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FEDERAL COURT OF AUSTRALIA

Madgwick v Kelly [2013] FCAFC 61

Citation:	Madgwick v Kelly [2013] FCAFC 61
Appeal from:	Application for leave to appeal: Kelly v Willmott Forests Ltd (in liquidation) [2012] FCA 1446
Parties:	**JONATHAN DAVID MADGWICK and MARCUS DERHAM and JAMES WILLIAM ANTONY HIGGINS and HUGH THOMAS DAVIES and RAYMOND MAXWELL SMITH v DAVID KELLY and MARGARET KELLY and AARON GRANT**
File number:	VID 31 of 2013
Parties:	**WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650) and BIOFOREST LIMITED (ACN 096 335 876) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) v DAVID KELLY and MARGARET KELLY and AARON GRANT**
File number:	VID 33 of 2013
Parties:	**MIS FUNDING NO 1 PTY LTD (ACN 119 268 905) v DAVID KELLY and MARGARET KELLY**
File number:	VID 34 of 2013
Parties	**COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124) v AARON GRANT**
File number:	VID 35 of 2013
Judges:	**ALLSOP CJ, JESSUP & MIDDLETON JJ**
Date of judgment:	14 June 2013
Catchwords:	**COSTS** – security for costs in a class action – whether proceedings defensive – independent operation of s 43(1A) and s 33ZG(c)(v) of the *Federal Court of Australia Act 1976* (Cth) – whether the applicant's solicitors are 'standing behind' the litigation – relevance of possible availability of litigation funding – whether an order for security would stifle the proceedings – onus of proof – commercial nature of the litigation – relevance of the

characteristics of the group members, including their unwillingness to provide security

Legislation: *Federal Court of Australia Act 1976* (Cth) ss 33ZG(c)(v), 43A(1), 56

Cases cited:
Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170
Ariss v Express Interiors Pty Ltd (in liq) [1996] 2 VR 507 cited
Bell Wholesale Co Ltd v Gates Export Corporation [1984] 2 FCR 1 cited
BPM Pty Ltd v HPM Pty Ltd (1996) 131 FLR 339 cited
Bray v F Hoffman-La Roche Ltd [2003] FCAFC 153; 130 FCR 317 discussed
Cowell v Taylor (1885) 31 Ch D 34 cited
Dae Boong International Co Pty Ltd v Gray [2009] NSWCA 11 considered
Décor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397
Delta Electricity v Blue Mountains Conservation Society Inc [2010] NSWCA 264
Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd [2008] NSWCA 148 cited
Hall v Australian Finance Direct Ltd [2005] VSC 306 considered
House v R (1936) 55 CLR 499
In re the Will of Gilbert (1946) 46 SR (NSW) 318
Jeffcott Holdings Ltd v Paior (1997) 15 ACLC 28 cited
Kelly v Willmott Forests Ltd (in liquidation) [2012] FCA 1446 reversed
Maatschappij voor Fondsenbezit v Shell Transport and Trading Co [1923] 2 KB 166 cited
Pioneer Park Pty Ltd (in liq) v Australia and New Zealand Banking Group Ltd (2007) 25 ACLC 1707; [2007] NSWCA 344 cited
Ryan v Great Lakes Council (1998) 154 ALR 584 disapproved
Ryan v Great Lakes Council (*Ryan No 2*) (1998) 155 ALR 447 disapproved
The Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd [2004] FCA 1400 discussed
Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd [2000] FCA 1004 disapproved
Willey v Synan [1935] HCA 76; 54 CLR 175 cited
Woodhouse v McPhee (1997) 80 FCR 529 disapproved

Date of hearing: 22 May 2013

Date of last submissions: 23 May 2013

Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
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Counsel for the Applicants in VID 31 of 2013:	J Delany and C van Proctor
Solicitor for the Applicants in VID 31 of 2013:	Brian Ward & Partners
Counsel for the Applicants in VID 33 of 2013:	W Harris SC and R Pintos-Lopez
Solicitor for the Applicants in VID 33 of 2013:	Arnold Bloch Leibler
Counsel for the Applicants in VID 34 and 35 of 2013:	B Quinn SC and A Di Pasquale
Solicitor for the Applicants in VID 34 and 35 of 2013:	Freehills
Counsel for the Respondents in VID 31, 33, 34 and 35 of 2013:	J W K Burnside QC, R Moore and N Evans
Solicitor for the Respondents in VID 31, 33, 34 and 35 of 2013:	Macpherson + Kelley Solicitors

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 31 of 2013**

BETWEEN:	**JONATHAN DAVID MADGWICK** **First Applicant**
	MARCUS DERHAM **Second Applicant**
	JAMES WILLIAM ANTONY HIGGINS **Third Applicant**
	HUGH THOMAS DAVIES **Fourth Applicant**
	RAYMOND MAXWELL SMITH **Fifth Applicant**
AND:	**DAVID KELLY** **First Respondent**
	MARGARET KELLY (NEE ILACQUA) **Second Respondent**
	AARON GRANT **Third Respondent**

JUDGES: **ALLSOP CJ, JESSUP & MIDDLETON JJ**
DATE OF ORDER: **14 JUNE 2013**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. Leave be granted to appeal from the orders of the Court made on 17 December 2012.
2. The applicants file and serve a notice of appeal in the form of the draft notice of appeal the subject of argument before the Full Court on 22 May 2013.
3. The appeal be allowed.
4. The orders of the Court made on 17 December 2012 be set aside.
5. Subject to any terms imposed by the primary judge and in an amount directed by the primary judge, the applicants in the primary proceeding provide security for the costs of the respondents in a sum and in a manner to be assessed by the primary judge.

6. The interlocutory application be remitted to the primary judge for the fixing of the sum of any security and the manner and term of its provision, such remitter and consideration to be on the basis of the evidence adduced already in the application, unless the primary judge orders otherwise.

7. The costs of the application for security for costs before the primary judge be remitted to the primary judge.

8. The respondents to the application and appeal (the applicants in the primary proceeding) pay half the applicants' costs of the appeal and application for leave to appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 33 of 2013**

BETWEEN:	**WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)** **First Applicant**
	BIOFOREST LIMITED (ACN 096 335 876) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) **Second Applicant**
AND:	**DAVID KELLY** **First Respondent**
	MARGARET KELLY (NEE ILACQUA) **Second Respondent**
	AARON GRANT **Third Respondent**

JUDGES:	**ALLSOP CJ, JESSUP AND MIDDLETON JJ**
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consideration to be on the basis of the evidence adduced already in the application, unless the primary judge orders otherwise.

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IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 34 of 2013**

BETWEEN:	**MIS FUNDING NO 1 PTY LTD (ACN 119 268 905)** **Applicant**
AND	**DAVID KELLY** **First Respondent**
	MARGARET KELLY (NEE ILACQUA) **Second Respondent**
JUDGES:	**ALLSOP CJ, JESSUP AND MIDDLETON JJ**
DATE OF ORDER:	**14 JUNE 2013**
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5. Subject to any terms imposed by the primary judge and in an amount directed by the primary judge, the applicants in the primary proceeding provide security for the costs of the respondent in a sum and in a manner to be assessed by the primary judge.
6. The interlocutory application be remitted to the primary judge for the fixing of the sum of any security and the manner and term of its provision, such remitter and consideration to be on the basis of the evidence adduced already in the application, unless the primary judge orders otherwise.
7. The costs of the application for security for costs before the primary judge be remitted to the primary judge.
8. The respondents to the application and appeal (the applicants in the primary proceeding) pay half the applicant's costs of the appeal and application for leave to appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011.*

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 35 of 2013**

BETWEEN:	**COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)** **Applicant**
AND:	**AARON GRANT** **Respondent**
JUDGES:	**ALLSOP CJ, JESSUP AND MIDDLETON JJ**
DATE OF ORDER:	**14 JUNE 2013**
WHERE MADE:	**MELBOURNE**

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1. Leave be granted to appeal from the orders of the Court made on 17 December 2012.
2. The applicant file and serve a notice of appeal in the form of the draft notice of appeal the subject of argument before the Full Court on 22 May 2013.
3. The appeal be allowed.
4. The orders of the Court made on 17 December 2012 be set aside.
5. Subject to any terms imposed by the primary judge and in an amount directed by the primary judge, the applicant in the primary proceeding provide security for the costs of the respondent in a sum and in a manner to be assessed by the primary judge.
6. The interlocutory application be remitted to the primary judge for the fixing of the sum of any security and the manner and term of its provision, such remitter and consideration to be on the basis of the evidence adduced already in the application, unless the primary judge orders otherwise.
7. The costs of the application for security for costs before the primary judge be remitted to the primary judge.
8. The respondent to the application and appeal (the applicant in the primary proceeding) pay half the applicant's costs of the appeal and application for leave to appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION **VID 31 of 2013**

BETWEEN:	**JONATHAN DAVID MADGWICK** **First Applicant**
	MARCUS DERHAM **Second Applicant**
	JAMES WILLIAM ANTONY HIGGINS **Third Applicant**
	HUGH THOMAS DAVIES **Fourth Applicant**
	RAYMOND MAXWELL SMITH **Fifth Applicant**
AND:	**DAVID KELLY** **First Respondent**
	MARGARET KELLY (NEE ILACQUA) **Second Respondent**
	AARON GRANT **Third Respondent**

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION **VID 33 of 2013**

BETWEEN:	**WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)** **First Applicant**
	BIOFOREST LIMITED (ACN 096 335 876) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) **Second Applicant**
AND:	**DAVID KELLY** **First Respondent**
	MARGARET KELLY (NEE ILACQUA) **Second Respondent**

AARON GRANT
Third Respondent

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 34 of 2013**

BETWEEN:	**MIS FUNDING NO 1 PTY LTD (ACN 119 268 905)** **Applicant**
AND	**DAVID KELLY** **First Respondent**
	MARGARET KELLY (NEE ILACQUA) **Second Respondent**

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 35 of 2013**

BETWEEN:	**COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)** **Applicant**
AND:	**AARON GRANT** **Respondent**

JUDGES:	**ALLSOP CJ, JESSUP & MIDDLETON JJ**
DATE:	**14 JUNE 2013**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

ALLSOP CJ AND MIDDLETON J:

1 In these related class actions, the primary judge dismissed the applications by the respondents to the proceedings for security for costs. (To avoid confusion, we will refer to the respondents as such, even though they were the applicants on the applications for security, the applicants for leave to appeal and, by reason of the orders, the appellants.) The

unsuccessful respondents seek leave to appeal. Argument on leave and the appeals was heard concurrently.

2 The primary judge's reasons were, if we may respectfully say, careful and thorough. In our respectful view, however, his Honour erred in a small number of respects. For that reason, we would grant leave, allow the appeal, and in the re-exercise of the discretion, order that security be provided, in amounts and on terms to be determined by the primary judge on remitter.

3 The thorough reasons of the primary judge make it possible to explain the background to the underlying litigation reasonably shortly. The applicants and group members were investors in forestry plantation schemes that failed. Willmott Forests Ltd (Willmott) and Bioforest Ltd (Bioforest) were the responsible entities in these managed investment schemes under the *Corporations Act 2001* (Cth) ('*Corporations Act*'): the Willmott Forests Project, the Bioforest Sustainable Timber and Biofuel Project 2007, and the Willmott Forests Premium Forestry Blend Project. The schemes were attractive to investors interested in planning their taxation affairs. That is not said pejoratively, but rather with a view to characterising the group members. In one proceeding (VID 1485 of 2011) the claims were made against the two companies and their directors; in the other two (VID 1483 and VID 1484 of 2011) the claims were made against the lenders (MIS Funding No 1 Pty Ltd (MIS) and the Commonwealth Bank of Australia Ltd (CBA)) who financed some of the investors into the schemes.

The primary judge's reasons and discussion thereof

4 The course that we have adopted is to analyse the judgment of the primary judge and, in so doing, where convenient, deal with some of the respondents' arguments. Later, we deal with the balance of those arguments individually under each appeal.

5 The primary judge at [5]-[10] of the reasons carefully identified the relevant legislation, being the *Federal Court of Australia Act 1976* (Cth) (FCA Act), s 56, and Pt IVA, especially ss 33ZG(c)(v), 33Q, 33R and 43A(1) and the *Federal Court Rules 2011*, rr 19.01 and 19.02. Each of the applicants is a natural person so the *Corporations Act*, s 1335(1), was not relevant.

6 The primary judge at [11]-[14] of the reasons described the principles attending the exercise of the judicial discretion in s 56. In [12] the primary judge helpfully set out a number of broad considerations that attend any security for costs question that bear repeating:

> It is established that the discretion conferred by s 56 is broad and unfettered. Many attempts to set limitations upon the discretion have been rejected by the Courts, and the only limitation is that it must be exercised judicially: *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 2 FCR 1…at 3 per Sheppard, Morling and Neaves JJ. It is a discretion to be exercised according to the merits of each case and without any particular predisposition: *Bryan E Fencott Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497…at 511 per French J. The discretion is to be exercised by reference to the particular circumstances arising in each case: *Woodhouse v McPhee* (1997) 80 FCR 529…at 533 per Merkel J.

7 In [13] of the reasons, the primary judge set out 12 considerations relevant to the exercise of the discretion under the FCA Act, s 56, in class actions, in part taken from the helpful judgment of Hollingworth J in *Hall v Australian Finance Direct Ltd* [2005] VSC 306 at [107]. The factors listed by the primary judge were as follows:

> (a) Whether there is reason to believe that the applicants will be unable to pay the respondents' costs if so ordered, that is, whether the applicants are impecunious?
>
> (b) Whether the applicants' insufficiency of means is caused by the conduct which is the foundation for the action?
>
> (c) The promptness of the application and the stage of the proceedings at which an application for security is brought.
>
> (d) Whether the proceeding has become bogged down with "interminable and expensive interlocutory applications" for which the applicants bear responsibility?
>
> (e) The strength and bona fides of the applicants' claim for relief from the respondents.
>
> (f) Whether the applicants have been deliberately selected as "persons of straw", in order to immunise from costs orders group members of substantial means?
>
> (g) Whether the proceeding is essentially defensive in nature?
>
> (h) Whether the applicants are suing for someone else's benefit?
>
> (i) The characteristics of the group members. For example do they include corporations or natural persons, and are they rich or poor?
>
> (j) Whether someone who stands to benefit from the litigation is funding the applicants?
>
> (k) Whether security would have been ordered if separate actions had been brought by the group members?

> (l) Whether an order for security would stifle the action and shut the applicants out from pursuing an arguable claim?

8 The primary judge thereafter framed his consideration of the application by reference to these factors. All these factors were legitimate to consider in an application such as this. No argument to the contrary was put. Nevertheless, it should not be taken that every case requires an examination of all these factors. Much will depend on the facts of the individual case, and, importantly, how the application is argued by the parties.

Impecuniosity of the applicants

9 After putting to one side considerations not relevant, the primary judge turned to the relevant impecuniosity of the applicants. Mr and Mrs Kelly's and Mr Grant's statements of financial circumstances revealed that they had modest, but not insignificant means: the Kellys having net assets of $392,225 with a combined after-tax income of $162,860 per annum; Mr Grant having net assets of $187,523, and an after-tax income of $110,450 per annum. The evidence was uncontested that the party-party costs likely to be recoverable are approximately $4.8 million for the two lenders, $2 million for the directors and between $580,000 and $2.4 million for the two companies.

10 In these circumstances, the primary judge concluded in [18] of the reasons that the applicants were "relevantly impecunious" in that they did not have sufficient assets to meet an adverse costs order for approximately $7.4 million to $9.2 million (taken as $8.2 million by the primary judge). No complaint was made about that conclusion as to impecuniosity. There was, however, complaint on appeal about the global framework applied by the primary judge in the last sentence of [19]:

> The applications for security are all based on similar grounds and it is appropriate to consider them having regard to the total amount sought.

