Before the High Court

Representative Actions: Continued Evolution or a Classless Society?

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In *Carnie v Esanda Finance Corporation Ltd* (hereafter *Carnie*) the High Court has the opportunity to consider the proper scope of the representative action in a modern litigious, consumer-oriented, society. In particular, the court will have to determine the proper principles to be applied in the context of claims arising from separate and individual contracts between, on the one hand, the plaintiff and the numerous claimants purporting to constitute a represented class and, on the other hand, the defendant sought to be held liable.[1] As will be seen, the existence of separate and individual contracts has often been viewed as providing a reason to deny recourse to representative litigation.

1. *The representative action*

The representative action, a product of the Court of Chancery[2] but subsequently incorporated in the post-*Judicature Act* Rules of the Supreme Court,[3] enables the similar claims of a number of persons against the same defendant to be resolved in the one action brought by a plaintiff on behalf of the represented class. The rule also permits a plaintiff to sue a number of defendants with common interests in the proceedings by naming one or more of them as representative.

The rule, in its original version, permitted an action to be commenced (or defended) in representative form in circumstances where the named party and those whom he or she sought to represent shared the "same interest" in the proceedings.[4] The current New South Wales provision which will be the focus of the High Court's deliberations in *Carnie*, retains the "same interest" criterion[5] and, along with the provisions applying in Queensland, Western

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1 Similar principles ought generally to apply to the case of a single plaintiff and numerous potential defendants.

2 See *Adair v New River Co* (1805) 11 Ves 429; *Cockburn v Thompson* (1809) 16 Ves 321.

3 Originally Rule 10 of the Rules of Procedure scheduled to the *Supreme Court of Judicature Act* 1873 (UK).

4 Ibid.

5 Supreme Court Rules (NSW) Pt 8 r13. This criterion has been generally interpreted, at least since the House of Lords' decision in *Duke of Bedford v Ellis* [1901] AC 1 (per Lord Macnaghten at 8), as requiring the representor to establish that he or she and the designated class members (i) share a common interest; (ii) have a common grievance; and (iii) would all be served by a representative suit in that relief could be secured which would, in its nature, be beneficial to all.

Australia, Tasmania, the Australian Capital Territory and the Northern Territory,[6] remains based substantially upon the original Rule 10. Only in Victoria,[7] South Australia[8] and, most noticeably, under Part IVA of the *Federal Court of Australia Act* 1976 (Cth), has it been thought necessary significantly to reform the rule.[9]

If given a liberal application, the representative action can promote a more efficient use of judicial resources by avoiding a multiplicity of actions dealing with common issues, thus resulting in savings, both in time and cost, for the parties and the court. Additionally, the representative action may enhance access to justice, by allowing the costs of litigating numerous small claims to be spread among a large group, in circumstances in which it would be economically senseless to proceed individually. Yet, in 1910, the Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd*,[10] disregarding previous decisions which had manifested a benevolent attitude to representative actions,[11] set about ensuring that this unruly child of equity would not corrupt the orderly procedures of the common law.

Markt was interpreted as imposing two main restrictions on the availability of the representative action. First, it could not be utilised when the relief claimed was damages, since damages were personal, requiring separate proof, and of no benefit to a class as a whole.[12] Secondly, outside the narrow categories of cases where representative actions had traditionally been permitted (such as a derivative action by shareholders, or a dispute about common property, or a common fund, by the creditors of a defendant), a representative action will usually be inapplicable in cases involving separate and individual contracts between claimants and defendant, largely because of the court's readiness to assume, without evidence, the likelihood of separate defences being advanced if each claim were to be prosecuted individually.[13]

2. *Evolution of Representative Actions: Eroding the Restrictions of Markt*

With only the occasional setback,[14] the 80 years since *Markt* have been characterised by a gradual, but determined, undermining of these two restrictions. Damages may now be claimed in a representative action, at least where a global figure can be arrived at without the need for protracted proceedings to

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6 Supreme Court Rules: Ord 3 r10 (Qld); Ord 18 r12 (WA); Ord 19 r10 (ACT); Ord 18 (NT); and, in more convoluted form, Ord 18 r9 (Tas). Similar provisions prevail in England (Ord 15 r12) and New Zealand (Rule 78).

7 See *Supreme Court Act* 1986 (Vic), ss34 and 35.

8 See Supreme Court Rules (SA), r34.01 to r34.07.

9 Although in all three jurisdictions defendant representative actions continue to be governed by provisions based substantially upon the original rule: Supreme Court Rules (Vic), Ord 18; Supreme Court Rules (SA), r34.08 to 34.12; and Federal Court Rules, Ord 6 r13.

