Anwar et al v. Fairfield Greenwich Limited et al
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CARNIE AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

ESANDA FINANCE CORPORATION LIMITED . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1994, *March* 3.

1995, *Feb.* 23.

Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

Practice — Representative action — Persons having same interest in proceedings — Persons with separate causes of action — Whether same interest — Supreme Court Rules 1970 *(N.S.W.), Pt* 8, *r.* 13(1).

Part 8, r. 13(1) of the Rules of the Supreme Court of New South Wales provided: "Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

Two borrowers sued their lender claiming that various matters had not been disclosed in the contract of loan between them, in contravention of the *Credit Act* 1984 (N.S.W.), and that as a result they were not liable to pay the credit charge for which the contract provided. They claimed to sue on their own behalf and on behalf of all other persons who had entered into loan contracts with the lender that had the same characteristics as their contracts. They claimed a declaration that no represented party was liable to pay any credit charge to the lender.

Held, that the plaintiffs and the represented parties had the same interest in the proceedings and r. 13 authorized their joinder in a representative action.

Per curiam. Persons having separate causes of action in contract or tort may have "the same interest" in proceedings to enforce those causes of action.

R. J. Flowers Ltd. v. Burns, [1987] 1 N.Z.L.R. 260; *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc.*, [1991] 2 Q.B. 206; and *Bank of America National Trust & Savings Association v. Taylor*, [1992] 1 Lloyd's Rep. 484, applied.

Markt & Co. Ltd. v. Knight Steamship Co. Ltd., [1910] 2 K.B. 1021, considered.

Per Brennan and McHugh JJ. The test for determining whether an action is within the scope of r. 13(1) is whether the plaintiff and the

members of the represented class have a community of interest in the determination of some substantial issue of law or fact.

Decision of the Supreme Court of New South Wales (Court of Appeal): *Esanda Finance Corporation Ltd. v. Carnie* (1992), 29 N.S.W.L.R. 382, reversed.

APPEAL from the Supreme Court of New South Wales.

Ainsley George Carnie and Dianne Helen Carnie purchased an International 711 SP Header with the aid of finance provided by Esanda Finance Corporation Ltd. ("Esanda"). The parties entered into a loan contract and a chattel mortgage. The transaction was governed by the *Credit Act* 1984 (N.S.W.) ("the Act"). The parties subsequently entered into a variation agreement under which the borrowers were to make instalment repayments over a longer period than under the initial contract. The borrowers sued Esanda in the Supreme Court of New South Wales claiming that relevant disclosures required by the Act were not made, and that by reason of s. 42 they were not liable to pay Esanda the credit charge provided for in the variation agreement. They claimed declarations and orders flowing from the contravention of the Act. Paragraph 6 of the statement of claim was as follows: "The plaintiffs bring these proceedings on behalf of themselves and all other persons ('the represented debtors') who have: — (a) on or after 28 February 1985 entered into loan or credit sale contracts with the defendant which were regulated contracts within the meaning of that term in the *Credit Act* 1984, (b) each of which contracts has been varied by an agreement ('the variation agreement') which did not discharge the original contract, and (i) wherein the total amount payable pursuant to the variation agreement was calculated by applying the annual percentage rate under the contract to the net balance due at the date of variation and the net balance due included unpaid accrued credit charges, or (ii) wherein the total amount payable pursuant to the variation agreement included default charges which had accrued prior to the date of variation but which were not disclosed as such in the variation agreement, and (c) which variation agreements did not comply with the requirements of ss. 35 and 36 of the *Credit Act* 1984." The plaintiffs claimed a declaration that no represented debtor was required to pay any amount on account of credit charges in relation to contracts answering the description in par. 6. The defendant applied for orders that the proceedings be stayed or dismissed in so far as they purported to relate to a representative action, and that the statement of claim be struck out in so far as it purported to plead a representative action. Master McLaughlin dismissed the application. An appeal by the the defendant to a judge

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was removed into the Court of Appeal by order of Young J. The Court of Appeal (Gleeson C.J. and Meagher J.A., Kirby P. dissenting) allowed the appeal and struck out the statement of claim in so far as it purported to plead a representative action (1). The plaintiffs appealed to the High Court by special leave.

J. Basten Q.C. (with him *N. F. Francey*), for the appellants. There is no requirement in r. 13 that there be a common proprietary interest of some kind between the plaintiff and the represented parties (2). The fact that the claims arise under separate contracts is no bar to the use of a representative action (3). Representative actions have been pursued in relation to claims in tort where each member of the class has a separate cause of action, but there is a common ingredient in the cause of action of each member (4). A representative action is available where persons have claims against a defendant arising under a statute, but there is no other common juristic element to link them (5). The rule should be applied flexibly to the exigencies of modern life as occasion requires (6), and should be treated as a flexible tool of convenience in the administration of justice (7). A representative action should be available whenever numerous persons have bona fide claims against another party and those persons have the same interest in the proceedings. The latter criterion is satisfied whenever there is a significant question common to all members of the class as against the other party. The correct approach is to consider what is common to the class, not what

(1) (1992) 29 N.S.W.L.R. 382.

(2) *Duke of Bedford v. Ellis*, [1901] A.C. 1, at p. 8; *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, at p. 443; *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, [1910] 2 K.B., at p. 1045.

(3) ibid., at pp. 1044, 1026-1027; *R. J. Flowers Ltd. v. Burns*, [1987] 1 N.Z.L.R. 260; *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc.*, [1991] 2 Q.B. 206; *Bank of America National Trust & Savings Association v. Taylor*, [1992] 1 Lloyd's Rep. 484; *Palmco Holdings Bhd. v. Sakapp Commodities (M) Sdn. Bhd.*, [1988] 2 M.L.J. 624; *Vook Keng v. Syarikat Muzwina Development Sdn. Bhd.*, [1990] 3 M.L.J. 61.

(4) *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.*, [1981] 1 Ch. 229, at p. 255; *E.M.I. Records Ltd. v. Riley*, [1981] 1 W.L.R. 923; [1981] 2 All E.R. 838; *Alberta (Pork Producers' Marketing Board) v. Swift Canada Co.* (1981), 129 D.L.R. (3d) 411; (1984) 9 D.L.R. (4th) 71; *Ranjoy Sales & Leasing Ltd. v. Deloitte Haskins & Sells*, [1984] 4 W.W.R. 706; (1984) 16 D.L.R. (4th) 218; *Kripps v. Touche, Ross & Co.* (1986), 7 B.C.L.R. (2d) 105.

(5) *Ellis v. Duke of Bedford*, [1899] 1 Ch. 494, at pp. 514, 517; *Duke of Bedford v. Ellis*, [1901] A.C. 1; *Chastain v. British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443.

(6) *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C., at p. 443.

(7) *John v. Rees*, [1970] Ch. 345, at p. 370.

differentiates the cases of individual members (8). If the court considers an action is inherently unmanageable, or that it lacks necessary powers to ensure control of the proceedings, it can, in the exercise of its residual discretion, decline to allow the action to proceed. [He also referred to Yeazell, "From Group Litigation to Class Action" (9); Yeazell, *From Medieval Group Litigation to the Modern Class Action* (10); *Alden v. Gaglardi* (11); *Shaw v. Real Estate Board of Greater Vancouver* (12); *Farnham v. Fingold* (13); *Northdown Drywall & Construction Ltd. v. Austin Co. Ltd.* (14); *Stephenson v. Air Canada* (15); *Cobbold v. Time Canada Ltd.* (16); *Palmer v. Nova Scotia Forest Industries* (17); *Balsdon v. Good Shepherd Shelter Foundation* (18); *Sparling v. Royal Trust Co. Ltd.* (19); and *Pasco v. Canadian National Railway Co. (Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (20).]