11 The complaints made about this approach were, broadly, threefold. First, there was a complaint, made in particular by the directors, that each proceeding was dealt with separately. Secondly, there was a complaint, made in particular by the companies, that differentiation had not been made between those group members who did not borrow (and so were not part of the proceedings against the lenders), those group members who borrowed from MIS, those

group members who borrowed from CBA and those group members who borrowed from both MIS and CBA. Thirdly, there was a complaint that the primary judge approached the application, and in particular the central question of the stultification of the proceedings, too rigidly, on an all ($8.2 million) or nothing basis. Rather, it was submitted, he should have approached the matter in stages, by first asking whether some security should be given, and then coming to a view as to an appropriate amount; and, if the amounts in question could not reasonably be afforded by the applicants, setting lesser, reasonable, sums.

12 At [20]-[24] of the reasons, the primary judge considered the traditional rule that natural persons will not, from impecuniosity alone, be debarred from continuing with (at least first instance) proceedings. It was unnecessary for him to resolve the issue raised by Heydon JA (as he then was) in the New South Wales Court of Appeal as to whether the terms of the FCA Act, s 56, over-rode or abolished the traditional rule; though the primary judge did express agreement with the observations of Branson J in *The Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd* [2004] FCA 1400 at [17]-[22] that such a fundamental right, having Constitutional dimensions, would require clear words for its abolition or affectation. The principle was seen as relevant, but was qualified by a recognised exception – if an impecunious party sues for the benefit of somebody else. No debate took place before us about this question of principle: see generally the discussion by Hodgson JA in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148; 67 ACSR 105 at 114[29]-119[45].

13 No particular complaint was made about the primary judge's articulation of principle in these respects.

Bona fides of the cases

14 At [25]-[48] of the reasons, the primary judge dealt with the strength and bona fides of the applicants' claims for relief. The conclusion drawn by his Honour at [48] was as follows:

> The claims in the proceedings are prima facie regular on the face of the pleadings and disclose various arguable causes of action. I will proceed on the basis that the proceedings have a reasonable prospect of success. This factor is therefore neutral in my decision.

15 No complaint was made on appeal about this conclusion or the consideration to reach it.

"Defence" or "attack"

16 At [49]-[56] of the reasons, the primary judge dealt with the question whether the proceedings were essentially defensive in nature. The language of "defence" and "attack" or "offence" has some lineage: *Maatschappij voor Fondsenbezit v Shell Transport and Trading Co* [1923] 2 KB 166 at 177 (Scrutton LJ), *Willey v Synan* [1935] HCA 76; 54 CLR 175 at 178-179 (Latham CJ) and 184-185 (Dixon J). That language is not however (and was not intended by the judges in those cases to be) a reason to analyse minutely the legal relationships involved in the disputes. Indeed, the language was used by Scrutton LJ (and adopted by Latham CJ and Dixon J) in furtherance of the proposition that it was substance, not form, that mattered. Some of the submissions of the respondents appeared to ignore this essential requirement. The primary judge was criticised for the characterisation and conclusions he drew in [55] of his reasons as follows:

> I consider that the two class actions brought against the Lenders are, in substance, to a significant degree defensive. To the extent that the two class actions against the Lenders are interwoven with the Willmott Proceeding, that proceeding too has some defensive elements for those group members with loans. This factor is required to be weighed with the others.

17 The lenders criticised the substantive characterisation. It was said that, to the extent that the proceeding sought the recovery of moneys that had been paid, it was to be distinguished from the challenge to apparent obligations that would be enforced unless set aside. Further, it was submitted that a distinction should be drawn between the applicants and members of the group (presumably those members who had agreed to the solicitors acting) who knew of their rights and were seeking to set aside the loans, on the one hand, and those members of the group who might be ignorant of their rights and who were continuing to comply with what they understood to be their obligations, on the other. We do not regard these arguments as compelling a conclusion of error. One way of evaluating and assessing the nature of the proceedings against the lenders was as an attack on the underlying basis of their ability to require repayment. Once one appreciates that, any aspect of the claims that may in form be to the investor's benefit, such as recovery of past sums and loss of use of the

money, can be seen to be attendant upon the setting aside of the loans. No error has been shown in this regard.

18 The directors and the companies complain that the cases against them are not defensive in any way. That, however, is too mechanical a way of looking at the matter. The expression of the matter by the primary judge in [55] of the reasons was, if we may say so, flawless. To the extent there was an interweaving (though in separate proceedings) of the different cases in the overall controversy or matter, as revealed by the primary judge's careful discussion of the strength and bona fides of the claims (at [25]-[48] of the reasons), that was a legitimate factor to weigh, along with others.

The applicants and the benefit for the group members

19 At [57] of the reasons, the primary judge noted that no submission was put that these applicants had been put forward as "persons of straw". As his Honour said, that they are not "persons of straw" was evident from their assets and the evidence of Mr Willemsen, the solicitor at Macpherson and Kelley acting for them.

20 At [58]-[87] of the reasons, the primary judge examined a number of related issues, and in particular whether the applicants were bringing the proceedings for the benefit of others and the characteristics of the group members.

21 After the primary judge referred to the general principle (in non-representative proceedings) that impecuniosity of a plaintiff (natural person) will not prevent the order for security if the action is brought for the benefit of others: *Cowell v Taylor* (1885) 31 Ch D 34, he referred to *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153; 130 FCR 317. After mentioning the trend of authority before 2003 to the effect that the bringing of the group action on behalf of others was not a significant factor, because to order security was seen to be incongruous and anomalous given the immunity of group members as to costs by reason of the FCA Act, s 43(1A), the primary judge identified at [61] of the reasons the following as important from the Full Court's decision in *Bray*:

> *Bray* establishes that where an impecunious applicant is bringing Part IVA proceedings, the fact that he or she is doing so for the benefit of represented persons *may* be a significant consideration in favour of granting security. It provides that the financial circumstances of the group members are relevant to the determination of an

> application for security. It also indicates that it is not necessary for the respondent to demonstrate the additional circumstance that the applicant has been deliberately selected in order to shield group members of substantial means for whose benefit the proceeding is also being brought. This may be seen from the separate reasons of Carr and Finkelstein J, with whom Branson J agreed.

22 At [62]-[63] of the reasons, the primary judge set out the following relevant passages from *Bray* as to the importance of other characteristics of the group:

> 62 At [141] Carr J construed the FCA as contemplating that a group member might be given the choice of contributing to a financial pool from which the applicant might provide security for costs. At [142] his Honour noted:
>
> > Much would depend upon the number of group members involved, their financial circumstances and in particular whether an order for security for costs might stifle the proceedings. In that regard, in my opinion, it was for the applicant to adduce evidence about the likely effect of any order for security for costs.
>
> 63 At [252] Finkelstein J similarly found:
>
> > Dependent upon the type of proceeding, the represented group may be quite diverse. The group may include corporations as well as natural persons. The members of the group, whether corporate or not, may be rich or poor. In my view, the characteristics of the group should be taken into account on an application for security. Accordingly, if there is still a rule that an order for security should not be made against an impecunious natural person (for a criticism of the absoluteness of this rule see *Melville v Craig Nowlan & Associates Pty Ltd* (2002) 54 NSWLR 82), the rule may have little application to many class actions.

23 To this point, no criticism was made as to the primary judge's treatment of *Bray*.

24 At [64]-[76] of the reasons, the primary judge gave consideration to the characteristics of the group members. First, the class was "open" and thus its size and the identity of all members is not known. The members' register of the companies, however, held 3,191 names of investors. This is the outer limit of the class. The primary judge noted that no one had submitted that an accurate estimate of the number of group members could be given. The primary judge concluded [65] of the reasons with the following sentence:

> This illustrates an obvious problem with taking into account the financial characteristics of the group members.

25 This sentence was highlighted by the respondents in their submissions as an indication of a failure to follow *Bray*. We do not attribute any such error from that sentence.

26 Macpherson and Kelley act for 409 members which is 12.8% of the total number of the investors. His Honour took the 409 to be "well less than half of all group members": [67] of the reasons. (Group members, of course, being those investors who claim losses caused by the respondents' conduct). No complaint was made of this analysis.

27 The primary judge then described the characteristics of the group by reference to the information held by the lenders, including financial information provided by investors when applying for loans. MIS made 1016 loans and CBA 757. Of these, 376 Macpherson and Kelley clients borrowed from the lenders, three being companies, three trusts or superannuation funds and 370 natural persons. From the financial information thus examined, the evidence recounted by the primary judge at [70] was that there were:

> (a) 158 persons with a loan from MIS and they had average net assets of $1.38 million, and average gross annual income of $234,562; and
>
> (b) 218 persons with a loan from CBA and they had average net assets of $187,523 and average gross annual income of $157,134.

28 The primary judge also noted at [70]:

> [Mr Hanson] also deposes that there are nine Macpherson and Kelley clients with loans from the Lenders in excess of $500,000, all of whom had net assets of over $1 million.

29 The primary judge noted at [71] of the reasons that Mr Hanson, who was the solicitor for MIS and who gave the above evidence, did not give any evidence about the financial characteristics of the balance of the 1,773 persons who obtained loans from the lender to invest in the schemes. (Nor, however, did the applicants seek to examine that material and put on their own evidence about the subject matter.)

30 In response to a submission of the respondents recounted at [73] of the reasons that there were numerous known group members who stood to benefit and who had sufficient assets to contribute to a pool of assets for security, the primary judge said at [74] and [75] of the reasons:

> 74 There are a number of difficulties with the evidence. Most importantly, I have no information as to the financial characteristics of the vast bulk of the group members. I have such information only in relation to 314 out of the potential 3191 group members. I do not know the financial characteristics of about 90% of potential group members. I also cannot know whether the financial characteristics of the

> Macpherson and Kelley clients are representative of those of the majority of the class. For example, it may be that those group members who have chosen to instruct solicitors are those who have suffered the greatest losses. I do not know.
>
> 75 I also have some doubts about the accuracy of the calculations performed as I do not know which of the 376 persons upon which Mr Hanson's calculations were based are not clients of Macpherson and Kelley. I also note that the Lenders' evidence as to the average net assets of the known group members is out of date (having been provided when they applied for loans between 6 September 2006 and 30 June 2009). The effluxion of time and the global financial crisis may mean that their current positions are different.

31 One of the criticisms of the primary judge's approach to the question of the stultification of the proceedings is that he was said to have wrongly reversed the onus of proof. These two paragraphs, [74] and [75] and the comments in [71] as to the absence of matters from Mr Hanson's evidence can be seen to be indicative of a requirement on the respondents for proving capacity of the group to be able to afford to put up security. The primary judge did say the following at [76] of the reasons:

> Even so, it is likely that there are persons within the class capable of contributing to a pool of security for costs in the manner contemplated in *Bray*. This is at least true of the nine known group members who are identified as having large loans, and net assets of more than $1 million and true of some of the other known group members identified by Mr Hanson. My consideration of the application for security will proceed on that basis.

Bray v Hoffman-La Roche

32 At [77]-[87] of the reasons, the primary judge discussed *Bray*. One of the central submissions on the application for leave to appeal made by each applicant was that the primary judge failed to follow the Full Court in *Bray*. Before coming to those submissions, what his Honour said should be referred to.

33 The primary judge began this section of his judgment in [77] with a comment reflecting the concern that he had with the Full Court decision in *Bray*.

> While I am bound to follow the decision of the Full Court in *Bray*, I wish to note the difficulties that arise from the approach to security for costs taken in that decision.

34 His Honour then referred (at [78] of the reasons) to the Australian Law Reform Commission (ALRC) Report and the draft bill attached to it that contained a provision (cl 31(2)) that provided that an order for security for costs may not be made on the ground that

the proceeding is for the benefit of group members. His Honour also referred to the Explanatory Memorandum in the ALRC Report in this respect. The primary judge did, however, note that Pt IVA of the FCA Act departed from the ALRC Report in this respect. His Honour then (at [79] of the reasons) referred to the insertion of s 43(1A) into the FCA Act *after* the introduction of Pt IVA. At [80] of the reasons he noted that s 33ZG(c)(v) provides expressly that, except as otherwise provided in the Part, nothing in Pt IVA affects the operation of any law relating to security for costs. At [81] of the reasons, the primary judge referred to the question whether s 43(1A) should be read as affecting the operation of the law relating to security for costs or "except as otherwise provided" within the meaning of that phrase for s 33ZG(c)(v). He noted that until *Bray*, various judges had expressed views as to the relationship between s 43(1A) and s 33ZG(c)(v) and concluded that the policy of immunity from an order for costs (in s 43(1A)) would be undermined if security for costs were to be ordered. These views were expressed in the cases referred to at [81] of the reasons, being *Woodhouse v McPhee* (1997) 80 FCR 529 at 533 (Merkel J), *Ryan v Great Lakes Council* (1998) 154 ALR 584 (Wilcox J agreeing with Merkel J in *Woodhouse*), *Ryan v Great Lakes Council* (*Ryan No 2*) (1998) 155 ALR 447 at 454-455 (Lindgren J); *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004 (Wilcox J) and *Bray* at first instance (Merkel J). Those views can be encapsulated, as Lindgren J did in *Ryan (No 2)* that the:

> Proposition that it is contrary to the spirit of s 43(1A) that the individuals constituting the group members be compelled to contribute to a fund to enable their impecunious representative party to satisfy an award of costs against him, is not attended by sufficient doubt to warrant reconsideration at appellate level.

They can also be summarised as Wilcox J did in *Ryan* at 589 (quoted by the primary judge at [82] of the reasons) by saying that s 43 (1A) "ought generally to be regarded as a substantial impediment to the 'financial pool' approach urged by [the defendants]"; or as Wilcox J said in *Tobacco Control* at [29] "it would run counter to the policy underlying s 43(1A)...to adopt a general position that treats group members as persons who 'stand behind' the proceeding, in the sense of that term used in the relevant authorities." One aspect of this previous approach as expressed by Merkel J in *Woodhouse v McPhee* and agreed with by Wilcox J in *Ryan* was that circumstances may warrant a different approach. The examples given by Merkel J in *Woodhouse v McPhee* at 534 were if the claim was "spurious, oppressive or clearly disproportionate to the costs involved… or if the proceedings were structured so as to

immunise persons of substance from costs orders." In *Ryan (No 2)* Lindgren J referred to these considerations, along with other considerations, such as whether group members would otherwise have been required to give security, for instance, because they were impecunious companies or natural persons resident outside Australia.

35 At [83] of the reasons, the primary judge (having referred to this previous body of authority) said:

> This is not to say that the characteristics of group members are to be treated as irrelevant, but rather that the consideration is properly narrowed to circumstances, such as where a person of straw has been chosen as applicant to shield the group members: *Ryan No 2* at 456 per Lindgren J.

36 It was put in argument that at this point the primary judge was expressing a principle to govern the exercise of his discretion. Though it is less than clear, with respect, we do not think that his Honour was doing anything more in [83] than encapsulating an aspect of the earlier approach.

37 At [84]-[87] of the reasons, the primary judge pointed out some of the difficulties of looking to group members to fund a pool for security for costs: they are not parties; they cannot be controlled; they may opt out; their financial circumstances cannot necessarily be ascertained; and the possibility of security may encourage group members to remain unidentified leading to greater difficulty in assessing quantum and in settling the action.

38 Whilst at [81] of the reasons, the primary judge recognised that *Bray* was inconsistent with this earlier line of authority, he did say in [81] of the reasons, after referring to the earlier line of authority:

> In my opinion the practical effect of the respondents' arguments in the present proceedings is that this important protection is removed, or at least substantially reduced.

39 The "important protection" was that provided by s 43(1A). It is difficult to understand this part of his Honour's reasons as other than a view, operative in the exercise of his discretion, that s 43(1A) would be undermined by the ordering of security. So understood, it is inconsistent with the Full Court in *Bray*. Both Carr J and Finkelstein J (with both of whose reasons on security for costs Branson J "substantially" agreed) expressed the

view, in passages that were critical to their reasoning (at 348 [141] and 374 [250]) that an order for security did not affect the immunity of s 43(1A) and that there was no overlap between ss 43(1A) and 33ZG(c)(v), which operate independently. No party sought to challenge *Bray*, save in respect of the characterisation of solicitors in the position of Macpherson and Kelley.