10 [1910] 2 KB 1021.

11 See *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426; *Duke of Bedford v Ellis*, above n5.

12 Above n10 at 1035; at 1040-1 per Fletcher Moulton LJ.

13 Id at 1030 per Vaughan Williams LJ; at 1040 per Fletcher Moulton LJ.

14 See, eg, *Naken v General Motors of Canada Ltd* [1983] 1 SCR 72.

determine the quantum of damages for each claimant;[15] or for which each defendant is liable — as, for instance, where proportionate liability is already specified by contract;[16] or where individual damages can easily be determined by simple mathematical calculation.[17]

In cases involving claims arising from separate and individual contracts, courts in most Commonwealth jurisdictions, including England, have taken up the task of removing the constraints imposed by *Markt*. No longer will the court simply assume, without evidence, that a representative action is inappropriate. Rather, the court will be inclined to allow the action to proceed,[18] particularly where the contracts are substantially similar.[19] A pragmatic approach is to be adopted and the court will look for a realistic, rather than theoretical, possibility of separate defences being raised were individual proceedings to be prosecuted.[20] Furthermore, if later it becomes apparent that the defendant may indeed have different defences as against different contracting class members, then the proceedings can be reshaped, rather than having to abandon the representative nature of the litigation and its attendant benefits — for example by adding further named plaintiffs so as properly to evaluate the newly ascertained defences.[21] However, in the context of claims arising from separate and individual contracts, the New South Wales Court of Appeal decision in *Carnie* has seen the process of evolving reform, from the nadir of *Markt*, brought to an abrupt halt, at least in New South Wales. The High Court's decision will determine whether that halt represents merely a temporary, rather than sustained, curtailment of the development of potentially one of the law's most useful procedural mechanisms.

3. *The Facts in Carnie*

Mr and Mrs Carnie were wheat farmers who, requiring finance to purchase a header, had entered into a loan contract with the defendant. Later, being unable to meet their instalments, they entered into a variation agreement, extending the period for repayment. In the subsequent litigation, the Carnies claimed

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15 *EMI Records Ltd v Riley* [1981] 2 All ER 838. An alternative route suggested by Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 is to bring a representative action seeking to obtain a declaration of the right to recover damages, with individual class members having subsequently to establish their individual entitlements.

16 *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)* [1991] 2 QB 206.

17 *Cobbold v TIME Canada Ltd* (1976) 71 DLR (3d) 629 (Ont HC). Note that apart from Gleeson CJ's reference to the *Markt* holding on damages as being "controversial", at 389, the judgments of the Court of Appeal in *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 do not deal with the issue of damages claimed in a representative action.

18 *Gaetjens v Arndale (Kilkenny) Pty Ltd* [1969] SASR 470 at 472; *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)*, above n16; *Bank of America National Trust and Savings Association v John Joseph Taylor and Stasima Maritima Co Ltd* [1992] 1 Lloyd's Rep 484 at 493. See also two recent decisions of the Malaysian High Court: *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd* [1988] 2 MLJ 624; and *Voon Keng v Syarikat Muzwina Development Sdn Bhd* [1990] 3 MLJ 61.

19 *Cobbold v TIME Canada Ltd*, above n17.

20 *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)*, above n16 at 222-3 per Staughton LJ; at 232 per Sir John Megaw.

21 *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 at 273.

that this variation agreement, in capitalising interest payable on the original loan, contravened provisions of the *Credit Act* 1984 (NSW). There was evidence that the variation agreement was of a type regularly used by the defendant, and the plaintiffs, in claiming declaratory relief and consequential orders, sought to bring a representative action on behalf of themselves and all other persons who, from a certain date, had entered into similar contracts with the defendant suffering from the same defect.

The proceedings in the Court of Appeal, though formally an appeal from a Master's refusal to strike out the representative nature of the writ, were in substance an appeal from a similar, earlier order of Cohen J,[22] declaring the representative action permissible under Part 8 Rule 13.

