SUPREME COURT OF QUEENSLAND

CITATION:	*Kinsella v Gold Coast City Council* [2014] QSC 65
PARTIES:	**HELEN BARBARA and PETER LOUIS KINSELLA** (Plaintiffs) **v** **GOLD COAST CITY COUNCIL** (Defendant)
FILE NO/S:	BS 5010 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	16 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2013
JUDGE:	Philip McMurdo J
ORDER:	**It is ordered that:** **1. paragraphs 60 to 65 of the amended statement of claim, filed 7 August 2013, be struck out;** **2. application to strike out amended statement of claim be otherwise dismissed; and** **3. the plaintiffs file and serve a further amended statement of claim within 28 days of this judgment.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PARTIES – REPRESENTATIVE PARTIES – where a proceeding is brought by a plaintiff in a representative capacity pursuant to r 75 – whether the represented persons have the "same interest" as the plaintiff – whether the represented persons stand to be equally affected by the relief sought. PROCEDURE – JUDGMENTS AND ORDERS – IN GENERAL – CLASSIFICATION – FINAL AND INTERLOCUTORY – whether the declarations sought by the plaintiff are interlocutory orders and impermissible. *Civil Proceedings Act* 2011 (Qld), s 18(2), s 18(3) *Uniform Civil Procedure Rules* 1999 (Qld), r 75, r 77(1), r 171, r 483, r 484 *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22

Australian Telecommunications Corporation v Barnes (1995) 125 FLR 335
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334
Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649
Cameron v National Mutual Life Association of Australasia Limited (No 2) [1992] 1 Qd R 133
Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386
Carnie v Esanda Finance Corporation Ltd (1995) 182 CLR 398
Clarke v Chadburn [1985] 1 W.L.R 78
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317
Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 Q.B. 630
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540
International General Electric Co of New York v Commissioners of Customs and Excise [1962] Ch. 784
Irish Shipping Ltd v Commercial Union Assurance Co plc [1991] 2 Q.B. 206
Magman International Pty Ltd v Westpac Banking Corporation (1991) 32 FCR 1
Markt & Co Ltd v Knight Steamship Co Ltd [1910] 2 K.B. 1021
Prudential Assurance Co Ltd v Newman Industries Ltd [1981] 1 Ch. 229
Inland Revenue Commissioners v Rossminster Ltd [1980] A.C. 952
Shaw v Real Estate Board of Greater Vancouver (1973) 36 D.L.R. (3d) 250
Stone v ACE-IRM Insurance Broking Pty Ltd [2004] 1 Qd R 173
Sutherland v Take Seven Group Pty Ltd (1998) 29 ACSR 201
Alberta (Pork Producers' Marketing Board) v Swift Canada Co (1984) 9 D.L.R (4th) 71
Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479
Warramunda Village Inc v Pryde (2002) 116 FCR 58

COUNSEL: D Kelly QC, with D P O'Brien QC, for the plaintiffs
P Flanagan QC, with B T Porter, for the defendant

SOLICITORS: Shine Lawyers for the plaintiffs
Clayton Utz for the defendant

[1] The plaintiffs own a house in the Arundel Hills Country Club Estate (the Estate) at the Gold Coast. Their house is near a waste disposal facility, which was operated by the defendant council and is known as the Suntown Landfill Facility (the facility). They claim that the Council's operation of the facility resulted in the escape of noxious materials from its site, causing the plaintiffs damage by diminishing the value of their property.

[2] Further, they claim that the Council, being aware of the risks of those materials escaping from the facility to nearby land, should not have permitted the specific area in which their property is located to be developed, at least as a residential subdivision. For that negligence, they claim effectively the same loss.

[3] They sue to recover damages from the diminution in the value of their property. But they also sue as the purported representatives of certain other persons, who are the owners of houses within a defined area of the Estate and who had acquired their property by September 2009, which is when the plaintiffs say the value of each of the subject properties was affected by the conduct of which they complain.

[4] The principal question within this judgment is whether this proceeding is able to be prosecuted on behalf of those other owners according to r 75 of the *Uniform Civil Procedure Rules*.

[5] The Council applies to strike out such part of the proceeding which advances a claim on behalf of another person. It argues that this proceeding is not of a kind described in r 75. For the moment at least, it does not argue that if the case is within r 75, there are discretionary considerations which should preclude the case going forward as a representative proceeding.

[6] The plaintiffs' case is according to an amended statement of claim filed last August. The defendant has not filed any Defence. The plaintiffs agreed that the defendant need not do so pending the making and determination of this application.

The pleaded case

[7] The Estate occupies about 173 hectares. Its south eastern boundary adjoins land owned by the Council and which is the location of the facility. It is not alleged that all of the Estate has been affected: the case is that the affected land is that which is closest to the facility and part of the land which was developed as Stage 3 of the Estate.

[8] The area said to have been affected by the facility is shown on an annexure to the pleading, which is an aerial photograph upon which there are superimposed the boundaries of the specific lots and which shows their proximity to the facility. As I have said, the persons whom the plaintiffs claim to represent are further defined according to the dates of acquisition of their lots. According to the evidence of a lawyer for the Council, there are a certain 80 lots which appear to be owned by those whom the plaintiffs would represent. These properties are situated along four streets and parts of another four streets. Inevitably, they are not equidistant from the facility. The evidence of the defendant's lawyer, by reference to an aerial photograph exhibited to her affidavit, indicates that some of the lots adjoin the boundary of the facility whilst others are up to 400 metres from it. The property of the plaintiffs is about 150 metres from that boundary. Stage 3 of the Estate was released for sale in September 2000 and was developed in that and the following year.