40 It is difficult to see how, at this point, the primary judge's approach at [81] does not contradict *Bray*.

The position of Macpherson and Kelly and the group members

41 At [88]-[110] of the reasons, the primary judge examined whether Macpherson and Kelley and the group members are funding the litigation and stand to benefit from the proceedings. The positions of Macpherson and Kelley and the group members were separate but related through the costs agreements in place. The primary judge required the production of the Conditional Costs Agreement between the applicants and Macpherson and Kelley and the Retainer, Authority and Costs Agreement between known group members and Macpherson and Kelley.

42 At [95]-[98] of the reasons, the primary judge examined the costs agreements. No submission was put that his analysis was factually incorrect. His Honour accepted that the agreements were "conditional costs agreements" as defined in the *Legal Profession Act 2004* (Vic), s 3.4.2. The essence of the agreements was that unless there was success (as defined), Macpherson and Kelley would only receive a proportion of their legal fees and disbursements. The consequences of success were described by the primary judge in [96] of the reasons as follows:

> If a successful outcome is achieved in the proceedings Macpherson and Kelley are entitled to receive 100% of the disbursements incurred, and the balance of their professional fees calculated in accordance with the costs agreement (with such further costs being capped at the amount recovered from the respondents). The LPA allows a lawyer acting under a conditional costs agreement to charge an "uplift" fee limited to 25% of the fees incurred: s 3.4.28(3). Although not described as such, the costs agreements provide for an uplift by way of a "case management fee". This is calculated on an aggregated basis by reference to:
>
> (a) 20% of the legal costs recovered from the respondents; and
>
> (b) any part of the remaining 80% of the legal costs recovered from the

respondents which exceeds the small fixed amounts initially paid by group members.

43 The primary judge rejected as "remarkable" the proposition that a lawyer acting under a conditional costs agreement is standing behind the litigation or standing to benefit in the relevant sense so as to be taken into account as someone who can be reasonably required to contribute to a fund to service the respondents' costs. His reasons were set out at [101]-[103] as follows:

> 101 However I consider it a remarkable proposition that a lawyer acting under a conditional costs agreement is relevantly standing behind the litigation or is standing to benefit. I do not understand the position of a lawyer acting for an applicant in a class action to be any different from that of the lawyer for a plaintiff acting on a "no win-no fee" basis in the thousands of such individual cases conducted in many different Australian courts each year. Such arrangements are usually entered into because the plaintiff is unable to pay legal fees and disbursements as they are incurred. It would be remarkable if such claimants, already finding it difficult to meet the expense of litigation, were liable to pay security for costs because their barristers or solicitors were prepared to act on the basis that they are not paid unless the case is successful. This has never been the law in Australia.
>
> 102 The preparedness of barristers and solicitors to provide legal services upon a "no-win-no fee" basis is an important aspect of access to justice, particularly in class actions. As the learned authors D. Graves, K. Adams and J. Betts explain in *Class Actions in Australia* (second edition, Lawbook Co, 2012, p 371):
>
> > While it may be appropriate to take account of any conditional fee agreement, it ought not be forgotten that the ALRC considered that such agreements were an integral part of determining whether the representative proceeding procedure is economically viable. On this point, the New South Wales Law Reform Commission has recently noted:
> >
> > > …conditional fee arrangements improve access to justice by making the payment of legal costs conditional upon a successful outcome for plaintiffs otherwise unable to meet their own legal costs up front but for whom legal aid is not available. Slater and Gordon asserted that: "to the extent that conditional fee arrangements are aimed at plaintiffs who are otherwise unable to meet their own legal costs up front, it is perverse for the court to regard this as a factor that speaks in favour of a plaintiff paying for the defendant's legal costs up front" (New South Wales Law Reform Commission, Security for Costs and Associated Orders, Consultation Paper 13 (May 2011) at 63).
>
> 103 One would be surprised if the barristers and solicitors that provide legal services in class actions upon a conditional fee basis would not prefer to be paid at the time the services are provided, rather than having payment for such complex legal work conditional on success. Put another way, I do not accept that it is proper to characterise as a benefit, a payment ultimately made to a lawyer who has agreed that he or she is only entitled to be paid upon winning the case, and is required to wait perhaps years for payment of both legal fees incurred and disbursements advanced.

> In a class action context the fee uplift involved is little compensation for the risk of non-payment and delay in any payment. It should not militate as a factor in favour of an order of security for costs. There is also nothing in the authorities which indicates that a person that retains a lawyer under a conditional costs agreement should be in a worse position in relation to security for costs than a person who can afford to do so.

44 We respectfully agree. His Honour had to deal (as do we) with what was said by Finkelstein J in *Bray* 375 at [252], to the following effect:

> It is also appropriate to bear in mind that it is commonly the case in a class action that a person will stand behind (I mean fund) the applicant. Usually this will be the applicant's solicitor, who will sometimes charge what is referred to as a "contingency fee" for the privilege… A party who is being funded by his solicitor is not really a "nominal plaintiff". Nevertheless, the solicitor does stand to benefit from the action (especially as regards the additional fee) if the action is ultimately successful, as the solicitor will then be able to recover his costs. That is a relevant, though not a decisive, consideration when deciding whether security should be ordered.

45 The primary judge dealt with this at [105]-[106] of the reasons as follows:

> 105 The reference to a "contingency fee" requires comment. It is illegal in Australia for a lawyer to charge such fees, based upon a percentage of the damages obtained. To my knowledge they have not been utilised in any Australian class action, and are the type of fees commonly charged by third party commercial litigation funders. A fee charged by a lawyer pursuant to a conditional costs agreement is quite different, and cannot be based upon a percentage of the damages obtained.
>
> 106 Importantly, the other members of the Full Court did not endorse the remarks of Finkelstein J. Carr J considered that the financial characteristics of group members was a relevant factor in a security for costs application, but he did not express the view that the resources of a lawyer acting under a conditional costs agreement were relevant. While Branson J expressed "substantial agreement" with what had been said by both Carr and Finkelstein JJ, this should be seen as an endorsement of the thrust of their reasons rather than this particular aspect.

46 The respondents criticised this approach. They submitted that Finkelstein J should not be seen to have been referring to illegal contingency fees. We agree with that criticism. We would not limit what Finkelstein J said in that way. The respondents submitted that there was no basis to distinguish between solicitors such as Macpherson and Kelley retained under conditional costs agreements such as these and commercial litigation funders of the kind to which the primary judge had referred at [91]-[94] of the reasons. There (at [91]) his Honour said that if there had been a litigation funder he would have ordered security.

47 In addition to the matters to which the primary judge made reference in [101]-[103] of the reasons, we would add the following. There are principled reasons to distinguish between a commercial litigation funder and solicitors such as Macpherson and Kelley under these agreements. The former take a percentage of the judgment; the latter earn professional fees. Here, the fees could not rise above costs as recovered. Solicitors are entitled to charge professional fees for undertaking the professional responsibilities of running the case, as officers of the Court, with all the attendant responsibilities (including duties to the Court) that that entails. No one, the solicitors included, should ever lose sight of those responsibilities. The expected or contingent receipt of proper professional fees (and there was not the slightest suggestion here that Macpherson and Kelley's fees, including the "case management fee", were other than proper) is not a basis for requiring an officer of the Court to contribute to a fund for the costs of the other side of the litigation. Looking at the matter from the point of view of the solicitors, it could not be considered reasonable for them to be required to fund on an ongoing basis the litigation brought under Pt IVA.

48 To the extent that what was said by Finkelstein J at 375 [252] can be seen as contrary to that, it was comment by way of *obiter dicta* and, in our respectful view, wrong. We do not take it as agreed in by the "substantial" agreement of Branson J. We agree with the primary judge's treatment of this question of precedent at [106] of the reasons.

Litigation funding

49 Before turning to the question of the group members standing behind the litigation, it is appropriate to note other matters to which the primary judge made reference at [91]-[94] of the reasons concerning litigation funding. The costs agreements contemplated the possibility of third party litigation funding to meet costs after a mediation. No litigation funding was on foot. There was evidence (from a solicitor for the directors) that commercial litigation funding may be available for claims such as these. The primary judge said (at [93] of the reasons) that this possibility was irrelevant and that the application must be considered on the arrangements as they exist. He also said at [94] of the reasons:

> I also note in passing that the evidence does not establish that commercial litigation funding is available to the applicants. One would be surprised if the applicants had not fully explored whether litigation funding was available, given that they stand to lose all of their assets if the proceedings are unsuccessful. It would also be surprising if Macpherson and Kelley had not done so, as if litigation funding was secured the

> firm might expect to be paid its costs and disbursements as incurred, rather than being paid conditional upon success.

50 We refer to this last paragraph ([94]) because it may reflect on the question of any error in the application of the onus of proof that the respondents submitted his Honour committed.

51 As to the group members, the primary judge accepted (at [100] of the reasons) that group members benefit by participation in the proceedings.

52 At [111]-[112] of the reasons, the primary judge examined the question of whether security would have been awarded if separate actions had been brought by group members. Given that the overwhelming majority of known group members are individuals, the answer would be, in all probability, no. The primary judge said the following in the last sentence of [112]:

> It is hard to see why the applicants should be in a worse position with regard to security because they utilise a mechanism provided to increase access to justice and judicial efficiency.

Stultification of the proceedings

53 At [113]-[129] of the reasons, the primary judge considered whether an order for security would "stifle the action and shut the applicants out from pursuing an arguable claim." At [133] of the reasons, in stating his conclusions, the primary judge stated that he was satisfied that "an order for security is likely to stifle the applicants and group members' pursuit of their claims". Clearly, this finding was important to the primary judge's refusal to order security. If not for this finding, the primary judge would not have dismissed the application for security for costs. He did, however, say (at [130] of the reasons) that there were "many factors which militate against an order for security for costs in these proceedings."

54 The respondents were critical of the approach of the primary judge to this subject. They submitted that his Honour reversed the onus of proof and made a finding which, on the evidence, was not available.

55 When the application before the primary judge was first called on, the applicants had little evidence going to the question of whether the action would be stifled. The Full Court in *Bray* stated (348 [142], 361-362 [214], 374 [250]) that the applicants bore the onus. After exchange between Bench and Bar on the subject, an adjournment was granted. A survey was undertaken and put into evidence at the resumed hearing.

56 At [115] of the reasons, the primary judge noted that he could not see how one could order security by reference to the financial characteristics of the unidentified group members and that the respondents' submission was that regard should be had to the financial characteristics of the known group members.

57 At [116] of the reasons, the primary judge posed what he saw as the relevant question as follows:

> If each of the 409 known group members were required to pay an equal share of $8.2 million into a pool for security for costs, they would be required to pay about $20,000 each. If some of these group members are unable to do so, or refuse to pay, the amount required would likely increase to $30,000 or more per person. The question is whether provision of security in these amounts may stifle the proceedings and shut out the applicants and group members from pursuing claims which are arguable.

58 This approach bore a significant burden of the criticism of the respondents on the appeal.

59 At [117]-[118] of the reasons, the primary judge referred to the evidence concerning the mean, median and mode averages of the investments of Macpherson and Kelley clients and known group members. At [119] of the reasons, the primary judge said:

> The calculation of the "mode" amount which is the investment most frequently made by the known group members, is of assistance. It shows that the loss most frequently suffered by known group members is in the order of $42-$50,000. Of the known group members 77% invested up to $100,000, and 30 percent invested less than $50,000. The applicants contend that in these circumstances the cost of contributing $20-$30,000 for security for costs is likely to be seen by a large proportion of the known group members as disproportionate to the amount likely to be recovered by them upon success in the proceedings. There is some force to the submission that this is likely to stifle the litigation.

60 Again, this paragraph bore a significant burden of criticism of the respondents on appeal.

61 At [120] of the reasons, the primary judge referred to the survey evidence. The survey was a random sample of 50 known group members conducted by Macpherson and Kelley as to their willingness and ability to contribute $20,000 - $30,000 to a financial pool. The primary judge discussed the survey evidence at [120]-[121] of the reasons:

> 120 Mr Willemsen deposes that in the random sample about 80% of the known group members advised that they were unable to afford to pay either $20,000 or $30,000 by way of security, and also advised that they were unwilling to do so. About 65% of the known group members in the random sample indicated that they would not continue to participate in the class action if required to pay security in such amounts. The survey is of a limited sample and it has other limitations, but in my view it is of real assistance.
>
> 121 If even 60% of the known group members are unable, or refuse, to contribute to the pool then the contributing group members would total only 163. Pooling the $8.2 million security for costs between 163 known group members would require a contribution of about $50,000 per person. It is likely that an increase to this amount would operate to further reduce the number of contributing group members and further increase the quantum of security payable by those remaining.

62 Mr and Mrs Kelly also gave evidence that they could not afford to pay $20,000 or $30,000.

63 The primary judge rejected criticism of the survey. One of the matters put by the respondents (that was developed on appeal) was that no questions were asked of the sample group on the basis of partial security being provided. Another criticism (also developed on appeal) was that the survey should have been performed on the basis that security contributions were sought pro rata to the claim amount of each known group member. The primary judge said the following about this criticism at [125] of the reasons:

> There is some merit to this criticism but I doubt that it would make a significant difference to the response of the majority of the known group members.

64 At [126] of the reasons, the primary judge rejected criticism that the survey was limited to known group members, saying (with some force) that the financial capacity of unknown people was impossible to show. In this context, the primary judge said the following at [126] of the reasons:

> The Lenders may have been able to provide some evidence as to the financial characteristics of the non-Macpherson and Kelley group members who obtained loans from them, but they did not.

65 At [127] of the reasons, the primary judge made a point (which he said was not significant to his decision) that he would be surprised if it was not difficult to persuade even wealthier known group members to carry the burden of security for costs, allowing the larger group of unidentified members to have a "free-ride".

66 At [128]-[129] of the reasons, the primary judge concluded his reasoning on stifling, as follows:

> 128 The question is whether the arguable claims of the applicants and group members are likely to be stifled by an order for security. The fact that in a random survey about 80% of known group members said that they could not afford to pay security, and about 65% said they would no longer participate in the actions, is good evidence of this. As against this there is no evidence that the known group members of more substantial means are prepared to shoulder the burden of security. This evidence is in contrast with the lack of such evidence in *Bray* where the applicants did not adduce any evidence about the ability or preparedness of the group members to contribute to security: *Bray* per Carr J at [139] and [142].
>
> 129 The risk of stifling the proceedings requires careful consideration in the context of class actions. They are notoriously expensive both to conduct and defend. Most natural persons who bring a class action will be relevantly impecunious and there are very few Australian citizens that could afford to meet security for costs in the amounts involved. Care must be taken in these circumstances to ensure that this does not unfairly deprive people of their fundamental right of access to the courts through the Part IVA mechanism.

67 At [130]-[133] of the reasons, the primary judge drew the following conclusion:

> 130 There are many factors which militate against an order for security for costs in these proceedings. It is clear that the applicants cannot provide the security sought, whether paid in a lump now or over stages, and the survey indicates that a large proportion of the known group members are also unable or unwilling to contribute to a pooling arrangement to share the burden of such security.
>
> 131 The applicants in the three proceedings are ordinary Australian citizens of average means. The vast majority of known group members are also natural persons. These are not cases where the applicants have been chosen for their impecuniosity or so as to allow others to shelter behind them. The applicants are not people with nothing to lose. I do not consider that the applicants' impecuniosity alone justifies an order for security and respect should be given to their right of access to the Court.
>
> 132 The proceedings are brought bona fide, are regularly pleaded, disclose arguable causes of action and I assume that they have reasonable prospects of success. If the applicants and group members commenced individual proceedings it is unlikely that security for costs would be ordered against them. At least the proceedings against the Lenders are to a significant degree defensive.
>
> 133 I am satisfied that an order for security is likely to stifle the applicants and group members' pursuit of their claims. The respondents were unable to take me to

> any reported decision in which security for costs has been awarded in class action proceedings against a natural person applicant. That is not to say that such an order cannot be made, but it illustrates the care that should be taken in this context. An order for security for costs in these proceedings is not appropriate.