P. G. Hely Q.C. (with him *R. C. McDougall* Q.C. and *P. R. Whitford*), for the respondent. Part 8 aside, the appellants have no locus to seek a determination, whether by way of declaration or otherwise, as to the impact of the *Credit Act* upon contracts to which they are not parties and in which they have no commercial interest (21). The appellants have no interest in the alleged entitlement of others to be discharged from monetary obligations contractually owed to the respondent or in their alleged entitlement to recover moneys from the respondent (22). Rule 13 does not enlarge the principle of representation formerly adopted by the Court of Chancery (23). That principle required all persons materially interested in the subject of a suit to be joined as parties, unless the class was numerous, in which case a class member could sue or be sued as the representative of all. Prior to the *Judicature Act* 1873

(8) *Duke of Bedford v. Ellis*, [1901] A.C., at p. 9.
(9) *U.C.L.A. Law Review*, vol. 27 (1980) 514.
(10) (1987) ch. 6.
(11) (1970) 15 D.L.R. (3d) 380.
(12) (1973) 36 D.L.R. (3d) 250.
(13) [1973] 2 O.R. 132.
(14) (1975) 8 O.R. (2d) 691.
(15) (1979) 103 D.L.R. (3d) 148.
(16) (1976) 13 O.R. (2d) 567; (1980) 28 O.R. (2d) 326.
(17) (1983) 2 D.L.R. (4th) 397.
(18) (1984) 9 D.L.R. (4th) 298.
(19) (1984) 6 D.L.R. (4th) 682.
(20) (1989) 56 D.L.R. (4th) 404; (1989) 63 D.L.R. (4th) 607.
(21) *Anderson v. The Commonwealth* (1932), 47 C.L.R. 50.
(22) *Payne v. Young* (1980), 145 C.L.R. 609, at pp. 614, 615.
(23) *Templeton v. Leviathan Pty. Ltd.* (1921), 30 C.L.R. 34, at pp. 43, 76; *Duke of Bedford v. Ellis*, [1901] A.C., at pp. 10, 14, 23.

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(U.K.) persons who had separate causes of action, or whose interests in a suit were distinct and several, could not sue as co-plaintiffs either at law or in equity, let alone be the subject of a representative action (24). Rule 2(a) specifies the circumstances in which persons having distinct and several claims may be joined as parties in the same proceedings. That rule would not authorize the joinder of the persons sought to be represented as plaintiffs in these proceedings (25). Rule 13 should not be construed so as to enable the appellants, as of right, to represent without joinder persons who could only be joined by leave. The terms in which the "class" is defined reflects the absence of a community of interest, let alone the "same interest". Ascertainment of those who are members of the class involves more than a mere matter of identification. A person is only a member of the class if the application of the Act, in the particular circumstances of the individual case, enlivens the operation of s. 42. The "class" is dependent upon, and defined by reference to, the existence of individual causes of action (26). In *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (27) and *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc.* (28) those permitted to be represented could have been joined as plaintiffs. The parties sought to be represented here have no interest of any kind in the contractual arrangements between the plaintiff and the defendant. Rule 13 should be confined to cases where the person sought to be represented is a necessary party to the resolution of the dispute between the plaintiff and the defendant. Alternatively the person sought to be represented must be one who could be joined as a party to the same proceedings. It is an abuse of the representative procedure to use it in such a way that until individual causes of action are determined one cannot tell who it is who is the beneficiary of whatever determination is made in those proceedings.

J. Basten Q.C., in reply.

Cur. adv. vult.

(24) *Daniell's Chancery Practice*, 5th ed. (1871), pp. 172-173, 213-214, 255-256; *Smurthwaite v. Hannay*, [1894] A.C. 494.
(25) *Payne v. Young* (1980), 145 C.L.R. 609; *Marino v. Esanda Ltd.*, [1986] V.R. 735.
(26) *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72, at p. 99; (1983) 144 D.L.R. (3d) 385, at p. 405; *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B., at pp. 1030, 1039, 1040, 1045.
(27) [1981] Ch. 229.
(28) [1991] 2 Q.B. 206.

1995, Feb. 23.

The following written judgments were delivered:—

MASON C.J., DEANE AND DAWSON JJ. Subject to the comments which follow, we agree with the reasons given by Toohey and Gaudron JJ. for allowing the appeal. We would, however, remit the matter to the Court of Appeal for the purpose of considering whether an order should be made that the action not continue as a representative action.

We do not agree with the statement of Kirby P. in the Court of Appeal that the majority in that Court (Gleeson C.J. and Meagher J.A.) failed to answer the correct question because their Honours assumed that the appellants were bringing a class action. Properly understood, the majority concluded that the particular procedure adopted by the appellants in this case — which their Honours happened to characterize as a "class action" — was not within the Supreme Court Rules 1970 (N.S.W.), Pt 8, r. 13(1). This conclusion is contained in the following passage of Gleeson C.J. (29):

> "To say that each borrower has the same interest in the proceedings as [the appellants], for the purpose of the rule relating to representative actions, goes well beyond received notions of the scope and purpose of the rule."

Whether the present case was or was not a class action is not the critical question. More than that, it is not a question which is susceptible of a precise or an instructive answer. The term "class action" is used in various senses. Sometimes it is employed as a generic term to comprehend any procedure which allows the claims of many individuals against the same defendant to be brought or conducted by a single representative (30). At other times, when the "same interest" stipulation was thought to preclude the application of the representative action procedure to actions for damages on the ground that each individual's entitlement to damages would have to be independently assessed (31), the term "class action" was employed to refer to an extension of the representative action to cover such actions.

The remaining sense in which the term "class action" is used is by way of reference to the class action procedures prescribed and applied in the United States, such as the procedures prescribed by

(29) (1992) 29 N.S.W.L.R. 382, at p. 389. Meagher J.A. agreed with the Chief Justice in a short concurring judgment.

(30) Australian Law Reform Commission, Report No. 46, *Grouped Proceedings in the Federal Court*, (1988) at p. 1.

(31) ibid., at p. 3.

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the Federal Rules of Civil Procedure, r. 23 (32). This is the sense in which the majority in the Court of Appeal used the term. It would be unprofitable and difficult to make a precise comparison between a representative action under r. 13 and a class action under r. 23 but we see no reason to doubt that the two rules could cover much common ground. The elaborate set of provisions contained in r. 23 would create some differences. But this does not seem to be of much moment for present purposes. What the majority in the Court of Appeal thought to be important was that, in the absence of legislation or a rule of court prescribing an elaborate set of rules regulating representative actions, a representative action could not be constituted in the manner contended for by the appellants.

But we do not think that this approach of the majority of the Court of Appeal can prevail in the face of the language of r. 13(1). All that this sub-rule requires is numerous parties who have the same interest. The sub-rule is expressed in broad terms and it is to be interpreted in the light of the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions. It has been suggested that the expression "same interest" is to be equated with a common ingredient in the cause of action by each member of the class (33). In our view, this interpretation might not adequately reflect the content of the statutory expression. It may be it extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings. Be that as it may, it has now been recognized that persons having separate causes of action in contract or tort may have "the same interest" in proceedings to enforce those causes of action.

Much as one might prefer to have a detailed legislative prescription by statute or rule of court regulating the incidents of representative action, r. 13 makes provision for an action to proceed as a representative action in a context in which there is no such legislative prescription. The absence of such a prescription does not enable a court to refuse to give effect to the provisions of the rule. Nor, more importantly, does the absence of such prescription provide a sufficient reason for narrowing the scope of the operation of the rule, as the Court of Appeal did, without giving effect to the purpose of the rule in facilitating the administration of justice.

(32) See Australian Law Reform Commission, Report No. 46, Appendix C, "Other models for class actions", p. 191.

(33) *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.*, [1981] Ch. 229, at p. 255.

Once the existence of numerous parties and the requisite commonality of interest are ascertained, the rule is brought into operation subject only to the exercise of the court's power to order otherwise. And that leaves for consideration the question whether the case is one in which the court should, in the exercise of that power, make an order that the action should not continue as a representative action. Relevant to that question are some of the comments of Gleeson C.J. in the course of explaining his concern about the absence of a detailed legislative prescription. In that context, Gleeson C.J. mentioned the need to deal with such important matters as (34): (1) whether or not consent is required from group members; (2) the right of such members to opt out of the proceedings; (3) the position of persons under a disability; (4) alterations to the description of the group; (5) settlement and discontinuance of the proceedings; and (6) the giving of various notices to group members.

The question of the importance of those matters, in the context of the particular case, in determining whether an order should be made that the action not continue as a representative action is by no means free from difficulty. However, the Court is not in a position to deal with them or with the consequences of the absence of a legislative prescription with respect to them. Indeed, argument has not been directed to that issue in this Court. The Court should not embark upon an examination of the question whether such an order should be made in the absence of such argument and without having the benefit of the views of the Court of Appeal.