[9] The pleading makes complaints about landfill gas and leachate. Landfill gas is said to be caused by "chemical reactions and microbes acting upon the waste contained in a landfill as the putrescibles materials begin to break down" and its production is said to be aided by "the ingress of water into the landfill". Leachate is said to be "principally caused by rainfall and surface water flowing through waste deposited in

the landfill, coming into contact with decomposing solid waste and becoming contaminated", whilst also being produced "during the composition of carbonaceous matter". It is alleged that leachate can itself produce landfill gas.

[10] Landfill gas and leachate are said to be produced for up to 30 years after the closure of a landfill site. They are said to be "harmful to the environment and public health" and "potentially causative of explosive activity and asphyxiation".

[11] It is alleged that landfill gas and leachate within a landfill facility are able to be "reasonably contained and managed" by steps which were not taken with this facility.

[12] The facility commenced to operate from about 1984. From 1988, the Council is said to have been aware that a residential estate was planned for the land on which Stage 3 is now situated. Until 1995, some of the facility was operated by a private contractor and some by the Council. From 1995 "until at least in or about 2001", the facility was owned, controlled and operated by the Council, when it was the "major waste facility accepting domestic waste for the city of the Gold Coast as well as "accepting commercial and industrial waste from surrounding areas".

[13] In about 2001, the Council closed that part of the facility which was located on the land which adjoined the Estate's south eastern boundary. The Council reopened that portion in or about 2004 after which it continued to control and operate the facility until about December 2010.

[14] The pleading contains a number of paragraphs which, in summary, present a case that the Council continuously failed to operate the facility so as to avoid the impact of landfill gas and leachate upon adjoining or nearby land.

[15] It is alleged that by April 2009, landfill gas was regularly escaping from the facility to other land, leachate had been "released to ground water" and "the Council was publicly acknowledging that its Landfill Gas capture system was inefficient". It is alleged that between August and November 2009, "there was intensive media reporting of health and landfill gas issues associated with the … facility with particular reference being made to" that part of Stage 3 in which the properties of the represented owners are located.

[16] The relevance of September 2009, as the date by which the represented owners had acquired their properties, is shown by paragraph 53(h) of the pleading which is as follows:

> "(h) By in or about September 2009, the issues of Landfill Gas and Leachate release at the Suntown Landfill Facility had become associated with the Specific Stage 3 Area and a stigma had attached to that particular area of the Estate."

[17] It is alleged that from September 2009, by reason of the Council's manner of operation of the facility, the plaintiffs and each of the represented lot owners suffered loss and damage, "namely economic loss in the form of diminution in the value of their land". That allegation is particularised to the effect that each lot is worth 15 to 20 per cent less than what it would have been worth if "unaffected by knowledge of the escape of landfill gas from [the facility] or the risk to public health and safety and of asphyxiation and explosion posed by the presence or the risk of the presence of such landfill gas". This allegation, read in the context of the

pleading and especially paragraph 53(h), is to the effect that it was the public knowledge of both the escape of the noxious material and the consequential risks, which affected the values of the subject properties.

[18] The first of the alleged legal bases for these claims is that the Council was negligent in its operation of the facility. The Council is said to have owed a duty of care to each of the plaintiffs and the represented owners "to take reasonable care in occupying, operating and controlling the Suntown Landfill Facility and activities on it to protect the plaintiffs and each of the represented lot owners from suffering economic loss or the loss of the use and enjoyment of their land". That duty is said to have come from the circumstances that the Council had power to prevent such losses, the plaintiffs and the represented owners "on and from the time they respectively became registered proprietors of lots … were vulnerable to, and were not able to protect themselves from a failure by the Council to take reasonable care to prevent them suffering [such loss] and damage …" and it was reasonably foreseeable that a failure to take reasonable care would occasion such losses to owners within this particular part of Stage 3.

[19] The breach of that duty of care is alleged in terms which do not distinguish between the respective cases of any of the plaintiffs and the represented owners.

[20] The second basis is that the council's operation of the facility was an actionable nuisance, which is pleaded as occurring "on and from no later than September 2009 and continuing thereafter". The alleged damage from the nuisance is identical to that which is the alleged consequence of the Council's negligence. There are particular difficulties with this nuisance claim, to which I will return.

[21] The third basis for the claims is that the Council was negligent in extending the relevant development approvals in 1996 to allow the developer a further four years in which to develop the Estate. It is alleged that the Council then owed a duty of care to the plaintiffs and each of the represented owners to exercise that discretionary power in relation to the development approval "so as to protect the plaintiffs and each of the represented lot owners from suffering economic loss as a result of purchasing and developing the land in relation to which the actual and potential escape of landfill gas from [the facility] … posed a risk to public health and safety". It is said that the Council breached this duty by extending the approval for a further period of four years, when the Council was aware that the part of the Estate which became owned by the plaintiffs and the represented owners was no longer suitable to be developed as residential land because of the potential for that land to be affected by the escape of landfill gas from the facility. Upon this third basis, again the same loss is alleged to have been suffered by the plaintiffs and the represented lot owners.