The arguments on the three applications and their resolution

68 The three groups of respondents: the directors, the companies and the lenders, made separate submissions. There was a degree of similarity in them. To the extent that there is a ground upon which the order of the primary judge is impugned by one, it should be seen to inure for the benefit of all, unless it is peculiar to one group.

The directors: VID 31/2013

Ground 1: The asserted failure to follow the Full Court's decision in Bray

69 The first complaint was an asserted failure by the primary judge to undertake a "balancing of the policy reflecting in s 43(1A) against the risk of injustice to a respondent" if security was not ordered: see Carr J in *Bray* at [141]. Two particular criticisms were made of the primary judge's approach: first, that he did not undertake at any point that balancing; and, secondly, that he wrongly (and contrary to *Bray*) saw an order for security as undermining the protection provided for by s 43(1A). The second of these errors, it was said, could be seen to inform the first.

70 We have already expressed our view that [81] of the primary judge's reasons appear to display an error. Nothing in the reasons thereafter militates against the provisional conclusion at [40] above. The primary judge went further than merely recognising that the immunity provided for by s 43(1A) is a consideration that may be taken into account. Inherent in [81] of the reasons is an approach inconsistent with *Bray*. That error gives focus to the lack of specific expression about the balancing exercise referred to in *Bray*. On one view, a type of balancing inheres in the very decision that is being made, but the balancing to which Carr J was referring in *Bray* at [141] was of the policy in s 43(1A) and the risks of injustice to a respondent in having no real capacity to recover the costs of successfully defending the litigation. That balancing was not undertaken, in part, because of the primary judge's view that an order would undermine the protection provided for in s 43(1A).

71 These two related errors are (and either is) sufficient, in our view, to vitiate the exercise of discretion.

72 A further area of complaint was the failure of the primary judge to follow the views expressed by Finkelstein J in *Bray* about solicitors acting under contingency arrangements, and the failure of the primary judge to equate Macpherson and Kelley with a litigation funder. For the reasons we have earlier expressed, we reject those criticisms of the primary judge's approach.

Grounds 2-4: asserted errors in the exercise of jurisdiction

The characterisation of the claims against the directors as other than wholly offensive

73 It was submitted that the claims against the directors were, and would only be, wholly offensive. For the reasons already given ([16] – [18] above), that complaint should be rejected.

The failure to consider the directors' security application on its own merits

74 The directors complain that the primary judge combined the three applications and looked at the matter globally. The applicants submitted that the respondents could not make that complaint because the applications had effectively been run on that basis. The parties (including the other respondents, who make a similar complaint) referred to both the transcript and the written submissions below. It is unnecessary to refer to these in detail. They reveal, however, that the respondents did urge the primary judge to examine the applications separately. Ms W Harris SC, who appeared for the companies leading Mr R Pintos-Lopez, provided the Court with a diagram showing the discrete and overlapping sectors of investors: not externally funded, investors funded by MIS, investors funded by CBA and investors funded by both MIS and CBA. There is some force in the point; but it should be said that ultimately there will be a total body of costs to be paid (if the respondents all succeed). None has a priority to claim its defence costs. No one suggested (as might be the case in some circumstances) that if the applicants could only raise so much security, and it was satisfactory for some but not all respondents, they should elect as to whom to proceed against.

75 If this were the only legitimate complaint, it may not have been sufficiently material to warrant relief.

The availability of third party funding

76 The view of the primary judge that the availability of third party funding was of "little relevance": ([93] of the reasons, see [49] above), was criticised as ignoring the need to consider a factor important to the balancing of the group's position, the risk of stultification and the prejudice to the respondents from the impecuniosity of the applicants and the immunity of the group members.

77 We consider there to be force in the submission. The applicants adduced no evidence as to whether litigation funding had been sought; and, if not, why not; and, if so, with what result. The costs agreements contemplated the possibility of litigation funding at a later stage, after a (presumably unsuccessful) mediation. Presumably, the introduction of such an external commercial funder would reduce the available funds for group members on success. That would be a relevant commercial consideration. There may be others. The evidence was silent on the matter. We should not be taken as advocating a rule that a step such as the retention of litigation funding should always be taken to avoid an order for security. This, however, when all is said and done, is a piece of commercial litigation. Investors with sufficient income or assets to protect entered commercial arrangements, many for hoped for taxation advantages. They now seek to engage in commercial litigation to repair perceived wrongs attending the entry into the arrangements. It is not unreasonable to want to understand, in the balancing of the interests of the parties, what has been done, if anything, about commercial funding of the litigation. Without that knowledge, at least in a case such as this, one cannot conclude that the proceedings would be stifled by any order for security.

78 These considerations in part underpin our conclusion that the primary judge could not be satisfied that the litigation was likely to be stifled, in the absence of any information about litigation funding, other than the fact that there was none on foot.

Solicitors standing behind the litigation

79 We have dealt with this earlier.

Characteristics of the group

80 Criticism was made of [83] of the reasons set out at [35] above. If the primary judge was at this point in his reasons stating an operative principle, it would have been an undoubted error; and in the light of *Bray*, a central one. That, however, is not how that paragraph should be read. It was a continuation of his Honour's commentary on the pre-existing law: see [36] above.

81 The respondents submitted that the characteristics of the group were relevant to the question of stultification. The onus of establishing that the making of an order would stultify the suit rests on the party resisting security: *Bell Wholesale Co Ltd v Gates Export Corporation* [1984] 2 FCR 1 at 4; *Pioneer Park Pty Ltd (in liq) v Australia and New Zealand Banking Group Ltd* (2007) 25 ACLC 1707; [2007] NSWCA 344; *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148; 67 ACSR 105 at 119 [45] and 127 [82]. That proposition is, to a degree, uncontroversial. A failure to prove stultification does not mean, however, that security must be provided. Indeed, as Hodgson JA (sitting alone as referrals judge) said in *Dae Boong International Co Pty Ltd v Gray* [2009] NSWCA 11 at [26], if the evidence does not permit a conclusion of stultification that does not make the impecunosity of the party and the difficulties in providing security (such as they are proved) irrelevant. As Hodgson JA said, if those who stand to benefit from the proceedings are reasonably unwilling, even though possibly able, to provide security, that may be a factor to be taken into account.

82 These considerations are especially apt to consider in a class action for the kinds of reasons referred to by the primary judge. The group members may or may not be willing to disclose their assets. They have no obligation to do so. The group members may be largely unidentified. The kinds of considerations to which the primary judge referred may not be sufficient to ground a defensible finding on likely stultification (to which question, we will come), but they are not irrelevant to the overall exercise of discretion. The generality of the discretion in s 56 should not be lost sight of. In *Dae Boong*, (although in the context of an application for security for costs pursuant to s 1335(1) of the *Corporations Act*) Hodgson JA went to the heart of the discussion in terms particularly apt for adoption in group proceedings when he said at [27]:

> Ultimately it seems to me the question to be determined by the court is whether it is

> fair that the person being sued by the company should be in the position of having to incur substantial costs, in this case perhaps tens of thousands of dollars of costs, and being at risk of liability for the company's costs, and yet have no real chance of recovering costs even if the action is unsuccessful, when there are persons who would benefit from the proceedings, who face no risk of liability for costs themselves and are either unwilling or unable to provide security.

83 Thus, it was not wrong for the primary judge to take into account the subject of unwillingness of people to contribute as a relevant factor. This has support in a number of cases: *BPM Pty Ltd v HPM Pty Ltd* (1996) 131 FLR 339 at 344-345; *Ariss v Express Interiors Pty Ltd (in liq)* [1996] 2 VR 507 at 515; and *Jeffcott Holdings Ltd v Paior* (1997) 15 ACLC 28 at 32. Of course, unwillingness in itself is not determinative, and the question of the reasonableness of any unwillingness to contribute must be considered in determining what is fair in all the circumstances. In the context of the applications for security for costs brought in these related class actions, the reasonableness of requiring people to contribute (and to what extent) was an important factor to consider in the context of Pt IVA.

The companies: VID 33 of 2013

Grounds 1 and 2: the asserted failure to follow Bray

84 The companies' submissions in this regard substantially replicated those of the directors. For the reasons we have given, the primary judge did err in how he approached the relationship between s 43(1A) and the ordering of security and in undertaking the balancing exercise called for by *Bray*. He did not err, however, in how he characterised Macpherson and Kelley.

Grounds 3 and 4: various asserted errors concerning the conclusion of stifling

85 The first substantial complaint was analysing the matter by reference to the global amount. We have dealt with this in dealing with the directors' application.

86 The second complaint was that the evidence did not substantiate a conclusion that the proceedings would likely be stifled if an order for security was made. We have already referred to the relevance to this argument of the absence of evidence on litigation funding. Secondly, we do not consider that this positive factual finding could be drawn on the evidence that was led. There were significant numbers of people with significant net assets.

There was no evidence of ability or willingness of the group to approach the matter on a pro-rata basis (something to which the primary judge referred at [125] of the reasons). The evidence disclosed some real capacity to pay. The evidence may not have been complete; but that inadequacy, at least to prove the fact of likely stultification by inability or reasonable unwillingness to contribute, was for the applicants to make good.

87 As we have said, that is not to say, especially in a class action, that questions of unwillingness, the difficulties of drawing conclusions about stultification, and the overall risk of stultification are not considerations that may be proper to take into account. The point, here, is that the primary judge effectively reversed the onus of proof and the conclusion that an order for security would stultify proceedings was not supported on the evidence.

The lenders: VID 34 and VID 35 of 2013

Grounds 1, 2 and 3: Failure to follow Bray

88 For the reasons already given, we have concluded that the primary judge did misapply principle in his reasoning at [81] and in his failure to balance s 43(1A) with the prejudice to the respondents, but did not err in his characterisation of Macpherson and Kelley.

Ground 4: Errors in the conclusion of stifling

89 For the reasons already given, we consider that the finding of stifling could not be supported.

90 One submission of the lenders should, however, be separately dealt with. It was submitted that the question of stultification should not be analysed by reference to whether the group proceedings under Pt IVA would be stultified, but by reference to whether the rights of the group members would be stultified. So, it was submitted, even if the proceeding under Pt IVA would be stultified, that would not be sufficient to resist an order; rather, it would be necessary to show that the group members' substantive rights would be stifled.

91 This submission has two principal vices. First, it places no weight on the significant statutory and public policy in proceedings under Pt IVA. The statutory provisions for group action are more than a procedural device. They comprise an important statutory mechanism

for the vindication of the rights of the parties. A conclusion of stultification of an otherwise properly brought group proceeding may well be a reason to consider refusal to make an order for security for costs.

92 Secondly, the submission is too mechanical in its approach. This reflected, to a degree, the approach the respondents took below and on appeal. Section 56 provides for a broad judicial discretion. Fairness as identified by Hodgson JA in *Dae Boong*, lies at the heart of the exercise of discretion under s 56 – fairness as to whether security should be ordered and, also, importantly, in what amount. The capacity of people to pay, their reasonable willingness to pay, the risk of stifling proceedings and many other factors may impinge on the consideration of these questions. One consideration relevant to consider, indeed important to consider, is whether an order for security would stifle a proceeding provided for by Pt IVA, even if this would leave all members free to pursue their rights individually.

Ground 5: Mischaracterisation of the proceedings as defensive

93 We have dealt with this complaint above. There was no error in the primary judge's approach.

Remedy

94 For the above reasons, the order made on 17 December 2012 that the application for security for costs be dismissed with costs should be set aside.

95 The question of what order should be made arises. The applicants urge remitter for reconsideration by the primary judge. The respondents urge that the Full Court deal with the applications.

96 It is appropriate for this Court to decide whether security (that is some security) should be ordered. The submissions on relief and, to a degree, the approach of the respondents below to the argument, had a degree of inflexibility. In this hearing, at least the companies and the lenders recognised that any conclusion that an order for security was appropriate did not necessarily mean that the order would be in the sum for the full amount of the recoverable costs. On a daily basis, judges in practice courts deal with this kind of

question on a robust and practical basis, taking into account the resources of the parties, the appropriateness of some security and balancing the respective interests of the parties. Further, in a court such as this Court, where case management is undertaken by a docket judge, close supervision of the ongoing requirements of the parties is possible. Security for costs is not necessarily a once only question. It can be managed, supervised and staged as part of case management, particularly to avoid injustice. The essential place of fairness referred to by Hodgson JA in *Dae Boong* relates not only to whether security will be ordered, but also in what amount, and on what terms.

97 We turn then to the question whether security (meaning some security) should be ordered.

98 It is not necessary or appropriate to deal at length with the question of security for costs in class actions. Some of the points made by the primary judge about the difficulties involved in security for costs applications in class actions have force. Depending upon the make up and surrounding circumstances of the claims and the class, it may be very difficult to be precise about risk or likelihood of stultification and what is fair to expect the group as a whole to put up as security. Such a broad evaluation may be attended by many considerations, including proper care not to undermine the availability of the procedure of Pt IVA that was intended by Parliament to provide broad access to justice for the common aspects of multiple claims. That said, it may not be fair on respondents to be placed at risk of having relevantly impecunious applicants as the only source of financial solace should they be successful.

99 Here, as we have already said, the applicants and group members entered commercial transactions for their own reasons. They had sufficient assets or income to warrant the decision to enter the arrangements and receive the hoped for commercial and fiscal advantages. The commercial or other advantages of the investments have not materialised. The applicants on behalf of themselves and the group members wish to engage in commercial litigation to repair the position they find themselves in. Some of those group members are persons of significant means. Some invested a lot; some invested little. All made a choice of a commercial character to enter arrangements to advance their asset or income position. It seems entirely fair that those standing to benefit from such litigation make a real, but not

oppressive, contribution to a fund to secure the costs of the respondents. The most obviously fair and appropriate approach would be rateable by reference to the investments. There would be a need, in setting the amount, not to risk stifling the action. Given, however, the nature of the underlying claims and proved ability of at least a not insignificant number of group members to contribute, an order for some security is appropriate.

100 It is preferable for the fixing of that sum to be undertaken by the primary judge as the docket judge responsible for case management. His Honour can reconsider the material and formulate a view as to an amount of security that is fair in all the circumstances. The amount and any staging in its provision may be affected by questions of management of the case. It would be a matter for the primary judge whether he acceded to any application to reopen the application. We are mindful, however, that the parties have already had ample opportunity to present evidence and argument to the Court on an interlocutory application that is meant to be dealt with expeditiously.

101 As to costs below, we would remit that to the primary judge as part of the assessment of the amount. Relevant to the exercise of that discretion would be an assessment by him as to how the matter was first run and the approach these reasons envisage. As to costs of the appeal, the respondents have had some success. They should receive half their costs on the appeal.

102 The orders that we would make in each application are:

1. Grant leave to appeal from the order of the Court made on 17 December 2012.
2. Direct the applicant (or applicants as the case may be) to file and serve a notice of appeal in the form of the draft notice of appeal the subject of argument before the Full Court on 22 May 2013.
3. Allow the appeal.
4. Set aside the orders of the Court made on 17 December 2012.
5. Subject to any terms imposed by the primary judge and in an amount directed by the primary judge, order that the applicants in the primary proceeding provide security for the costs of the respondents in a sum and in a manner to be assessed by the primary judge.

6. Remit the interlocutory application to the primary judge for the fixing of the sum of any security and the manner and term of its provision, such remitter and consideration to be on the basis of the evidence adduced already in the application, unless the primary judge orders otherwise.

7. Costs of the application for security for costs before the primary judge to be remitted to the primary judge.

8. The respondents to the appeal (the applicants in the primary proceedings) pay half the appellants' costs of the appeal and application for leave to appeal.

I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and the Honourable Justice Middleton.