In the result, we would allow the appeal, set aside the orders made by the Court of Appeal striking out the further amended statement of claim in so far as it purports to plead a representative action and remit the matter to the Court of Appeal for consideration of the question whether it should "otherwise order" within the meaning of r. 13(1).

BRENNAN J. The appellants, Mr. and Mrs. Carnie ("the plaintiffs"), plead in their further amended statement of claim against the respondent, Esanda Finance Corporation Ltd. ("the defendant"), that the variation agreement into which they entered is a regulated loan contract within the terms of the *Credit Act* 1984 (N.S.W.), that it does not comply with the requirements of Pt 3 of that Act and that the plaintiffs are therefore not liable to pay to the defendant the credit charge under the variation agreement. The

(34) (1992) 29 N.S.W.L.R., at p. 388.

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allegation that the variation agreement is a regulated loan contract depends on its alleged non-compliance with at least one of the requirements of s. 70, compliance with which would have exempted the agreement from the disclosure provisions of the Act. In particular, the argument supporting non-compliance draws attention to sub-s. (1)(a) which reads:

> "The credit provider and the debtor under a credit sale contract or a loan contract may agree to vary the terms of the contract in relation to, or to payment of, the amount owing under the contract if:
>
> (a) the outstanding balance of the amount financed at the date of the variation is not increased by the variation or is increased by the variation by reason only of the addition of an amount referred to in subsection (3)."

The disclosure provision of the Act that was said not to have been complied with is s. 36 and, in particular, s. 36(1)(e). It was submitted that, contrary to that provision, the variation agreement did not contain "a statement of the annual percentage rate in accordance with section 38". Subject to s. 85 (which authorizes the Commercial Tribunal to relieve a credit provider from the civil consequences of non-disclosure), s. 42(1)(b) provides that where "a loan contract ... is not in accordance with section 36 ... the debtor is not liable to pay to the credit provider the credit charge under the contract".

The facts relevant to these issues are not likely to be in controversy. But those facts raise the issue of the meaning of the phrase "the amount financed" in s. 70(1)(a). The defendant, in accordance with what was said to be its office practice at the time, added the unpaid credit charges under the plaintiffs' original loan contract to the principal sum that had been financed under that contract in calculating "the outstanding balance of the amount financed" for the purposes of the variation agreement. The addition of unpaid credit charges under the original loan contract, and the practice of which it was said to be an instance, are claimed by the plaintiffs not to be in compliance with s. 70(1)(a). That is because "the amount financed" is said to consist only in the amount financed under the original loan contract and to exclude unpaid credit charges under the original loan contract. It was this issue which generated the pleading in sub-par. (b) of par. 6 of the further amended statement of claim which reads:

> "The Plaintiffs bring these proceedings on behalf of themselves and all other persons ('the represented debtors') who have: —
>
> (a) on or after 28 February 1985 entered into loan or credit sale contracts with the Defendant which were

regulated contracts within the meaning of that term in the *Credit Act* 1984,

(b) each of which contracts has been varied by an agreement ('the variation agreement') which did not discharge the original contract, and

(i) wherein the total amount payable pursuant to the variation agreement was calculated by applying the annual percentage rate under the contract to the net balance due at the date of variation and the net balance due included unpaid accrued credit charges, or

(ii) wherein the total amount payable pursuant to the variation agreement included default charges which had accrued prior to the date of variation but which were not disclosed as such in the variation agreement,

and

(c) which variation agreements did not comply with the requirements of ss. 35 and 36 of the *Credit Act*, 1984."

Paragraph 7(2) of the further amended statement of claim seeks, inter alia:

> "A declaration that no represented debtor is required to pay to the defendant any amount on account of credit charges as defined in the *Credit Act* 1984 in relation to contracts as varied which fall within the class specified in paragraph 6 of this Statement of Claim."

Counsel for the defendant, supporting the order of the Court of Appeal, submits that this is not a case in which the plaintiffs can commence and continue an action as representing the class of borrowers identified by the criteria pleaded in par. 6. The submission is based on two related propositions: first, that the represented persons in a representative action under Pt 8, r. 13(1) of the Rules of the Supreme Court of New South Wales must have "the same interest" in the proceedings; second, that par. 6 identifies the class in a way that denies any real issue for determination. Part 8, r. 13(1) reads as follows:

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

The defendant submits that the scope and purpose of the procedure under Pt 8, r. 13(1) is to overcome or to provide an exception to the practice of the courts of equity that all persons having an interest in the subject matter of the suit ought to be made parties (35). And, as

(35) *Templeton v. Leviathan Pty. Ltd.* (1921), 30 C.L.R. 34, at pp. 43, 75-76.

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each member of the putative class would have a distinct cause of action arising out of distinct transactions, there is no common interest in the proceedings. For that reason the class sought to be represented could not be joined as plaintiffs, nor could their respective causes of action be joined, in the same proceeding (36).

For the reasons stated by Toohey and Gaudron JJ., I would reject the proposition that the scope and purpose of Pt 8, r. 13(1) is limited in the manner submitted. Rule 13(1) requires "the same interest" in the proceeding, not necessarily the same cause of action nor an entitlement to have or to share in the same relief. I respectfully agree with McHugh J. that the test for determining whether an action is within the scope of Pt 8, r. 13(1) is whether the plaintiff and the members of the represented class have a community of interest in the determination of some substantial issue of law or fact. Here, the further amended statement of claim raised an issue in which there is a community of interest, namely, whether s. 70(1)(a) permits the inclusion of unpaid credit charges under an original loan or credit sale contract in the calculation of "the outstanding balance of the amount financed" for the purposes of that provision.

However, it is precisely because of the flexible utility of the representative action that judicial control of its conduct is important, to ensure not only that the litigation as between the plaintiff and defendant is efficiently disposed of but also that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf. The self-proclaimed carrier of a litigious banner may prove to be an indolent or incompetent champion of the common cause in the courtroom. As Vinelott J. said in the course of his judgment in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (37), the court must be satisfied that "the issues common to every member of the class will be decided after full discovery and in the light of all the evidence capable of being adduced in favour of the claim". I would add that if, for any reason, the court is not satisfied that the interests of the absent but represented class are being properly advanced, the court should exclude the represented persons from the action (38). That power can be exercised at any time before the judgment is perfected.

In the present case at the time when the plaintiffs delivered their

(36) *Payne v. Young* (1980), 145 C.L.R. 609, at pp. 611, 614, 615, 617.

(37) [1981] Ch. 229, at p. 255.

(38) It was the attempt to allow any one shipper to conduct litigation on behalf of another without his leave and yet so as to bind him that was branded as a "fundamental error" by Fletcher Moulton L.J. in *Markt & Co. Ltd. v. Knight*

statement of claim, there appeared to be a live issue as to whether, in the case of a variation agreement, "the amount financed" as that term is used in s. 70(1)(a) of the Act must exclude credit charges under the original loan contract. In the course of argument, counsel for the defendant conceded that if the plaintiffs brought themselves within sub-pars. (a), (b)(i) and (c) of par. 6 of the further amended statement of claim, they would be entitled to relief under s. 42. If it be conceded that the issue relating to the interpretation of s. 70(1)(a) is to be determined in favour of the plaintiffs and of all members of the represented class coming within sub-par. (b)(i) of par. 6, there can be no doubt that the action is prima facie one appropriate to be conducted as a representative action subject to the court's supervision. The concession eliminates any risk that the issue can be determined adversely to the members of the represented class coming within sub-par. (b)(i). If it continues as a representative action and that concession is not withdrawn, there will be a binding declaration in favour of the plaintiffs and all members of the represented class.

Counsel for the defendant submits, however, that the pleading which identifies the persons represented is unsatisfactory and really denies any issue of common interest for determination. He draws attention to par. 6 of the further amended statement of claim which does not plead the facts which bring the contracts referred to in that sub-paragraph within the definition of regulated loan or credit sale contracts, nor the facts establishing non-compliance with the requirements of ss. 35 and 36. The facts are unique to each contract but the criterion of the represented class is pleaded as a conclusion that the contracts of all members of the class answer the description therein alleged. Counsel further submits that a "variation agreement" falling under sub-par. (b)(ii) of par. 6 might not be supported by consideration, though consideration is needed to constitute a "loan contract" under s. 3 of the Act. And, finally, it is said that the credit charges in respect of which Mr. and Mrs. Carnie seek relief under s. 42 are pleaded as the credit charges under the variation agreement, but par. 7(2) may be seeking (it is said to be ambiguous) relief under s. 42 not only in respect of the credit charges under the variation agreements but in respect of credit charges under the original loan agreements. However, the plaintiffs

(38) *cont.*
Steamship Co. Ltd.; *Sale & Frazar v. Knight Steamship Co. Ltd.*, [1910] 2 K.B. 1021, at p. 1040.

accept, and intend, that the declaration sought in par. 7(2) relates only to credit charges under the variation agreements.

