationship between rule 7.4," which is the New South Wales representative rule, "And rule 6.19," which is their joinder rule and I'll return to that relationship later in these reasons. Then a discussion of *Prudential* and on page 15 at line 48, "Representative actions have been allowed where the represented persons have a common interest in obtaining declarations that the conduct of the defendant was unlawful, leaving it open to the represented person subsequently to sue individually for damages, being entitled to rely upon the declaration as *res judicata*."

**ANDERSON J:**

In the present case, the case before us the relief is named as damages but it's really restitutionary in part and damages in part. The restitutionary aspect although he's called it damages, but it's not it's a restitution is for the purchase price of the shares, whereas the loss of expected income or profit from the shares is really in the nature of damages.

**MR OLNEY:**

There is no question of the rescission remedy under the Securities Act, it is for relief under section 55. In that sense it's damages. I think the accurate characterisation is that the plaintiff contends that the proper measure of damages is the purchase price paid for the shares less any value realised on resale.

His Honour then continues, White J that is at line 49, "To express the view that the plaintiff and the represented persons have the same interest interview he declaration which is sought. Proceedings have been properly commenced as representative proceedings even though an order to obtain the several damages, the represented persons will ultimately have to become parties to proceedings brought either severally or together pursuant to rule 6.1.9." And then notes the conclusion in *Prudential Assurance* that your Honours have just seen that, "The limitation periods for the recovery of damages would continue to run against any member of the class of represented person until he or she bought his or her own action."

His Honour goes on to refer to *Cameron* which McGrath J has already identified as a case for the opposite proposition and expresses his doubt that that can be right. And I'll come to *Cameron* in more detail. He says, "The question of limitation periods is not before me," that's because the limitation periods hadn't run and there was still time to go. He expresses his tentative view on that basis that *Prudential* was right and *Cameron* was wrong or at least arguably so.

The next paragraph His Honour deals with *Fostif,* again I'll come to that in more detail.

**McGRATH J:**

So what did he say about the *Fostif*?

**MR OLNEY:**

In essence that it wasn't really this sort of case.

**McGRATH J:**

He distinguished it?

**MR OLNEY:**

Yes. In the present case I'm over the page on 16. "If the plaintiff and the represented persons have a claim for relief beneficial to all, it is a claim for a declaration that the defendant has engaged in misleading or deceptive conduct in contravention of the statutory provisions. The claims for damages are not beneficial or common to all of the represented persons. If the contraventions are established it will still be necessary for the individual represented persons to establish that the contraventions were causative of any loss. Any losses established will be several to each represented person. Accordingly if the proceedings continue as a representative so that the represented persons are not parties, who have commenced their own action on causes of action for the recovery of damages and the purported commencement of such a proceeding by the plaintiff was not authorised by rule 7.4 is at least seriously arguable the limitation periods will continue to run."

On page 17 at line 58 His Honour there endorses the two-stage process of a declaration on common issues with individual damages claims to follow. Page 18 at line 60, paragraph 63, "I have accepted that the plaintiffs cannot maintain in a representative action the causes of action of each of the represented persons for damages." He repeats the reasons given earlier for that conclusion.

And then His Honour introduces a discussion about the representative proceeding as compared to joinder, and it's 6.19.

**ARNOLD J:**

Can I just stop you here a moment. So is what the Judge saying here that the representative order should not have been made, there shouldn't have been a representative proceeding given the nature of the claims?

**MR OLNEY:**

And what he's saying is that he's content that the representative order can properly be made to establish a *res judicata* on the common issues and thereby set up a legal platform for those who have the benefit of that *res judicata* to bring their individual damages claims. But he's observed.

**ARNOLD J:**

But he's made the point a number of times though about the representative action earlier not being authorised under the rules. I'm just struggling because here we have got an order, a representative order, it's no dispute that it's valid but it does seem to be material to the Judge's reasoning here about the nature of the representative order in this particular case.

**MR OLNEY:**

Yes. In that case, like our case, we have individual issues that can't be resolved through the representative mechanism, that's the first similarity. The second point is that His Honour is observing that the representative order does not toll the running of time for represented persons. So –

**ARNOLD J:**

I understand that, I'm just trying to make sure I do understand the context properly. So is the Judge saying that in relation to the remedy of declaration a representative order could stand but it couldn't stand beyond that in relation to the damages claims?

**MR OLNEY:**

Exactly. The plaintiff in that case would self-censored, having observed the law that the plaintiff had said, well I would like a representative order just on the declaration on the common issues and the plaintiff was saying, I am content for myself and other represented persons to pursue their individual claims later. The defendant was arguing that the representative process shouldn't be used in that liberal way and were saying that because the ultimate goal is damages and that raises individual issues, there should be no representative order at all. And His Honour was endorsing the flexibility or the liberalism of allowing the representative order to function on part only of the claim. But he also observed that nothing about the representative order told time limitations and that brought him to the question of what to do with these individual claims that were still to come and against which time was running. And –

**McGRATH J:**
They've said that even though limitation wasn't before him so it was more of a caution was it?

**MR OLNEY:**
It was coming. It was 18 months away.

**McGRATH J:**
Yes. So it was a cautionary comment to the parties?

**MR OLNEY:**
Yes, yes but, he recognised, I think it's fair to say, that because the issue was coming, one needed to have clarity about what to do with these individual claims and under the heading of should a contrary order be made, he entertained whether they should all be joined to preserve their limitation position and that's the discussion that follows on page 18, at paragraph 66. Half-way through he observes that, "Whether the proceedings were brought as a representative action with one plaintiff or 84 represented persons or as a single proceedings with 85 plaintiffs, there would be no material difference in the directions to be made for the conduct of the proceedings. The same issues will be determined in the same sequence, pre-trial interlocutory procedures would be similar."

Then at page 19, at paragraph 72, "Having satisfied himself that the representative order was the appropriate course, if the proceedings continue as a representative proceeding under rule 7.4 for declaratory relief, it's probable that the plaintiff and the represented persons will bring a separate proceeding for damages pursuant to 6.1.9, that is all joined in a single proceeding, that proceeding would no doubt be stayed until the representative proceeding for declaratory relief is determined." That's the mechanism of filing the protective proceeding to hold their limitation position there.

And then over the page, page 20 of the report, paragraph 73, "There may be a question whether the plaintiff wishes the action to continue as a representative action for a claim for declaratory relief, having regard to my conclusion that the individual claims for the represented persons for damages cannot be brought in a representative action and there is a risk that limitation periods continue to run." So it's, in my submission, a neat demonstration of the options that were open to this plaintiff to hold the limitation position of the presented shareholders.

Staying then in that same bundle of authorities at tab 32, this is the Law Reform Institute for Alberta considering whether or not they should move from the representative rules based system akin to ours to a comprehensive statutory system. There's a discussion of the limitation issue at page 165, top right corner. "The bringing of an action on a claim in an ordinary action stops the limitation period from running against the plaintiff. It's necessary to know whether or not the bringing of a class action", by which they mean a representative action in this context, "stops the" or sorry, it could be either a statutory class action or a representative action. "It's necessary to know whether or not the bringing of a class action stops the limitation period from running against class members who technically have not brought the class action but whose claims are being asserted in the class action."

So I just read paragraph 413 which notes the importance of knowing what the limitation position is in respect of the represented members. Paragraph 414, "Here again rule 42 is silent so the general law applies. The representative plaintiff will have protected –"

**GLAZEBROOK J:**
Have we got rule 42 there somewhere?

**MR OLNEY:**
Yes I will ask my junior to find it.

**GLAZEBROOK J:**
It's quite old isn't it and it's probably similar to –

**MR OLNEY:**
It's in quite similar terms to our own but -

**GLAZEBROOK J:**
They don't refer to authority on that?

**MR OLNEY:**
No it's a view they've arrived at without explaining fully the reasoning. If I give your Honours the reference. You can find the rule replicated –

**GLAZEBROOK J:**

Oh hang on, the last sentence implies that limitation doesn't run in 414, that limitation problems, only if they're excluded from the class or the representative action is disallowed. So it actually assumes that if you're in the representation action then limitation does protect you.

**MR OLNEY:**

In Canada they don't entertain the two-stage approach that we saw in *Prudential v O'Sullivan*. They require that the relief be beneficial for all and in that sense it excludes damages claims but what the, the observation here is that it may be that a represented person is sitting there represented, content that the proceeding will deliver the sort of relief they want, effectively and if that's the case, of course, their indifferent to limitation provisions, they just share in the relief when it comes but the observation is that if something later develops in the case with the consequence that the representative action or the order is rescinded, it ceases to be a representative action, then they will find they no longer have the ability to get the relief they thought was coming and yet their individual claim for pursuing that same relief is now time barred.

**GLAZEBROOK J:**

Well, but if they don't entertain damages claims then it's – then actually the limitation period – they agree that if a representative action is brought properly then limitation doesn't run. So it's actually against you rather than for you. So they're only saying that if in fact you get chucked out of the representative action or the representative action goes, then you have limitation problems but not while you have the representative action brought properly in respect of you.

**MR OLNEY:**

In my submission what they're saying is that time is running on your individual claim. If –

**GLAZEBROOK J:**

No they're not, they're saying that the time doesn't run on your individual claim as long as you're part of the representative action.

**MR OLNEY:**

As long as you're part of the representative action and it continues, you're entitled to share in the relief that that action achieves.

**GLAZEBROOK J:**

Well then limitation can't be running against you.

**MR OLNEY:**

I would say it actually is irrelevant.

**MCGRATH J:**

What seems clear at page 47 is that the existing rule has been judicially interpreted in such a way as to make it ineffective as a practical procedure.

**MR OLNEY:**

Well that too and that's the debate that has been had in a number of jurisdictions.

**MCGRATH J:**

But that's why it's again in that context. Anyway.

**ELIAS CJ:**

I'm not sure why you're putting so much emphasis on relief because plaintiffs commencing proceedings can change and do change the relief they seek during the course of proceedings without running foul of the Limitation Act. So first I don't really understand that. And secondly, if people – if it becomes inappropriate for some plaintiffs to continue to be within the representative claim as constituted, surely the Courts can severe and set up different classes. I have no problem with that because that really is the adjectival law which is inherent and the Courts can shape to do justice in the particular case or derived from rules or whatever, but what bothers me is that you seem to be suggesting – and some of these cases seem to be suggesting – that Judges can play fast and loose with the substantive law of limitations and can say, "We're stopping the clock here. We're starting it there." It seems quite unnecessary to be as complicated as that. If proceedings are constituted within the period of limitation and somebody's in those proceedings because they're a representative of him, surely we can forget about limitations. It may be necessary to reconstitute those proceedings but the purpose of the limitation bar has been met. So I'm just not really sure what you think we would be – that Courts can do in terms

of suspending and moving cases along. It just doesn't seem to me to touch the limitation point. The important thing is that the individual, that the person covered, be within the representative suit. If he has an additional claim, they're going to have to make an assessment whether he should constitute the proceedings separately because that won't be covered.

**MR OLNEY:**
That is exactly my argument.

**ELIAS CJ:**
I don't think so, actually.

**MR OLNEY:**
If the represented person is within the represented group and the relief that the representative can obtain on his behalf is wholly satisfactory –

**ELIAS CJ:**
Well, I flag that I don't know why you're placing so much emphasis on relief.

**MR OLNEY:**
Well, if, in order to get damages, the represented person still needs to bring their individual damages claim, then they'll need to be – they're to do that within time because the Courts can't suspend the running of that limitation period. It's not suspended by the making of the representative order. It's continuing to run, and the Courts don't have the ability to suspend the running of that time while the common issues are determined. So if that represented person wants to preserve their position, they'll need to bring their individual claim.

**ELIAS CJ:**
If it's outside.

**MR OLNEY:**
That's right. If they can get the whole thing wrapped up within their –

**ELIAS CJ:**
But they don't have to get the whole thing wrapped up. They have to get their proceedings on foot. If they're in the representative action it may morph in different

ways, as all litigation does. I don't see the problem, because then it can be managed using the rules and the inherent jurisdiction.

**MR OLNEY:**

My core submission is that their claim is not brought by virtue of being represented.

**GLAZEBROOK J:**

Right, well, what is the claim that's not brought? Because their individual claim would be, "There's been a misrepresentation in the prospectus causing me loss," which is actually what the representative action says. So their claim would be misrepresentation. Their relief would be damages, but it's not a separate claim. It's relief in the proceedings which are related to misrepresentation, and I'm simplifying the proceedings, obviously, because there are Fair Trading Act and Securities Act and ...

**MR OLNEY:**

I would simplify them differently. The plaintiff has brought his individual claim for damages and his claim –

**GLAZEBROOK J:**

Well, no, he's brought a claim in misrepresentation. The claim isn't for damages. The cause of action isn't damages. That's the relief sought.

**ELIAS CJ:**

You might be right in negligence, because damages is part of the cause of action. But leaving that aside for the moment, what's the problem?