Associate:

Dated: 14 June 2013

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION **VID 31 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**JONATHAN DAVID MADGWICK** **First Applicant**
	MARCUS DERHAM **Second Applicant**
	JAMES WILLIAM ANTONY HIGGINS **Third Applicant**
	HUGH THOMAS DAVIES **Fourth Applicant**
	RAYMOND MAXWELL SMITH **Fifth Applicant**
AND:	**DAVID KELLY** **First Respondent**
	MARGARET KELLY (NEE ILACQUA) **Second Respondent**
	AARON GRANT **Third Respondent**

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION **VID 33 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)** **First Applicant**
	BIOFOREST LIMITED (ACN 096 335 876) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) **Second Applicant**
AND:	**DAVID KELLY**

First Respondent

MARGARET KELLY (NEE ILACQUA)
Second Respondent

AARON GRANT
Third Respondent

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 34 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **MIS FUNDING NO 1 PTY LTD (ACN 119 268 905)**
Applicant

AND **DAVID KELLY**
First Respondent

MARGARET KELLY (NEE ILACQUA)
Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 35 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)**
Applicant

AND: **AARON GRANT**
Respondent

JUDGES: **ALLSOP CJ, JESSUP & MIDDLETON JJ**
DATE: **14 JUNE 2013**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

JESSUP J

INTRODUCTION

103 This is an application for leave to appeal and, provisionally upon the grant of leave, an appeal, from a judgment of a single Judge of the court given on 17 December 2012, wherein his Honour refused the applications of the then respondents in three proceedings ("the respondents") for the provision of security for costs by the applicants in those proceedings ("the applicants"). Each proceeding was a representative one under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act"). The proceedings arose out of investments in managed investment schemes ("the schemes") involving long-term forestry plantations associated with Willmott Forests Ltd and Bioforest Ltd ("the scheme companies"), both in liquidation at the time of the applications before the primary Judge.

104 One proceeding was brought against the scheme companies and against five individuals who were directors of them ("the directors"). It was brought on behalf of the applicants in that proceeding themselves and on behalf of all persons who acquired an interest in the schemes and who suffered loss and damage by reason of the conduct of the respondents in that proceeding. A second proceeding was brought against Commonwealth Bank of Australia Ltd ("CBA") on behalf of the applicant in that proceeding himself and on behalf of all persons who acquired an interest in the schemes, who entered a loan agreement with CBA to finance the acquisition of the interest, and who suffered loss and damage by reason of the conduct of CBA. A third proceeding was brought against MIS Funding No 1 Pty Ltd ("MIS"), a wholly owned subsidiary of CBA, on behalf of the applicants in that proceeding themselves and on behalf of all persons who acquired an interest in the schemes, who entered a loan agreement with MIS to finance the acquisition of the interest, and who suffered loss and damage by reason of the conduct of MIS. I shall refer to CBA and MIS together as "the lenders".

THE REASONS OF THE PRIMARY JUDGE

105 Having referred to the principles which govern the disposition of an application for security for costs (none of which, as such, is presently contentious), the primary Judge turned to the application of those principles to the facts of the cases before him. His Honour dealt

first with three matters which were not in issue, and they do not require further mention here. He then considered whether there was reason to believe that the applicants would be unable to pay the respondents' costs if so ordered. The evidence was that the costs of the scheme companies would be in the range of $580,000 to $2.4m, that the costs of the directors would be about $2m and that the costs of the two lenders would be about $4.8m. Having considered the assets of the applicants, his Honour held that they would not be able to meet a costs order in favour of the respondents. On the present application, there was no challenge to that conclusion.

106 The primary Judge linked the consideration just referred to with a second one, namely, whether the applicants were impecunious. His Honour held that, in the sense that the applicants would be unable to meet a costs order in favour of the respondents, they were "relevantly impecunious". This conclusion invoked the "traditional rule" that a natural person (such as each of the applicants) would not, by reason of impecuniosity alone, be barred from continuing with a proceeding by the grant of an order for security for costs: *Cowell v Taylor* (1885) 31 Ch D 34, 38. Having recognised that an exception to that rule was a situation in which "an impecunious party sues for the benefit of somebody else", his Honour mentioned a number of authorities on the subject of the traditional rule and held that the general words of s 56 of the Federal Court Act (see para 142 below) did not abrogate that rule. His Honour's conclusion in this regard is sufficiently encapsulated in the words of Branson J in *The Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd* [2004] FCA 1400 at [22], which his Honour quoted:

> … I consider that I am bound both by authority and principle to act on the basis that subs 56(1) of the Federal Court Act is not intended to empower the Court to act in disregard of the principle that poverty of itself is no ground for ordering a litigant to provide security for costs.

The primary Judge then turned to a consideration of the strength and bona fides of the applicants' claims. His Honour's conclusion, which has not been challenged on the present applications, was that the claims were "prima facie regular on the face of the pleadings and disclose various arguable causes of action". His Honour proceeded "on the basis that the proceedings have a reasonable prospect of success".

107 The next point which his Honour considered was whether the proceedings were essentially defensive in nature. This was a live issue in the case because the lenders had brought proceedings against some of the persons who had acquired interests in the schemes and who were in default in repayment of their loans. His Honour concluded that it was likely that, absent the present proceedings, the group members could expect recovery proceedings to be commenced against them if they failed to meet their loan repayments, and that the two proceedings brought against the lenders were, "in substance, to a significant degree defensive". His Honour also took the view that, to the extent that those proceedings were "interwoven" with the other proceeding (against the scheme companies and the directors), the latter also had "some defensive elements for those group members with loans".

108 The primary Judge next held, as was uncontroversial on the present applications, that the applicants had not been deliberately selected as "persons of straw" in order to immunise from costs orders other group members of substantial means. His Honour held that the applicants themselves had, "[b]y community standards … significant assets and by taking on the role of representative party each has placed at risk assets which must be of substantial importance to them." They were not put forward as applicants because they had nothing to lose.

109 The next consideration which the primary Judge took into account was one which lay at the centre of the controversies on the applications for leave to appeal. His Honour said:

> It has long been established that where a nominal plaintiff sues for the benefit of another the impecuniosity of the plaintiff is no bar to an order for security. This exception was referred to by Bowen LJ in *Cowell v Taylor* as necessary to deal with the risk of abuse. This sensible approach has been applied in numerous non-representative proceedings. For example, in [*Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1] the Full Court held at 4:
>
> > In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means.
>
> See also [*KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189] at 197 per Beazley J; [*Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497] at 513 per French J.

The primary Judge noted, as was accepted by the respondents, that the applicants were not "nominal parties" in the sense referred to in *Cowell v Taylor*. They advanced their own

claims, and also brought proceedings in a representative capacity. They did not bring the individual damages claims made by the group members, but brought claims on their behalf by seeking findings on the common questions of fact or law. His Honour continued that, once findings on the common questions were made, if a group member were to recover damages, he or she would then have to advance and succeed on the issues of fact and law which were relevant to his or her individual claim.

110 The question which the primary Judge had to address was whether, in circumstances where the applicants had not been specially put forward because of their impecuniosity and had much to lose personally from the making of an adverse costs order, the fact that they were, as representative applicants under Pt IVA of the Federal Court Act, in one sense suing for the benefit of others should stand in the way of them submitting that an order for security would stifle the litigation unless they took the further step of establishing that those for whose benefit they were suing were also unable to provide the security sought by the respondents. The applicants submitted not, consistently with the protection from an adverse costs order given to group members under s 43(1A) of the Federal Court Act, which reads:

> In a representative proceeding commenced under Part IVA or a proceeding of a representative character commenced under any other Act that authorises the commencement of a proceeding of that character, the Court or Judge may not award costs against a person on whose behalf the proceeding has been commenced (other than a party to the proceeding who is representing such a person) except as authorised by:
> (a) in the case of a representative proceeding commenced under Part IVA—section 33Q or 33R; or
> (b) in the case of a proceeding of a representative character commenced under another Act—any provision in that Act.

The respondents, by contrast, pressed for an affirmative answer to be given to the question, relying upon the judgment of the Full Court in *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317.

111 The primary Judge said:

> *Bray* dealt with an application for security for costs in a class action brought by businesses and consumers in relation to cartel conduct in breach of the *Trade Practices Act 1974* (Cth). The Full Court upheld an appeal against an interlocutory judgment by Merkel J in which he refused an application for security for costs. *Bray* establishes that where an impecunious applicant is bringing Part IVA proceedings, the fact that he or she is doing so for the benefit of represented persons *may* be a significant consideration in favour of granting security. It provides that the financial

> circumstances of the group members are relevant to the determination of an application for security. It also indicates that it is not necessary for the respondent to demonstrate the additional circumstance that the applicant has been deliberately selected in order to shield group members of substantial means for whose benefit the proceeding is also being brought.

It was in the light of this understanding of *Bray* that his Honour turned to consider the characteristics of the group members.

112 In total, there were 3,191 persons who acquired interests in the schemes. While his Honour was prepared to infer that many of them had suffered losses from the schemes, he noted that it was unknown how many of them claimed that their losses were caused by the alleged conduct of the respondents. That meant that it was not possible to make an accurate estimate of the number of group members in the proceedings, and his Honour considered that "even an approximate estimate is fraught with difficulty". However, there was evidence that MIS had made loans to 1,016 investors, and that CBA had made loans to 757 investors, in the schemes. Beyond that, his Honour was confronted with an incomplete picture. The lenders led evidence, by reference to a client list supplied by the applicants' solicitors, that 653 of the investors in the schemes were clients of those solicitors. Of that number, the lenders' evidence was that 376 borrowed money for the purpose of their investments. 370 of them were natural persons. 158 of them had loans from MIS; these had average net assets of $1.38m and an average gross annual income of $234,562. 218 of them had loans from CBA; these had average net assets of $187,523 and an average gross annual income of $157,134. Of the investors who were clients of the applicants' solicitors, nine had borrowed in excess of $500,000, and all of these had net assets of over $1m. The primary Judge observed that "the Lenders only provide[d] information as to about 21% of those persons who took loans from them in order to acquire an interest in the relevant schemes".

113 The evidence from the applicants' solicitors was that they did not have 653 clients from those who invested in the schemes. They had only 409 investors as clients, 142 of whom had taken out loans from MIS and 172 of whom had taken out loans from CBA. His Honour accepted these figures. The solicitor making the affidavit deposed that he did not have the loan applications of most of his clients, and that he did not seek to calculate their average net assets or average gross annual income. In this state of affairs, the primary Judge noted that he had no information "as to the financial characteristics of the vast bulk of the

group members". If the 314 derived from adding the 142 and the 172 mentioned earlier in this paragraph were within the 376 of whom the lenders had given evidence, the result was that his Honour did not know the financial characteristics of about 90% of potential group members. But his Honour had no way of knowing whether the 314 were within the 376. His Honour added that, since the lenders' evidence as to the average net assets of those who had taken out loans was based on information obtained when those loans were applied for, the information in question was "out of date", noting that "[t]he effluxion of time and the global financial crisis may mean that their current positions are different".

114 Notwithstanding these reservations, the primary Judge concluded that it was –

> … likely that there are persons within the class capable of contributing to a pool of security for costs in the manner contemplated in *Bray*. This is at least true of the nine known group members who are identified as having large loans, and net assets of more than $1 million and true of some of the other known group members identified [in the evidence led on behalf of the lenders]. My consideration of the application for security will proceed on that basis.

115 The primary Judge next undertook something in the nature of a critique of the judgment of the Full Court in *Bray*, but his Honour recognised that he was bound by that judgment and, for my part, I am satisfied that his Honour made it sufficiently clear that his reservations about the judgment had no influence on the way he decided the matter before him.

116 His Honour next turned to the question whether the applicants' solicitors, and the group members who had made contributions to a fund maintained by those solicitors, relevantly stood to "benefit" from the proceedings within the meaning of the authorities. His Honour received into evidence a redacted copy of the standard conditional costs agreement between known group members and the applicants' solicitors. It contemplated the possibility that a third party litigation funder might later agree to meet what were described as "Stage 3 Post-mediation stage" legal costs. But his Honour said: "Whatever the applicants' hopes or plans in this regard, the evidence is that there are no litigation funding agreements presently on foot." The respondents led evidence of the potential availability of litigation funding, but the primary Judge regarded it as of little relevance. His Honour said that the application for security was to be determined on the basis of the arrangements which existed, rather than on the basis of those which the respondents suggested might be available. In a comment which

was said to be "in passing", his Honour noted that the evidence did not establish that commercial litigation funding was available to the applicants. His Honour continued:

> One would be surprised if the applicants had not fully explored whether litigation funding was available, given that they stand to lose all of their assets if the proceedings are unsuccessful. It would also be surprising if [the applicants' solicitors] had not done so, as if litigation funding was secured the firm might expect to be paid its costs and disbursements as incurred, rather than being paid conditional upon success.

117 The agreement between the applicants and their solicitors provided that, unless the class actions had a successful outcome as defined, the solicitors would be paid only a small proportion of the legal fees to which they would otherwise be entitled and the disbursements which they had made. The solicitors would initially receive only a small fixed amount from each of the applicants and known group members, 25% of which would be paid into a separate interest-bearing account to be used to meet any adverse costs order and, if not required for that purpose at the conclusion of the proceeding, would be payable to the solicitors. Save for this initial amount, the balance of the fees owing to, and of the disbursements made by, the applicants' solicitors would be payable only in the event of a successful outcome. If there were such an outcome, the applicants' solicitors would be entitled to receive 100% of the disbursements incurred, and the balance of their professional fees calculated in accordance with the costs agreement up to a maximum of the amount recovered from the respondents. Additionally, there was a "case management fee", calculated as 20% of the legal costs recovered from the respondents and any part of the remaining 80% of those costs which exceeded the small fixed amounts initially paid by group members.

118 In a lengthy – and apparently strongly-felt – passage in his Honour's reasons, the primary Judge rejected the proposition that the applicants' solicitors should be regarded as persons standing to benefit from a successful conclusion to the proceedings because they had entered into agreements which entitled them to their fees, and to the "uplift" which was inherent in the case management fee, only in the event of such a conclusion. The gravamen of his Honour's thinking is set out in the extract which appears in para 43 of the reasons of Allsop CJ and Middleton J, and it is not necessary for me further to rehearse those aspects here.

119 With respect to the question whether the known (ie in the sense that they had engaged the applicants' solicitors) group members should be regarded as standing to benefit from a successful conclusion to the proceedings, the primary Judge said:

> Although I doubt this is what is intended in authorities such as *KP Cable*, it must be accepted that group members benefit by participation in Part IVA proceedings. I have taken into account the financial circumstances of the known group members in my decision.

120 The next question which the primary Judge thought relevant to address was whether security would have been awarded if separate actions had been brought by the group members. His Honour noted that "the overwhelming majority of the known group members are individuals, ordinarily resident in Australia and suing for their own benefit", and that "[a]bsent some other compelling factor the respondents could not realistically expect to obtain an order for security in an individual case brought by such claimants." His Honour continued:

> As Lindgren J observed in [*Ryan v Great Lakes Council* (1998) 155 ALR 447] at 456, in a class action the Court should assess a security for costs application on the assumption that in the absence of the representative proceeding each of the group members would commence their own proceedings. If the respondents were facing individual claims from even half of the 3191 possible group members the costs incurred by the respondents would be likely to be well more than $8.2 million. The same would likely be the case even if only the 409 known group members brought individual claims. It is hard to see why the applicants should be in a worse position with regard to security because they utilise a mechanism provided to increase access to justice and judicial efficiency.

121 That brought the primary Judge to the question whether an order for security would stifle the action and shut the applicants out from pursuing an arguable claim. His Honour noted that it was for the applicants to establish this part of the case. If only the applicants were taken into account, his Honour held it to be plain that an order for security for costs of $8.2m (or even a more conservative figure of $6.4m) would stifle the litigation. The real question, however, was whether the proceedings might be stifled if the burden of a security for costs order were "spread across the group members through a pooling arrangement". The primary Judge was unable to see how a security order might be made by reference to the financial characteristics of the unidentified group members "as their identity, and even their number, is unknown". But the thrust of the respondents' submissions was that his Honour should consider the application by reference to the financial characteristics of the known

group members. This was an important part of the case before the primary Judge, and it is necessary to refer in some detail to the terms in which his Honour dealt with it.