The defendant's objections are without substance so far as they challenge the availability of the representative procedure. Sub-paragraphs (a) and (c) of par. 6 simply ensure that the issue of common interest and the declaration as to that issue are confined to the issue arising under s. 70(1)(a). And sub-par. (b)(ii) clearly relates to a variation agreement enforceable subject to the Act. The questions whether the arrangement with the defendant into which any particular person has entered is a regulated loan or credit sale contract and whether a particular variation agreement is supported by consideration will be answered according to the circumstances of each case. They do not arise and need not be addressed in the present action except in respect of Mr. and Mrs. Carnie.

However, the defendant's objections are relevant to the second aspect of Pt 8, r. 13(1): should the action be permitted to continue as a representative action? If it be conceded, or held, that s. 42(1)(b) applies to all variation agreements falling within par. 6, s. 85 entitles the defendant to apply to the Commercial Tribunal "for an order increasing the liability of the debtor to the credit provider". In other words, the application of s. 42(1)(b) could prove to be a pyrrhic victory for a debtor. The discretionary powers of the Tribunal are to be exercised according to the individual circumstances of the case. Is it appropriate, then, to permit the action to continue as a representative action when, in any given case, it will be necessary to determine whether the person seeking relief against the defendant has entered into a loan or credit sale contract (39) and whether there has been a non-compliance with s. 35 or s. 36 (40), and the ultimate benefit of the litigation to that person will depend on the prospect of the defendant's obtaining an order under s. 85 increasing the liability of the particular debtor? These are matters which it is appropriate for the Supreme Court to consider in supervising the conduct of the litigation.

As these matters were not material to the decision of the majority of the Court of Appeal once their Honours decided that the plaintiffs and the represented debtors did not have the "same interest in [the] proceedings", I would agree with the order proposed by Mason C.J., Deane and Dawson JJ. It will be for the Court of Appeal, appreciating the nature of the interest common to the plaintiffs and the represented class and evaluating the factors

(39) Issues arising under sub-par. (a) and arguably under sub-par. (b)(ii) of par. 6.
(40) Issues arising under sub-par. (c) of par. 6.

relevant to the obtaining of substantive relief by each of the represented persons, to determine (or to direct the determination of) the question whether the action should continue as a representative action.

TOOHEY AND GAUDRON JJ. The order of the Court of Appeal of New South Wales from which this appeal is brought reads:

> "The Further Amended Statement of Claim filed on 10 August 1990, be struck out insofar as it purports to plead a representative action."

The background

The appellants, Ainsley George Carnie and Dianne Helen Carnie, are wheat farmers. In March 1986 they purchased an International 711 SP Header. They arranged finance through the respondent, Esanda Finance Corporation Ltd., and on 27 March 1986 the parties entered into a loan contract and chattel mortgage ("the contract"). The transaction was governed by the *Credit Act* 1984 (N.S.W.) ("the Act"). The contract was a "regulated contract" (41) for the purposes of the Act (42), thereby requiring disclosures by the credit provider with penalties in case of default. It was common ground that the contract complied with the requirements of disclosure set out in s. 36.

The contract showed that the amount financed was $22,000. The predetermined credit charge of $12,641 was added to that amount, resulting in a total amount financed of $34,641. Repayments were to be made in three annual instalments of $11,547. Although the structure of the contract appears to have taken into consideration the particular circumstance of wheat farmers, namely that their income generally comes in annual payments, the appellants were not able to meet the first instalment due in February 1987. Accordingly the parties agreed to vary the terms of the contract. That agreement, dated 19 May 1987, was entitled "Variation Agreement". It is on a printed form and several of the blanks have figures inserted. The first item is headed "Outstanding balance of the amount financed at time of variation" and shows $31,641. This was the amount originally financed plus credit charges shown in the original contract, less $3,000 which was apparently paid off the debt by the appellants at the time of the variation. Additional credit charges by reason of the variation are shown as $7,529.84. The instalments are

(41) As defined in s. 5.
(42) See s. 30(2).

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set out as being $2,000 due on 27 July, followed by three annual instalments of $12,390.28 due in February 1988, 1989 and 1990.

The appellants' argument is that the figures in the Variation Agreement are not in accordance with the Act. They contend that the figure set out as the "Amount financed" is overstated by adding credit charges to the original amount borrowed, with a deduction for a payment made or about to be made, and interest calculated on that balance. The result, they say, is that the respondent has been charging interest on part of the original interest rather than on the amount financed as defined. Whilst this manner of calculation is permitted under the Act, the transaction must be documented in a particular way and certain disclosures must be made. The appellants contend that those disclosures have not been made and say that the relevant penalties under the Act apply. In particular they say that by reason of s. 42 of the Act they are not liable to pay to the respondent the credit charge provided for in the Variation Agreement.

There is evidence that the respondent had distributed guidelines to its employees which involved other variation agreements being set out in the same way. The appellants claim that they are personally entitled to declarations and orders flowing from the contravention of the Act. And, central to this appeal, they seek to make this claim on behalf of all other parties who entered into offending variation agreements of the same kind with the respondent.

The claim for a representative order

Paragraph 6 of the statement of claim as amended reads:

"The plaintiffs bring these proceedings on behalf of themselves and all other persons ('the represented debtors') who have: —
(a) on or after 28 February 1985 entered into loan or credit sale contracts with the Defendant which were regulated contracts within the meaning of that term in the *Credit Act* 1984,
(b) each of which contracts has been varied by an agreement ('the variation agreement') which did not discharge the original contract, and

(i) wherein the total amount payable pursuant to the variation agreement was calculated by applying the annual percentage rate under the contract to the net balance due at the date of variation and the net balance due included unpaid accrued credit charges, or
(ii) wherein the total amount payable pursuant to the variation agreement included default charges which had accrued prior to the date of variation but which were not disclosed as such in the variation agreement,
and

> (c) which variation agreements did not comply with the requirements of ss. 35 and 36 of the *Credit Act*, 1984."

The prayer for relief includes a declaratory order that no represented debtor is required to pay to the respondent any amount on account of credit charges as defined in the Act in relation to contracts answering the description in par. 6 of the statement of claim. The date 28 February 1985 mentioned in par. 6 is the date when the relevant sections of the Act commenced.

By notice of motion the respondent sought various orders against the appellants. For the purposes of this appeal, it is necessary to note only the following:

> "1. AN ORDER (whether pursuant to the Supreme Court Rules 1970 Pt 8 r. 13(1) or Pt 13 r. 5 or otherwise) that the proceedings be stayed or dismissed in so far as they purport to relate to a representative action.
>
> 2. AN ORDER (whether pursuant to the Supreme Court Rules 1970 Pt 15 r. 26 or otherwise) that the Amended Statement of Claim filed on 10 August 1990 be struck out in so far as it purports to plead a representative action."

Thereafter the proceedings followed a tortuous course which it is unnecessary to detail. They culminated in a decision of the Court of Appeal (43) (Gleeson C.J. and Meagher J.A., Kirby P. dissenting) that the further amended statement of claim "be struck out insofar as its purports to plead a representative action".

The appellants base their claim for a representative order on Supreme Court Rules 1970 (N.S.W.) Pt 8, r. 13(1) which is in the following terms:

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

Gleeson C.J. was of the opinion that a representative order was inappropriate in the circumstances of the case. That opinion was based on a number of concerns. First, that the proceedings were an attempt to make the rule the foundation of a controversial modern "class action" for which a rule as simple as r. 13(1) is inadequate. Another problem was that the history of the rule as explained by Lord Macnaghten in *Duke of Bedford v. Ellis* (44) shows limitations on the concept of persons having the "same interest" in the proceedings and that to say in this case that each borrower, with her

(43) *Esanda Finance Corporation Ltd. v. Carnie* (1992), 29 N.S.W.L.R. 382.
(44) [1901] A.C. 1.