4. *Four Suggested Reasons For Denying Recourse to a Representative Action*

Four principal reasons can be discerned from the majority judgments of Gleeson CJ and Meagher JA, in the Court of Appeal, as to why a representative action was deemed impermissible. All four reasons will no doubt be pressed upon the High Court yet all four are troublesome and invite comment. First, and least plausible, it was said that some represented debtors might be quite satisfied with their existing contractual arrangements and be uninterested in making hostile claims against their financier. In effect, this line of argument addresses the third suggested requirement for a representative action,[23] by asserting that concurrence of interest is absent since the relief sought is not beneficial to all class members. Gleeson CJ thought that "many people who make agreements are willing to abide by them, even if there is a statute which relieves them from the necessity to do so."[24] Similar comments can be found in the short concurring judgment of Meagher JA.[25] However, Kirby P, in a compelling dissent, highlighted the absurdity of the proposition advanced. To suggest that struggling farmers would be content paying large sums of money unnecessarily "stretches even the judicial imagination quite unreasonably."[26] Of course, the concept of the contented debtor, as envisaged by the majority, is pure fantasy. But even if such a person were found to exist, a representative action need not be avoided since he or she would be free not only to return to the defendant any refund cheque received,[27] but also to apply to be joined as a defendant in the action,[28] or to be represented by the defendant,[29] if so desired.

In truth, any reliance on a "contented debtors" argument could, in this case, gain credibility only from the fact the plaintiffs had claimed, among the relief

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22 *Carnie v Esanda Finance Corporation Ltd* (1990) ASC 55-983.
23 Above n5.
24 Above n17 at 386.
25 Id at 404.
26 Id at 400.
27 As suggested by Kirby P, ibid.
28 *Wilson v Church* (1878) 9 Ch D 552 at 559; *Watson v Cave (No. 1)* (1881) 17 Ch D 19; *Fraser v Cooper Hall & Co* (1882) 21 Ch D 718 at 719.
29 *Fraser v Cooper Hall & Co*, id at 720; *John v Rees* [1970] Ch 345 at 371.

sought, a declaration that all variation agreements were null and void. Since such agreements postponed the time of repayment, their cancellation may not have constituted a form of relief beneficial to all class members, particularly those who had since reorganised their finances. However, Kirby P was surely correct in viewing this potentially fatal objection to the representative action as having been overcome by the plaintiffs' application, unopposed by the defendant, to abandon this particular claim for relief.[30]

Second, Gleeson CJ characterised the action as a controversial "attempt to make the rule the foundation of what is called in modern times a 'class *action*'".[31] The existing rule, in contrast to detailed class action statutes prevailing in other jurisdictions, was, Gleeson CJ argued, incapable of bearing the weight of a complex class action. Kirby P criticised such characterisation for being "misleading"[32] and distinguished class actions as a radically different form of legal procedure developed by US courts.

On one view, "representative action" and "class action" are merely the different terms used by various jurisdictions to describe their procedures for representative litigation, with differences in form existing from jurisdiction to jurisdiction - for example, the term "class action" has been used in Canadian jurisdictions possessing rules substantially similar to Part 8 Rule 13.[33] However, from another perspective, it must be acknowledged that US, particularly Californian, courts have taken a much more adventurous approach to the utilisation of representative litigation than have their Anglo-Australian counterparts, and Kirby P was right to point out the differences in size, procedure, relief sought, and cost rules that prevail in US class action litigation.[34] Yet one need be careful lest the enquiry centre upon matters of semantics, rather than substance. The plaintiffs sought to utilise a longstanding provision in the NSW Rules. The choice of term to be used does not assist in explaining why the plaintiffs were not able to avail themselves of an action clearly contemplated by the Rules.[35]

Furthermore, existing jurisprudence, dealing with such matters as the requirement of numerous persons to be represented;[36] the representative party's conduct of proceedings;[37] joint representatives;[38] the discontented class member;[39] together with a sensible appreciation of the Court's wide capacity to manage proceedings,[40] help to ensure that the rule is capable of application according to its terms.

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30 Above n17 at 398-9.
31 Id at 386; see also at 388.
32 Id at 390.
33 See, eg, the Supreme Court of Canada interpreting the then Rule 75 of the Ontario Supreme Court Rules in *Naken v General Motors of Canada Ltd*, above n14. Moreover, the terms "representative action" and "class action" were used interchangeably by Griffith CJ in *Barnes & Co Ltd v Sharpe* (1910) 11 CLR 462 at 469, when considering the possibility of a representative action in proceedings for defamation.
34 Above n17 at 390-1.
35 A point acknowledged by Kirby P, id at 397.
36 *Re Braybrook* [1916] WN 74.
37 *Handford v Storie* (1825) 2 S & S 196.
38 *Leathley v McAndrew* [1876] WN 38.
39 *Watson v Cave (No 1)*, above n28.
40 Above n21.