[22] The fourth basis for the claims is that the Council was negligent in again extending the period for the development of the Estate, in August 2000, by a further four years. The duty of care alleged to have been owed on this occasion is substantially the same as that which is alleged for the 1996 extension by the Council. The alleged breach of this duty of care in 2000 is relevantly identical to the alleged breach of the equivalent duty in 1996, as is the alleged loss from that negligence.

[23] The relief claimed in the statement of claim is as follows:

> "1. A declaration that the Council owed to the Plaintiffs and to each of the Represented Lot Owners the Council's Design, Operation and Control of the Suntown Landfill Facility Duty;
>
> 2. A declaration that the Council owed to the Plaintiffs and to each of the Represented Lot Owners the Council's Statutory Powers Duty;
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> 3. A declaration that the Council has breached the Council's Design, Operation and Control of the Suntown Landfill Facility Duty;
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> 4. A declaration that the Council has breached the Council's Statutory Powers Duty;
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> 5. Damages for Negligence;
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> 6. Damages for Nuisance;
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> 7. Statutory interest on damages calculated at the rate of 10%;
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> 8. Costs."

The duty referred to in paragraphs 1 and 3 in that extract is the alleged duty of care in the operation of the facility. The duty referred to in paragraphs 2 and 4 is the alleged duty (or duties) of care in deciding whether to extend the duration of the development approval.

[24] At this point some matters should be noted about the relief which is there claimed. The first is that the four declarations which are claimed, if granted, would not constitute an adjudication by the court that the defendant was liable to the plaintiffs or any of the represented owners. Damage is an essential element of the tort of negligence and proof of damage is essential to establishing liability. Declarations in the terms which are sought would themselves be merely a statement of the court's determination of some elements of the cases of the plaintiffs and the other owners.

[25] The second is that the claims for "damages for negligence" and "damages for nuisance" do not, when read alone, extend to claims on behalf of the represented owners. But the pleading as a whole indicates an intention to make claims for damages on behalf of the represented owners, for otherwise the allegations of losses having been suffered by them would be superfluous.

The relevant rules

[26] The plaintiffs sue in a representative capacity in reliance upon r 75 which is as follows:

> "75. A proceeding may be started and continued by or against 1 or more persons who have the same interest in the subject matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding."

[27] Where a proceeding is brought by a plaintiff in a representative capacity, pursuant to r 75, the represented persons do not become parties to the proceedings. But they become bound by the judgment, because s 18(2) of the *Civil Proceedings Act 2011* (Qld) provides that unless the court orders otherwise, an order in such a proceeding binds the persons who have the same interest as the representative party and who could have been parties to the proceeding. Section 18(3) and r 77(1) each provides that the order may be enforced against a person not named as a party only with the court's leave.

[28] Rule 75 has analogues in other jurisdictions which have been considered, most relevantly, by the High Court in *Carnie v Esanda Finance Corporation Ltd*[1] ("*Carnie*") and *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* ("*Fostif*").[2] In *Carnie*, Mason CJ, Deane and Dawson JJ said of the (then) equivalent rule in New South Wales that it:[3]

> "… is expressed in broad terms and it is to be interpreted in the light of the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions."

Their Honours continued:[4]

> "It has been suggested that the expression 'same interest' is to be equated with a common ingredient in the cause of action by each member of the class. In our view, this interpretation might not adequately reflect the content of the statutory expression. It may be it extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings. Be that as it may, it has now been recognised that persons having separate causes of action in contract or tort may have 'the same interest' in proceedings to enforce those causes of action."

[29] In the same case, Brennan J and McHugh J each said that the test of whether an action was within the rule was whether the plaintiff and the represented parties had "a community of interest in the determination of any substantial question of law or fact".[5] Brennan J said that the rule requires "'the same interest' in the proceeding, not necessarily the same cause of action nor an entitlement to have or to share in the same relief".[6]

[30] Toohey and Gaudron JJ agreed that the rule could apply where the plaintiff and the represented parties had different causes of action. But in their view, there had to be not only a significant question which was common to all members of the class but also a common effect of the relief which was sought. They agreed with the following statement (substituting "representative action" for "class action"), by Bull JA in *Shaw v Real Estate Board of Greater Vancouver*:[7]

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1 (1995) 182 CLR 398.
2 (2006) 229 CLR 386.
3 (1995) 182 CLR 398 at 404.
4 Ibid.
5 (1995) 182 CLR 398 at 408 (Brennan J) and 427 (McHugh J).
6 (1995) 182 CLR 398 at 408.
7 (1973) 36 DLR (3d) 250 at 254 cited by Toohey and Gaudron JJ at (1995) 182 CLR 398 at 419.

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

Their Honours noted that the plaintiffs and the represented parties in *Carnie* had the same interest in the proceedings "in the sense that there is a significant question common to all members of the class and they stand to be equally affected by the declaratory relief which the appellants seek".[8] Those passages are emphasised by the Council's submissions, where it is argued that r 75 can apply only where the plaintiff and all members of the class stand to be equally affected by the relief which is sought.[9] But at another point in the Council's written submissions, it is argued that the requirement is for a "common interest in the relief which is sought",[10] which would not appear to require that the relief have an equal effect on the plaintiffs and all members of the represented class.