**MR OLNEY:**

The statutory torts of the Securities Act or the Fair Trading Act, the same in nature. He's bringing his claim for breach of those Acts and seeks by way of relief damages for himself, but he does so as a representative of others. He can't, as a representative, in my submission, prove all of their claims.

**ELIAS CJ:**

When would representative actions ever be permitted? Is it only where you're seeking declaratory relief or something like that?

**MR OLNEY:**

Well, as I say, the representative process is permitted in respect of the common issues.

**McGRATH J:**

It's permitted to the extent that it will provide a *res judicata* for the wider group if the wider group avail themselves of it by bringing their own. That's your position?

**MR OLNEY:**

Yes. If we're in a case where declaration is the final relief sought, then actually the representative proceeding will bring an end to the whole issue. There are some cases which I'll draw to your Honour's attention where damages can be assessed globally for the whole represented group without getting into any individual issues. There are examples of the representative procedure being used in those cases. But my submission is that we're not in that territory because we necessarily have to go through the individual issues before the entitlement to damages of each shareholder can be determined.

**GLAZEBROOK J:**

That's assuming the "but for" test doesn't apply.

**McGRATH J:**

You're taking us to the Alberta law reform report to indicate that that province in Canada has seen the only way through as legislation, class actions legislation?

**MR OLNEY:**

Yes, and they're not the only ones, Sir. We can see South Australia reached the same view. That's the bundle of authorities volume 3 at tab 35. That's at page 10 of that document. Four paragraphs down, "Class actions require some modification of the rules regarding limitation of actions. The ordinary limitation provisions must be made subject to the right of individual members of a class to establish their claims after the common questions have been determined, notwithstanding that the time for instituting proceedings has expired. Some provision must also be made for members of the class who may have delayed their remedy as a result of the class action but who are disappointed in that expectation, as were an order to proceed is a class action is refused or, having been granted, is substantially rescinded."

**McGRATH J:**

So South Australia had a class actions Bill since shortly after that?

**MR OLNEY:**

Yes. I'm not sure exactly when it was passed, but the trend in a number of these jurisdictions is to identify that while there are many things about these class actions that can be achieved by procedural innovation, universally conclude that the limitation suspension is not one of them. That's a real driver to legislation as a means of making these schemes work. And that point is usefully made in the Civil Justice Council material I have provided to the Court in the bundle of authorities volume 2, tab 33. I just draw your Honours' attention to the index, you'll see the sections set out there followed by recommendations and then at page 7, lists the various appendices that are relied on.

**ELIAS CJ:**

Why are you taking us to this material? The indication being that it's necessary to have legislative amendment.

**MR OLNEY:**

Yes.

**ELIAS CJ:**

That's all is it?

**MR OLNEY:**

Yes.

**ELIAS CJ:**

Yes.

**MCGRATH J:**

Sorry page 7 but where's the substantive –

**MR OLNEY:**

If your Honour turns to page 104. Sorry my apologies 110. Council is setting out the views of the various people about what aspects of class actions can be achieved by procedural innovation and which aspects require legislation. And your Honours can

see there numbered 1, limitation is identified as an important element and the note records there, "It's common ground that suspension of limitation provisions will require implementation of primary legislation." Which is unsurprising because it's substantive law and our own rules committee reached the same view and if I could – it might help to demonstrate how that all cashes out in legislation in –

**GLAZEBROOK J:**
I'm sorry I don't really understand, what's the point from page 110?

**MR OLNEY:**
There's agreement that –

**GLAZEBROOK J:**
Well I don't actually read it that way but which – what are you actually pointing to?

**MCGRATH J:**
The foot of the page he's pointing to.

**GLAZEBROOK J:**
Well I know but they're just saying well a knocked out regime would suspend the limitation period by legislation. I don't see the point.

**MR OLNEY:**
It's in the context of a debate about whether –

**GLAZEBROOK J:**
Oh we have to read the rest of it, do we, to understand it?

**MR OLNEY:**
Yes.

**GLAZEBROOK J:**
The summary is somebody or other's views.

**MR OLNEY:**
Yes so there's a debate between Professor Mulheron and Mr Sorabji, the leading jurists in this space, who are assisting the Council to consider the extent to which

these features can be achieved through procedural innovation and the extent to which they will require legislation.

**ARNOLD J:**
One of the problems, it seems to me, with this argument is really a terminological one. I mean you talk about in this report, does suspending the limitation period and, but the other way of looking at it of course is simply interpreting the effect of the rule, the High Court Rules and interpreting the Limitation Act when they brought their claims and on the view that the Court of Appeal took, there was no issue of suspending limitation periods at all. The claims had been brought within the required time.

**GLAZEBROOK J:**
Which is probably quite different with a opt out regime because you don't have any individual actions there but –

**ARNOLD J:**
That's right and –

**GLAZEBROOK J:**
And a class action is different from a representative action in any event.

**ARNOLD J:**
And with the opt in regime, all you end up, as I understand the Court of Appeal saying is that when the representative action is brought, assuming it's authorised as it had to be in this case, all of those, with an opt in regime, those people who ultimately opt in are treated as being represented from the time at which the proceedings were issued for limitation purposes and the opt in part of it is simply a case management technique for identifying the people but it's got nothing to do with suspending the limitation period.

**MR OLNEY:**
And that's my second argument that if it's opting in, that brings someone within the fold of the representative action and thereby preserves their limitation position then, in my submission, they must opt in, in time. That's my second argument.

**ARNOLD J:**

Yes I understand that. All I'm saying I guess is that a lot of this language doesn't seem to – it sort of proves itself. Of course Courts can't suspend limitation periods, suspend the effect of the legislation, what we are arguing about is what is the effect of the legislation in this context?

**MR OLNEY:**

Yes and I've referred to those two cases and I've developed in my submission the argument that being represented does not prevent time for running, it doesn't bring ones case and law reform commissions have recognised that same phenomenon.

**MCGRATH J:**

Yes.

**GLAZEBROOK J:**

Well I'm not sure they did in Alberta because frankly I read that paragraph in Alberta as saying that it does suspend time until you're thrown out or until the – and you can be thrown out either by you being thrown out because you're no longer being represented or because the representative order has come to an end but Alberta otherwise seems to me to say it does bring an action on behalf of and not suspend the limitation period but bring an action in time for all who are represented.

**MR OLNEY:**

If that was true, if being represented told the time limitation period, then there would be no problem with being thrown out at a later time.

**GLAZEBROOK J:**

Well yes there would.

**MR OLNEY:**

Because the time would've told.

**GLAZEBROOK J:**

Because you are no longer represented and because you're no longer represented, if you don't have an action and then you would have to bring your own individual action and you would be out of time. So there would be a problem because you're no

longer covered by the action that has been brought and you would have to bring your own individual action and you are out of time for that individual action.

**MR OLNEY:**
Yes and –

**GLAZEBROOK J:**
But while you're part of the representative action there is no problem for you.

**MR OLNEY:**
And my submission is that indeed time is still running on the individual action.

**GLAZEBROOK J:**
But only if you have to bring an individual action and you're no longer covered by the representative action.

**MR OLNEY:**
Quite and my first submission is that here where we have both common and individual issues, where the representative aspect can only bite on the common issues, we will have to have individual claims to follow and because the time is running on those or has run on those individual claims, they can never be brought and so the representative order serves no function.

**ELIAS CJ:**
Well if you are right you will succeed in your defence, if they institute fresh proceedings.

**MR OLNEY:**
That's one consequence. In my submission the other consequence of my being right is that the representative order is inappropriate for this case and when we are continually revising and reviewing the question of whether the representative order is appropriate, in my submission the answer should be no, given that it can serve no useful purpose.

**ANDERSON J:**
You've lost that appeal. We're dealing with limitations, with whether the order should appropriately have been made.

**MR OLNEY:**

The question of whether it was appropriate that the represented border continue, arose when the plaintiff applied to lift the stay. I opposed on the basis that lifting the stay and allowing it to continue on a representative basis served no purpose. The High Court found against me, the appeal to the Court of Appeal was unsuccessful and that is the judgment being appealed from here.

**MCGRATH J:**

Now that's probably everything you've said but the Law Reform Commissions reports saying you've got to do this by legislation if you want to do it, that's probably a good lead into the Australian cases.

**MR OLNEY:**

Yes so, I gather your Honour's referring to *Cameron* and *Fostif*.

**McGRATH J:**

I was thinking of *Flowers*, the New Zealand decision of Justice McGechan.

**MR OLNEY:**

Can I introduce *Flowers*, perhaps, by reference to one aspect of my written submission? It's at 3.15. It's the observation that in some circumstances it's not necessary to have this two-stage approach where we have a representative process at stage 1 on common issues followed by individual claims. Sometimes it's possible to resolve all matters, including damages for all, in the one representative proceeding, and as I set out there, the cases in which that's possible have two characteristics. The first is that the total liability at issue can be readily established as a global sum and the amount due to individual represented persons is uncontested, either because as a group they're content for a global award to the representative or the apportionment between them is purely mathematical. Examples of that are helpfully found in the textbook by Professor Andrews in the bundle of authorities volume 3 tab 43 at paragraph 41.80, page 993 under the heading, "Damages can be awarded if a defendant's total liability is ascertainable. It's sometimes possible to eliminate the two-stage procedure just mentioned and award damages in a representative claim in a single, concentrated procedure although this is exceedingly rare. Exceptionally, this can happen if a defendant's total liability can be calculated readily and damages divided precisely among class members."

**GLAZEBROOK J:**

And the only reason you say it can't here is because individuals may not have relied on – because it can be easily calculated, can't it? How it's divided is easily calculated, as well, because it depends on how many shares people bought.

**MR OLNEY:**

That much is mathematical. So reliance, causation, the discretionary elements under the Fair Trading Act, the section 63 of the Securities Act where the relief is to be modified in all the circumstances of the individual case. Those are the key aspects where individual aspects arise.

**GLAZEBROOK J:**

I wouldn't have thought section 63 is going to bite in these circumstances, is it?

**MR OLNEY:**

Well, we might have – we have some shareholders, for example, Hunter Hall, which is a large institution, which in its product disclosure statements trumpets its legions of analysts who form their own independent views –

**GLAZEBROOK J:**

So it's fine to misrepresent on the basis of inside information because that's what it has to be, doesn't it?

**MR OLNEY:**

No, no. I'm just suggesting that Hunter Hall is in a different position.

**GLAZEBROOK J:**

I'd be surprised if that would be a section 63 issue, that you should have known better.

**MR OLNEY:**

Well, it may be that at a certain point in time, as the share price was declining, Hunter Hall had various analysis and took a decision notwithstanding what it then knew to remain in the company and depending on the facts, the argument may be open, that from that point in time that they were taking their own risk and that the decline in shares from that point in time can't be attributed back to the defendants.

**GLAZEBROOK J:**

That's causation, not section 63, isn't it?

**MR OLNEY:**

I suppose it depends on how the argument is developed and the facts, but if –

**GLAZEBROOK J:**

Anyway, it probably doesn't matter.

**MR OLNEY:**

Professor Andrews, at 41.81 and 41.82 gives two examples of where damages can be done in this single process. The first there at 41.81, the cargo owners' cargo had been thrown off the ship to lighten it when it was in distress and were claiming against the ship owner. The total volume of loss was known. That was the value of the cargo. The amount due to each individual was applied by the law of general average, so there was no need to –

**McGRATH J:**

We can see that's a ready instance of what you're saying. I think we understand the proposition sufficiently.

**MR OLNEY:**

*EMI Record Ltd v Riley* [1981] 1 WLR 923 (Ch) is a similar case. *Flowers*, by way of introduction, is exactly the same sort of case, in my submission.

**McGRATH J:**

Justice McGechan did attempt to come to grips with how the rule 78 should work, didn't he?

**MR OLNEY:**

Quite, Sir, and he endorsed Prudential and what I've called the justice principle, the essential requirement that it be attached to a common question that there be this community of interest. Had there been individual issues arising, he wouldn't have been able to award damages through the representative procedure. But in that case, the ability to use the representative procedure was preserved because all the growers said, "We don't want you to determine how much is owing to us individually. We're happy for a global sum to be determined."

**McGRATH J:**

So the case doesn't really help us here, you're saying? It fits in that category.

**MR OLNEY:**

It fits into the exceptional category. The other New Zealand case is the *Taspac* case, the decision of Justice Barker, where it was a claim by the users of spat sticks oyster farmers who essentially it was a negligence claim, claiming damages on the basis that the spat sticks were negligently prepared. That's a neat example of the two-stage approach. Because they couldn't do damages within the representative procedure they limited the scope of the representative procedure to the common issue, whether there was a duty of care and whether it was breached. His Honour Justice Barker in that case, as did Justice McGechan in this case, reserve the possibility that if individual issues emerge it may be that the representative procedure either has to be more limited or abandoned, and both of them refer as the alternative to joinder of the plaintiffs. So they're quite helpful examples of the two approaches, but I say we're clearly in the two-stage world.