122 His Honour commenced with some arithmetic. He said that, if the 409 known group members were required to pay an equal share of $8.2m into a pool for security for costs, they would be required to pay about $20,000 each. If some of these group members were unable to do so, or refused to pay, the amount required from each of the remaining ones would likely increase to $30,000 or more. His Honour identified the question to be addressed as "whether provision of security in these amounts may stifle the proceedings and shut out the applicants and group members from pursuing claims which are arguable."

123 The applicants' solicitor had made an affidavit which set out some calculations which he had performed as to the mean (the simple average), the median (the middle number) and the mode (the most frequently occurring number) of the investments made by his clients. The results were:

Clients with MIS Loans

Mean	$124,156.80
Median	$84,480.00
Mode	$42,240.00

Clients with CBA Loans

Mean	$82,735.47
Median	$62,500.00
Mode	$50,000.00

All clients (with or without loans)

Mean	$103,310.99
Median	$77,000.00
Mode	$42,240.00

There was also evidence that the applicants' solicitors had 126 clients who had invested $50,000 or less, 190 clients who had invested between $50,001 and $100,000, 69 clients who had invested between $100,001 and $200,000, and 20 clients who had invested more than $200,001.

124 With respect to the above evidence, the primary Judge said:

> The calculation of the "mode" amount which is the investment most frequently made by the known group members, is of assistance. It shows that the loss most frequently suffered by known group members is in the order of $42-$50,000. Of the known group members 77% invested up to $100,000, and 30 percent invested less than $50,000. The applicants contend that in these circumstances the cost of contributing $20-$30,000 for security for costs is likely to be seen by a large proportion of the known group members as disproportionate to the amount likely to be recovered by them upon success in the proceedings. There is some force to the submission that this is likely to stifle the litigation.

125 His Honour continued that it was "unnecessary to determine this question by inference alone", since the applicants' solicitors had conducted a "random sample" survey of 50 known group members as to their inability or unwillingness to contribute $20,000, alternatively $30,000, to a financial pool. The survey indicated that a high percentage of known group members were unable to pay security in such amounts. About 80% advised that they were both unable and unwilling to pay either $20,000 or $30,000. About 65% indicated that they would not continue to participate in the class action if they were required to pay security in such amounts. Although the survey was of a limited sample and had what the primary Judge described as "other limitations", it was, in his Honour's view, "of real assistance". His Honour continued:

> If even 60% of the known group members are unable, or refuse, to contribute to the pool then the contributing group members would total only 163. Pooling the $8.2 million security for costs between 163 known group members would require a contribution of about $50,000 per person. It is likely that an increase to this amount would operate to further reduce the number of contributing group members and further increase the quantum of security payable by those remaining.

126 The primary Judge then dealt with a number of arguments against the utility of the applicants' solicitors' survey that had been advanced by the lenders. The first was that no questions were asked on the basis that partial security of, say, 50% be provided; nor on the basis that security might be provided in stages. His Honour's response to this was:

> However, payment in stages would not alter the ultimate amount due, and in any event the respondents did not seek orders for payment in stages or partial payment of security. I can see nothing wrong in the questions in the survey being asked as they were.

The second argument was that the survey was random rather than targeted at those known group members with the largest investments or the most significant assets. His Honour's response to this was:

> However, if the survey was not random it would likely have been the subject of different criticisms. I note also that two known group members with net assets of over $1 million were approached to respond to the survey, and they apparently chose not to respond.

The third argument was that the survey should have been performed on the basis that security contributions would be sought pro rata to the claim amount of each known group member. His Honour's response to this was:

> There is some merit to this criticism but I doubt that it would make a significant difference to the response of the majority of the known group members.

The final argument was by way of criticising the survey for having dealt only with the known group members, the clients of the applicants' solicitors. His Honour's response to this was:

> It is not clear to me how the applicants can properly be criticised for failing to provide any information as to the capacity to meet security for costs of group members whose identity and financial characteristics are unknown. The Lenders may have been able to provide some evidence as to the financial characteristics of the non-[applicants' solicitors] group members who obtained loans from them, but they did not.

127 Completing this section of his reasons, the primary Judge said:

> The question is whether the arguable claims of the applicants and group members are likely to be stifled by an order for security. The fact that in a random survey about 80% of known group members said that they could not afford to pay security, and about 65% said they would no longer participate in the actions, is good evidence of this. As against this there is no evidence that the known group members of more substantial means are prepared to shoulder the burden of security. This evidence is in contrast with the lack of such evidence in *Bray* where the applicants did not adduce any evidence about the ability or preparedness of the group members to contribute to security: *Bray* per Carr J at [139] and [142].

His Honour added that the risk of stifling the proceedings required careful consideration in the context of class actions. They were "notoriously expensive both to conduct and defend". Most natural persons who brought a class action would be "relevantly impecunious" and there were "very few Australian citizens that could afford to meet security for costs in the amounts involved". His Honour said that "[c]are must be taken in these circumstances to ensure that this does not unfairly deprive people of their fundamental right of access to the courts through the Part IVA mechanism."

128 The primary Judge's conclusion was as follows:

> There are many factors which militate against an order for security for costs in these proceedings. It is clear that the applicants cannot provide the security sought, whether paid in a lump now or over stages, and the survey indicates that a large proportion of the known group members are also unable or unwilling to contribute to a pooling arrangement to share the burden of such security.
>
> The applicants in the three proceedings are ordinary Australian citizens of average means. The vast majority of known group members are also natural persons. These are not cases where the applicants have been chosen for their impecuniosity or so as to allow others to shelter behind them. The applicants are not people with nothing to lose. I do not consider that the applicants' impecuniosity alone justifies an order for security and respect should be given to their right of access to the Court.
>
> The proceedings are brought bona fide, are regularly pleaded, disclose arguable causes of action and I assume that they have reasonable prospects of success. If the applicants and group members commenced individual proceedings it is unlikely that security for costs would be ordered against them. At least the proceedings against the Lenders are to a significant degree defensive.
>
> I am satisfied that an order for security is likely to stifle the applicants and group members' pursuit of their claims. The respondents were unable to take me to any reported decision in which security for costs has been awarded in class action proceedings against a natural person applicant. That is not to say that such an order cannot be made, but it illustrates the care that should be taken in this context. An order for security for costs in these proceedings is not appropriate.

THE ISSUES ARISING ON THE APPLICATION FOR LEAVE

129 In each of the applications for leave now before the court, there was a draft Notice of Appeal, setting out provisionally the grounds upon which the respondents concerned would rely if leave were to be granted.

130 The directors have four provisional grounds of appeal, which may be summarised as follows:

1. The primary Judge failed to follow *Bray* by not balancing the policy reflected in s 43(1A) of the Federal Court Act against the risk of injustice to the directors if security were not ordered, by accepting the proposition that the protection provided by s 43(1A) would be removed or substantially reduced by the making of an order for security, and by refusing to accept that a principle for which *Bray* stood was that the financial resources of an applicant's lawyer were to be taken into account.

2. The primary Judge failed to take into account a number of relevant considerations, namely, the need to distinguish between the directors and the lenders when considering whether a proceeding was offensive or defensive, the need to address

separately the question whether an order for security in the proceeding against the directors would stifle the litigation, the fact that the directors had sought security in two stages, the potential availability of third party funding, the circumstance that the applicants' solicitors were standing behind the litigation and stood to benefit from it, the evidence of the financial position of 409 of the group members and the need to weigh the quantum of the damages sought against the directors against the quantum of the security sought by them.

3. The primary Judge took irrelevant considerations into account, namely, that there were defensive elements of the proceeding against the directors, that $3.85m was being sought as security by the lenders in other proceedings, and the unwillingness, as opposed to the inability, of the group members to contribute to security.

4. The primary Judge mistook some facts, namely, in finding that the proceeding against the directors had some defensive elements and that the applicants' solicitors did not stand to benefit from the litigation.

131 The scheme companies have four provisional grounds of appeal, which may be summarised as follows:

1. The primary Judge failed to follow *Bray* by not balancing the policy reflected in s 43(1A) of the Federal Court Act against the risk of injustice to the scheme companies if security were not ordered, by narrowing his consideration of the characteristics of group members and by failing to take account of the fact that the applicants' solicitors stood to benefit from the litigation.

2. The primary Judge mistook some facts, namely, in finding that the applicants' solicitors did not stand to benefit from the litigation, that the proceeding against the scheme companies had some defensive elements and that group members were unwilling and/or unable to contribute to a financial pool.

3. The primary Judge failed to take into account three relevant considerations, namely, the financial position of 409 of the group members, the fact that the applicants' solicitors stood to benefit from the litigation and the existence of potential alternatives with respect to the quantum and source of security sought.

4. The primary Judge took irrelevant considerations into account, namely, that there were defensive elements of the proceeding against the scheme companies, that, absent the representative proceeding, the group members, or a significant proportion of them, would each commence his or her own proceeding, that $3.85m was being sought as security by the lenders in other proceedings, and the unwillingness, as opposed to the inability, of the group members to contribute to security.

132 The lenders (each in its own application) have five provisional grounds of appeal, which may be summarised as follows:

1. The primary Judge failed properly to apply the principles in *Bray*.

2. The primary Judge failed to balance the risk of injustice to the lenders by being unable to recover costs if successful against the policy reflected in s 43(1A) of the Federal Court Act.

3. The primary Judge failed to characterise the applicants' solicitors, and the group members who retained them, as persons funding the litigation who stood to benefit from a successful outcome and failed to take into account the terms of the conditional costs agreements between the applicants' solicitors and their clients.

4. The primary Judge failed to consider whether an award of security would stifle the claims or legal rights of group members (as distinct from stifling the proceedings as such or any like representative proceedings); his Honour adopted an "all or nothing" approach and did not consider whether the risk of stifling could be alleviated by an award of security in a lesser amount than that sought by the lenders; and his Honour treated deficiencies or uncertainties in the evidence of group members as weighing against an award of security, thereby reversing the onus of proof.

5. The primary Judge mischaracterised the proceedings as defensive and did not take into account the fact that many of the group members' claims were partly or wholly offensive, including the possibility that any perceived defensive aspect of the proceedings could be addressed by an award of security in a lesser amount.

133 Unsurprisingly, there is a degree of overlap in these grounds. From them (to the extent that they were developed in the submissions made before the Full Court) it may be seen that the following issues are raised in the respondents' cases that there is sufficient doubt

about the correctness of the decision of the primary Judge to warrant appellate consideration of the grounds advanced:

1. For what proposition or propositions does *Bray* stand? Specifically, does *Bray* provide support for the proposition that, in a representative proceeding under Pt IVA of the Federal Court Act, the solicitor conducting the case or the group members who have instructed that solicitor should be regarded as persons standing behind the named applicant who would benefit from a successful outcome?

2. Was the primary Judge obliged to balance the injustice that would arise if the respondents succeeded in the case and could not recover their costs against the policy reflected in s 43(1A) of the Federal Court Act, and, if so, did he fail to address that balance?

3. Was the primary Judge obliged to regard the applicants' solicitors as persons standing behind the applicants who would benefit from a successful outcome?

4. Was the primary Judge obliged to consider the potential for litigation funders to be engaged in connection with the proceedings, and, if so, did his Honour fail to consider that aspect?

5. Was the primary Judge obliged to consider the potential for all members of the group involved in these representative proceedings to make a contribution to security for costs?

6. To the extent that consideration is to be given to the position of persons who would so benefit, should the question be whether they are willing to contribute to security or whether they are able to contribute to security? Did the primary Judge's reasons reflect the correct approach in this regard?

7. Was the primary Judge's treatment of the limited, and in some respects incomplete, evidence in the case – on the question of the ability or willingness of the known group members to contribute to security – such as effectively to reverse the onus of proof?

8. Was the primary Judge correct to characterise the proceedings against the lenders as being, to a significant degree, defensive, and to characterise the other proceedings as having some defensive elements for group members with loans?

9. Should the primary Judge have considered the questions which arose on the security applications proceeding-by-proceeding, or was he correct to take the global approach which he did?

10. Should the primary Judge have considered whether security might be ordered in lesser amounts than were sought by the respondents, or in stages, or was he correct to address one question only, namely, whether security in the amounts sought should be ordered then and there?

THE NATURE OF THE TASK AT HAND

134 The questions arising on the applications for leave to appeal are whether there is sufficient doubt as to the correctness of the judgment below to warrant its being considered by the Full Court and, if so, whether substantial injustice would result if leave were refused, supposing the decision to be wrong: *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, 398-399. Because of the purpose of an order for security, mentioned below, and the sums involved, if the second question arose, it would have to be answered in the affirmative.

135 The judgment of the primary Judge was a discretionary one. Conformably with the well-known principle in *House v R* (1936) 55 CLR 499, before an appeal will be allowed from such a judgment, "[i]t must appear that some error has been made in exercising the discretion" (55 CLR at 505). Furthermore, his Honour's judgment was given on a question of practice and procedure, in which setting a "tight rein" should normally be kept upon appellate interference with judgments at first instance: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 177, applying *In re the Will of Gilbert* (1946) 46 SR (NSW) 318, 323. Nevertheless, "the question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration" (148 CLR at 177) and, if it be established in the present case that the orders made below were attended by error and that substantial injustice would result, I do not understand it to be suggested that leave to appeal should not be granted.

BRAY

136 *Bray* was a representative proceeding under Pt IVA of the Federal Court Act commenced by an individual who had net assets of $73,000 and whose only source of income

was an invalid pension of $931.40 per month. Her solicitors did not hold instructions that any of the group members would be able to provide security for costs (see 130 FCR at 346 [134]). One of the respondents sought security. The primary Judge rejected that application, relying on factors which included the following (130 FCR at 347-8 [136]):

> - public policy considerations weigh strongly against an order for security of costs that might impede or hinder the group members' claim for injunctive relief and for damages resulting from the cartel arrangement;
> - the kind of circumstances that might warrant an order for security for costs against an impecunious individual bringing a representative proceeding are absent in the present case.

With the "substantial" agreement of Branson and Finkelstein JJ, Carr J held that those factors disclosed an error of principle (130 FCR at 348 [137]).

137 Carr J held that an order providing reasonable security for costs did not necessarily operate indirectly to remove the effect of the immunity provided by s 43(1A). As to whether an order for security would be made, his Honour said (130 FCR at 348 [142]):

> Much would depend upon the number of group members involved, their financial circumstances and in particular whether an order for security for costs might stifle the proceedings. In that regard, in my opinion, it was for the applicant to adduce evidence about the likely effect of any order for security for costs. She chose not to do so and in my view, in those circumstances, the discretion having miscarried, it should be exercised again.

Carr J also held that the primary Judge had erred by treating it as a "condition precedent" to the making of an order for security that the named applicant had been deliberately selected as a "person of straw" in order to immunise from costs orders others of more substantial means and by imposing on the respondent seeking security the onus of proof in those respects (130 FCR at 348 [144]).

138 In addition to agreeing substantially with what had been written by Carr J, Finkelstein J drew attention to some special circumstances attending representative proceedings which might go either against or in favour of granting security. His Honour dealt first with the potential for the characteristics of group members to bear upon the subject. His Honour said (130 FCR at 374 [252]):

> Dependent upon the type of proceeding, the represented group may be quite diverse. The group may include corporations as well as natural persons. The members of the group, whether corporate or not, may be rich or poor. In my view, the characteristics

> of the group should be taken into account on an application for security. Accordingly, if there is still a rule that an order for security should not be made against an impecunious natural person (for a criticism of the absoluteness of this rule see *Melville v Craig Nowlan & Assocs Pty Ltd* (2002) 54 NSWLR 82), the rule may have little application to many class actions.

His Honour next dealt with the prospect that there would be others than the applicant and the group members funding the litigation. His Honour said (130 FCR at 375 [252]):

> It is also appropriate to bear in mind that it is commonly the case in a class action that a person will stand behind (I mean fund) the applicant. Usually this will be the applicant's solicitor, who will sometimes charge what is referred to as a "contingency fee" for the privilege. When a proceeding is brought by a "nominal plaintiff" that is a plaintiff who will not himself benefit from the action but is making the claim for the benefit of someone else, an order for security is usually made. A party who is being funded by his solicitor is not really a "nominal plaintiff". Nevertheless, the solicitor does stand to benefit from the action (especially as regards the additional fee) if the action is ultimately successful, as the solicitor will then be able to recover his costs. That is a relevant, though not a decisive, consideration when deciding whether security should be ordered.