[31] In *Fostif*, Callinan and Heydon JJ said:[11]

> "214. First, it was not enough that 'numerous persons' had 'the same interest' in the abstract - they had to have the same interest *in the proceedings*. To use words employed by Toohey and Gaudron JJ (with whom Mason CJ, Deane and Dawson JJ concurred) in *Carnie v Esanda Finance Corporation Ltd*, it had to be the case that there was 'a significant question common to all members of the class and they stand to be equally affected by the declaratory relief which the [plaintiffs] seek'. Similarly, to use words employed by Lord Macnaghten and approvingly quoted by Toohey and Gaudron JJ in *Carnie v Esanda Finance Corporation Ltd*, the action lay 'if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent'.
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> 215. The second condition was that 'the same interest' must actually have existed when the proceedings began. It was not enough that it might exist at some future time."

It was that second condition which, in *Fostif*, was not satisfied. That was because when the proceedings begun, they were not in terms in which the plaintiff was said to be suing as a representative: rather it then claimed that it would be suing as a representative if and when another person or persons chose to be represented. Gummow, Hayne and Crennan JJ said that one consequence of the proceeding being commenced in that form was as follows:[12]

> "No other person had an interest in those proceedings because no order made or judgment given in the proceedings would bind that

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8 (1995) 182 CLR 398 at 421. See also at 424.

9 Council's written submissions, paragraph 26(b).

10 Council's written submissions, paragraph 15.

11 (2006) 229 CLR 386 at 470.

12 (2006) 229 CLR 386 at 422-423 [58].

> other person. No grant of declaratory relief was sought to resolve or determine any question common to the 'numerous persons' alleged to have 'the same interest in the proceedings'. The summons is thus to be distinguished from the statement of claim in *Carnie*, where the plaintiffs claimed declarations for the common benefit of 'the represented debtors'. No doubt it was hoped that the procedures for 'opting-in', which the summonses contemplated would be followed *after* the proceedings had been instituted, would lead to there being numerous persons with the same interest, but that was a hope or expectation about future events."

[32] That particular impediment in *Fostif* does not exist in the present case. Here the proceeding was commenced by the plaintiffs for themselves and as representatives of the other owners. More relevant to the present case is this passage from the judgment of Gummow, Hayne and Crennan JJ in *Fostif*:[13]

> "[Q]uestions about the engagement of [the rule] must be considered having regard to the purposes of the rule. A central objective of the representative procedures for which [the rule] provided was the avoidance of multiplicity of proceedings and the efficient determination, once and for all, of controversies in which the parties have the same interest. … A judgment entered or order made in the proceedings 'shall be binding on all the persons as representing whom the plaintiffs sue'. What the rules were intended to achieve was a single judicial determination of common issues in a way that binds those were are interested in those issues. Whether the present matters fell within [the rule] must be considered having regard to what the summons said about the parties, what issues were raised in the proceedings, and what relief was sought in the proceedings."

Gummow, Hayne and Crennan JJ did not endorse there the particular statement by Toohey and Gaudron JJ in *Carnie* that the members of the class had to "stand to be equally affected by the declaratory relief which the [plaintiffs] seek".[14]

[33] From these authorities, these things are clear. The "same interest in the subject matter of the proceeding" does not exist only in cases where the plaintiff and the represented parties share the same cause of action; nor is the rule excluded where not every issue of law or fact is common to their several causes of action. It is necessary to consider more than whether there is a significant common issue: the relief claimed is also relevant. As the evident purpose of the rule is to enable parties with the same interest to secure a determination in one action rather than in separate actions, the available relief claimed must be considered in assessing whether that purpose could be served.

[34] But there is an argument here as to whether the relief claimed must be in all respects the same, in the sense that the outcome could not differ between any of the plaintiffs and the represented owners. The submissions for the Council emphasise the statement by Toohey and Gaudron JJ in *Carnie*, apparently approved by Callinan and Heydon JJ in *Fostif*, that all members of the class and the plaintiffs have to be "equally affected" by the relief which is sought. But a consideration of that

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13 (2006) 229 CLR 386 at 422 [55].

14 (1995) 182 CLR 398 at 421.

submission requires that statement to be put in context. Toohey and Gaudron JJ adopted the statement by Bull JA in the passage which I have set out above at [30]. As that indicates, there is no requirement for the relief to have an identical quantitative effect across the plaintiffs and the represented parties. In the present case therefore, it is to be expected that, perhaps for several reasons, the amount of the losses suffered by the plaintiffs and the owners would not be identical. One reason is that the (unaffected) value of one house might be more or less than that of another within the group, so that even assuming a uniform percentage diminution in those values, the dollar amount would differ from case to case. Another reason, the Council argues, is that properties within the group which are more remote from the site of the facility would be expected to be less affected. However, on the way in which the case is pleaded, at least for the negligence claims, the particular location of a house within the group is irrelevant because the loss is said to come from the public notoriety in the actual or likely impact of the facility upon this group of houses, such that the public and the market would not distinguish the detrimental impact of the facility from one house to another.