The third reason floated for denying a representative action was class ambiguity. Gleeson CJ referred to the difficulties the plaintiffs faced in identifying the persons being represented;[41] Meagher JA described them as an "indeterminate group of other customers" unknown to the plaintiffs.[42] Yet, while the plaintiffs must describe the represented class with sufficient particularity, so that one can readily determine whether a particular individual is a member, the plaintiffs are not required to be able to name each person or indeed to report the total number of members.[43] Furthermore, the defendant would not be prejudiced in any way, since one can readily assume that its records would disclose all potential class members. Kirby P was surely correct in depicting the class as "closed and readily ascertainable".[44]

Fourth, the fact that the claims arose from separate and individual contracts between the defendant and each debtor, demonstrated that the plaintiffs and represented debtors did not share the "same interest" in the proceedings, as required by the rule. Here the retreat to the philosophy of *Markt* is most clear. According to Gleeson CJ, all that the plaintiffs and the represented debtors had in common was that, on some past occasion, they had entered into the same kind of contract with the defendant.[45] The facts were, Gleeson CJ opined, very different from the traditional categories of cases (derivative actions by shareholders, and disputes about a common fund, or common property, by creditors) and went "well beyond received notions of the scope and purpose of the rule".[46] Meagher JA reasoned similarly, declaring, in respect of the plaintiffs and represented debtors, "[t]hey in no way resemble the classes with respect to whom a representative order is customarily and properly made ... ".[47]

Yet such reasoning wholly ignores the advances on *Markt*, described above,[48] in cases involving claims arising from separate and individual contracts, where courts have permitted the representative action to be introduced in novel factual circumstances.[49] Thus in *Cobbold v TIME Canada Ltd*[50] the plaintiff was allowed to bring a representative action, for breach of contract, on behalf of numerous other subscribers to the defendant's magazine, despite all such persons being bound by separate, albeit largely identical, contracts of subscription. In *R J Flowers Ltd v Burns*[51] the plaintiff was permitted to sue in a representative action, on behalf of fellow kiwifruit growers, for breach of separate contracts of bailment for reward, in circumstances in which valuable fruit was damaged; while the plaintiffs in *Gaetjens v Arndale (Kilkenny) Pty*

41 Above n17 at 390.
42 Id at 404.
43 *Duke of Ellis v Bedford*, above n5 at 11.
44 Above n17 at 398.
45 Id at 388; at 404, Meagher JA viewed the plaintiffs as "seeking to intermeddle in the commercial relationship between Esanda and its customers" and added that the plaintiffs "have no proprietary interest in those other persons contracts".
46 Id at 389.
47 Id at 404.
48 See above n18 to n21 and accompanying text.
49 Indeed, since no allusion is made to the possibility of separate defences (even if, as in *Markt*, that possibility is advanced merely in the abstract, and left uninvestigated), the case might be said to represent a more restrictive approach than was evidenced even in *Markt*.
50 Above n17.
51 Above n21.

Ltd[52] were allowed to bring a representative action on behalf of other lessees of shops in a shopping complex, all lessees being bound by substantially similar leases with the defendant lessor. In *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd*[53] the plaintiff was permitted to sue as representative of all purchasers of palm oil under 5, 150 separate futures contracts declared to have been defaulted on by named defendants. And in two important cases involving defendant representative actions, namely *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)*[54] and *Bank of America National Trust and Savings Association v John Joseph Taylor and Stasima Maritima Co Ltd*,[55] proceedings were permitted nominating certain defendants as representatives of numerous underwriters of individual marine insurance policies; significantly, in the latter case, without the benefit of a leading underwriter clause, in each contract of insurance, providing a common contractual framework.

Moreover, the attempt by the Court of Appeal majority in *Carnie*, following the example of *Markt*, to restrict use of the representative action in the multi-contractual sphere to a few, long-standing categories of cases is manifestly alien to the gradual evolution of legal concepts, by matching changing circumstances as required, which is a customary, and rightly cherished, characteristic of common law development. The representative action has accurately been described, by Megarry J (as he then was), as "a flexible tool of convenience in the administration of justice";[56] yet cementation into rigid categories of use is not the usual chaperone of flexibility. The suggested restriction must be wrong in principle, and runs counter to the benevolent construction accorded the representative action by Lord Lindley in *Taff Vale Railway Co v Amalgamated Society of Railway Servants*[57] when declaring: "[t]he principle [of convenience] on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports." In practical terms, one profound consequence of the restriction is the segregation, in terms of access to representative litigation, of the debtors of a company from its creditors and debenture holders.[58] Yet since both classes comprise easily ascertainable persons in an existing legal relationship with the company, the justification for discriminatory treatment is not readily apparent.