**McGRATH J:**

Yes.

**GLAZEBROOK J:**

What do you say to the proposition that if that was the case that should have been raised at the start so that the representative order was clearly limited to that? Because that's not what happened here and it certainly wasn't done by implication in any way because the argument was never raised.

**MR OLNEY:**

It's emerged over time.

**GLAZEBROOK J:**

Well – but either it was appropriate to make the representation order covering both which it's at, and there were discussions of that or it wasn't. If it wasn't then it should have been made only very clearly in respect of liability with it made absolutely clear that it didn't cover damages but in fact it was made on a broader basis and upheld on a broader basis.

**MR OLNEY:**

It was upheld by the first Court of Appeal decision on that broader basis, on the basis that it would be the subject of continuous review both as to its scope and its existence.

**ANDERSON J:**

I'm just trying to find the High Court rule that would authorise that, can you assist me there, maybe over lunch or something?

**MR OLNEY:**

Yes, I'll consider that further. The – and in the process of continuous review or that process of continuous review has resulted in an order from Justice French that the *res judicata* established on the hearing of Mr Houghton's claim will be limited solely to the common issues.

**GLAZEBROOK J:**

Sorry – I've, well let's just take a step back. The order wasn't made on a two-stage process. The argument amount damages was before the first Court of Appeal without any suggestion it should be made on a two-stage process. Even if something is kept under review because there are change in circumstances, there have been no changes in circumstances apart from the limitation period arising which was always going to happen in the course of the proceedings in any event because there was no way that would have been concluded by May.

**MR OLNEY:**

One of the –

**GLAZEBROOK J:**

And then I don't understand the argument that says Justice French has said *res judicata* only bites on the common issues, so I thought that's what we were arguing about now.

**MR OLNEY:**

I should take one step at a time. The first Court of Appeal judgment which required this ongoing review, both as to the existence and scope of the order, noted that one of the important factors to be taken in account in that review was an identification of the issues which were common and which were going to be the subject of individual

claims to follow so that the scope of the *res judicata* could be identified and those were the paragraphs that we've referred to previously.

**GLAZEBROOK J:**

At that stage I have to say we had a pleading that was totally at large and it was not clear exactly what they, what the causes of action even would be or what the relief sought or how individual the other claims would be so I would suggest that it has to be read in that context.

**MR OLNEY:**

Quite, and more precise surgical fashioning of the procedures just simply wasn't possible at that time. And then I started to take your Honours to the process by which the individual and common issues were identified but perhaps if I give you the pinpoint for the conclusion of that process which is in the case on appeal. It's in the case on appeal at volume 2, tab 17. The underlying documents are also in the case on appeal but the relevant passages at paragraph 8. "At the hearing," this is the plaintiff's preliminary issue hearing, "A consensus developed that rather than stages 1 and 2 being a liability loss split as proposed by –

**GLAZEBROOK J:**

Sorry, paragraph 8 sorry.

**MR OLNEY:**

– the more appropriate course of action was to have Mr Houghton's own claim heard in its entirety, both liability and loss at stage 1. That of necessity would involve resolution of all issues that were common to Mr Houghton and all other claimants as well as issues that were unique to Mr Houghton," that is the individual issue. "On the second stage the individual aspects of the claims of all other qualifying shareholders would be considered. It was further agreed that a list of common issues," meaning issues common to Mr Houghton or other claimants, "To be traversed at stage 1 hearing should be compiled in advance. The list was to be compiled on the basis that findings on the listed issues would be binding as between the defendants and all members of the represented class, the findings would be *res judicata*."

**ELIAS CJ:**

Sorry what was it that, can you just tell us what's the point that's being made here?

**MR OLNEY:**

The point is that the parties have agreed and the Court have ordered that we have a *res judicata* being established on the common issues only and the individual issues will remain to be proved. And my submission is that –

**GLAZEBROOK J:**

Well what she's recording is the consensus that presumably came out of a fight as to who was going to do what at what stage –

**MR OLNEY:**

And Her Honour –

**GLAZEBROOK J:**

– so it's not a ruling of the Court, it's saying well this is what's now been agreed and a ruling that possibly that – well no it's actually just dealing with a concession by Mr Forbes, if you look at paragraph 11, to say well I'm not, I'm putting my hands up, I'm not going to bother arguing, we'll do it this way as a case management tool.

**MR OLNEY:**

So then – it says there will be a *res judicata* established on the common issues but the individual issues will still need to be proved individually at stage 2. Her Honour was –

**GLAZEBROOK J:**

Well no it's just what was accepted by the parties that that's how it was going to go.

**MR OLNEY:**

Her Honour was agnostic as to whether they'd be in this proceeding or a separate proceeding or they'd be joined –

**ANDERSON J:**

Well -

**MR OLNEY:**

- as plaintiffs.

**ELIAS CJ:**

It's not in a separate proceeding though is it, it's in a separate hearing of the proceeding. I mean can you say more than the Judge has directed that the issues be split for the purposes of trial, it's something that happens often?

**GLAZEBROOK J:**

Usually with disastrous results.

**MR OLNEY:**

Can I finish that judgment though by directing your Honours' attention to the outcome at paragraph 39, 40 and following.

**ELIAS CJ:**

I'm just trying to move us through a little, I'm afraid Mr Olney, because I'm very concerned about the time and it's not your fault because you've been greatly interrupted, that's why I just asked you if you could tell us.

**MR OLNEY:**

Right, so the key point is 39 there will be a stage 1 hearing, Mr Houghton's claim to be determined in its entirety. Paragraph 40, that will establish the *res judicata* on the common issues and then what follows over the page, the question of whether at stage 2 fresh proceedings are required or anything further was left at large.

**GLAZEBROOK J:**

And then decided by Her Honour's judgment and the Court of Appeal judgment?

**MR OLNEY:**

No, no. This is all subsequent to the Court of Appeal judgment.

**McGRATH J:**

Is it fair to say that this –

**ELIAS CJ:**

Well then –

**McGRATH J:**

– on the 1st of August 2012 –

**ELIAS CJ:**

– can't be right.

**McGRATH J:**

– is saying nothing different from what was said in the minute which was the 9th of December the previous year other than this final passage you've just referred us to in which there's some suggestion that fresh proceedings may be required?

**MR OLNEY:**

If the conclusion of the process whereby the parties –

**GLAZEBROOK J:**

Well hang on, because isn't that contrary to what the Court of Appeal has said that the limitation period isn't running. Where's the Court of Appeal judgment now, what date's – are you saying that's –

**MR OLNEY:**

Tab 12 of volume 2.

**GLAZEBROOK J:**

Well it's just contrary – I mean if that's what she's saying, it's just contrary to the Court of Appeal judgment, you don't need separate proceedings –

**ELIAS CJ:**

Well the Judge is in fact, isn't she, she's not directing that there will be proceedings required, she's indicating that it will be necessary for the defendants, if they're determined to maintain the stance that fresh proceedings are required, to come back and make out that case.

**MR OLNEY:**

Exactly. The shape of stage 2 was hotly debated including because of these limitation consequences.

**GLAZEBROOK J:**

Well then if it's at large, there is absolutely no point in us saying anything about the Court of Appeal judgment if it can be ignored by the parties and by the High Court.

**MR OLNEY:**

I'm struggling, I apologise your Honour but I don't understand which bit of the Court of Appeal judgment was ignored.

**GLAZEBROOK J:**

Well if limitation periods are not running against, then you don't need new proceedings, you do it in these proceedings, don't you? That's a necessary implication isn't it?

**MR OLNEY:**

Your Honour is talking about the second Court of Appeal judgment. This precedes, this exercise comes between the first Court of Appeal judgment and the second Court of Appeal judgment.

**GLAZEBROOK J:**

Oh I thought it was 30 –

**ELIAS CJ:**

We've got a schedule haven't we, somewhere, someone's provided a schedule?

**MR OLNEY:**

Yes I've done the chronology in two ways.

**ELIAS CJ:**

It's at the end of your submissions is it?

**MR OLNEY:**

I've done it at section 2 of my submission.

**GLAZEBROOK J:**

But then what I was saying was this has been superseded by the Court of Appeal judgment. So I don't see why we're being taken to it.

**MR OLNEY:**

At the time we went to it we were talking about the fact that we weren't in a situation where damages could be determined for all in the one proceeding.

**ANDERSON J:**

Why not?

**MR OLNEY:**

Because there are individual issues involved. We are not in the EMI, RJ Flowers situation.

**ANDERSON J:**

But staggered hearings within a proceeding are not different proceedings.

**MR OLNEY:**

But the individual issues can't be proved by this plaintiff as representative, precisely because they are individual issues. His function as representative is limited to addressing common issues.

**GLAZEBROOK J:**

But you're just putting your argument in another way. What I didn't understand was why you were taking this to the earlier Justice French indication when in fact that's been superseded by her later judgment and the second Court of Appeal decision and now – but you're putting the – we understand that argument but it doesn't help to go back to an earlier decision which is no longer operative given the Court of Appeal decision.

**MR OLNEY:**

It's operative on the question of whether or not we have common and individual issues. The question of whether limitation has run on individual claims to follow, didn't need to be determined in this context, it arose in a different context, which was the application by the plaintiff to have the stay lifted, so the proceeding could continue.

**ELIAS CJ:**

Mr Olney, it's 1 o'clock. We'll take the adjournment now but I wonder really whether we're not going around in circles a little bit and again not necessarily your fault at all but how long – how much longer do you expect to be? What do you want to take us to?

**MR OLNEY:**

I certainly need to address my second argument.

**ELIAS CJ:**

The fall back one?

**MR OLNEY:**

Yes or at least the second argument, if it's concluded that being represented stops time. I need to address that argument.

**ELIAS CJ:**

Well we have read your submissions, of course, so you might want to simply emphasise material, particularly in the light of the discussion today, this morning.

**MR OLNEY:**

Yes. I'm content to do that. I'll come back after lunch with –

**ELIAS CJ:**

Well how long do you think you might be.

**MR OLNEY:**

Shall we try – can I endeavour to do that in 15 minutes.

**ELIAS CJ:**

Perfect thank you.

**COURT ADJOURNS: 1.05 PM**

**COURT RESUMES: 2.17 PM**

**MR OLNEY:**

Yes thank you your Honour, it occurred to me over the lunch break that I never got to turn to *Cameron* and *Fostif.*

**MCGRATH J:**

Well you dealt with Justice White's –

**MR OLNEY:**

Yes.

**MCGRATH J:**

The way he approached them but I think that in particular Justice Mason in New South Wales Court of Appeal in *Fostif* is a matter that you will have to address either now or in reply.

**MR OLNEY:**

Yes at least for now, bearing the Chief Justice's indication to move on. I can give your Honour the reference in my written subs 3.43 to 3.53.

**MCGRATH J:**

Well you distinguished I think didn't you, is that right?

**MR OLNEY:**

Yes.

**MCGRATH J:**

Sorry 3.53?

**MR OLNEY:**

3.43 to 3.53, those 10 paragraphs address that issue. Turning then to my second argument which arises, if my first argument is not accepted. If it's thought that being represented had the effect of bringing the shareholder's claim, in my submission the claim can only have been brought when that shareholder became represented. That is to say, in the context of this proceeding, when they opted in. Equally if one is to identify as the critical quality of represented status being bound by the judgment, I say that the opt-in date is critical on that basis as well, because it's only when a shareholder opts in that they become bound by the *res judicata* in the plaintiff's claim.

**MCGRATH J:**

Not when the representative action was brought or the Court of Appeal stipulated the terms on which it was brought.

**MR OLNEY:**

Quite. In my submission, if it's being –

**MCGRATH J:**

The opt-in aspect is essential and why is that, before the proceeding is brought or before sorry the issue is brought?

**MR OLNEY:**

If being represented is what causes the shareholder's claim to be brought, it must be at the point they opt-in. It can't be before then that their claim is brought because prior to opting in they're a complete stranger to both the plaintiff and the proceeding.

**MCGRATH J:**

I see is the opt-in the distinguishing factor from *Fostif* for example?

**MR OLNEY:**

Yes, among others. The – I say that if it's right that becoming represented in the proceeding is what tolls time for limitation purposes, then the person must become represented before time expires and in this proceeding they can only become represented by opting in. So in my submission they must opt-in before the expiry of time on their claims.

**MCGRATH J:**

What's the language in the Limitation Act? It's when the action is brought, is that it?

**MR OLNEY:**

Yes.

**ELIAS CJ:**

The terms of rule 4.24 are that someone may sue for the benefit of all persons with the same interest.

**MR OLNEY:**

Yes.

**ELIAS CJ:**

You're loading different concepts in when you talk about when do you become part of it. It's really only necessary that someone is identified to bring the proceedings for the benefit of someone.