[35] Therefore the fact that the amounts of damage suffered by the plaintiffs and the other owners would not be identical does not preclude the operation of the rule. In *Carnie*, for example, it was inevitable that different members of the represented class would have monetary remedies in different amounts. But there was relief claimed there which affected both the plaintiffs and the represented persons, namely a declaration that no represented party was liable to pay a credit charge of the kind which was required by the terms of the contract which each had made with the respondent.

[36] In the present case, I accept that it is not sufficient for the plaintiffs to identify the significant issue of fact or law which is common to their case and those which could be brought by the represented owners. They must also demonstrate that by the relief which is claimed or which could be claimed in this proceeding, an order could be made which would bind not only the plaintiffs and the Council, but each of the represented owners.

[37] It is necessary to consider also the relief which *might* be given, because if an irregularity in the present claim is capable of being remedied without injustice to the Council, the plaintiffs should be permitted to do so rather than having the representative component of their case struck out.[15] It is necessary to consider then what relief could be claimed upon the facts which are alleged in the statement of claim.

Common issues

[38] I will discuss first whether there is a significant common issue. That consideration is made more difficult by the absence of a pleading from the Council. But I will assume that the Council could and would plead a case which is consistent with its submissions on this application.

[39] Except for the amounts of the losses respectively suffered, *according to the statement of claim*, the issues of law and fact in the negligence claims would be identical across the causes of action of the plaintiffs and the represented owners.

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[15] cf *Cameron v National Mutual Life Association of Australasia Limited (No 2)* [1992] 1 Qd R 133 at 138; *Stone v ACE-IRM Insurance Broking Pty Ltd* [2004] 1 Qd R 173.

The pleaded case allows for no possibility that, for example, the Council owed a duty of care to some but not all of the owners. At least for the negligence claims, the type of damage is identical: it is a purely economic loss from the diminution in value of the property from the public notoriety of the effect or potential effect of the facility upon the enjoyment of any property within this part of the Estate. If the plaintiff proves its case as pleaded, each of the plaintiffs and the represented owners will have suffered damage caused by the Council's breach of a duty or duties of care as owed to that person.

[40] As noted, the alleged damage from the nuisance is apparently identical to that which is claimed for the alleged negligence. In paragraph 60 of the pleading, the plaintiffs allege that from September 2009, landfill gas was escaping "to adjoining and nearby land". In paragraph 62, they allege that it was reasonably foreseeable that the plaintiffs and the represented owners "were in a class of persons likely to suffer loss and damage due to an unreasonable interference with the use and enjoyment of their land by reason of such nuisance". In paragraph 63(a), they refer to the nuisance constituted by "the escape of landfill gas … and the risks to public health and safety and of asphyxiation and explosion on adjoining and nearby land" and say that this had become "a nuisance of which the public had knowledge". In paragraph 63(b), they allege that the presence of landfill gas emitted from the facility and the risks to public health and safety and of asphyxiation and explosion on "adjoining and nearby land" constituted a nuisance and "an unlawful interference with the use or enjoyment of land by the plaintiffs and each represented lot owner".

[41] Paragraph 64 contains similar reference to the escape of gas onto "adjoining and nearby land" as being "an unlawful interference with the use or enjoyment of land by the plaintiffs and each Represented Lot Owner". And paragraph 65 contains the allegation that "in addition", the "damage for such unlawful interference with the use and enjoyment of their land may be measured by reference to diminution in the market value of their land".

[42] The case in nuisance which is thereby pleaded is unusual. As I read this part of the pleading, the plaintiffs do not allege that gas has escaped to each and every lot of the plaintiffs and the adjoining owners with the consequence of unlawfully interfering with the use and enjoyment of their properties. Rather, the case is that gas has escaped to "adjoining and nearby land", which need not include every property of the plaintiffs and the represented owners. There does appear to be a deliberate distinction which is employed in this part of the pleading between what is described as "adjoining and nearby land" and the relevant lots. It is alleged that there was an unreasonable interference with the use and enjoyment of those lots. But that was from the presence of landfill gas on adjoining and nearby land, which might include only part of the subject lots or land which is not within the subject lots.

[43] Overall, the nuisance case seems to be that the escape of landfill gas from the facility, with its associated risks to public health and safety, interfered with the use or enjoyment of the properties of the plaintiffs and the represented owners, not so much from the presence of landfill gas within those properties, but from it being publicly known that land within the vicinity of a subject lot was affected by the presence there of landfill gas.

[44] That understanding of the plaintiffs' case is confirmed by the damage which is pleaded, which is identical in its extent between the plaintiffs and the represented owners. Ultimately, the loss is said to come from the public notoriety around the facts and circumstances of the escape of noxious material from the facility. It therefore appears that the nuisance claims are not made upon a factual basis, requiring proof by the plaintiffs, that each and every lot was itself subjected to the intrusion of landfill gas. I accept the Council's submission that upon this understanding of the claim for damages for nuisance, it is flawed for want of an actual interference with the use of enjoyment of a relevant lot.[16]

[45] In my view, the nuisance claim or claims should be struck out on this basis. If the plaintiffs were meaning to allege that there was an escape of landfill gas from the facility onto each of the subject lots, thereby unlawfully interfering with the use and enjoyment of that lot, then the extent of that interference would have to be assessed, lot by lot. Conceivably in such a claim, there could be some common issue of fact across the several claims in nuisance. For the present, it cannot be said that a nuisance case pleaded in that way would or would not be permitted by r 75. But as the claims in nuisance are not so pleaded and they should be struck out in their present terms, what follows in this judgment is limited to the claims in negligence.