139 The third member of the court in *Bray*, Branson J, was in substantial agreement with Carr and Finkelstein JJ (130 FCR at 361-362 [214]).

140 In understanding the judgments in *Bray*, it is essential to keep in mind that, although it was readily to be inferred that the litigation was being funded by someone other than the named applicant, there was no evidence about the agreement, if any, that the applicant had with her solicitors and, as noted above, the solicitors did not hold instructions that any of the group members would be able to provide security for costs. Carr J did not join in Finkelstein J's observation as to the potential for an applicant's solicitor to be regarded as someone who would benefit from a successful outcome. Although Branson J probably has to be regarded as having been in substantial agreement with those observations, I think they were *obiter* in the circumstances. On the facts as they were presented to the Full Court, *Bray* was not a case which turned on the nature of the funding arrangements existing between a representative applicant and the solicitor conducting the case.

141 In the circumstances, I would regard *Bray* as authority only for the propositions positively adumbrated by Carr J, namely, that s 43(1A) of the Federal Court Act does not, as a matter of policy, stand in the way of the success of an application for security in a representative proceeding, that the financial circumstances of the group members are relevant

to such an application, and that the named plaintiff carries the onus of proof in that regard. In the present case, the primary Judge neither misunderstood nor misapplied the first two of these propositions. His Honour recognised the third, but it will be necessary to return to that subject below.

BALANCING THE CONSIDERATIONS

142 The decision of the primary Judge was made under s 56(1) of the Federal Court Act, which provides:

> The Court or a Judge may order an applicant in a proceeding in the Court, or an appellant in an appeal under Division 2 of Part III, to give security for the payment of costs that may be awarded against him or her.

This provision gives the court a general discretion, the only relevant limitation upon which is that it must be exercised judicially: *Bell Wholesale*, 2 FCR 1 at 3.

143 Because the proceedings before the primary Judge arose under Pt IVA of the Federal Court Act, s 43(1A) of that Act was relevant (see para 110 above). But so too was s 33ZG(c)(v) of that Act, which provides:

> Except as otherwise provided by this Part, nothing in this Part affects:
> …
> (c) the operation of any law relating to:
> …
> (v) security for costs.

Section 43(1A) did not, therefore, affect the operation of s 56.

144 "The purpose in ordering security for costs is to provide protection to a party brought into litigation by a party who is unable to meet the costs of that other party, should the litigation be unsuccessful.": *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 264 at [4]. To that extent, the injustice that would arise if the respondents succeeded in the present case and could not recover their costs against the unsuccessful applicants is self-evident and would have to be weighed in the balance. But that is only a starting point, albeit a fundamental one. In the present case, it was taken as a given that the applicants would be unable to pay the respondents' costs. The question then arose whether any of the exceptions to what would then have been the respondents' presumptive entitlement to security was relevant. The exception which required, and was given, consideration

particularly was whether a requirement to provide security would stifle the litigation. The relevance of that exception was accepted by the respondents. Ultimately, it was the basis upon which the primary Judge rejected their applications for security. Absent some measure of success in their present endeavour to impugn the way his Honour dealt with the matter of stifling, the respondents' point that the primary Judge did not properly put the injustice of them being deprived of their costs on the scales would seem to be a moot one.

145 Where does s 43(1A) of the Federal Court Act enter the picture? In *Bray*, it was held that this provision did not preclude the court from awarding security in a representative proceeding, and did not provide a discretionary basis for refusing, categorically, to consider the characteristics and circumstances of the group members for their potential to answer the question whether there were persons other than the named applicant for whose benefit a particular proceeding was being conducted. The subsection implied no policy that the ability of group members to contribute to security was not to be taken into account. There was, according to the Full Court in *Bray*, no necessary opposition between the purpose of an order for security, to which I referred in the previous paragraph, and the purposes of s 43(1A).

146 There was a section in the reasons of the primary Judge that created the impression – which, for present purposes, I am prepared to accept was an accurate one – that his Honour disagreed with the judgment in *Bray*, and saw a deal of merit in earlier judgments which had expressed a different view as to the significance of s 43(1A). But his Honour made it clear that this section formed no part of his deliberative reasoning, and the subsection was not mentioned later in his reasons, including the "conclusion" which summarised why he considered that an order for security should not be made.

147 In the circumstances, this first issue does not provide a proper basis for the grant of leave to appeal.

THE APPLICANTS' SOLICITORS

148 It was submitted on behalf of the respondents that the conditional costs agreement into which the applicants' solicitors had entered with their 409 relevant clients was such as to put those solicitors into the position of third-party beneficiaries for the purposes of the principles referred to above. I would not accept that submission. In the conventional case, a

solicitor will be entitled to his or her fees and disbursements, on a solicitor/client basis, regardless of the outcome of the proceeding in question. A solicitor who agrees to forego all or part of that entitlement unless a successful result is achieved does not, in my opinion, thereby convert the proceeding in question into one commenced for the benefit of others. The "benefit" referred to in the rule was never intended to capture ordinary remuneration for professional services or reimbursement of disbursements made in the course of conducting the case.

149 I would express the same conclusion in a situation in which the solicitor in question is entitled to more than what would otherwise be his or her conventional solicitor/client costs in the event of a successful outcome, provided always that the additional entitlement – or "uplift" as it has been described – is not related to the award received by the applicant in the proceeding and is otherwise within the limits permitted by any applicable legislation. I take the view that the arrangements made between the applicants and their solicitors in the present case would, even in the event of a successful outcome, still be regarded as giving rise to nothing more than remuneration for the professional services of those solicitors. To the extent that the reasons of Finkelstein J in *Bray* (130 FCR at 375 [252]) are to be understood as proposing that a solicitor on the record for an applicant in a group proceeding, even one who has entered into an agreement along the lines of the one that was before the primary Judge in the present case, was necessarily to be treated as a person for whose benefit the proceeding was brought so as to bring his or her financial circumstances, and ability to contribute to security for costs, into play on an occasion such as the present, I consider that those reasons overstate the correct position. Beyond that, I would not want to enter upon the wider question of when, if at all, the size of an uplift in fees, in the event of a successful outcome in a case, would turn a solicitor into a person for whose benefit the litigation was commenced.

LITIGATION FUNDERS

150 While there is no categorical requirement, in all cases in which security for costs is sought, for the potential for funding from litigation funders to be considered, nonetheless the present was a case in which the potential was raised by the lenders, not merely as a matter of submission but also by leading some evidence on the subject. Where it lay upon the applicants to prove that an order for security would stifle their access to justice, it was not, in

my respectful view, sufficient for the primary Judge to confine himself, as a matter of relevance, to the arrangements which existed. In the absence of evidence to the contrary, it was to be inferred that those arrangements were the result of the choices of the applicants. It was not enough for his Honour to have expected that the applicants' solicitors would have explored whether litigation funding was available: in a situation in which the applicants carried the onus, they had chosen not to lead evidence on the subject. In the absence of any such evidence, it was not, in my view, open for the primary Judge to hold that the provision of security would stifle the proceedings.

RELEVANCE OF GROUP MEMBERS' CIRCUMSTANCES

151 Representative proceedings under Pt IVA of the Federal Court Act have a special quality which cannot be ignored when questions of security for costs arise: they involve "open" classes of group members. An applicant will define on whose behalf the proceeding is brought and, unless they opt out, all persons who fit within the relevant definition will be part of the group, and bound by any result. They would, in one sense, benefit from a successful outcome on the part of the applicant. Depending on the nature of the case, that benefit may be neither automatic nor the equivalent of that achieved by the applicant. The applicant may have achieved answers to common questions which are favourable for other group members, but the latter may still be required to establish (possibly more problematic) answers to their own individual questions before they become entitled to a final outcome as beneficial as that achieved by the applicant in his or her own case. There is also the circumstance that the other group members need not be known to the applicant. Many of them may not even be aware of the litigation. To the extent that they do not opt out, they are assumed to be interested in receiving a benefit of some kind from the outcome, but, in many cases, that assumption will be artificial in point of fact.

152 In the circumstances, I do not think there can be any categorical proposition that all group members in a representative proceeding are necessarily to be treated as persons standing behind the applicant for the purposes of the principles which govern the disposition of applications for security. It would not be reasonable to condition an impecunious applicant's recourse to Pt IVA on his or her ability to marshal support from persons who are unknown to him or her. But that does not mean that the circumstance that a proceeding is a representative one, and that there are necessarily persons other than the applicant who would

benefit, to some extent at least, from a favourable outcome, can never be relevant for the purposes of those principles. Consistently with the reasons of Carr J in *Bray* (130 FCR 317), the court's approach should be a pragmatic and realistic one which recognises the realities of the case at hand.

153 In the present case, what was significant, in my view, was not the mere fact that the proceedings were representative ones. It was that there were 409 persons who had engaged the applicants' solicitors. They were known to the applicants and had made a financial commitment to support the litigation to some extent at least. On any view, they were to be regarded as persons standing behind the applicants who would benefit from a favourable outcome. Their circumstances were relevant when the primary Judge came to consider whether an order for security would stifle the litigation. Indeed, his Honour approached the question on that basis. But I would not accept that the applicants bore the onus of bringing the financial circumstances of other members of the class – apparently amounting to about 87% of the total – before the court in the context of the stifling submission which they made.

WILLINGNESS OR ABILITY

154 In the case of a normal proceeding with a single, unsupported, applicant, it is because of his or her impecuniosity that a security for costs order would presumptively stifle the proceeding. "Impecuniosity" itself is, of course, a relative term, and will always involve a degree of judgment on the part of the court. At least in modern times, I do not believe it has ever been suggested that it implies utter destitution. On the other hand, there may be situations in which an applicant's access to credit, for example, would compromise his or her ability to contend that an order for security would stifle the proceeding. Clearly the overall financial circumstances of the applicant would need to be considered. During the hearing of the present applications, it was suggested that the question should be whether an applicant was "reasonably able" to provide security, and I would be content to adopt that formulation.

155 From the situation of a single unsupported applicant as I have discussed it above, the law moved to the situation in which, although there was one applicant only, there were others standing behind him or her who would stand to benefit from a successful outcome to the litigation. An obvious case was that of a company with creditors or shareholders; another was that of a trustee. In such a situation, the applicant would not be heard to contend that an

order for security would stifle the litigation unless he or she brought into play (as it has sometimes been put) the assets of those standing behind. At this level, the question must have been the same as would have been put to the applicant as such: are you reasonably able to provide the necessary security? Or, is each of you reasonably in a position to make a contribution by means of which, overall, sufficient security will be provided?

156 In a passage set out by the primary Judge himself (see para 109 above), in *Bell Wholesale* the Full Court held that litigation should not be held to be frustrated unless the applicant company established that those who stood behind it and who would benefit from the litigation "are also without means" (2 FCR at 4). That was tantamount to stating the criterion as inability, not mere unwillingness. Although *Bell Wholesale* was a case in which a company was the applicant, in principle the same criterion should apply where the applicant is an individual suing for the benefit of others.

157 However, the distinction presently of concern was not the main focus of the Full Court's attention in *Bell Wholesale*. Their Honours were principally concerned with the issue of onus of proof. I do, with respect, agree with what was said on the subject by Phillips JA (with the agreement of Ormiston and Charles JJA) in *Ariss v Express Interiors Pty Ltd (In liq)* [1996] 2 VR 507, 515:

> To my mind, there is much force in the contention, advanced before us, that what was said in *Bell Wholesale* has perhaps been extended beyond its context in later cases. It may not matter that the court in that case was concerned principally with an order for security under the Rules of Court (so that s 533(1) of the *Companies Code* (Qld) was considered only as a possible "alternative source of power"); and I do not pursue that point of distinction, if such it be. But additionally the court was only required in that case to say which of the two parties had had the task below of addressing by evidence the issue of stultification. The court decided that question against the plaintiff (using the terms already quoted); and that question does not now arise. There can be no absolute rule that, in order to resist an order for security on the ground that the litigation will be altogether frustrated, there must be evidence that those who will benefit from the litigation are without means; it will depend upon how the case is being put.

His Honour was of the view that *Bell Wholesale* was only a specific application of a wider principle, namely, "that if a plaintiff company seeks to resist an order for security on the ground of stultification, then it must establish the necessary factual basis before the argument can be weighed in the exercise of discretion." His Honour continued ([1996] 2 VR at 515):

> The argument of stultification means no more than that if an order for security is

> made the order cannot be met, with the result that the litigation will be brought to a premature end. *Bell Wholesale* decided only that, if the plaintiff relies upon a want of means to establish that the order cannot be met, the plaintiff must demonstrate that fact by reference, not to its resources (which *ex hypothesi* must be inadequate if the discretion is called into play), but by reference to the resources of those who will benefit from the litigation and who might reasonably be expected to meet some of the costs ….

In *Ariss* itself, it was held not to amount to a miscarriage of the primary Judge's discretion for him to have taken into account, in refusing to order security, the "commercial impracticability" of requiring creditors of the plaintiff company to contribute to security, having regard to the relationship between the amount of security being sought and the size of the debts which they claimed to be owed.

158 Likewise in *BPM Pty Ltd v HPM Pty Ltd* (1996) 131 FLR 339 Anderson J, with the concurrence of Kennedy and Ipp JJ, said (131 FLR at 344):

> The criticism of the master's decision on this aspect of the application is that he decided the wrong question in that he looked not to the capacity of the creditors, but to their likely attitude to providing security. I am not sure that the master did actually confine himself to the question of the likely willingness of the creditors, although he certainly did consider that subject, as is plain from his reasons recited above. I think the master is to be understood as having decided the correct question, namely whether in practical commonsense terms it was reasonable to expect the creditors of this plaintiff company to put up a very substantial sum as security for costs. Their likely attitude, their likely unwillingness to do so, was merely something to be discussed in that context, that is, as to whether in all the circumstances it would be reasonable to require the creditors to provide the first defendant with security for its costs…

159 In *Jeffcott Holdings Ltd v Paior* (1996) 15 ACLC 28, Doyle CJ, with the concurrence of Prior and Nyland JJ, said (15 ACLC at 32) that it was –

> … adequately established by authority that a relevant factor is the question of whether the making of an order will mean that the corporation is unable to continue with its proceedings. That makes relevant the question of whether a shareholder or creditor or other person standing behind the company could reasonably be expected to satisfy an order for security.

His Honour cited, and applied, relevant aspects of the judgment of Phillips JA in *Ariss*.

160 Where a proceeding is brought by a single applicant, clearly he or she could not be heard to submit that a requirement to provide security would stifle the proceeding in the

absence of evidence of his or her means. It would not be sufficient for him or her to state on affidavit an unwillingness to provide the security. The question of means would fall to be decided objectively, and that could only be done upon a consideration of the applicant's circumstances. In my view, the authorities require the same approach to be taken when there are several applicants, and where there are persons standing behind the applicant for whose benefit the proceeding is brought. The question must be whether their "means" – that is, their financial circumstances generally – are such (to use the formulation of Doyle CJ in *Jeffcott Holdings*) that it would not be reasonable to expect them to satisfy (ie to contribute to the satisfaction of) an order for security. That question too must be addressed objectively. While there is no categorical requirement that they be "unable" to provide the security required, clearly evidence that they were merely unwilling to do so, in the absence of evidence of their means such as would permit the court to determine the matter objectively, would not be sufficient.