**MR OLNEY:**

Yes, in my submission the representative can't act on behalf of a represented person until they've opted in. If we conceive of the representative bringing the represented person's claim on their behalf, then they can't do so until they are the representative of the represented person. They can't do anything on behalf of the represented person or bring their claim, until the represented person has opted in.

**ELIAS CJ:**

Well doesn't that follow though from the terms of the order that the Judge has made directing that it be a representative action under 4.24.

**MR OLNEY:**

Yes, is your Honour thinking of that paragraph 224?

**ELIAS CJ:**

Yes.

**MR OLNEY:**

Quite. It keeps faith with that order that replaces the opt-out process with an opt-in process and says if shareholders want to be represented in this proceeding then they need to opt-in and at that point they will be represented.

**ELIAS CJ:**

But the proceedings have been authorised, irrespective of who – we are really going over old ground. I mean I think we understand your argument on this but the other argument, the countervailing argument is that the proceedings have been constituted and it's just a question of ascertaining who's within that class and the Judge has indicated a procedure for making that certain.

**MR OLNEY:**

That logic would require the initial constitution of the proceeding on a representative basis as tolling the limitation period.

**ELIAS CJ:**

I really don't know what you mean by tolling.

**GLAZEBROOK J:**

No.

**MR OLNEY:**

Stopping time running for everyone who may potentially want to opt-in.

**ELIAS CJ:**

I don't see why it's necessary to be as elaborate as that. The fact is that the proceedings have been constituted, they are within time. You really have to convince us that those potentially able to be included, the proceedings haven't been constituted for them.

**MR OLNEY:**

The plaintiff's claim has been properly constituted, no question.

**ELIAS CJ:**

Yes but it's been amended. It's morphed and it's now, with the authority of the Court, a claim that he brings on the part of all those who, I don't know how it's expressed but it's all those who have made losses from the acquisition of the shares.

**MR OLNEY:**

We then have a situation where individuals are opting into the proceeding nine and a half years after the accrual of their cause of action.

**ELIAS CJ:**

Well their proceedings have been brought. If they don't opt-in, then it – they're not going to benefit but the proceedings are on foot.

**MR OLNEY:**

Yes. If we're conceiving of the representative having brought their proceeding on their behalf, to use the language of 4.24, in my submission you need to have a relationship formed between the representative and the representee, so that the representative can bring the proceeding on their behalf and prior to the point of time of opt-in, they're strangers to one another.

**MCGRATH J:**
Well I understand what you're saying but the statutory prohibition of limitation is on an action being brought.

**MR OLNEY:**
Yes.

**MCGRATH J:**
Now the only action we're concerned with here is a representative proceeding is it not.

**MR OLNEY:**
Yes.

**MCGRATH J:**
And within that proceeding there is a requirement settled by the order of the Court for opting-in for a particular person represented can avail themselves of matters but it seems to me that what you're really doing is asking us to read a prohibition on an action being brought as a prohibition on a step being taken in that action after it has been brought.

**MR OLNEY:**
What I'm submitting is that if the representative plaintiff is bringing the action of these others, the others' claim can only be brought at the point where that relationship of representative and representee is crystallised, when their claim is brought into the proceedings.

**MCGRATH J:**
As a matter of everyday language I understand what you are saying but we have to decide what the prohibition of an action being brought is in this context, how that affects the situation, where there was only one action and it's already underfoot.

**MR OLNEY:**
Otherwise we're left in a situation where the representative is conceived of having brought the claims of everyone who might opt-in whether they do or not and that's, in my submission an impossible situation.

**MCGRATH J:**

We have to conceive that the representative has brought the action, whether or not people finally opt-in or not, I would have to accept that but that's what the statute is concerned with, when the action is brought.

**MR OLNEY:**

The action, we have a situation where every shareholder has a separate cause of action.

**MCGRATH J:**

Correct.

**MR OLNEY:**

And a shareholder who never opts-in nevertheless has their own separate cause of action.

**MCGRATH J:**

Correct.

**MR OLNEY:**

So we're tasked with identifying the mechanism by which the representative brings the cause of action of another.

**MCGRATH J:**

Maybe but once you're moving away from the statutory language of a prohibition of a bringing of an action I start to become concerned because we have to interpret the meaning of those words in the Act, the Limitation Act.

**MR OLNEY:**

Yes. I guess my submission boils down to the proposition that the opt-in process ordered was an invitation to other shareholders to bring their cause of action to Court and have it advanced by the representative and they accept that invitation to bring their cause of action by opting-in.

**GLAZEBROOK J:**

The other way of dealing with is presumably you're saying it's not the making of the representative order itself that makes it a representative action, it is the action of the individual shareholders that make it brought of their behalf, is that –

**MR OLNEY:**

Yes, yes. It may help to –

**GLAZEBROOK J:**

The difficulty is that there is already the order for a representative action and that's the only action that's extant.

**MR OLNEY:**

It's an opt-in representative order.

**GLAZEBROOK J:**

Well no the representative order is an order for a representative action already made. At the very start there's probably only one person there.

**ARNOLD J:**

And effectively what you're doing, if you look at rule 4.24, there are two mechanisms for constituting a representative action, either consent of the parties or order of the Court. Here we have got an order of the Court but you're saying it can't be effective until people opt-in, that is until they give their consent. So isn't that undermining the rule which recognises two distinct alternatives.

**MR OLNEY:**

The order of the Court was to opt-in by signalling their consent to the Court.

**ARNOLD J:**

The order of the Court was this is a representative action in respect of this class of people. That's order A and then later on the order was for those in this class of people who want to participate they must signify by this date.

**MR OLNEY:**

Yes. The *Fostif* decision in the High Court of Australia may help on this where there was a representative order made but no one had yet opted-in and the way the rule

works in the Central Court of Australia you need seven or more. There's a numerosity requirement and the Court there said, "But no one has opted-in yet, so you haven't satisfied the requirement, there is no one to be represented." I think, in my submission, the characterisation of those orders in 2.24 –

**ELIAS CJ:**

What was that point made for? Was it made in connection in the limitation issue because we haven't been referred to the High Court decision in *Fostif.*

**MR OLNEY:**

No it wasn't directly in relation to a limitation issue. There was a limitation consequence because the issue of the proceeding took place just immediately before the time bar arose.

**ELIAS CJ:**

Well I'd quite like to see the – do we have the High Court decision with us? And if you could just point us, don't take your time on it but just point us to the passage that you're referring to.

**MR OLNEY:**

Tab 12 of volume 1, the discussion of numerous persons having the same interest at page 420 of the report, it starts there. At page 421 there's a description of the opt-in procedure. At 422, the last paragraph, "At the time the summons was issued to commence the *Fostif* proceedings, there were no persons –

**ELIAS CJ:**

There were persons.

**MR OLNEY:**

-other than Fostif, the named plaintiff who had an interest in the proceedings which were instituted. No other person had an interest in the proceeding. There was no order made or judgment given.

**ELIAS CJ:**

Is this paragraph 57?

**MR OLNEY:**

58.

**ANDERSON J:**

There might often be occasions where a class, as such, will be perceived as appropriate for a representative action but identifying individuals may not be possible until later. But nevertheless, the proceeding has been brought on behalf of every member of the class.

**MR OLNEY:**

One could conceive, I agree, Sir, of a representative action without an opt-in process being necessary to constitute the class.

**ANDERSON J:**

What we have here is that right up until the delivery of Justice French's judgment in, I think, August or October 2008, we had a class defined by reference to all those who did not opt out, and all those persons at that time were within time. Now, when the order was buried by Justice French, all that did was alter the mechanism for identifying the components of the class. It didn't amount to the bringing of a separate cause of action by all of those who opted in.

**MR OLNEY:**

Her Honour had found that the initial order should never have been made.

**ANDERSON J:**

So she reviewed it, in effect?

**MR OLNEY:**

Yes. She rescinded and replaced it with this order.

**ANDERSON J:**

She didn't rescind it. If you look at that paragraph I mentioned she says, "It will be continued subject to."

**MR OLNEY:**

Sorry, Sir. I was thinking of 224B she amended by rescinding those parts of the order providing for an opt-out procedure and replacing them with an opt-in procedure.

**ELIAS CJ:**

That's not the same as rescinding the order. And, indeed, it's the point that she returns to. I don't know whether it was the minute or subsequent judgment.

**MR OLNEY:**

The proposition we're left with is that an ex parte order that should never have been made has stopped time running for every shareholder who may wish to opt in in the future, and in my submission, that asks too much of an ex parte order that should never have been made.

**GLAZEBROOK J:**

Well, it's only up to a certain date, because the date for the opt-in has been indicated by the Court, and presumably extended after that, and I know it's been extended a number of times. Anyone else is out of time because at that stage they can't join their representative action because the order is made on terms that you can only join it up to that particular date.

**MR OLNEY:**

And my two responses to that are firstly that we then have the application of the substantive limitation rights made a matter of case management, where the Court is by case management tools extending more or less time limitations which has resulted here in time being extended to over nine years. My second response is that we have a situation where for claims of represented persons are brought for limitations purposes on the making of the order and then if they don't opt in by the date, their status turns to not brought, and on the Court of Appeal's logic, the normal limitation implications apply.

**GLAZEBROOK J:**

Well, no. It's somebody who has, at that stage, been thrown out of the class. It's the Alberta situation because the representative order no longer covers them, and so they're at that stage not within the class any more.

**MR OLNEY:**

Yes, and the Court of Appeal says that in the normal –

**GLAZEBROOK J:**

Which is what the Alberta Law Commission was concerned about.

**MR OLNEY:**

So we have their claim brought initially and then –

**GLAZEBROOK J:**

But that's because as they're no longer part of the representative action the only way they can bring a claim is to bring a new claim, and that new claim will be out of time. It's nothing to do with the old claim being out of time. That was within time. But as they're no longer part of it, they have to bring a new claim and that new claim will be out of time. So they don't suddenly become out of time on the proceeding that's brought. They're just no longer part of that proceeding, and therefore because they're no longer part of that proceeding the only way they can proceed is to bring a claim of their own. If they're out of time they're out of time for that because that's a new claim.

**MR OLNEY:**

Their action can't be asserted in the extant proceeding because they haven't opted in, and it can't be asserted outside of that proceeding because it's time barred. But this is in fact exactly how the statutory limitation suspension provisions are intended to work.

**GLAZEBROOK J:**

But that's because they didn't like the result, but that is the result that operates absent the statutory amendments.

**MR OLNEY:**

The statutory amendments hold the limitation position on the – well ...

**GLAZEBROOK J:**

So they changed the common law position or the position under the Limitation Act which would apply here to any new action and that's what they're doing and that's what they're intending to do.

**MR OLNEY:**

In substance, the consequence of making this a matter of case management is that we have represented shareholders coming forth and asserting their claims through the represented mechanism at a time when they couldn't assert their claims in separate proceedings, and that offends one of the core justice principles described in

universally-accepted out of Prudential. It also does some violence to the conception of what it is to be represented, because if we conceive of the nature of the representative –

**ELIAS CJ:**

I'm sorry, I'm still going on to have a look at the *Fostif*, because it does seem to me that it is pretty significant if there's a decision of the High Court of Australia on this point. You haven't really quite closed on this. Is *Fostif* the case – Fostif wasn't even within the class, is that right?

**MR OLNEY:**

Fostif was the named plaintiff.

**ELIAS CJ:**

I just notice that there are dissents by Chief Justice Gleeson and Justice Kirby in this, and I thought, just looking at the headnote, that the plaintiff wasn't really in the class.

**GLAZEBROOK J:**

Well, I think the plaintiff had only asked for damages on its own behalf and there was no cause of action which asked for a declaration which would give the common cause and because you needed seven people under the rule, you didn't have seven who were also asking for the damages at the same time.

**MR OLNEY:**

Yes.

**ELIAS CJ:**

If you want us to draw something of general application from it, you probably need to indicate what it is we are to take from it.

**GLAZEBROOK J:**

The implication is if there had been a declaration that was of common interest, then the class were sufficiently ascertained because they were all of the odd – the retailers and wholesalers but anyway, the class was relatively ascertainable because it was the people who had been affected by that so the implication of this is that if you had asked for a declaration then you would have had the seven people, but because

you weren't asking for that there was nothing in common and therefore you didn't meet the seven persons.

**MR OLNEY:**

And because the proceeding was issued on a representative basis in the expectation that seven or more people would opt in.

**GLAZEBROOK J:**

Yes. They were going round the country trying to find them.

**MR OLNEY:**

Yes. It was really the funder that had initiated the thing. The Court said, "Well, you haven't got your seven people now."

**ELIAS CJ:**

Chief Justice Gleeson said that he was unable to distinguish *Carnie v Esanda* Finance Corp Ltd (1994-1995) 182 CLR 398, so he would have allowed this to go ahead even despite the fact the seven person thing, no commonality. Well, aren't we interested in that?