5. *Further Reflection*

Two further broad points are worthy of comment. First, as a typical element in the judicial reasoning towards a restrictive interpretation, Part 8 Rule 13, and its equivalents in other common law jurisdictions, are contrasted, unfavourably, with the detailed legislative regimes,[59] for the conduct and carriage of

52 Above n18.
53 Id. See also *Voon Keng v Syarikat Muzwina Development Sdn Bhd*, above n18.
54 Above n16.
55 Above n18.
56 *John v Rees*, above n29 at 370.
57 Above n11 at 443.
58 See above n17 at 404 per Meagher JA.
59 Consider *Federal Court of Australia Act* 1976 (Cth), Pt IVA; *Supreme Court Act* 1986 (Vic), ss 34 and 35; and Ontario's recently enacted *Class Proceedings Act* 1992 (Ont).

representative actions, applying in other jurisdictions.[60] Yet such reasoning provokes four responses. First, and most obvious, the existence, in other jurisdictions, of such detailed legislative frameworks cannot, as a matter of sound legal reasoning, provide a basis for denying effect to, and evolution of, the existing rule under consideration. Second, it can be argued that, at least in some respects, the reasons supporting the need for reform, such as to combat the restrictions of *Markt* in the context of claims for damages[61] or claims arising out of separate and individual contracts,[62] have been overtaken by subsequent events, as outlined above.[63] Third, the lack of rigid specificity of the rule means that it may thus retain an agreeable degree of flexibility denied to more detailed and specific regimes. A ready example may be the development, described below, in the law on the liability of represented persons to contribute, when circumstances require, to party-party costs — a development that would have been impossible in the presence of detailed legislative provision.[64] Fourth, the existing rule is not left to flounder helplessly upon its own, as some judicial criticism might suggest; rather, upon its seemingly modest structure has been encrusted a significant body of jurisprudence, providing guidance to both courts and litigants.[65] There is no good reason to deny further development of this body of law as cases arise calling for determination of novel issues.

Moreover, such criticism of the rule displays little confidence in the court's ability competently to manage its own procedures.[66] A much more assured approach was rightly adopted by McGechan J in *R J Flowers Ltd v Burns*.[67] In a particularly pertinent example, he refused to deny a representative action, on claims arising from separate and individual contracts, on the ground of alleged possible separate defences as against different represented growers. Rather, the benefits of the representative action are such that the possibility of separate defences, so as to deny those advantages, must be real and immediate, not speculative and advanced merely in the abstract.[68] The representative action, in *R J Flowers Ltd v Burns*, was allowed to continue with the court retaining the power to reshape proceedings if, at a later stage, it became apparent that the defendants did indeed have different defences as against different

60 See *Naken v General Motors of Canada Ltd*, above n14; *Esanda Finance Corporation Ltd v Carnie*, above n17 at 388 per Gleeson CJ: "[i]f [class actions] are to become part of our litigious procedures, then they need to be governed by rules that make them manageable and effective. An example is to be found in the recently enacted Part IVA of the *Federal Court of Australia Act* 1976 ..."; see also at 389-90.

61 Cf *Federal Court of Australia Act* 1976 (Cth), ss33c(2)(a)(ii) and (iii); *Supreme Court Act* 1986 (Vic), ss35(6)(a) and (b). See also Supreme Court Rules (SA), r34.03(a).

62 Cf *Federal Court of Australia Act* 1976 (Cth), ss33c(2)(b)(i). See also Supreme Court Rules (SA), r34.03(b).

63 See n14 to n21 above and accompanying text.

64 See *Federal Court of Australia Act* 1976 (Cth), s43(1A); *Class Proceedings Act* 1992 (Ont), s31(2).

65 For an example of some aspects touched upon, see n36 to n40 above.

66 Cf, for a more positive view in the context of group litigation, *Chrzanowska v Glaxo Laboratories Ltd*, The Times, 16 March 1990, per Steyn J: "I ... proceed on the basis that our courts have a broad and flexible power to adopt new procedures which will promote the ends of justice."