161 Returning to the circumstances of the present case, the respondents' application for security was conducted before the primary Judge over two days: 1 and 7 June 2012. On the first day, the respondents' evidence referred to at para 112 above, and the averages tables set out at para 123 above, were before the court. In response to an inquiry from the court, counsel for each of the groups of respondents indicated the amount of security that their clients were seeking. The total was about $9.2m. Senior counsel for the scheme companies accepted that that sounded like a lot of money, but, "[w]hen you divide that by the number of investors, 409, we have $22,457. And when given the 20 per cent discount that [senior counsel for the lenders] referred to, that's $20,917. That's cheap …." Subsequent interchanges between counsel and the primary Judge tended to work by reference to a round figure of about $20,000 that would have to be found by each of the known group members if the whole of the security sought by the respondents were to be provided at the outset. Then, counsel for the applicants submitted, and his Honour appeared to accept, that, to the extent that some of the 409 group members did not respond to the invitation to provide security, the per-head figure would correspondingly increase.

162 That kind of intuitive analysis substantially informed the survey of known group members conducted by the applicants' solicitors. By means which were not challenged on the present applications, 84 of their clients were randomly identified as respondents to the

survey, 50 of whom responded. The survey was conducted by telephone. There was a standard script which the questioner was required to follow. After dealing with the nature and circumstances of the litigation, the script continued:

> The respondents have asked the Court to make orders requiring the lead applicants to provide security (a designated sum of money) for their costs. If the respondents successfully defend the proceeding, the money will then be available to the respondents to pay their legal costs. The respondents have asked for a total of approximately $9.2m to be provided as security. If the Court makes the order the respondents' [sic] seek, the proceedings cannot continue until the security has been provided.

It was explained that the interviewee would never come under an obligation to pay costs to the respondents, and that he or she was not, at that stage, being asked to provide money. The script then continued:

> Based on the above, in addition to the amounts you have already paid to us and the ongoing amounts that you are required to pay to us under your existing retainer, if the applicants were ordered to pay security:
>
> A. can you afford to pay $20k towards the costs of that security? What about $30k?
>
> B. would you be willing to pay $20k towards any security ordered? What about $30k?
>
> C. if security was ordered to be paid and we sought from you payment in the amount of $20k, would you remain part of the class action and continue retaining M+K to act on your behalf? What about if we sought $30k?

The "$20k" was, in each case, the per-head amount which was the subject of submissions on 1 June 2012. The "$30k" had no specific significance, but was chosen by the applicants' solicitors as representing a contribution higher than $20,000 which might be necessary if a substantial number of the group members refused to contribute at the lower level.

163 I have referred to the results of the survey, as summarised in the reasons of the primary Judge, at para 125 above.

164 On the second day of the hearing before the primary Judge, 7 June 2012, various issues were dealt with, but it was determined that the parties' submissions with respect to the survey conducted by the applicants' solicitors would be received in writing. That was what happened, and I next refer to the written submissions which were filed accordingly.

165 On behalf of the directors, it was submitted that the applicants had taken no steps to put evidence before the court of the actual financial position of their 406 clients (ie additionally to the three named applicants) or of their ability to provide security for costs. In the circumstances, the only evidence of the ability of those who would benefit from a favourable result in the case was that called on behalf of the respondents, to the effect set out in para 112 above. It was submitted that the applicants had failed to discharge their onus of proof, and that, it being apparent that the 376 group members referred to had, at the times of their borrowings, net assets of $346m, there was no room for any inference that they were unable to contribute to security.

166 With respect to the survey conducted by the applicants' solicitors, the directors submitted that that the questions posed did not address the ability of the interviewees to contribute to an order for costs. Those submissions continued:

> Questions directed to whether the clients could "afford" security are of little assistance, given that the expression "afford" has a subjective meaning that many [sic] mean different things to different people. The questions were also not accompanied by an explanation that if the action were successful the money provided by way of security would be refunded. Nor is it apparent that the clients understood that in the event that security were not provided, and the proceeding stayed, they may become liable to pay the outstanding balance of their loans.

167 The scheme companies adopted the submissions made on behalf of the directors.

168 On behalf of the lenders, it was submitted that there was evidence that the group members could provide security, that the evidence introduced since the first day of the hearing did not support the conclusion that the clients of the applicants' solicitors would not provide security, and that that evidence did not address the position of the 87.2% of group members who were not clients of those solicitors. It was submitted that the survey was "fatally flawed by reason of two false premises", namely, that, if an order for security were made, (1) it would be in the total sum of about $9.2m, and (2) it would operate immediately in that amount, rather than, for example, providing for the provision of security in stages. Thus, it was submitted, "the figures selected were those most likely to elicit a negative response from those surveyed".

169 The lenders then submitted that there were four "methodological and evaluative shortcomings" in the survey conducted by the applicants' solicitors, namely:

- The survey did not capture the clients of the applicants' solicitors most likely to be willing and able to contribute to security. Rather than randomly selecting group members from amongst their clients, consistently with the implicit objective of maximising the prospect of the proceedings continuing, the applicants' solicitors should have surveyed those with the most to gain from the litigation, namely, at least in the first instance, the nine clients of the solicitors with loans in excess of $500,000, all of whom had net assets of more than $1m. Only two of them were within the 84 clients surveyed, and neither responded. Of those who did respond, only one had a loan amount over $200,000, and that respondent was prepared to provide the security proposed.

- > Secondly, the survey inexplicably assumed that an equal contribution from all [the solicitors'] clients would be appropriate such that those with higher loan amounts and means would be subsidised by those with lower loan amounts and means. This was inherently likely to render the amount of security sought from those with small loans disproportionate to the commercial benefit that they could expect from a successful outcome of the litigation. The more equitable approach would be to seek a security contribution pro-rata with claim amount. For example, the total principal of loans sought to be avoided by the 409 … clients is about $37 million … and, adding interest, the total amount claimed by them is $50-55 million; the total security sought is therefore about 15-16% of the total amount at stake in the proceedings for the … clients (leaving aside loss of use damages which have not been particularised). If [the] clients surveyed had been asked whether they would be prepared to contribute, say, 15% of their loan amount and interest, the responses may have been very different. The security sought would have been more affordable and worthwhile on a cost-benefit analysis for those with smaller loans.

- The surveyed clients were not told that, if they succeeded at trial, they would get their money back. Some of the responses confidentially made available by the applicants indicated that the interviewees in question laboured under the assumption that the security being sought would constitute money lost once and for all, and it might be inferred that others did likewise.

- Nothing was known about the circumstances of the group members who had not retained the applicants' solicitors. They constituted 87.2% of those who had taken out loans with the lenders. It could not be inferred that they would be unwilling to contribute to security.

170 I consider that there is substance in a number of the respondents' criticisms of the way the applicants went about proving the circumstances of the known group members. Their solicitors had 409 clients who had signed agreements with them. In those circumstances, it was not, in my view, satisfactory for them to have proceeded by way of "survey". It may be that to canvass the circumstances of all 409 would have been a task of some proportions, but, at the same time, every one of those 409 group members would, if the case were successful, be required to have his or her claim processed. The applicants' solicitors having assumed the obligation of taking on each such person as a client, it was not, in my view, sufficient for them to respond to the obligation imposed upon the applicants by the respondents' applications for security by making telephone inquiries of 50 of the group members only. Apart from the obviously incomplete quality of the information which the solicitors thereby obtained, I would also accept the criticism that, designed in the way that it was, the survey was not calculated to maximise the prospect of the applicants finding, and interrogating, the group members who were most likely to be able, and to have it in their interests, to contribute to security.

171 Neither, in my view, was the content of the survey – which, I would add, was wholly the doing of the applicants and had not been canvassed before the primary Judge – suitable for the task upon which the applicants ought to have been engaged. The questions were intensely subjective, concerned as they were with what would have been an interviewee's reaction to a request that he or she contribute to security. In the case of a single applicant from whom security was sought, answers to questions in those terms would never be sufficient. He or she would need to inform the court of his or her financial circumstances. Save as may have been implied by the wholly subjective answers to the questions posed in the survey, the applicants did not grapple with that subject, even in the case of the limited number of group members whom their solicitors contacted.

172 The terms in which the primary Judge dealt with the respondents' objections has been summarised above in these reasons. His Honour said that there was "some force" in the applicants' contention that the cost of contributing $20-$30,000 for security for costs "is likely to be seen by a large proportion of the known group members as disproportionate to the amount likely to be recovered by them upon success in the proceedings". His Honour described the survey results as indicating that "a high percentage of known group members

are unable to pay security" of $20,000 or $30,000. Then at the point of considering the knock-on effect on the contributions required of remaining group members if some of their number did not contribute, his Honour contemplated a situation in which 60% of them "are unable, or refuse" to contribute. Ultimately, his Honour held that the fact that about 80% of known group members "said that they could not afford to pay security", and about 65% "said they would no longer participate in the actions" if security in the amounts asked about was ordered, was "good evidence" that the arguable claims of the applicants and group members were likely to be stifled by an order for security.

173 In my respectful view, the primary Judge was in error to have accepted, and based his judgment on, the results of the applicants' survey. The survey was not calculated to elicit information about the financial circumstances of the 409 group members represented by the applicants' solicitors. The questions in it, and therefore the results of it, were subjective and, in significant respects, required judgments to be made by the interviewees which ought to have been for the court. In this respect, I consider that there is substance in the argument of the directors that "afford" involves a subjective concept which may mean different things to different people. Significantly for present purposes, I do not think that it sufficiently paints an objective picture of the means of the people concerned. Indeed, in the common vernacular, the word probably involves elements both of unwillingness and inability, according to the personal financial priorities of each person being questioned.

174 For the above reasons, I take the view that the primary Judge was in error not to have held that the applicants did not establish that the group members who had engaged their solicitors were not reasonably able to make the required contribution to security.

ONUS OF PROOF

175 There are some indications in the reasons of the primary Judge that the absence of evidence on particular aspects of the case was held against the respondents. However, in the context of the reasons as a whole, I consider the argument that his Honour cast upon the respondents the onus of calling evidence of the circumstances of group members on the stifling point to be a weak one. This was civil litigation in which "all evidence is to be weighed according to the proof which is in the power of one side to have produced, and in the power of the other side to have contradicted": *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201

FCR 173, 202 [170]. In one instance, the primary Judge observed that the lenders, who had led evidence as to the financial circumstances of some of the group members, had not gone further. In another instance, having referred to the survey results as "good evidence" that the arguable claims of the applicants and group members were likely to be stifled by an order for security, his Honour said: "As against this there is no evidence that the known group members of more substantial means are prepared to shoulder the burden of security." Statements such as these do not, in my view, imply a reversal of the onus of proof, the correct direction of which was clearly apparent to his Honour. Rather, as will be apparent from the previous section of my reasons, I consider that his Honour's error lay in accepting as sufficient evidence from the applicants which ought not to have been accepted. I would not grant leave to appeal by reference to the respondents' onus of proof point.

DEFENSIVE OR OFFENSIVE PROCEEDINGS?

176 On this aspect, I agree with what has been written by Allsop CJ and Middleton J.

PROCEEDING-BY-PROCEEDING OR GLOBAL APPROACH?

177 Strictly, the applicants had chosen to institute three proceedings and the question whether security should be provided fell to be answered in relation to each. However, two factors would then have been relevant. First, no distinction was to be made as between the scheme companies and the directors: although separately represented, they were parties to the same proceeding. The primary Judge did, of course, have to address the applications for security which were made by each of these groups, but he was, in the circumstances, justified in dealing with the stifling point by reference to the ability of the applicants to provide the total security that was sought. Secondly, the lenders themselves made no distinction by reason of the fact that, technically, they were sued in separate proceedings. They were jointly represented and, apparently, part of the same corporate group.

178 In the proceedings before the primary Judge, the first of the respondents to make submissions were the directors. At the outset, senior counsel for them said:

> Your Honour, in terms of the directors' application, what is sought is a total of $2 million, and the basis on which that is sought is really in two amounts. One [is] the cost of [sic – costs before?] trial and the other for trial costs. And we don't understand there to be any real issue about quantum, so I don't propose to address your Honour on that.

Later, senior counsel submitted that the primary Judge needed "to look, in the first instance at least, to each application separately on its merits". Counsel for the scheme companies adopted the submissions of counsel for the directors, adding that their clients' sum was $2.4m. They proceeded to the calculations referred to in para 161 above. So far as I can see, the lenders made no particular submission to the effect that their application for security should not be dealt with at the same time as the others.

179 Had the primary Judge determined one only of the applications before him, that determination would necessarily have been a complicating circumstance in the next application which he came to consider: it would have had to be taken into account on the question of the tendency of any second order to stifle the litigation. And so on. In this environment, whether the applications were considered sequentially or, as his Honour did, together, was essentially a question of procedure. I do not detect, in the transcript of the hearing before his Honour, any conspicuous resistance on the part of the respondents to the conjoint consideration of the applications, and indeed, the $20,000 calculations proposed on behalf of the scheme companies (which did not provoke any protest from the directors or the lenders) implied the taking of such an approach.

180 I do not think that the respondents' application for leave to appeal derives any support from this consideration.

THE POSSIBILITY OF STAGING

181 The ordering of security to be provided in stages is a reasonable approach commonly taken in lengthy and costly proceedings. To the lenders' suggestion that the applicants' survey was deficient for not having questioned the interviewees about such a possibility, the primary Judge said that "payment in stages would not alter the ultimate amount due, and in any event the respondents did not seek orders for payment in stages or partial payment of security." As to the second part of this statement, it is true, as noted above, that the directors – and, by adoption, the scheme companies – did submit that security might be ordered and provided in two stages, but his Honour was correct to observe that a staged approach was not sought in the application made by either of these groups. Neither was it sought in the lenders' application. And, apart from the submission to which I have referred (which, I

would have to say, was made almost in passing, when compared with the emphasis placed on other aspects of the directors' case), there was scant reference to the desirability of security being provided in stages until the point where written submissions were filed in relation to the applicants' survey.

182 If his Honour's approach to the question of stifling were otherwise unobjectionable, I would not regard his treatment of the staging point as justifying the grant of leave to appeal.

DISPOSITION OF THE APPLICATION AND APPEAL

183 To summarise what I have said above, I consider that the primary Judge was in error in two respects, each connected with the obligation of the applicants to put before the court evidence which would sustain the conclusion that an order for security would stifle the litigation. The first, and in my view more significant, aspect is the failure of the applicants to establish in point of objective fact what were the financial circumstances of the group members who had engaged their solicitors, and the related error of accepting the survey results as sufficient in that regard. The second aspect is his Honour's disregarding the prospect of the applicants being able to obtain the services of litigation funding, in circumstances where that prospect was the subject of positive evidence from the lenders. Although a matter of procedure in one sense, the availability of security for costs in an appropriate case is an important dimension of the civil justice system administered in the court. It follows that leave to appeal from the primary Judge's judgment of 17 December 2012 ought to be granted.

184 Leave having been granted, I would uphold the respondents' appeals for the two reasons identified in the previous paragraph.

185 The question then arises whether the matter should be remitted to the primary Judge for reconsideration. Here I note that Allsop CJ and Middleton J likewise take the view that the evidence before the primary Judge did not sustain the conclusion that an order for the provision of security would stifle the proceedings concerned. Neither on appeal nor, so far as I can see, before the primary Judge, was there any serious suggestion on behalf of the applicants that the respondents would not have been conventionally entitled to an order for security (to some extent at least) in the absence of the applicants having discharged the onus

of establishing that the provision of security would stifle their litigation. I make that observation, of course, in the light of the inability of the applicants to satisfy an order for costs (which was and is uncontroversial) and of the jurisprudence laid down in *Bray* that the characteristics of group members other than the applicants were proper to be taken into account. I agree that orders 1-7 proposed by their Honours should be made.

186 I do not, however, agree with the other members of the Full Court that the respondents should have half only of their costs of the application for leave and of the appeal. They have been substantially successful. It is true that not all of their arguments were accepted, and it is true that we have declined their invitation to undertake for ourselves the task of working out how much security should be ordered, and in what stages. But the respondents were wholly successful in what was on any view the burden of their cases in the Full Court: they secured the reversal of the primary Judge's refusal to order security, and have obtained an order that security be provided. On the conclusions of the Full Court – those of Allsop CJ and Middleton J no less than of myself – I regard this as a clear case in which costs should follow the event. I would order the applicants to pay the respondents' costs in each application/appeal.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 14 June 2013