ANU LAW STUDENTS' SOCIETY

LAWS2244
Litigation and Dispute Management
Semester 1, 2010

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QA2 – Mark 80

This appears to be a Pt IVA Representative Proceeding.
Under s 33C(1)(a) *Federal Court Act 1976*, 7 or more persons with a claim against the same person where (b) the claims arise out of the same, similar or related circumstanced and (c) give rise to a substantial common issue of law or fact can commence a proceeding in the Federal Court (FCA) with one or more persons representing some or all of them.
However, the Court has discretion to order that such proceeding no longer continue where satisfied it is in the interest of justice to do so: s33N FCA.
Such procedures are "opt-out", requiring group members to opt out within a fixed date: s33J FCA, and the judgment binds all group members who do not opt out: s33ZB(b)FCA.

2(a) How might JV & W Respond?

JV & W can dispute that s33C has been satisfied, by claiming that all plaintiffs would be required to have action against all respondents under s33C(1)(a): *Phillip Morris*, whereas most plaintiffs would only have been prescribed Zopler or Wokle, not both, although this requirement was doubted in *Bray v Hoffman La Roche* [✔]. [**A+]**
Could analogise with Phillip Morris and argue that the circumstnaces giving rise to claim were varied [✔] and involved such a range of conduct differing between JV and W that the claims could not rise out of "related circumstances": s 33C(1)(b), since P part of JV has held conferences that W was not related to or involved in – thus disparate circumstances.
JV & W could also ask Court to exercise s33N discretion by saying it was inappropriate that claims be pursued by means of rep proceedings: s33N(1)(d) [✔].

2(b)

I would advise E that she is actually required to 'opt out' of proceeding as per s33J before the fixed date to avoid being bound by the judgment: s33ZB.
Since E does not have a clear claim against W, and it appears that all representative plaintiffs must have claims against all respondents to a rep proceeding: s33C(1)(a), *Phillip Morris*, I would advise that her claim/involvement in the FCA claim may be challenged.
I would advise her, regardless, that although there are cost savings with the FCA claim due to pooled resources, there are disadvantages: such as Court approval regarding settlement: s33V, lack of control, the fact she cannot opt out after a certain date: s33J without the Court's leave: s33J93), means she should commence proceedings in the ACT for greater flexibility and control over the proceedings [✔].

2(c)

L, JV and W can be joined due to r 211 where:

- There is a common issue of law or fact: r211(a)(i),
- E has a right to relief arising out of the same (or series of) transactions or events): r 211(a)(ii).

Since the claim against W & JV are related to the claim against L, as L's liability is affected by W & JV, it is appropriate that they be joined: *Birtles v Cth*, considering the transaction (prescription) as a whole, likely L could be joined to JV or W:[✔✔][**A+**]
However, given the fact that E never took Wokle, uncertain whether there is a right to relief for E arising out of the same transaction as that with JV: r211(a)(ii), especially as W was never involved in P's conference, a partner of JV in 2007 – unlikely that joinder would succeed.
Service?
On L
Originating process must be served personally: r54(2), thus personal service on office in Dickson (within ACT) would suffice: *Maharanee of Baroda*, and would be personal as long as sealed copy given to L: r6405.
On JV – Partnership
Would need to be served under *SEPA*, as they are outside of ACT: r6430(2). Initiating process would be served in same way as required in place of issue: s15, and needs prescribed notices to be attached: s16.
Thus, could apply r6433 which relates to partnerhips and serve the originating process on at least one of the partners: r6433(1)(a) or by serving on registered office in Adelaide: r 6433(1)(c) [**Not RO – Business premises]**

W
A registered Australian company in ACT.
Serve W by leaving it or sending by post to Acton registered office: s6432, s109X *Corporations Act* or delivering it personally to a director residing in Australia: s109X(b). [✔]
2(d)
Bring JV by making Pt 6.2 application to Court to add party as defendant under r220, as Court has general discretion to add partner where they ought to be included and could argue r 210 [**no nec. Parties**]**,** that L ought to be included, to adjudicate effectively and completely on all issues in dispute, and this r 220 discretion is broad: *Birtles* and can be at any time: r 220(2)(a).
L could also issue third party notice under r302 joining his claim against JV to the existing proceedings [**≠ Co-d**] as a claim relating to the original subject matter: r302(b) of L prescribe E the medicine. [✔].

2(e)
There is evidence that JV is destroying evidence thus L should make urgent originating application: r706(2)(b), r 706(4) with supporting affidavit: r 751(3) seeking the Court make a search order under r 751[✔] to require JV to allow someone to enter premises to secure evidence: r751. L can make such application as intending to start proceeding against JV :r 706(1)(b) by bringing third party notice. [✔]
]The criteria L must satisfy is that:

- L has prima facie case on an accrued cause of action: r 752(1)(a) [✔]– here, likely to satisfy as F's post shows there is 'incriminating' evidence;
- Potential or actual loss to L would be series, if search order is not made: r 752(1)(b) - yes, since JV is shredding documents that may not otherwise be available, appears to be incriminating evidence.
- Sufficient evidence that JV has evidence and real possibility that JV might destroy: r 752(1)(c) – yes, likely to satisfy due to Freddy's evidence and postings. [**Evidence is not probative – you need to get sep evidence by F**].

Could analogise with Anton Pillar [**Piller**] case [✔] and seek Anton pillar [**Piller]** order under Court's inherent jurisdiction: s20 *Supreme Court Act* as JV holds the relevant incriminating documents about Topaine, like the defendant held incriminating evidence in Anton Pillar [**Piller**] with clear fears that such evidence would be destroyed and prevent justice [✔].
Could also seek r715 order to inspect documents.

2(f)
Settlement could be effected by consent judgment under r1611, which has the effect of an order made by the Court: r 1611(5), thus giving JV and L the security of issue estoppel preventing E from bringing further action. [✔].
Could also enter into contract or deed but they do not give rise to res judicata and would require a separate action for breach of contract if breached, and E would need to discontinue proceedings under r1160.
Costs?
E has made a Calderbank offer to L, but this offer did not involve JV and in any event, this final settlement is higher. The award of costs is discretionary: r1721, but usually on a party-party basis: r 1751(1) and costs follow the event: *Knight v FP assets*.
Thus, since JV and L made offer to settle **[offer made by L**], should be liable for E's party-party costs in bringing action, no 'special circumstances' exist to justify indemnity costs: *Hurstville Municipal Council*, although perhaps L should have settled at P's first offer, thus should indemnify P for costs from L's rejection of offer, but unclear due to L's joining JV. [✔✔ **A+**].

[**Very good work – 80**].