67 Above n21.

68 Above n20.

contracting class members. Among the options recognised by McGechan J, for refashioning the proceedings, were, in lieu of abandoning altogether the representative nature of the action, the addition of further growers as named plaintiffs so as properly to evaluate the newly ascertained defences, and the splitting of the original action into two or more smaller representative proceedings, to be dealt with separately.[69]

A second broad point is worthy of consideration, namely whether the judicial hostility, evidenced in cases such as *Markt* and now *Carnie*, to the expansion of representative actions, might not stem from what Kirby P identified as a judicial aversion to the dispensing of "free justice"?[70] For a long time the orthodox view was that represented persons could not be made liable for party-party costs in the event of failure in trial of the action by their representor.[71] They have thus been viewed as seeking to avoid what Fletcher Moulton LJ, in *Markt*, described as "the ordinary responsibilities of plaintiffs".[72] Indeed, Kirby P went so far as to state that "[i]t would be impossible to underestimate the effect which this principle has had on the course of this representative action."[73]

However, the law as to the liability of represented persons for party-party costs has been undergoing something of a quiet revolution in recent times;[74] and Kirby P's statement that: "[i]t seems to be accepted by the case law and the practice books that the represented parties are not personally liable for costs" may not, with respect, be an accurate depiction of the present state of the law.[75] In appropriate, though no doubt limited,[76] circumstances, it may well be that a represented person could be held liable for party-party costs, particularly one who has made a significant contribution, whether of a financial nature[77] or otherwise, to the commencement or carriage of the proceedings. And if, as such, the traditional view on costs liability no longer

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69 Above n21 at 273.

70 *Esanda Finance Corporation Ltd v Carnie*, above n17 at 402.

71 See *Price v Rhondda Urban District Council* [1923] All ER 679; *Markt & Co Ltd v Knight Steamship Co Ltd*, above n10 at 1039; *Moon v Atherton* [1972] 2 QB 435 at 441; *Cameron v National Mutual Life Association of Australasia Ltd (No 2)* [1992] 1 QdR 133 at 136.

72 Above n10 at 1037. Represented persons may also be immune from orders for discovery: *Markt & Co Ltd v Knight Steamship Co Ltd*, above n10 at 1039; *Ventouris v Mountain, The Italia Express* [1990] 3 All ER 157; but cf *R J Flowers Ltd v Burns*, above n21 at 273.

73 Above n17 at 402.

74 In *Bank of America National Trust and Savings Association v John Joseph Taylor and Stasima Maritima Co Ltd*, above n18, Waller J thought it was "strongly arguable" that the orthodox view should be reconsidered in light of *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, in which the House of Lords interpreted the court's wide discretionary power to award costs, contained in s51(1) of the *Supreme Court Act* 1981 (UK), as not limited to parties to the action. To similar effect is the High Court's recent decision in *Knight v F P Special Assets Ltd* (1992) 174 CLR 178, interpreting Supreme Court Rules (Qld), Ord 91 r1. (See also *Supreme Court Act* 1970 (NSW), s76(1)).

75 A conclusion reached by the Appeal Division of the Supreme Court of Victoria in *Burns Philp Trustee Co Ltd v Bhagat* [1993] 1 VR 203, interpreting s24(1) of the *Supreme Court Act* 1986 (Vic); yet, significantly, encompassing within its holding plaintiff (and, presumably, defendant) representative actions brought, for whatever reason, under Ord 18, the still-existing Victorian counterpart of Part 8 Rule 13.

76 See *Bhicoobai v Hariba Raghuji Jambhookar* (1918) 42 Bom 556 at 578 (Bombay HC).

77 Cf *McAllister v O'Meara* (1896) 17 PR 176 at 179 (Ont Div Ct).

represents the true position, this removes one further, albeit often unstated, objection to use of the representative action in cases such as *Carnie*.

One would think that matters of procedural law, being of peculiar concern to the judiciary, would be sufficiently malleable to match the changing conditions of a modern, litigious society. That this has not always been so is unfortunate. In particular, the Court of Appeal decision in *Carnie* marks an unwelcome return to the outdated philosophy of *Markt*, at a time when cuts in government funding to courts and litigants, and the high cost of legal services, make more urgent the utilisation of procedures promoting efficiency in litigation. Lord Lindley's wise and oft-quoted counsel that the rule "ought to be applied to the exigencies of modern life as occasion demands",[78] seems more relevant than ever.

78 *Taff Vale Railway Co v Amalgamated Society of Railway Servants*, above n11 at 443.