**MR OLNEY:**

Yes. Your Honour is absolutely right. There was a five-two split on that point. So I would endeavour, in my submission, to set out the conceptual difficulties one has with trying to conceive of the claims of others being brought and those others being bound at a time when they haven't yet opted in and they aren't bound. The consequence of all that in circumstances here, we have some people opting in on or about the six year mark with these lists being filed and then thereafter in subsequent years. It may be quite difficult if your Honour – sorry, it might be quite easy if your Honours were to accept my argument to exclude as out of time the later lists, but people on the lists in that early June period are more difficult because the High Court has not been asked to, and hasn't, determined exactly where the date falls, whether the six year anniversary is six years from the date of subscription or the date of allotment and that makes a difference. We also have some uncertainty about exactly when those lists were filed. I described in my written submission them being filed on the dates there, but since writing that it turns out that the Court records have them being filed some time later. So there are factual issues that I just point out that in my

submission would make it appropriate that those aspects go back to the High Court to be addressed.

**GLAZEBROOK J:**

Can I just check in *Fostif*, if they had have their seven plaintiffs, wouldn't that have answered the question for the five as well as the two? Because all you needed to start the action was to have seven plaintiffs. So if you had your seven plaintiffs I would have thought the implication is that – and a common interest which gave some kind of declaration as well as the damages.

**MR OLNEY:**

In order to satisfy the threshold requirements for a representative proceeding, you needed to have seven people.

**GLAZEBROOK J:**

Well, isn't that all that's been discussed as to whether there were seven at the time they were instituted and they don't say anything, do they – you can let me know if they do – about what would happen if they had had the seven because then you would have had the proceedings instituted with, presumably, the class ascertainable. You may have had to have the common interest of the declaration as well.

**MR OLNEY:**

I don't recall them discussing that counterfactual.

**GLAZEBROOK J:**

Well, I wouldn't imagine they were because they would have been seeing whether those particular proceedings were instituted in accordance with the rule.

**MR OLNEY:**

Yes. I apologise, I've taken even longer. Unless your Honours have any questions.

**ELIAS CJ:**

No, thank you. Thank you. So Mr Cooper, do you wish to be heard?

**MR COOPER:**

I do, your Honour, only briefly on two points, if I may.

**ELIAS CJ:**

Yes.

**MR COOPER:**

We filed only a very brief written submission just noting that we may seek leave to be heard on issues that arise.

**ELIAS CJ:**

Yes.

**MR COOPER:**

One of the two issues that I'd like to be heard on, the first is the issue of the procedural context in which this issue comes before the Court, which is a matter raised this morning which wasn't addressed in the written submissions. The second is slightly less clearly a new issue, perhaps, but it is the precise nature of a representative order that was made and what consequences that has. That's an issue that's sort of arisen but wasn't dealt with in any detail in the submissions.

**ELIAS CJ:**

Yes, thank you. That would be helpful.

**MR COOPER:**

As to the procedural context, there is a difficulty as to how this issue has been determined, at least apparently on a final basis by both the High Court and the Court of Appeal in an uncertain procedural context. My clients are the former directors of Feltex, who are the first defendants in the proceeding. They plead limitation defences but haven't sought to advance them summarily in any interlocutory context. They haven't advanced arguments on this issue, these issues, before the High Court or the Court of Appeal, but nonetheless the way in which those Courts have dealt with the issues has led to judgments which, on their face, at least, determine them finally in proceedings to which my clients are parties.

**ELIAS CJ:**

You didn't appeal the Court of Appeal decision?

**MR COOPER:**

No, we did not, your Honour.

But the issue now, having been raised as to whether it is appropriate for binding determinations to be made on this issue with an uncertain procedural context in my submission it ought not to be and probably ought not to have been decided in a final way in those earlier judgments because it doesn't arise for final determination.

**GLAZEBROOK J:**
Well, it would clearly signal that that's what the argument was going to be, well, actually, in the notice of opposition, so if that was the decision being taken by the directors they should have said so in the High Court and the Court of Appeal. It's really a bit late to be saying it now, however attractive it might seem.

**MR COOPER:**
Well, we haven't advanced it in the High Court or the Court of Appeal. We've been passive parties, as it were, while this issue was being argued by other parties. We've not sought to support the argument or advance it, but we are simply in the position.

**GLAZEBROOK J:**
Or even to say it shouldn't be dealt with?

**MR COOPER:**
No.

**GLAZEBROOK J:**
Which is what you're now saying.

**MR COOPER:**
Except implicitly by not bringing it ourselves before the Court, it's true, your Honour.

**McGRATH J:**
But you did appear in those Courts when it was argued?

**MR COOPER:**
I should be clear, we did appeal the High Court decision to the Court of Appeal on different grounds. That appeal was also dismissed and we did not appeal further from that judgment to this Court.

**McGRATH J:**
But you have appeared and the directors have been represented at each stage of the proceeding?

**MR COOPER:**
Yes, they have. It's not a natural justice point I make, but just one as to the procedural context and whether it's appropriate for that to lead to a final determination of the issues.

That's all I wanted to say on that point.

On the second point of the nature of the representative order and this follows from submissions my learned friend Mr Olney was making to your Honours about the alternative argument, as the appellants put it, the argument for opting in to be the relevant trigger for bringing a proceeding or making a claim for Fair Trading Act purposes. May I on that simply refer to the terms of the judgment which we have been to, which is the judgment of Justice French. It's volume 2 tab 10. It's the same paragraph we've looked at, paragraph 224, and the two parts of that. We've focused on A and also to some extent on B, but I want to look at the two together. When the proceeding was commenced in February, ex parte orders were made which were on clear opt-out terms, so on that point there was a representative proceeding in which the represented persons were everyone who had acquired shares in the public offer of Feltex shares. That was the status quo coming into this judgment. What Her Honour did was to amend those orders, partly by removing one of the plaintiffs and so only Mr Houghton remained as a plaintiff. Noting that he sues in a representative capacity, but then B, by rescinding those parts of the order providing for opt-out and replacing for an opt-in.

Now, the word "rescinding" and the concept of rescission of that order in my submission does have some significance and under tab 19 of that bundle is the order in question, so the ex parte order, and the relevant order, I think, is that numbered 1.1 so tab 19 page 334. So the order as it existed was that the named plaintiffs, because there were two of them, represented all Feltex's shareholders in the class referred to below, unless they elect to opt out by a date. Now, that's the order that Her Honour rescinded and amended it to an opt-in, so the words might now read that the named first plaintiff, because that was the other change, represents all Feltex shareholders within the class referred to in paragraph 2 herein who elect to opt in by,

and I think the date given was 19 December 2008, the initial date. If that's the effect of the rescission and the amendment, then the question becomes having made that order, Her Honour's order in October 2008, who then were the represented persons? In my submission, at that point nobody was represented. Anybody could become represented at the point when they opted in. Initially that was to be a short-term process. For reasons we don't need to go into, it became a long-term process, but immediately after Her Honour's judgment and the rescission of the opt-out order we had an empty class. The class was to be populated as potential class members opted into it. Now, for limitation purposes and in terms of the provisions of section 4 of the Act, obviously, the action of those persons, in my submission, was then brought when they became members of a represented class by opting in to what was initially an empty class. Now, the rest of that argument is the same argument that's already been advanced. I don't want to repeat it but just to make that separate point about the effect of the orders which leads to the consequences.

**McGRATH J:**
Was the action brought earlier, before the modification of the order but somehow ceased then to exist?

**MR COOPER:**
If we take, your Honour, the example of one other shareholder, not Mr Houghton but somebody else.

**ANDERSON J:**
Yes.

**MR COOPER:**
Then yes he had brought an action because he was included in the class but the order which had that effect, the opt-in order was rescinded and so yes it's equivalent to him bringing a claim, his own claim, it being struck out or discontinued or in any other way ceasing and then he has that option to start again but rescinding the order which gave him the status of a represented person is the same effect as a striking out or a discontinuance, in my submission.

**ANDERSON J:**
The persons who may be represented, it's not a matter of the semantics of the detail of a particular Court order because opting-in and opting-out is not a common feature,

it's not a benefit that may be represented. The common features that are relevant are the ones in 1, under the three bullet points and although the remaining directions purport to define a class, they're actually only identifying the relevant members of the class.

**MR COOPER:**
It's not, I don't want to appear semantic about it, it's not, the definition of the class is necessarily determined by the terms of the representative order.

**ANDERSON J:**
Not necessarily. The relevant class is really referable to 2.24 or 4.24.

**MR COOPER:**
But 4.24 Sir has the two limbs. The first is those who consent and so nobody consents until they opt-in. The second limb is otherwise by order of the Court and when one gets to that limb one has to look to see just what the order of the Court was. In this case the order of the Court was those persons who opt-in. In a way those two limbs are very similar and almost merge here because Her Honour's judgment effectively restricted the Court ordered category to those who give consent in a Court ordered form of notifying the Court of opting-in.

**ANDERSON J:**
It's an approach that reduces the social and consumer value of really class type actions because they've often brought for people, large numbers of people who have claims that are not worth pursuing individually.

**MR COOPER:**
And there may well be cases Sir where it's just not possible to identify or to give notice to people. In that instance the position can be addressed by crafting the definition of the class, the representative order, in sufficiently broad terms that caters to the particular factual circumstances and difficulties that a particular group of claimants may have. In this case it was done in quite a precise and narrow way, which is to identify simply those people who take the step of opting-in by a given date.

**ELIAS CJ:**

But to pick up what Justice Arnold was raising earlier, what's the point of doing that because the Judge could as easily have said no representation order if those consent can do this as of right. They can consent Mr Houghton bringing the proceedings. This was a case where the Judge was of the view, probably because of the concern with protection, to mention that it was appropriate to give directions under the second limb of the rule.

**MR COOPER:**

Yes but the direction given was one which required consent by opting-in, in order to join the class, to use that term, the represented group, so –

**ELIAS CJ:**

Well I wonder, I wonder really whether the class wasn't set but of course no one was to be forced to be party to – well to be part of the proceedings and so there was the mechanism provided because the class doesn't alter in the Judge's terms.

**MR COOPER:**

But what is meant by class, your Honour? There's a group of people who potentially qualify to become represented persons. The effect of the order though is to define those who do become represented persons. There's a much, necessarily a wider class of persons who –

**ELIAS CJ:**

Well I just wonder really whether it isn't effectively an opt-out mechanism. You have to opt-in to opt-out, I mean to not opt-out.

**ARNOLD J:**

It's also – I mean it all depends, the opting-in can still refer back to the date of institution of the proceedings because you're saying, "I am consenting to being part of these represented proceedings." Now it seems to me it's not necessarily the result that you're only consenting as from the date on which you gave your consent. You're saying this representative proceeding is afoot, I am consenting to being a party to it, to be part of it. So is there any illogicality in saying that refers back to the date of institution of the proceedings?

**MR COOPER:**

I accept that such an order could be made and that it wouldn't be an illogical order, to say that represented persons are those who, all shareholders who purchased shares in the IPO and all of those people shall remain represented persons provided that they opt-in by a certain date. That would be a possible formulation. The point is, my point is to look at the order that was in fact made and to see what class that constitutes and that order is one which rescinds the opt-out, so that having been made there is no –

**ARNOLD J:**

Well you've got to look at what replaces it. What replaced it was paragraph B of 224, given a date to advise the Court whether they consent to being part of the proceeding. Well what is the proceeding? It is the proceeding instituted on a particular date. So if they consent to being part of it, why does that consent not refer back to the day on which it was instituted as a representative claim? There's nothing in the order of preventing that is there?

**MR COOPER:**

There's in the order which expressly prevents that. But there's nothing – the language of the order is to say identification of the persons represented now depends on opting-in and so up until the time that somebody opts-in, their claim is not being brought by the plaintiff.

**ARNOLD J:**

Well I think you're using opting-in as a shorthand. What the Judge actually said is you've got to this date to advise you, as I have said, whether you consent to being part of the proceeding.

**MR COOPER:**

I'm reading the consent in C to be the –

**GLAZEBROOK J:**

Well isn't there just being a direction under 4.24B in relation to a representative proceeding that's already on foot? Because persons having the same – somebody may sue on behalf of those, either with the consent of the same persons, well that's effectively an opt-in procedure or as directed by the Court made on an application by a party or intending party to the proceeding. So you've had the application, it's made

a representative order, that was not rescinded. The only thing that was rescinded was one of the directions made as directed and then there's a new direction made on an already instituted proceeding. There's nothing there that says you can't be – that you're not somebody who's being sued on behalf of until you opt-in.

**MR COOPER:**
What's rescinded though is – the order itself is rescinded.

**GLAZEBROOK J:**
Well the order isn't rescinded. The only thing is rescinded is one part of the directions that were made by the Judge in respect of that.

**MR COOPER:**
Yes.

**GLAZEBROOK J:**
Because the representative proceeding, everybody agrees, remained on foot, after Justice French's amendment.