[46] As to the alleged duties of care, the Council argues that it is necessary to have regard to more than the statement of claim and to analyse what are described as the "salient features", as that term is used by Allsop P (as he then was) in *Caltex Refineries (Qld) Pty Ltd v Stavar*.[17] It is said that possibly some of the represented owners were aware of the existence of landfill gas and of relevant risks before purchasing their properties. In that respect, the Council's argument points to some evidence which, it is suggested, indicates that possibility whilst not proving it.[18]

[47] It is submitted that the fact that individuals might have purchased knowing of and accepting the risks of living next to a landfill would be relevant in determining whether the same duty was owed to them as was owed to persons who purchased without that knowledge. As I see it, the suggested distinction amongst the represented owners provides no reason, at present, for concluding that the plaintiffs could not succeed upon the case as they have pleaded. The duties are alleged to have been owed to a class of persons, relevantly future owners of lots within the Estate whose economic interests could be affected by a failure to take reasonable care in the operation of the facility or the exercise of the Council's discretionary powers to extend the currency of the development approval for this part of the Estate. The duties of care were owed to a class of which the plaintiffs and the represented owners were members, namely prospective purchasers of land in this part of the Estate.

[48] I accept that a relevant circumstance for the existence of the duties of care was the vulnerability of this class that existed not only from their inability to control what the Council was doing, but also from the fact that they would not know of every material fact and risk when purchasing their properties. It is inherently unlikely that any of them did purchase with a complete understanding of the facts and risks and of the likely impact upon their economic interests. If the Council is going to argue that within the represented owners, there was a subgroup of this kind, it would be

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16 *Victoria Park Racing and Recreation Grounds Company v Taylor* (1937) 58 CLR 479 at 506-507.

17 (2009) 75 NSWLR 649 at 676–677 [104] – [106].

18 Written submissions, paragraph 60.

incumbent upon the Council to plead that case. At present, there is no evidence for such a case and it would seem to be no more than an unlikely possibility.

[49] It was argued for the Council that the outcome on the question of causation of a loss need not be the same from one property to another, at least because some are closer than others to the facility but also perhaps because there are other circumstances which could vary between the owners such as there being a probability that there would be "unique causation issues for individuals".[19]

[50] It is also said that there is a material difference amongst the represented owners in that some properties were near to locations where there had been positive readings of landfill gas whilst others were apparently "more directly affected, in that in-home monitoring has been undertaken in their houses". The results of that monitoring are known to the Council but were not disclosed in the evidence here or, it would seem, to the plaintiffs or the represented owners.

[51] The effect of these various submissions is that the plaintiffs could not succeed upon the case as they have pleaded it. In particular, it is asserted the plaintiffs could not prove that each of the properties was affected by the public notoriety surrounding the facility. But there is no evidence here which might prove that assertion by the Council. An order ought not to be made under r 171, upon the basis that the claim could not be proved in fact, unless that is clearly demonstrated. I am far from persuaded that it is. It is true, as the Council submits, that the pleading also appears to complain of some physical impact upon the enjoyment of these properties. But it is the economic loss from the perception in the market place of the impact of the facility which is the loss for which compensation is sought.

[52] On the issue of causation, it is also suggested that some owners may not have suffered a loss from the alleged negligence (again) because they purchased with an awareness of all the relevant facts and risks. But again, that is presently an unpleaded and improbable possibility.

[53] A related submission is that the probability of damage and the likely extent of damage are relevant considerations in assessing whether a duty of care was owed, what was its content and whether it was breached. Therefore, the Council argued, those questions might require different answers from one owner to another. But again, that is a way of saying that the plaintiffs cannot succeed upon the case which they have pleaded.

[54] In my view, the negligence claims raise common issues of fact and law. On the way in which the negligence claims are advanced, there is no distinction between the several causes of action of the plaintiffs and the owners, save for the quantification of the loss which has been suffered by each.

Relief

[55] I have held that upon the plaintiffs' pleaded case, there are common issues for determination in this proceeding. But the Council argues that if so, nevertheless the proceeding has not been duly brought pursuant to r 75 because no relief is available by which the represented owners would be bound by that determination.

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[19] Written submissions, paragraph 45.

[56] For the Council it is submitted that "as a general rule, claims for damages cannot be pursued in representative proceedings".[20] It is said that this rule has some exceptions, being where the causes of action are held jointly,[21] where damages can be calculated according to a formula[22] or where one plaintiff has the right to recover the whole of the sum owing to the represented plaintiffs and a correlative obligation to distribute the amount.[23] Should it matter, the second of those exceptions does apply to the present case, as it is pleaded, because the plaintiffs plead that the nature of the losses is uniform and the respective amounts are to be calculated at a certain percentage of the (unaffected) value of the lots. In any case, I am not persuaded that there is such a general rule as is suggested. The principal case which is cited for this so called rule is *Markt & Co Ltd v Knight Steamship Co Ltd*[24] and it is well recognised that that decision, which was of the Court of Appeal of England, does not represent the law in this country or now in England.[25]

[57] In *Carnie*, the relief which was able to bind the represented persons was a declaration as to the absence of a liability to pay a certain charge under the contract which had been made between each of them and the respondent. More precisely, the declaration which was sought by the plaintiffs in that case was as follows:[26]

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

Had that declaration been granted, it would have bound each represented debtor and the defendant in respect of that debtor's individual cause of action. As was there held, the representative proceeding was not precluded by the fact that the represented parties had their own causes of action. Subject to discretionary considerations, which were not being considered by the High Court in *Carnie* (and are not raised within the present application), the plaintiffs could be given relief which had operation upon the causes of action of others.