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or his individual contract, has the same interest in the proceedings as the appellants went "well beyond received notions of the scope and purpose of the rule" (45). His Honour also expressed concern at the procedural difficulties that would arise if the appellants were allowed to proceed with their representative action: difficulties of identifying those who answered the description in par. 6 of the statement of claim, of knowing the attitude of such persons to the contractual arrangements they had made with the respondent and of ascertaining their attitude to the litigation. Gleeson C.J. concluded with this observation (46):

> "If class actions of the kind now available in the Federal Court are to be permitted in New South Wales, (and there are large policy issues involved in that decision), then this should only be done with the backing of appropriate legislation or rules of court, adequate to the complexity of the problem, and appropriate to the requirements of justice."

Meagher J.A. agreed with the Chief Justice and branded the course which the appellants wished to take as "seeking to intermeddle in the commercial relationship between Esanda and its customers, who may have no desire to be engaged in hostile litigation with their financier" (47). He saw no "common interest" between the appellants and those whom they sought to represent.

Kirby P., on the other hand, thought it misleading to describe the proceedings as a class action. His Honour examined the nature of such an action at length in order to distinguish it from the representative action which the appellants wished to bring. Failure to make the distinction had led, in his view, to a failure to answer the right question, namely, whether "the procedure adopted by the [appellants] fell within, or outside, that permitted by the Rules; not whether it was a 'class action'" (48). Furthermore, in his Honour's view, there had been "confusion between circumstances which legitimately enliven the discretionary operation of the Rules, and circumstances which take the procedure outside the scope of the Rules" (48). He concluded that, subject to certain amendments to the statement of claim, the representative action should be allowed to proceed. In our opinion, the general approach of Kirby P. is correct.

(45) (1992) 29 N.S.W.L.R., at p. 389.
(46) ibid., at p. 390.
(47) ibid., at p. 404.
(48) ibid., at p. 397.

The approach to a claim for a representative action

It is necessary to go back to Pt 8, r. 13(1) itself and not merely assume that it is a class action that the appellants wish to bring and for which the Rules do not adequately provide. The starting point is whether the procedure which the appellants wish to adopt is within the Rules. If it is, a subsidiary question arises, whether the Supreme Court should exercise its discretion to "otherwise order" and so prevent the continuance of the proceedings in that form. With respect to their Honours in the majority in the Court of Appeal, those two necessary steps appear to have been taken as one.

In ascertaining whether the procedure which the appellants wish to adopt is within the Rules it is helpful to consider the history and interpretation of r. 13(1), the ancestor of which is to be found in the English Rules of the Supreme Court and which appears in various forms in other common law countries. Rule 13(1) is almost identical in language with O. 15, r. 12(1) of the English Rules of the Supreme Court, from which it was clearly taken. The English rule was in turn derived from an earlier rule which itself was derived from the practice of the Court of Chancery (49).

Historically the common law courts had no power to hear an action by a representative plaintiff. However, in the Court of Chancery representative actions were permitted in certain cases. With the merger of common law and equity, the new rules of procedure scheduled to the *Supreme Court of Judicature Act* 1873 (U.K.) incorporated the chancery practice (50). That practice was described by Lord Macnaghten in *Duke of Bedford v. Ellis* (51) as follows:

> "The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience; for the sake of convenience it was relaxed."

Initially the courts construed the rule narrowly. In *Temperton v. Russell* (52) the requirement for those represented to have the

(49) *The Supreme Court Practice* (1993), vol. 1, 15/12/1; and see *Duke of Bedford v. Ellis*, [1901] A.C. 1.

(50) Rule 10 of the Rules of Procedure. Rule 10 was subsequently replaced in 1883 by O. 16, r. 9 and then in 1962 by the current O. 15, r. 12(1).

(51) [1901] A.C., at p. 8.

(52) [1893] 1 Q.B. 435.

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"same interest" was interpreted as applying only to individuals who had a "beneficial proprietary right" in the matter (53). However, in *Duke of Bedford v. Ellis* that narrow approach was rejected by the House of Lords and, apart from one significant exception (54), in the cases that followed the general approach to interpretation and application of the English rule became increasingly liberal.

In *Duke of Bedford v. Ellis* a number of plaintiffs were permitted to sue on behalf of themselves and all other growers of fruit, flowers, vegetables, roots and herbs within the meaning of the *Covent Garden Market Act* 1828 (U.K.) to enforce statutory preferential rights to stands in the market. The plaintiffs sought a declaration as to the true construction of the Act, an injunction to restrain the infringement of their statutory rights and an account of the sums which they had allegedly been overcharged. Lord Macnaghten, with whom the majority concurred, identified three criteria which must be satisfied before the representative rule can apply (55):

> "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

The majority held there was a common interest and it did not matter that the group was a fluctuating body which would be difficult to catalogue. It was enough that there was a clear description of the growers sought to be represented in the Act. The fact that the plaintiffs were claiming separate and different rights under the Act did not detract from the practicality of using the representative procedure.

This broad and liberal approach suffered a setback with the decision of the Court of Appeal in *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.* which had the effect for some time afterwards of limiting the scope of the representative action to exclude those cases where the relief claimed was damages and where separate and individual contracts were involved. In that case the plaintiff shippers had various goods aboard the defendant's vessel which was sunk by Russians who suspected it of carrying contraband during the Russo-Japanese war. The plaintiffs sued the defendant on behalf of themselves and the forty-four other owners of cargo for "damages for breach of contract and duty in and about the carriage of goods

(53) [1893] 1 Q.B., at p. 438.
(54) *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, [1910] 2 K.B. 1021.
(55) [1901] A.C., at p. 8.

by sea" (56). The majority in the Court of Appeal held that the shippers did not have the same interest because each contract was manifestly different. Different defences such as estoppel and set off may have existed so that no representative action could settle the rights of the individual members of the class.

But the subsequent history of representative actions evidences a greater readiness to sanction them. In *John v. Rees* (57) Megarry J. referred to the broad approach of Lord Macnaghten in *Duke of Bedford v. Ellis* with approval, saying (58):

> "This seems to me to make it plain that the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice."

His Honour said this approach was consistent with the language of the rule which was wide and permissive in its scope while providing adequate safeguards for the substance and that he "would therefore be slow to apply the rule in any strict or rigorous sense" (59).

In *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (60) Vinelott J. traced the history of the rule and its application in the United Kingdom. He distinguished *Markt* on its particular facts, saying (61):

> "it is clear on authority and principle that a representative action can be brought by a plaintiff, suing on behalf of himself and all other members of a class, each member of which, including the plaintiff, is alleged to have a separate cause of action in tort, provided three conditions are satisfied."

The first condition was that no order could be made if the effect might be to confer a right of action on a member of the class represented who would not otherwise have been able to assert such a right in separate proceedings, or to bar a defence which might otherwise have been available to the defendant in a separate action. The second was that the common interest requirement, where there are separate causes of action in tort, is a requirement for a common ingredient in the cause of action of each member of the class. In this case the representative action resulted in a declaration that was common in terms of relief to all the members of the class: whether a circular sent to shareholders was misleading and contained statements that were untrue. The third condition was that it must be

(56) [1910] 2 K.B., at p. 1025.
(57) [1970] Ch. 345.
(58) ibid., at pp. 369-370.
(59) ibid., at p. 370.
(60) [1981] Ch. 229.
(61) ibid., at p. 254.

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for the benefit of the class that the plaintiff be permitted to sue in a representative capacity.

Likewise, in *R. J. Flowers Ltd. v. Burns* (62), McGechan J. of the New Zealand High Court held that the fact that claims arose under separate contracts was not an objection to the use of a representative action. The defendant pleaded defences which, if established, would remove any common interest. But at an early interlocutory stage of the proceedings the Court was not prepared to elevate the mere expression of contest by a defendant into an automatic barrier to a representative action, saying (63):

> "The traditional concern to ensure that representative actions are not to be allowed to work injustice must be kept in mind. Subject to those restraints however the rule should be applied and developed to meet modern requirements."

In *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc.* (64) the defendant sought to rely on *Markt* for the proposition that there can be no common interest where there are separate contracts and the claim of the plaintiff is damages. Staughton L.J. reviewed the English authorities and came to the conclusion that the law had been reformed by decisions since *Markt* (65). The case involved insurance contracts containing a leading underwriters clause which made it possible to regard the seventy-seven individual contracts as one contract. However, while this was an important factor in finding a common interest in this particular case, further authority has held that this was not the decisive factor (66).