**MR COOPER:**
Yes your Honour but the order, the representative order was an opt-out order to separate the – there wasn't a representative order which had a –

**GLAZEBROOK J:**
But the representative order just says one or more persons may sue on behalf or for the benefit of all persons with the same interest. So if you have the same interest, isn't that all that you're doing? I mean go back to the rule. Nothing to do with – and then the question is if you have something that's on behalf of that, does that mean the proceedings have been brought, and that doesn't matter on technicalities in terms of what's directed or not directed by the Court, even on the terms of the rule.

**MR COOPER:**
The relevant part of the rule is limb B, which refers to the particular order made.

**GLAZEBROOK J:**
They may sue as directed by the Court, so they did as directed by Judge Christiansen and then that was changed. The direction was changed by

Justice French but not the representative order or the permission to sue on behalf of the persons.

**MR COOPER:**

With respect, your Honour, that doesn't give any meaning to the use of rescission in the judgment, which is to –

**GLAZEBROOK J:**

Because there's nothing about rescission in 4.24 unless it said the representative order is cancelled and you must, Mr Houghton, put in another proceeding, then that might have rescinded the order.

**MR COOPER:**

There was initially an order under 4.24B which constituted a group of represented persons, namely everyone. That was rescinded and substituted with a different order. That's the distinction.

**GLAZEBROOK J:**

But no different proceedings?

**MR COOPER:**

I accept that, your Honour.

**ANDERSON J:**

This is why I mentioned earlier that it shouldn't turn on the semantics of the order but on the words of the Act. I think it would defeat the underlying policy of the Act, rule 1.1 if all the people he thought they were in because they didn't opt out said, "Well, I better bring my own proceedings because in four years and one week it might get before the Supreme Court and they might turn it around."

**ELIAS CJ:**

I think on that note we'll move on otherwise we'll be here for another year. Thank you, Mr Cooper. That was helpful.

**McGRATH J:**

No one is representing the fourth respondent, are they? I'm not suggesting anyone should be, but they've elected not to appear, is that right? Yes, thank you.

**MR McLELLAN:**

I don't seek to be heard.

**ELIAS CJ:**

Thank you, Mr McLellan. Yes, Mr Forbes. We will take an adjournment at 3.30 and then sit on until five.

**MR FORBES QC:**

Thank you, Sir – Ma'am. My intention, your Honours, would be to just refer to a number of hopefully reasonably succinct points following the discussion rather than to, in any way, recap the argument other than to say that the three principal grounds of the opposition to the appeal that the Court of Appeal was right, that in effect to allow the appellants' argument to succeed would negate the whole fundamental purpose of a representative proceeding under rule 78, as it was, when the order was made or 4.24 now. Secondly, it is the rules of Court that determine when an action is brought or an application is made. It's nothing to do with the Limitation Act at all. That stipulates the time period within which a proceeding must be brought or an application must be made if we're talking about the Fair Trading Act. Thirdly, there's no limitation policy that's contravened by that consequence because when this proceeding was filed the defendants knew the total aggregate of what the claim was, which was the amount paid in total, $250 million for the shares. They knew the generic group, that is, all the shareholders who purchased on the IPO. They knew what the grounds of the claim were. It's irrelevant that those grounds have been amended since. They knew at that stage there was a Fair Trading Act claim and a Securities Act claim. From that point on, either opt out or opt in if that was a condition of the representation order. It could only serve to diminish the pool of those who were going to actually seek relief.

**ELIAS CJ:**

Mr Forbes, when was the amended statement of claim that did extend the claim to a representative claim that was presumably following the ...

**MR FORBES QC:**

The original statement of claim was expressed to be –

**ELIAS CJ:**

Representative, was it?

**MR FORBES QC:**

Yes, for and on behalf of.

**McGRATH J:**

When was that filed?

**MR FORBES QC:**

26th of February 2008, Sir. If should add, if the Court would like to have the current statement of claim as filed –

**ELIAS CJ:**

No, thank you, I don't think we need it at all.

**ANDERSON J:**

The statement of claim was filed simultaneously with the ex parte interlocutory application.

**MR FORBES QC:**

That's correct. The order was made the same day, Sir, apparently.

I won't necessarily labour it, your Honours, but my submissions at 15 have a footnote as to how this issue has arisen, and I make the point that there's not been an application at this stage to strike out the statement of claim on limitation grounds. It's footnote 8, your Honour. No application to strike out or, indeed, a specific application to vary the representation order. The present limitation argument was first raised by Credit Suisse, the present appellant, in submissions in the interlocutory hearings before French J in November, December 2010 which resulted in Her Honour's judgment of the 8th of June 2011 which is the High Court judgment as the subject of this current appeal having been, of course, to the Court of Appeal. But then the argument was confined and the notice of opposition that we refer to previously, your Honour, of Credit Suisse of the 1st of October 2010 is only concerned with the second argument. It raised that there were represented parties who had opted in who were time barred because they had opted in after the expiry of the limitation period. Bifurcated argument separate proceedings was not argued and consequently, of course, is not referred to in French's J decision. That argument was advanced in the Court of Appeal, being the judgment which this current appeal is from. It was

expanded from not only were the claims barred because opt-in had occurred in many instances after the limitation period had expired, on a more fundamental level all of the claims except that of the plaintiff were barred because they were out of time. What was required was this argument that separate proceedings were required to be filed within the limitation period in order to protect the represented parties against the expiration of time. So it's had an unusual course, and I note in the same footnote there were interlocutory proceedings in 2008, 2009, and in 2010 were this issue, the bifurcation argument, was not raised or relied on.

**McGRATH J:**
I think you're saying that when you refer to footnote 8 that the limitation argument in the particular form was raised before the statement of defence raised limitation.

**MR FORBES QC:**
I'm not sure about that, Sir, I'm sorry. But certainly the argument that you had to opt in before the expiration of the limitation period was relied on and is in the notice of opposition but not the bifurcation argument which was quite novel. No discussion of prudential or anything of that nature until we got to the Court of Appeal.

Justice Glazebrook raised what I respectfully submit were pertinent points to the issue of reliance. Again, I won't go through them all but at paragraph 46 of my submissions the varying modes of reliance, including all of those that Justice Glazebrook raised, are discussed there. Indeed, they are pleaded in the current amendment statement of claim, the third amended statement of claim. The fundamental one is exactly what Justice Glazebrook was raising, which is that the Securities Act is concerned with consumer protection and the fact of the prospectus is enough. It will not be necessary for any plaintiff or for the plaintiff or any claimant to prove that I relied on specific parts of the prospectus. But there's a range, and some of them were signalled in the Court of Appeal's first decision there might be induced reliance, there might be inferred reliance, and indeed I think there's a good argument, as is pleaded specifically in the negligence claim, that there was a voluntary assumption of responsibility by those who issued the prospectus, the directors and the promoter, and that includes all the defendants on the plaintiffs' case whereby that was sufficient for those who then purchased on the basis of the prospectus. The Court of Appeal in its first judgment pointed out that a prospectus doesn't have to accompany an investment statement and it's difficult to see how you would necessarily have to be relying on a prospectus that wasn't required to be

supplied to investors unless specifically sought. There's another issue, as well. What's the issue as to reliance when half the allegations pleaded against the defendant are omissions, material omissions. Clearly enough, a plaintiff or an investor cannot rely on omissions other than to say in the witness box, "I would not have invested had I known of those admissions," and the Court has got to say yes or no we do or don't accept that. We can't rely on something that's not there. So that's the case, and as I said, it's in 46. All those issues will be before the Court when it comes to trial.

At 25 of my submissions, your Honour, I make the point that Credit Suisse – I put it this way, submissions gave scant recognition to what the Court of Appeal said in its first judgment in December 2009 that the Courts must fill the void under their inherent power and both determine the availability of the class action, which in that context were treating it the same as a representative action, that is the same interest requirement and the mechanics of class action practice. That's at paragraph 41 of the Court of Appeal's first judgment in December 2009. The Judge may be assisted by the experience in other jurisdictions, in particular, Australia. One consideration relevant to how judicial making powers should be employed should be employed is the practical administration of justice.

The position of the plaintiff, your Honours, is that no defence available to the defendants will be defeated by the representation order if a defendant can establish that a plaintiff is barred by time from bringing an individual claim prior to the date on which this proceeding was filed, that defence will be available, as indeed will any other defence in respect of a particular claim. What the plaintiff maintains firmly, however, obviously enough and before your Honours, is that the claim was brought when the proceeding was filed. That equates with the wording of rule 78 and no material difference, 4.24 and it equates with section 4 of the Limitation Act. The claim is brought when it's filed. It's not brought when a party opts in. It's already been brought as a representative proceeding. That's when time stops. When that proceeding is filed, the defendants are aware, as I said, of the nature of the claim, the extent of it, and the potential range or generic range of the claimants. Thereafter, it can only diminish.

**McGRATH J:**
It's brought when the proceedings are filed in terms of 4.24 because that's when they're sued by all plaintiffs, all claimants.

**MR FORBES QC:**

Exactly, your Honour. Rule 78 actually uses the word "sued". Now, how you can be sued when you're opting in I just simply – it can't be right. You're sued when you file the proceeding. Taking the point that the Court rules determine when a proceeding is brought, can I just remind you, it's an authority that helpfully was referred to by my friend in his bundle, *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 (NSWCA), tab 16 of the appellant's bundle volume 1, and it's a decision of Chief Justice Gleeson, as he then was, in the New South Wales Court of Appeal, and I'm referring to page 17 of the report at mid way between A and B. "It is to be borne in mind that in New South Wales as in England, it is the rules of Court which determine when an action is begun for the purposes of the Limitation Act. It is not the Act itself." I refer in my submissions to the example of filing an appeal both in the Court of Appeal and in this Court that the rules require for the appeal to be brought, not only that it's filed in the registry office but is also served, so that conditions what brings an appeal. It's an analogous example of how the rules determine whether a step in terms of filing has been complied with. My next point is this. I'm a little disparate in dealing with them but that's the way I noted them as they came up.

**ELIAS CJ:**

This judgment deals only with that point, does it?

**MR FORBES QC:**

That's all I'm relying on it, for.

**McGRATH J:**

It's cited elsewhere, though, isn't it? I think it's referred to by Justice Mason in *Fostif*.

**MR FORBES QC:**

Exactly, your Honour, and indeed by the presiding Senior Judge McPherson in the *Cameron* case that it's what the rules say that determines what's brought.

**ELIAS CJ:**

Do we have a rule that – I can't remember – determines when proceedings are brought?

**MR FORBES QC:**

Yes, we do, your Honour. The Limitation Act itself, section 2 provides –

**ELIAS CJ:**

No, I'm not talking about that. I'm talking about proceedings generally because it seems to me that that ties in, too. The proceedings have been brought.

**GLAZEBROOK J:**

There is probably a filing service requirement, I suspect. He files a notice to be served so he files a files a notice under rule 4.18.

**MCGRATH J:**

What does that say?

**GLAZEBROOK J:**

I don't know I'll find out – sorry –

**ELIAS CJ:**

Commencement of proceedings is part 5.

**MR FORBES QC:**

I'm not aware of it being any more than the document being accepted across the counter, so to speak and there's provision for what happens if the Court is closed on a particular day and can't do so.

**ELIAS CJ:**

Proceedings commence by filing statement of claim, that sort of seems to be as good as it gets.

**MR FORBES QC:**

Yes, filing meaning pay your money and the document's accepted.

**ELIAS CJ:**

Yes.

**MR FORBES QC:**

My next point, as I said, slight disparate, is that the appellant's argument, Credit Suisse, is at least, in my respectful submission, difficult to follow to this extent, apart from others, is the running of time, does it stop in respect of the common issues

giving rise to *res judicata* or does it still continue to tick or is it only in respect of the individual issues that time continues to run? Because if it runs in respect of the common issues giving rise to *res judicata*, the proposition of the appellants becomes frankly even more absurd. There is simply no advantage in the representative procedure because each individual claimant is going to have to file separate proceedings or join the proceeding on all matters, including the common issues, as well as any individual claims for relief, if that's what the argument is and what happens, for instance if after the limitation period has expired, the Court decides at trial that what was previously believed to be a common issue wasn't in fact properly so described. Where does that leave the claimants? The whole thing is an unnecessary gloss on the rule and the critical issue, with respect is what Justice Arnold said, we are going to have to go through this process anyway. It's just a question of whether it's done under the umbrella of the representative procedure where the injustice of keeping these three and a half thousand investors out of Court form pursuing their claim is allowed to be pursued or are we to exclude them because of an unstated rule that they're required to file separate proceedings.