[58] The question then is whether there is, within this court's extensive powers, a means of granting relief which determines these common issues across the several causes of action.

[59] The present case is sought to be distinguished from *Carnie*, where (as here) there were several causes of action which might result in individual monetary judgments, because in that case there was also common relief beneficial to all of the represented persons by the grant of a declaration. In the present case, it is said for the Council that no such declaration could be granted.

[60] There were several reasons advanced for the suggested unavailability of declaratory relief. One is that no declaration could be made because of the suggested

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20 Written submissions, paragraph 31.

21 For which the submission cites *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] 1 Ch 229 at 247A-B.

22 *Alberta (Pork Producers' Marketing Board)* v *Swift Canada Co* (1984) 9 D.L.R (4th) 71 discussed by Toohey and Gaudron JJ in *Carnie* (1995) 182 CLR 398 at 419.

23 *Irish Shipping Ltd v Commercial Union Assurance Co plc* [1991] 2 Q.B. 206.

24 [1910] 2 K.B. 1021.

25 See in particular the discussion by Toohey and Gaudron JJ in *Carnie* (1995) 182 CLR 398 especially at 416-418.

26 (1995) 182 CLR 398 at 407.

differences between the several causes of action. I have already rejected that submission when discussing the common issues of fact or law: on the particular case which is advanced by the plaintiffs in their statement of claim, the questions of existence and content of the duties of care, the breach or breaches of that duty or duties and the fact of some loss to each of the plaintiffs and the represented owners, are the same across the plaintiffs and the represented owners.

[61] A further suggested impediment to the grant of declaratory relief is that any declaration would be interlocutory in nature and it is suggested, thereby impermissible. That submission cites a passage from the joint judgment of Gummow and Hayne JJ in *Graham Barclay Oysters Pty Ltd v Ryan*[27] and another from the joint judgment of Hayne and Callinan JJ in *Dovuro Pty Ltd v Wilkins*.[28]

[62] In *Graham Barclay Oysters*, a representative action had been brought in the Federal Court on behalf of a group of consumers who had become ill from contaminated oysters, their loss and damage being allegedly caused by the negligence and contravention of various provisions of the *Trade Practices Act 1974* (Cth) by several defendants. The primary judge held that some of the defendants were liable in negligence to the consumers. He ordered damages in a certain sum in favour of the representative claimant. And he made an order declaring that the representative plaintiff was entitled to succeed against those defendants "in respect of that portion of his representative claim that alleges negligence, but only on behalf of those group members who prove damage has been suffered by them".[29] Gummow and Hayne JJ said:[30]

> "The remaining claims the subject of the group proceeding were not finally decided. Orders that were made in connection with those other claims were, therefore, interlocutory orders. It then is apparent that it was inappropriate to make the order in the terms set out above which were expressed in the form of a declaration. 'Interlocutory declaration' is a form of order not known to the law yet that, in effect, is the nature of the order that was made, expressed, as it was, in declaratory terms. The making of an order in that form in this case was not only wrong, it's making may obscure some questions which the claims made in the proceeding inevitably present."

[63] Their Honours there cited three cases which further explain why such a declaration should not be made. The first was *International General Electric Co of New York Ltd v Commissioners of Customs and Excise*,[31] where the plaintiffs sought a declaration that the defendants were not entitled to detain their goods (as they had done upon the basis that their importation infringed certain legislation with respect to trademarks). The plaintiffs applied ex parte for an interim declaration, which the primary judge declined on the basis that the court had no power to make such an order. That view was upheld in the Court of Appeal, the judgment of which was cited by Gummow and Hayne JJ. The principal judgment was given by Upjohn LJ, who said:[32]

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27 (2002) 211 CLR 540.
28 (2003) 215 CLR 317.
29 Set out at (2002) 211 CLR 540 at 590 [127].
30 (2002) 211 CLR 540 at 590-591[128].
31 [1962] Ch. 784.
32 [1962] Ch. 784 at 789-790.

> "[A]n order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties for ever, subject only, of course, to a right of appeal. It may be … that in certain cases it is proper on a motion or on a summons to make some declaration of rights upon some interlocutory proceeding. That, however, is infrequent and should only sparingly be exercised, but the point is that if it is determined on some interlocutory proceeding, it finally determines and declares the rights of the parties: it is not open to further review except on appeal. …
>
> Speaking for my part I simply do not understand how there can be such an animal, as I ventured to call it in argument, as an interim declaratory order which does not finally declare the rights of the parties."