In *Naken v. General Motors of Canada Ltd.* (67) the Supreme Court of Canada found the O. 8, r. 13(1) equivalent in Canada to be "totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty" as the one before it. In the Court of Appeal Gleeson C.J. referred to that decision and appeared to treat the present case as one which fell within the parameters of that conclusion. In *Naken* the applicants sued General Motors on behalf of persons who purchased new 1971 and 1972 Firenza motor vehicles in Ontario and who had not at the date of the writ sold the cars. Due to a defect the value of the cars was allegedly diminished by $1,000. The claim was based on a

(62) [1987] 1 N.Z.L.R. 260.
(63) ibid., at p. 271.
(64) [1991] 2 Q.B. 206.
(65) ibid., at p. 227.
(66) *Bank of America National Trust & Savings Association v. Taylor*, [1992] 1 Lloyd's Rep. 484, at p. 494.
(67) [1983] 1 S.C.R. 72, at p. 105; (1983) 144 D.L.R. (3d) 385, at p. 410.

breach of implied and express warranty. The express warranty was contained in newspaper advertisements. In order to prove their membership of the class individuals would have had to prove they had responded to the advertisement. Estey J. gave the decision of the Court that the case was inappropriate for a representative action. A catalogue of problems against such a course was listed, including the complexity of determining the class which would entail the Master trying up to 4,932 claims; the lack of authority to award costs against unsuccessful claimants for membership of the class; and the possibility of future tort actions for personal injury arising out of reliance on the defect being estopped.

However, *Naken* was carefully distinguished by the Alberta Court of Appeal in *Swift Canada Co. v. Alberta (Pork Producers' Marketing Board)* (68). In that case the plaintiffs claimed a declaration of entitlement to an orderly market and free competition, together with a claim for damages suffered by the class by reason of the tortious conspiracy of the defendants to purchase hogs from the class for prices lower than those which would otherwise have prevailed. The damages claimed were restricted to the difference on each transaction made during the period between the price actually paid and the price which would have been paid under the marketing system but for the tortious conduct of the defendants. The Court held that a representative action was appropriate because there was a common interest in securing a declaration that the activities of the defendants were unlawful and in recovering the losses sustained by virtue of those activities. The damages of the class could be determined by mathematical computation. The defendants would not be prejudiced by inability to have discovery of all the members claiming as plaintiffs.

In *Shaw v. Real Estate Board of Greater Vancouver* (69), Bull J.A. observed:

> "It appears to me that the many passages uttered by Judges of high authority over the years really boil down to a simple proposition that a class action is appropriate where if the plaintiff wins the other persons he purports to represent win too, and if he, because of that success, becomes entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief, having regard, always, for different quantitative participations."

In our view that observation is apposite to r. 13(1), notwithstanding the use of "representative action" rather than "class action".

(68) (1984) 9 D.L.R. (4th) 71.
(69) (1973) 36 D.L.R. (3d) 250, at p. 254.

The operation of r. 13(1)

It is against this background that the operation of r. 13(1) falls to be considered though in the end it is the language of the rule which must determine its meaning. The critical words are: "Where numerous persons have the same interest in any proceedings." In the course of his judgment Kirby P. referred to the requirements identified by Lord Macnaghten in *Duke of Bedford v. Ellis*, namely, that all persons to be represented have a common interest, that they have a common grievance and that they stand to receive relief which, in its nature, would be beneficial to all. This, of course, is not the precise language of r. 13(1) but Kirby P. said (70) that the present appellants accepted the need to bring themselves within these criteria and he was content to adopt the same approach. In this Court the appellants placed greater emphasis on the actual terms of r. 13, arguing that a representative action should be available whenever the two prescribed criteria are established, namely, numerous persons having bona fide claims against another party and having the same interest in the proceedings.

Although the judgments below and the argument in this Court focused on r. 13(1), reference should be made to other aspects of the rule. Sub-rule (4) provides:

> "A judgment entered or order made in proceedings pursuant to this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued but shall not be enforced against any person not a party to the proceedings except with the leave of the Court."

Though any judgment or order will be binding on those for whom a plaintiff sues, the represented parties are not liable for costs (71). Sub-rule (6) allows any person against whom a judgment or order is sought to be enforced to dispute liability "on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from the liability".

Objections to a representative order: "same interest"

As Gleeson C.J. observed (72): "It is the meaning of the expression 'the same interest' ... that lies at the heart of the problem."

The authorities are clear that the fact that claims arise under separate contracts does not mean that the requirement for the same

(70) (1992) 29 N.S.W.L.R., at p. 394.
(71) *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, [1910] 2 K.B., at p. 1039.
(72) (1992) 29 N.S.W.L.R., at p. 389.

interest is defeated (73). A refusal to allow a representative action on this ground is open to the criticism that it looks to the question of the Court's discretion to allow a representative action to proceed rather than to the basic question of whether the rule is applicable. That question, stated in terms of the rule, is this: Do numerous persons have the same interest in the action which the appellants have commenced? If they do not then that is the end of the matter. If they do, then the action is properly begun and, unless the Court otherwise orders, it may be continued.

Then it was argued that the same interest was lacking because the relief might not be beneficial to all members of the class, that some parties might not want to contend that their variation agreements were null and void because they had the benefit of the extended time for repayment provided by the variation agreements and that they might be content with their arrangements. However, in the Court of Appeal the appellants, without objection, abandoned the pursuit of a declaration that the variation agreements were null and void. Kirby P. would have given leave to amend the statement of claim so that that claim could be deleted, substituting declaratory relief that went no further than determining the meaning of the Act so far as it affects those concerned on matters in which they have a common interest. In that event those debtors who do not wish to take advantage of a favourable judgment would be under no obligation to do so. That is the basis on which the matter was argued in this Court.

There are many persons who have entered into variation agreements with the respondent. They have the "same interest" in testing those agreements against the Act to see if the method of calculating the amount owed was correct. If that method was not in accordance with the Act, then those persons have a common interest in obtaining the relief of being released from liability for the credit charges. That is, they have the same interest in these proceedings in the sense that there is a significant question common to all members of the class and they stand to be equally affected by the declaratory relief which the appellants seek.

Although each contract will be different in the details of the amounts involved, this will not eliminate the convenience of finding

(73) *R. J. Flowers Ltd. v. Burns*, [1987] 1 N.Z.L.R. 260; *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc.*, [1991] 2 Q.B. 206; *Bank of America National Trust & Savings Association v. Taylor*, [1992] 1 Lloyd's Rep. 484; *Palmco Holding Bhd. v. Sakapp Commodities (M) Sdn. Bhd.*, [1988] 2 M.L.J. 624 and *Voon Keng v. Syarikat Muzwina Development Sdn. Bhd.*, [1990] 3 M.L.J. 61.

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a right to a release which is common to all of them. As Lord Macnaghten said (74):

> "In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members."

Identification of class

The respondent contended that there were particular difficulties in identifying the class which the appellants wished to represent. But the onus on the appellants is not to identify every member of the class; rather it is to identify the class with sufficient particularity (75). They have done this in par. 6 of the statement of claim. The class is not open ended; it is limited to those persons who have credit sale or loan contracts with the respondent which have been varied in circumstances where the variation has been executed in such a way as to be inconsistent with the Act. Furthermore the situation here, unlike cases such as *Naken v. General Motors of Canada Ltd.* (76), is one in which the respondent knows or has the means of knowing better than anyone else the Duke of members of the class.

Adequacy of r. 13

As noted earlier, Gleeson C.J. regarded the present case as an attempt to make r. 13(1) the foundation of a class action. Questions of nomenclature aside, it is true that r. 13 lacks the detail of some other rules of court. But there is no reason to think that the Supreme Court of New South Wales lacks the authority to give directions as to such matters as service, notice and the conduct of proceedings which would enable it to monitor and finally to determine the action with justice to all concerned. The simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied "to the exigencies of modern life as occasion requires" (77). The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.

(74) *Duke of Bedford v. Ellis*, [1901] A.C., at p. 7.
(75) ibid., at p. 11.
(76) [1983] 1 S.C.R. 72; (1983) 144 D.L.R. (3d) 385.
(77) *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, at p. 443.