Now we know that Justice Vinelott's decision in *Prudential* has been criticised, it's implicitly not followed in *Fostif* or indeed in *Cameron* in Australian, criticised by Justice McGechan in *R J Flowers* and indeed Justic McGechan, and I make this point in 29 and 30 of my submissions, that he specifically, His Honour specifically addressed what would happen if – he raises the issue that the representative proceeding would still be suitable, notwithstanding that there could be considerable difficulty in each individual member of a class establishing his individual damage. He was making that point in relation to what Justice Dillon has said in the *EMI Records* and *Riley* case that Justice Dillon had said there was no such requirement as to the need to file separate proceedings because Justice Dillon had said it would be a wholly unnecessary complication to have to file separate proceedings. Justice McGechan is agreeing with that and Justice McGechan said, and I refer to this at 29 of my submissions, page 271 of his judgment, "If injustice can be avoided the rule, that is rule 78, can and should be applied to serve the interests of expedition and economy." And I go on then referring to what Justice McGechan said at 273 that there could be differing claims by the contractors in that case who are growers and that some of them have made oral contracts which could differ materially from the others, "If such facts emerges it could well be that the continuation by representative proceeding in the present form may no longer be entirely appropriate. The proceeding may need to be reshaped as a number of separate representative

proceeding or by the addition of some growers as individual plaintiffs." So he's not saying "separate proceedings", he's saying, "We have to fashion it to meet the case." And Professor Mulheron, in her academic commentary on class actions talks about the ability to form sub-classes and Justice French in her judgment in August last year gave leave to make application to form sub-classes.

The Australian cases, and I refer to this in my submissions, are quite flexible as to a plaintiff representing a party, even though that plaintiff hasn't suffered the same damage, can call somebody who has suffered that damage in order to establish proof of that particular loss and there is no need to deny –

**ELIAS CJ:**
I was just wondering –

**MR FORBES QC:**
I won't be long after this your Honour, perhaps quarter of an hour.

**ELIAS CJ:**
Quarter of an hour, yes all right I think we'll take the adjournment now. We'll take it for 15 minutes, if that suits.

**MR FORBES QC:**
Yes thank you.

**ELIAS CJ:**
Did you want to complete anything?

**MR FORBES QC:**
No, that's fine.

**COURT ADJOURNS: 3.36 PM**

**COURT RESUMES: 3.52 PM**

**MR FORBES QC:**
Thank your Honour. Your Honour Chief Justice, correct, of course you're correct, that's the rule 5.25, a proceeding is brought when it's filed, so it is rule 5.25.

**ELIAS CJ:**

And I see there is authority cited in McGechan, *CIR v Registrar of Companies 1994*, which is probably on that point, thank you.

**MR FORBES QC:**

My next point is to take up -

**MCGRATH J:**

So you're about to leave *Flowers?*

**MR FORBES QC:**

Well the criticisms that I –

**MCGRATH J:**

Well I just noted that in *Flowers* Justice McGechan invokes rule 4 of the High Court Rules, require interpretation to secure just, speedy and inexpensive determination of the proceeding.

**MR FORBES QC:**

Yes and indeed that's specifically referred to in the first Court of Appeal judgment as an underlying feature of the way that the mechanics of the class action should be –

**ELIAS CJ:**

And I think the second Court of Appeal judgment too.

**MR FORBES QC:**

Yes indeed your Honour.

**GLAZEBROOK J:**

And while we're on the rules, 5.35 where it says what the statement of claim has to contain when a party sues in a representative capacity.

**MR FORBES QC:**

In 5.35 your Honour?

**GLAZEBROOK J:**

Yes which might have some bearing.

**MR FORBES QC:**

My next point was to just again hopefully briefly take up Justice Glazebrook's point that there's room for the view that the plaintiffs have, if not been misled, certainly lulled into a false sense of security in this case. When you look at that –

**ELIAS CJ:**

I think, I'm sorry, I think that may be a slightly different thing, the representative capacity. That's whether you're sued as a trustee or a member of a firm or something like that.

**GLAZEBROOK J:**

Oh it might too, no you're right.

**MR FORBES QC:**

Okay.

**ELIAS CJ:**

It's the older use of the word "representative".

**ARNOLD J:**

It has got a cross-reference to rule 4.24 though.

**ELIAS CJ:**

Oh does it? That's odd, oh yes. Oh well.

**GLAZEBROOK J:**

Well yes so maybe –

**MR FORBES QC:**

Justice Glazebrook raised the issue that if limitation, at least in terms of the appellant's second principle argument here, based on opt-in and limitation, was only being raised in late 2009, with the limitation period looming up midway through 2010. It was probably going to be difficult to ever be met. Bear in mind as well that in the first Court of Appeal judgment which is at tab 10 of the case on appeal, the Court at 79 imposed a condition that I'd made the submission, at least in the Court of Appeal, I couldn't find any precedent for in any other jurisdiction that there had to be - the Court had to be satisfied that there is an arguable case for rights that warrant

vindicating and that was indeed what the application to lift the stay was essentially about that was filed and determined by Justice French in late 2010. The defendants arguing that there was not an arguable case for rights that warranted vindicating but it was a threshold merits assessment that had to be fulfilled by the plaintiff before the plaintiff was allowed to proceed and as I said, even in jurisdictions that have class action regimes, statutory or representatives rules based regimes, I couldn't find any precedent for that being a requirement to bring a claim and that is included, Professor Mulheron, in my recollection has made the same comment in relation to nowhere in the United States either.

**GLAZEBROOK J:**
Was that more in relation to litigating funding?

**MR FORBES QC:**
You mean the Court of Appeal's requirement?

**GLAZEBROOK J:**
Well yes because most - I don't know whether it was explicitly there but it was against a background of litigation funding with at that stage quite stringent requirements which of course we didn't deal with in *Waterhouse* specifically but it can't necessarily be taken that those were requirements of a representative capacity, as against a litigation funding agreement.

**MR FORBES QC:**
Well it was really, the Court of Appeal – you mean what the Court of Appeal said your Honour?

**GLAZEBROOK J:**
Yes.

**MR FORBES QC:**
Yes, well it was saying that the common law of New Zealand should refrain from condemning as tortious or otherwise unlawful maintenance and champerty where the Court is satisfied there is an arguable case for rights that warrant vindicating." So to overcome the –

**ELIAS CJ:**

It was really the litigation funding issue that brought that comment on rather than the representative capacity of it.

**MR FORBES QC:**

All I'm trying to say is we had to go through the process of establishing an arguable case, we had arguments about what an arguable case meant and the whole while there is this lurking argument that we are going to confront sometime later, after the limitation period has expired, that in fact you are all out, except the plaintiff, because you have to file separate proceedings and I understood my friend, Mr Cooper, to say that the effect of Justice French's order, as recorded in paragraph 224 of her judgment of 7 October 2008, was effectively to provide for a discontinuance of the representative order as it had been made and substitution by a new order requiring opt-in and that there were no represented claimants at that stage. Now that can't have been what Justice French intended because if you go to Her Honour's judgment of the 7th of October at paragraph 20, she records –

**ELIAS CJ:**

Is that the representative order judgment?

**MR FORBES QC:**

Yes indeed. So it's at 20 your Honour, page 180, it's at tab 10 of case on appeal, volume 2. Her Honour records, "At the date of filing the situation regarding shareholder consent and the funding of the claim was as follows, there were approximately 800 shareholders who had signed a written authority authorising Wakefields to act on their behalf and consenting to the proceeding being commenced. Many of the 800 are said to have requested that funding be provided them on a success basis." And that they were asked to make an initial contribution of $600 each and that there had been a funding offer by a litigation company called Joint Action Funding Limited, which is Mr Gavigan's company or incorporated by him. But the point was there were already 800 who had consented. The only thing they hadn't done was sign the form that Justice French said would be required to be approved as the opt-in form but in substance it was clear that they were agreeing to be part of the proceeding.

**ELIAS CJ:**

Sorry where do we find that? I just didn't take a note of it.

**GLAZEBROOK J:**

Paragraph 20, the representative order judgment.

**MR FORBES QC:**

It's judgment of French J, 7th of October 2008, tab 10 of volume 2.

**ELIAS CJ:**

Yes. No I don't need to look at just –

**MR FORBES QC:**

- in paragraph 20 your Honour.

**ELIAS CJ:**

Thank you.

**MR FORBES QC:**

So there's already 800 there.

**ANDERSON J:**

They wouldn't have to opt-in or opt-out.

**MR FORBES QC:**

No, no.

**ANDERSON J:**

They come under the first limb of 4.24.

**MR FORBES QC:**

And as your Honour said, Justice Anderson, effective Credit Suisse is maintaining a collateral attack on the representation order but it's done and dusted. They can't go behind that and opting-in is not bringing a proceeding in terms of either Limitation Act or the High Court Rules. Any my submissions at 26 to 31 deal with the range of other criticisms of the decision in *Prudential* but including what I said Justice McGechan's analysis in *R J Flowers* and I won't go into them any further than that.

Another anomaly from the appellant's case, in my submission, is that my friend accepts that there appear to be at least some claims or categories of claims for

damages which can properly be brought as a representative proceeding. Global assessment of damages or where the individuals don't claim any right to a claim in themselves because it's going to be paid to an industry body or where the calculation of the claim for damages is quite straightforward. Now why should those cases be allowed to be brought as a representative proceeding but not those where the assessment of a claim for compensation or damages might be more complicated. But having said that even, in the present case, it could hardly be more straightforward. It's going to be something although the plaintiff will seek to have a Court appointed expert or accountant assessed. What did you pay for your shares? We know that, the issue price of $1.70. Have you sold them? No. Well it's the full amount restitution reclaim and indeed the relief sought in all but the negligence claim is for an order for the repayment of their subscriptions plus damages for their unpaid dividend. So it is restitutionary in terms of the form of relief that's sought but there's no logic or commonsense behind saying that you can file a representative proceeding without the need for separate proceedings for a claim for damages in some categories but outside of those, if it becomes more difficult, you can't do so and that again begs the question, well what happens if later on the Court takes the view that you are not within the prescribed category on the appellant's case, where damages can be claimed and you've got to file separate proceedings but by that stage the limitation period has already expired.

I'll just briefly mention that Justice French's judgment of the 1st of August 2012, the split trial judgment, when you read it, it's clear that her judgment in no way is suggesting that separate proceedings should be filed. It was a direction that there be a two-stage hearing of the representative claim. All Her Honour was saying was that it could be subject to the defendant's maintaining – whether or not the defendants maintain that fresh proceedings are required because that had been signalled in front of her as a possibility and she was saying, "Well you can make that application but otherwise it's a two-stage proceeding within the representative order." My next – I'm getting near the end of my list so to speak – point is that it's interesting that *Fostif* is an opting case and think that was something that Justice McGrath may have raised. It's an opting case and when the proceeding was filed the represented parties were not named but Justice – well President Mason nevertheless was of the view that time stopped from the time the proceeding was filed. It didn't matter that the represented parties were unnamed and it didn't matter that there was an opt-in procedure.

On appeal the limitation issue is not addressed by the Supreme Court, sorry the High Court of Australia. It's all to do with whether the proceeding was a same interest, qualified for the same interest requirement and they came to a view, by a majority with reasonably powerful descents, that it did not but the limitation issue and I note that in my submissions, was not the subject of comment in the body.

**ELIAS CJ:**

Well it was also though, it did consider when the proceedings were brought it was said that the representation claim had not been brought because there were no parties represented.

**MR FORBES QC:**

No other parties mentioned, no.

**ELIAS CJ:**

Yes, so that's a slightly different point.

**MR FORBES QC:**

Yes but the actual substance of the judgment of President Mason as to the consequence having approved it as a – or taking the view that he agreed it was a representative, proper representative proceeding, which the High Court disagreed with in the event, having approved it, it didn't matter. For limitation purposes time stopped and notwithstanding, and he doesn't say this expressly but it is, in fact, an opt-in case, not an opt-out case, it's an opt-in case and the parties, well no the parties weren't named, that was one of the deficiencies that the High Court pointed to, agreed. But there was nobody else directly represented but he was still going to approve it because there were others apparently that were in the same position.

**ELIAS CJ:**

Yes I think the majority in the High Court took a slightly different view of it.

**MR FORBES QC:**

So my friend, Mr Olney said that represented parties, prior to opting-in, were strangers to the proceeding. Well I submit that that cannot be correct. They are part of the proceeding, they come within it and all that's required is that they comply with a post-order requirement or direction that they had to signify their agreement to take

the benefit of the proceeding and be bound by it, by opting in. And as I have said, all that could do would be to reduce the class. It can't increase it.

So in my submissions at 77 I say, "Under the Associate Judge's order the represented parties or persons represented in the proceeding by the named plaintiffs, unless they opted to opt-out. Under the order of French J they were persons who were represented, their obligation to be bound by and to receive the benefit from it be subject to their electing to opt-in, in terms of the order made by French J of 224 of her judgment." And that, as Justice Anderson said, identified those that wished to have the benefit of the judgment or seek to have the benefit of any judgment and to be bound by it.

So the bringing of the proceeding was separate and indeed irrelevant to the issue of opting-in. That was a condition of the representative order that had already been made and the other consequence of Credit Suisse's argument is that there is an undesirable difference between opt-out and opt-in because with opt-out you are definitely in from the time the order is made, it's just a question of whether you elect to opt-out and no longer take the benefit of the order that's been made in your favour. On opt-in, on the appellant's argument, you are not there at all until you opt-in, including for limitation purposes.

And my final point, in reply to my friend Mr Cooper, was with respect French J's paragraph 224 in her judgment of the 7th of October cannot be interpreted to say that the – well be reworded to mean that the plaintiff is to represent all shareholders within the class referred to in paragraph 2 who elect to opt-in. That isn't what Justice French's paragraph 224(b) says. The opt-in is not part of the proceeding, as I said, in my final submission, not part of the proceeding in the terms of rule 78, it's not what is being sued for and nor is it part of bringing an action or making an application in terms of the Limitation Act or section 43 of the Fair Trading Act. It's a condition of taking the benefit of the judgment and agreeing to be bound by it. So unless your Honours have anything further to raise, that concludes my –

**ELIAS CJ:**

Thank you Mr Forbes.

**MR FORBES QC:**

My junior has just pointed out, Ms Mills, that in the statement of claim now filed it's described as, "Mr Houghton has issued this proceeding in a representative capacity pursuant to the High Court Rules 4.24 for shareholders in Feltex who purchased shares under the public offer and the prospectus and who claims to have suffered loss on their investment." But it was expressed the same way in the original statement of claim. My junior suggests that Justice Glazebrook's mention of 5.45 may be correct but I don't think anything turns on it. We know when the proceeding was filed and as long as there's a reference to it being brought in a representative capacity then the only other condition is going to be that the Court agrees if there's no consent of the other parties involved who are purporting to be represented or are going to be.

**GLAZEBROOK J:**

Well, it does assume, perhaps, that if you say what capacity you're suing in then you also say in your statement of claim what you're actually claiming and that that is what the representative order is designed to deal with. So if anything, it backs up your argument.

**MR FORBES QC:**

You would have to signal that I'm bringing a representative capacity, otherwise it won't comply. If your Honour pleases.

**ELIAS CJ:**

Thank you. Yes, Mr Olney.

**MR OLNEY:**

Two points, if I may. My learned friend referred to *Flowers* at tab 27 of volume 2 and characterised it as something of a departure from *Prudential*, something of a brave new world where we can take a more expansive view of resolving individual issues and damages and represented actions. In my submission, that's a misreading of the judgment. The relevant parts is really the discussion of *Prudential* and *EMI* on pages 269 and 270. In the middle of 270, line 21, Justice Vinelott in *Prudential Insurance*, "While admitting the possibility of representative actions and damages, even if the extreme case of separate causes of action and tort, took the view it generally would be necessary for represented members to follow up a represented action by subsequent separate actions to establish and quantify individual damages, and then

at the bottom of that page bringing all that has gone before together, the position prevailing in three points. Firstly, members of the class to be represented were required to have a common interest in the proceedings, and in particular must all have been able to claim as plaintiffs in separate actions in respect of the events concerned with no defences available applicable to some only of that class. That's no defences to be precluded in respect of the justice principle that we saw. The second point, the represented action must be, have been beneficial to all of that class and thirdly a representative action for damages is possible if both the above requirements were met. The action covered the whole, or virtually the whole, of the class of potential plaintiffs and the consent of all represented members to payment of global damages to the representative plaintiff was given. Mere difficulty on the part of a class member in establishing individual loss was not a barrier, despite the common interest doctrine, provided such consent was established and global loss of all representative members could be established.

In my submission, what His Honour is saying is if there's an effective mechanism for avoiding the need to address those individual issues.

**GLAZEBROOK J:**
I actually read him quite the opposite because he's saying if you've got a global loss of all representative members, which he clearly had here, you don't actually have a fight between plaintiffs as to who gets what because you've got a global amount and there's no – nobody says, "Well, you can't have your share price because I get mine," so there's no contest between plaintiffs.

**MR OLNEY:**
Yes.

**GLAZEBROOK J:**
And you can have the global loss of all representative plaintiffs established and I read it as saying, well, if you have difficulty in the margins of establishing individual loss, well, that can still be part of the global representative actions.

**MR OLNEY:**
What has happened here is that they knew the total amount of kiwifruit that had spoiled in the coolstore and they knew how much each individual grower had put into the coolstore. What they didn't know was how much of the fruit that spoiled was

readily attributable to each individual. So there was an individual issue there that would have arisen by for their agreement.

**McGRATH J:**
Yes. It was a case of a total sum clearly being due to all and that, I think, is the concept that Mr Justice Dillon was referring to on the previous page.

**MR OLNEY:**
Yes.

**GLAZEBROOK J:**
But in that case there actually was a difficulty of deciding who was owed what then, and yet the representative action was still thought to be available on those facts.

**MR OLNEY:**
Again, because all of the individual copyright holders said, "We are content that all the damages go to our industry representative."

**GLAZEBROOK J:**
No, no, it's nothing to do with *EMI*. I'm talking about *Flowers*. Why should it matter that they're content for it to go somewhere rather than it goes to them?

**MR OLNEY:**
Well, otherwise the establishment of the damages to them on each of their causes of action would have required the Court to get into their individual issues.

**McGRATH J:**
It's just a question of divvying up the pie. The pie was settled.

**MR OLNEY:**
No, they avoided the need to cut up the pie.

**GLAZEBROOK J:**
But if, in fact, in the *EMI* case you had to show something individually, then the total amount of damages wasn't established and it wouldn't matter a fig who it's going to. So what has to arise out of the finding of liability on the *EMI* and on this one is just the fact of liability of the amount for total amount, doesn't it? Why does it matter that

it's going to someone else, because if in fact it could be a lesser amount because you have some plaintiffs whose fruit wasn't spoiled in some way then ...

**MR OLNEY:**
Because each grower has a separate cause of action for damages in varying amounts and the plaintiff as representative by proving his own claim won't establish the damages owing to them.

**GLAZEBROOK J:**
What I'm really asking you is why your exception is an exception, because you're still going to have exactly that issue, aren't you, whether the damages go to someone else or whether they go to the individual plaintiffs. If there is a difference, then on your argument, surely you can't have a representative claim.

**MR OLNEY:**
Are you asking about in our case here?

**GLAZEBROOK J:**
Well, you're accepting there's an exception. What I don't understand is why you're accepting there's that exception. It's really the point that Mr Forbes was making. What was the difference?

**MR OLNEY:**
I say the exception proves the rule, and Mr Forbes – his submission is that the case we face here is within the exception because we can prove the total amount of loss and any issues of attributing that to individual shareholders is just maths. But my submission is that that's not the case, because in order to establish – the total loss is just the aggregate of the entitlement to damages of each shareholder and one can't determine the entitlement to damages of each shareholder without addressing individual issues, like causation.

**GLAZEBROOK J:**
What I'm asking you is, why were *Flowers* and *EMI* different?

**MR OLNEY:**
Because in those cases the class members relieved the Court of the obligation to make the individual assessment.

**GLAZEBROOK J:**

But how can you do that if you say they have to prove individual reliance et cetera in those cases? Are you saying they weren't cases where they had to prove something differently? Because you could say the parties here have said, "Oh, well, look, don't worry about it. We're not going to worry about that. We'll just divide it up according to share price."

**MR OLNEY:**

Well, they can't do that because of the reason I just explained.

**GLAZEBROOK J:**

I understand that. But why are *EMI* and the *Flowers* case different?

**MR OLNEY:**

In our case, the total pie is the aggregation of what's owed.

**GLAZEBROOK J:**

Why wasn't it in the other cases?

**MR OLNEY:**

Because the total was the total amount of fruit, which was a known quantity, or in *EMI* the number of offending pirate records, which was a known quantity. That's the key distinction.

**McGRATH J:**

One of the things that caught my eye in *Flowers* is the discussion of Rule 78 at 2.71 and Justice McGechan coming in and looking at the rule in 1987 comprehensively, and saying a liberal approach has to be taken to it and that it has to be applied. The rule should be applied and developed to meet modern requirements. That's at line 40. So that, I think, doesn't help you, if I can put it that way. It is suggesting that this is an area in which, however the rule was read in 1977, was it, in the *Prudential* case, it can be developed within, of course, the scope of its language, with the emphasis being on treating it as a flexible tool of convenience and the administration of justice. We haven't had much about how we should interpret the rule here, but that seems to me to be at least a statement of principle that still has some validity today.

**MR OLNEY:**

Yes. In my submission, the flexible approach in *Prudential* of not strictly applying the same interest test in allowing the representative proceeding to bite just on the common issues. That is an expression of the liberal, flexible approach that His Honour Justice McGechan was endorsing.

**McGRATH J:**

It's a question of how much, I suppose.

**MR OLNEY:**

Yes, it is, and we come up against the hard limit, in my submission, when we get to individual issues. However flexible one wants to be with the representative proceeding, that's the no-go area because the minute the representative tries to prove his individual issue on behalf of everyone else, you do injustice because the others may well not be in the same position.

**McGRATH J:**

Well, I certainly understand there is an area where flexibility has to end. The issue in this case is where and the procedural issue of when the action has been brought, when the claims have been brought, I think would be the way you'd prefer to have that put.

**MR OLNEY:**

My limit is where we strike individual issues.

**ANDERSON J:**

But even 26 years ago, Justice McGechan was envisaging flexibility in how you resolve these different details of people with the same interest in the subject matter. The term "subject matter" needs to be looked at, I suppose.

**GLAZEBROOK J:**

Because in *Flowers*, too, there could well have been slightly different concepts which meant slightly different liabilities so it wasn't a case of actually them being able to say there weren't different defences because different defences were raised.

**MR OLNEY:**

This is the need to keep the order under review. At 273, at the top of the page, His Honour makes exactly that point and reserves the possibility that if these individual issues come up then it may be necessary to revisit the whole issue, including whether it's appropriate that there be a representative order.

**GLAZEBROOK J:**

Well, only if they differ materially, different degrees of knowledge or have no fruit in the store at the time.

**MR OLNEY:**

That's right. It's just reserving the possibility that it may need to be revisited.

My learned friend referred to the consent of the 800, that there were six or seven or 800 shareholders who at an early stage it signalled their consent. I don't understand that to be a consent about the manner in which the proceeding would be limited or the representative order. As I understand it, it's a consent to be involved. But to that I just point out –

**GLAZEBROOK J:**

What's the difference?

**MR OLNEY:**

Well, I'm making the point that that is a different sort of consent to the consent to global damages that was influential in *Flowers*.

**GLAZEBROOK J:**

You're not saying it wasn't a consent to be involved in the representative proceedings?

**MR OLNEY:**

I don't know what it was. It was –

**GLAZEBROOK J:**

Because my memory of the case was that there were a lot of people who had already signed up even before the first statement of claim was filed. They hadn't signed up in, perhaps, a way that meant they had had – one of the difficulties, actually, now I

recall was that they possibly had signed up without having full information, especially with the litigation funding arrangement, so that that was one of the concerns in the first case. But that's slightly different from saying they hadn't signed up to a representative action.

**MR OLNEY:**
Yes. It was a private arrangement.

My second point, just on *Fostiv* at 3.46 of my written submission, *Fostif* was quite different to – it fits better into the sort of case where damages or relief can be dealt with finally in the one proceeding. If the plaintiff was right that the levy or charge at issue was invalid, then it simply returns to the plaintiff and the represented parties who paid it. That is just a matter of maths. But President Mason specifically distinguished that issue from the individual claims that arise in a prospectus misrepresentation case, given the need for such things as subjective reliance. My friend offers a number of ways in which he may seek to establish individual reliance, whether by inference or otherwise, in my –

**GLAZEBROOK J:**
If he has to.

**MR OLNEY:**
If he has to. In my submission that doesn't change the fact that he has to establish it individually. He has to establish it in respect of each shareholder. Secondly –

**ELIAS CJ:**
But is that more than saying that all within the class have to be qualified to bring a cause of action which is accepted on the authorities? They must all have claims.

**MR OLNEY:**
Yes. It's that in order to succeed on their claims and be entitled to relief they will need to show that they individually make out all the elements if the causes of action, including reliance and causation and perhaps less importantly loss, but reliance and caution specifically, including under the Fair Trading Act. In addition to the statements being objectively misleading, it's necessary that the claimant actually be misled and there be causation in that way and similarly in negligence, and those are unavoidable, in my submission, in this case.

**ANDERSON J:**

It'd be a pretty long witness list, wouldn't it? Three and a half thousand.

**MR OLNEY:**

Yes, Sir. It's a function of there being three and a half thousand claimants. That's the situation we face.

**ELIAS CJ:**

Thank you, Mr Olney. Thank you, counsel, for your submissions. We will reserve our decision in this matter.

**HEARING CONCLUDES**