Res judicata

In the course of argument a question arose as to the effect of a judgment in these proceedings, if constituted as a representative action. Strictly speaking, the question does not arise at the stage where the issue is whether "numerous persons have the same interest in any proceedings". Rather, it goes to the issue whether the Court "otherwise orders" the continuance of the proceedings in that form. Nevertheless, it is appropriate to say something about the effect of a judgment on the represented persons; it has a bearing on the outcome of this appeal.

If the action, constituted as a representative action, succeeds those represented will have the benefit of declaratory relief as to the meaning of the Act. Whether they choose to take advantage of such a declaration will be a matter for them. But what if the action fails? Counsel for the appellant conceded that each of the members of the class would be "estopped". Later, in response to a question from the Court, counsel agreed that "in theory" if the action failed borrowers within the class would lose the right to take advantage of s. 42 of the Act. Section 42 provides that where there has been a failure to comply with certain requirements of the Act, particularly relating to disclosure, the debtor is not liable to pay to the credit provider the credit charges under the contract. But it may be said that in the light of such a decision there was no such right in any event.

The relevant principle is stated in the following way by Spencer Bower and Turner (78):

> "A judicial decision inter partes operates as an estoppel in favour of, or (as the case may be) so as to bind, ... in the case of a 'representative' or 'test' action, all members of the class, whom a party purports to represent therein, ... but not those who, though alleged to be so represented, insist and establish that they are not."

In *Naken v. General Motors of Canada Ltd.*, Estey J., in delivering the judgment of the Court, was clearly concerned as to the consequences of res judicata for those sought to be represented, particularly as a fixed sum was claimed for the purchaser of each motor vehicle though each might "still have rights flowing from the formal contract of purchase and the warranties and covenants contained therein" (79). In *Zhang v. Minister for Immigration, Local Government and Ethnic Affairs* (80), French J. ordered that proceedings in the Federal Court should not continue as a

(78) *The Doctrine of Res Judicata*, 2nd ed. (1969), par. 231.
(79) [1983] 1 S.C.R., at pp. 101-102; (1983) 144 D.L.R. (3d), at p. 407.
(80) (1993) 45 F.C.R. 384.

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representative proceeding under Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) because of the implications of res judicata for other applicants for refugee status.

In the argument before this Court nothing emerged to show that members of the class in question would be prejudiced by the outcome of this action other than in the obvious sense that they would be bound by a judgment acceding to or rejecting the claim for relief. It would not affect other rights they might have against the respondent, for instance a claim that a member of the class had entered into a contract as a result of misrepresentation or false or misleading conduct. If it did appear that other rights would be affected, it would be a matter for consideration in determining whether the Court should otherwise order. But it is not a consideration in deciding whether the action is properly constituted in terms of r. 13(1). And, as mentioned earlier, the members of the class are not liable to the respondent in costs.

The appellants have brought themselves within r. 13(1)

The appellants have brought themselves within r. 13(1). There are numerous other persons capable of being clearly defined who have the same interest in these proceedings in that they will be equally affected by the declaratory relief which the appellants seek. Whether, in the end, they take advantage of that relief if granted is another matter. But that consideration cannot disqualify the appellants from invoking r. 13(1). However, in reaching a conclusion as to the applicability of r. 13(1), it is appropriate to look a little more closely at some aspects of the Act.

The implications of the Act for a loan contract

Part 3 of the Act is concerned with "regulated contracts", a term which is defined (s. 5) to mean "a regulated credit sale contract, regulated loan contract or regulated continuing credit contract". The appellants assert their Variation Agreement (and the variation agreements of others) to be a "regulated loan contract", a term which is defined (s. 5) to mean "a loan contract to which Part 3 applies". The term "loan contract" is defined (s. 5) to mean:

> "a contract under which a person in the course of a business carried on by him provides or agrees to provide ... credit to another person ... in one ... or more of the following ways."

Of the ways that follow, it is necessary to mention only par. (c), "by varying the terms of a contract under which moneys owed to him by that other person are payable".

The loan contract to which the appellants and the respondent are

parties is a loan contract for the purposes of Pt 3 (s. 5). Part 3 specifies a number of obligations in respect to loan contracts. Where a loan contract does not comply with the requirements of the Act and is caught by the penalty provision in s. 42, the debtor is not liable to pay to the credit provider the credit charge under the contract, subject to a right in the credit provider to apply to the Commercial Tribunal for an order increasing the liability of the debtor (s. 85). "Credit charge" is defined (s. 5) as "credit charge within the meaning of section 11(1)". Broadly speaking, s. 11(1) identifies the credit charge as the amount by which the amount payable under the contract by the debtor to the credit provider exceeds the amount financed. To ascertain the "amount financed" it is necessary to look to the formula in Sch. 4 to the Act.

Section 85 operates where, by reason of a contravention or a failure to comply with the Act, a debtor is not liable to pay an amount otherwise payable. In those circumstances the credit provider may apply to the Tribunal for an order increasing the liability of the debtor to the credit provider. The Tribunal, after consideration of the relevant circumstances, may determine that the debtor is liable to pay the amount financed and the whole or part of the credit charge.

It should be mentioned that s. 70 permits a credit provider and debtor under a loan contract to vary the terms of the contract if certain conditions are met. An agreement to vary a contract in accordance with the section is not a loan contract and hence is outside the disclosure requirements of s. 36 (s. 70(5)). The appellants submitted that their Variation Agreement did not satisfy the requirements of s. 70 because of a failure to specify correctly "Outstanding balance of the amount financed at time of variation" (81). But their case does not require them to take themselves outside s. 70; rather, that is a section which is available to the respondent if it chooses to rely on it. And, as it happens, during the course of the argument the appellants agreed that par. 5A of the statement of claim, which pleaded that the Variation Agreement did not comply with s. 70 and was therefore "null and void and of no effect", should be struck out. With the removal of par. 5A of the statement of claim and sub-pars. (1A) and (1B) of the prayer for relief in par. 7, the appellants' case as pleaded is that the Variation Agreement did not comply with Pt 3 of the Act and therefore they are not liable to pay the credit charge; that the "represented debtors" entered into variation agreements which likewise did not

(81) See s. 70(1)(a).

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comply with Pt 3; that the appellants are entitled to a declarat that they are not liable to pay to the respondent any amount account of credit charges and that no represented debtor is liabl pay any such amount.

Conclusion

On this footing, those whom the appellants seek to represent h the same interest as the appellants. They have entered into l contracts with the respondent in circumstances where, if appellants can make good their claim, the variation of th contracts was not in accordance with Pt 3 of the Act. Accordin they are not obliged to pay any amount on account of credit charg In terms of r. 13(1) all have the same interest in the proceedin While it is not known how many other borrowers might wish to t advantage of the declaratory relief the appellants seek, potentially stand to benefit from a successful action.

In view of the conclusion that the decision of the Court of App was in error in holding that the appellants' action did not fall wit r. 13, the appeal should be allowed. It might be said that there is point in allowing the appeal if, in all the circumstances, the Supre Court should "otherwise order" in respect of the continuance of proceedings. If the appellants had persisted with their claims declarations that the variation agreements were null and void and no effect, we would be disposed to remit the matter to the Court Appeal on the basis that the appellants' action fell within r. 13 and that it was for that Court to decide whether the action sho continue. However, since the appellants do not persist with t particular aspect of their claim, there appears to be no answer what Kirby P. said at the end of his judgment (82):

> "Once these are excised, what remains is a proper case fo representative order. The class of person affected is cle defined and now closed. The primary relief sought is declaration as to the meaning of an Act of Parliament as affects the members of that claim in respect of which all them will have a common interest and a common le grievance. So far as the orders are concerned, as so amend they seek relief which is wholly beneficial to all the perso represented."

The trial judge has it within his or her power to "otherwise orde if, as the action proceeds, circumstances make that cour appropriate.

We would therefore allow the appeal and set aside the orders

(82) (1992) 29 N.S.W.L.R., at p. 403.

the Court of Appeal striking out the further amended statement of claim in so far as it purports to plead a representative action.

McHugh J. The question in this appeal is whether "numerous persons have the same interest" in the proceedings so that, "unless the court otherwise orders", the plaintiffs may join them in a representative action brought in accordance with r. 13 of Pt 8 of the Supreme Court Rules 1970 (N.S.W.). In my opinion, the persons described as "represented debtors" in the statement of claim do have the same interest as the plaintiffs, and r. 13 authorizes their joinder in a representative action.

The facts and legislative provisions are set out in the judgment of Toohey and Gaudron JJ. which also discusses the modern authorities.

In my opinion, a plaintiff and the represented persons have "the same interest" in legal proceedings when they have a community of interest in the determination of any substantial question of law or fact that arises in the proceedings. Other factors may make it undesirable that the proceedings should continue as a representative action, but that is a matter for the exercise of discretion, not jurisdiction.

In the present case, the represented debtors as well as the plaintiffs have the same interest in determining whether the method adopted by Esanda in the calculation of the variation agreement repayments resulted in a breach of s. 70 of the *Credit Act* 1984 (N.S.W.) ("the Act"). If that method did breach s. 70, the standard form variation agreement used in each case did not comply with the requirements of s. 36 of the Act. Consequently, s. 42 of the Act which imposes civil penalties for breach of s. 36 would result in Esanda forfeiting its credit charges under the loan contracts. The effect of the breach for each of the represented debtors is no doubt different from the effect for the plaintiffs. But all of them have a common interest in determining whether Esanda's procedures in relation to the variation of a credit or loan agreement comply with the Act.

The terms of r. 13 are based on the principles that governed the practice of the Court of Chancery in representative actions (83). In *Duke of Bedford v. Ellis* (83), Lord Macnaghten, when considering the then English equivalent of r. 13, said that there was no reason for "restricting the rule, which was only meant to apply the practice

(83) *Duke of Bedford v. Ellis*, [1901] A.C. 1, at p. 8.

of the Court of Chancery to all divisions of the High Court". His Lordship went on to say:

> "Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Rule 13(1) commences with a condition "[w]here numerous persons have the same interest in any proceedings". Being part of a quasi-legislative instrument, the term "same interest" probably requires a more exact application than was allowable in applying the general principles of the Court of Chancery. Nevertheless, I see no difficulty in holding that the "represented debtors" have the "same interest" as that of the appellants.

As long ago as 1837 Frederic Calvert (84) thought that the "authorities" in the Court of Chancery justified the statement that "when a large number of persons have a common interest in the entire object of a suit in its nature beneficial to them all, one or more of them may sue on behalf of all". It was sufficient that there was "some community of interest between the active litigant and the members of the represented group" (85). Furthermore, as Calvert pointed out (86), it was not necessary that the claims of those permitted to join in the suit should be "precisely of the same degree".

Nothing in the application of the principles that guided the practice of the Court of Chancery suggests that that Court would have refused to apply its general practice to the kind of social problem that lies at the back of the present action. In *Taff Vale Railway v. Amalgamated Society of Railway Servants* (87), Lord Lindley, speaking of the rule of court that the House of Lords considered in *Bedford*, said:

> "The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found

(84) *A Treatise upon the Law Respecting Parties to Suits in Equity* (1837), p. 41.
(85) Yeazell, "From Group Litigation to Class Action, Part II: Interest, Class and Representation", *U.C.L.A. Law Review*, vol. 27 (1980) 1067, at p. 1084.
(86) Calvert, op. cit., p. 36.
(87) [1901] A.C. 426, at p. 443.

in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires."

The procedure of the representative action was "invented by Chancery in the seventeenth century to cope with disputes between rural tenants and landlords, parishioners and parsons" (88). A reading of the cases in the eighteenth and nineteenth centuries indicates that the Court of Chancery often allowed the representative action to be used so that groups of individuals who had suffered similar wrongs could redress the economic harm which they had collectively suffered (89). In many cases, the Court allowed persons with the same or common interest to be joined in a representative action only because the defendant insisted that the suit was bad for want of parties and it was inconvenient to make all interested persons parties to the action. In some cases the represented parties had consented to and encouraged the plaintiff to bring the action as a representative action. But in other cases the Court allowed the plaintiff to represent persons with similar interests whether or not they consented or even knew of the action (90). This was particularly true of actions arising from the activities of joint stock companies and friendly societies. In that situation, as Yeazell points out (91), "the represented must rely on the congruence of their interests with those of the representatives as the incentive for effective representation; the self-interest of the representative rather than the consent and supervision of the represented drives the active party".

For much of this century, and notwithstanding the decision and reasons in *Bedford*, the courts have given r. 13 and its equivalents a narrow meaning. But, as the judgment of Toohey and Gaudron JJ. shows, the recent cases have been more liberal in allowing representative actions to proceed. In the Age of Consumerism, it is proper that this should be so. The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done efficiently and effectively on their behalf by one person

(88) Yeazell, op. cit., p. 1067.

(89) *Brown v. Howard* (1701), 1 Eq. Rep. 163 [21 E.R. 960]; *City of London v. Perkins* (1734), 3 Bro. P.C. 602 [1 E.R. 1524]; *Leigh v. Thomas* (1751), 2 Ves. Sen. 312 [28 E.R. 201]; *Adair v. New River Co.* (1805), 11 Ves. Jun. 429 [32 E.R. 1153]; *Hichens v. Congreve* (1828), 4 Russ. 562 [38 E.R. 917].

(90) Yeazell, "From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation" *U.C.L.A. Law Review*, vol. 27 (1980) 514, at p. 537.

(91) ibid., at p. 522.

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with the same community of interest as other consumers. Nor should the courts' lists be cluttered by numerous actions when one action can effectively determine the rights of many.

The entire object of the present action is to obtain a judicial determination as to whether the method that Esanda used in dealing with variations of loan or credit sale contracts complied with the Act. All those persons who come within the class of debtors defined in par. 6 of the statement of claim have a community of interest in the outcome of that determination. In *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.* (92), the English Court of Appeal held that persons did not have the same interest within the meaning of the rule when they sued for damages arising out of separate and individual contracts. But it is now well established that the existence of separate contracts does not prevent the represented persons having the same interest as the plaintiff in the action (93).

In *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (94), however, Vinelott J. said that in "a representative action in which it is claimed that every member of the class has a separate cause of action in tort, this condition requires ... that there must be a common ingredient in the cause of action of each member of the class". I see no reason to confine the rule to cases where there is a common element in the causes of action of the plaintiff and the represented persons. If the plaintiff and the represented persons have a community of interest in the determination of some substantial issue of law or fact in the action, they have the same interest within the meaning of the rule. In such a case, other factors may require that the court, in the exercise of its discretion, should "otherwise" order.

Discretion

Since the amendment to the pleadings, the question to be decided is one of law and applies to the represented debtors' agreements as well as to the plaintiffs' agreement. The object of the suit is to obtain a determination as to whether Esanda's procedures when varying agreements comply with the Act. Every one of the represented debtors has the same interest in that question whether or not that person wishes to obtain any benefit from an interpretation that is favourable to him or her. The identity of

(92) [1910] 2 K.B. 1021.
(93) *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc.*, [1991] 2 Q.B. 206; *Bank of America National Trust & Savings Association v. Taylor*, [1992] 1 Lloyd's Rep. 484.
(94) [1981] Ch. 229, at p. 255.

interest between the plaintiffs and those they seek to represent gives the plaintiffs the incentive to represent the other debtors effectively. Gleeson C.J. thought that, if class actions are to become part of our litigation procedure, various matters (95) needed to be governed by rules. However, the present action is not a class action, and, having regard to the way that the statement of claim has now been amended, I do not think that those matters provide any basis for exercising a discretion to stop the present action proceeding as a representative action.

Order

I agree with the order proposed by Toohey and Gaudron JJ.

Appeal allowed.

Set aside the orders made by the New South Wales Court of Appeal on 18 *November* 1992.

Remit the matter to the Court of Appeal for consideration of the question whether it should "otherwise order", within the meaning of the Supreme Court Rules 1970 *(N.S.W.), Pt* 8, *r.* 13(1), *that the action not continue as a representative action.*

The respondent to pay the appellants' costs of the appeal to this Court and of the appeal to the New South Wales Court of Appeal.

Solicitor for the appellants, *Jeremy Stoljar*, Solicitor, Consumer Credit Legal Centre (N.S.W.) Inc.

Solicitors for the respondent, *Corrs Chambers Westgarth*.

R.A.S.

(95) See *Esanda Finance Corporation Ltd. v. Carnie* (1992), 29 N.S.W.L.R. 382, at p. 388: "such important matters as whether or not consent is required from persons who are to be group members in representative proceedings, the position of persons under disability, the right of a group member to opt out of a representative proceeding, alterations to the description of the group, settlement and discontinuance of proceedings, and the giving of various notices to group members."