Diplock LJ agreed, adding that such an "interim" declaration was a "contradiction in terms"[33] and should not be made because "it might be in the precisely opposite sense to the final declaration made at the trial".[34]

[64] The second of the cases cited by Gummow and Hayne JJ was *Inland Revenue Commissioners v Rossminster Ltd*.[35] The passage cited was from the speech of Lord Wilberforce, who was critical of a final declaration which had been granted by the Court of Appeal in that proceeding, at an interlocutory stage, not because no final injunction could ever be granted before the conclusion of a proceeding, but because the Court of Appeal had not been in a proper position to make the factual findings which the granting of a final injunction required.[36]

[65] The third case was *Magman International Pty Ltd v Westpac Banking Corporation*,[37] in which a claim had been brought in the Federal Court to recover damages for misleading and deceptive conduct and for negligence in relation to foreign currency loans which had been made by the respondent to the appellants. Before the commencement of the trial, the respondent applied to strike out the claims on the basis that they were statute-barred. The primary judge (Sheppard J) held that the claims under the *Trade Practices Act* were statute-barred but that the claims in negligence were not and he made declarations to that effect. A Full Court of five judges allowed the appeal, because the question whether the claims were statute-barred was one which could be considered properly only after hearing the evidence in the case. In the passage which is presently relevant, Beaumont J (with whom the others agreed) said that a declaration should be made before the trial only where it was possible to give a definite answer to the relevant question, for which he cited the judgment of Upjohn LJ in *International General Electric Co of New York Ltd*.[38]

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33 [1962] 1 Ch 784 at 790
34 Ibid.
35 [1980] A.C. 952.
36 [1980] A.C. 952 at 1000.
37 (1991) 32 FCR 1.
38 [1962] Ch. 784.

[66] From these three cases cited by Gummow and Hayne JJ in *Graham Barclay Oysters*, it is clear that there is no absolute impediment to the grant of a declaration prior to the conclusion of the entire proceeding. But a declaration must not be granted until the court is in a position to make a final declaration, as distinct from some interim order which would be susceptible to being set aside or varied or which was in some other way provisional in its nature.

[67] The apparent defect in the declaration which had been made in *Graham Barclay Oysters Pty Ltd* was that it *provisionally* declared the entitlements of the represented persons, by declaring that each was entitled to succeed in an action for negligence if he or she could prove that he or she had suffered damage. This was not a final determination of whether the defendants were liable to any of the represented consumers.

[68] In *Dovuro Pty Ltd v Wilkins*, a representative action was brought in the Federal Court on behalf of a number of farmers who had bought and planted defective seed, alleging negligence in contravention of s 52 of the *Trade Practices Act*. Issues of liability were tried in advance of those of damages. The trial judge made declarations that the defendant owed a duty of care to the claimant and to the represented group, that the defendant was in breach of that duty and that damage had been suffered by the representative claimant as a result of that breach. An appeal by the defendant to the Full Court of the Federal Court was dismissed, but the defendant successfully appealed to the High Court, which held that, in the facts of that case, the defendant had not breached a duty of care. Those parts of some of the joint judgment of Hayne and Callinan JJ which are presently relied upon, were not essential to the outcome of the appeal.

[69] Hayne and Callinan JJ (with whom Heydon J agreed) said that in a case where the extent of the relevant duty of care was not clear, identification of the damage suffered and the particular want of care alleged may reveal the scope of the duty of care upon which the allegations of breach of duty and damage depended.[39] The Council submits that this indicates a flaw in the present proceedings, because what was the (common) issues of the existence and content of the duty of care and the breach of that duty should be determined with the benefit of evidence of the losses (if any) suffered by the plaintiffs and the represented owners. But as I have held, the case, as confined by the pleading, is that there was a loss of a certain kind and at a trial of this proceeding as a representative claim, it is to be expected that the court will hear evidence of the general effect on the market value of properties in this part of the Estate, that is, of the nature of the damage suffered by each of the represented owners.

[70] Secondly and relevantly for the availability of declaratory relief, Hayne and Callinan JJ said:[40]

> "143. Apart altogether from these difficulties, there is a further and different kind of difficulty presented by taking the course which was taken in this case. If the primary judge concludes, as he did in the case against Dovuro, that negligence has been established, no final judgment can be entered. In this case, while an appeal to the Full Court of the

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39 (2003) 215 CLR 317 at 362-363 [142].

40 (2003) 215 CLR 317 at 363.

> Federal Court was pending, the primary judge made orders in the form of declarations - declaring that Dovuro 'owed a duty of care to the [Wilkins] and group members and that it was in breach of such a duty' and that 'some damage was suffered by the [Wilkins] as a result of such a breach of duty'. It seems to have been thought that the making of such orders would facilitate an appeal against the primary judge's findings. Be this as it may, orders of that kind should not be made (182). Interlocutory declaration is a form of order not known to the law.
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> 144. If, as may have been the intention, all questions of liability were to be regarded as concluded as between the Wilkins and Dovuro, it may have been open to the primary judge to direct entry of judgment for the Wilkins in their proceeding against Dovuro, for damages to be assessed. But what is not clear from the orders that were made is what, if any, questions were concluded as between Dovuro and those whom the Wilkins represented. On no view of the orders was the question of liability finally determined; there was no determination that any of the represented parties had suffered damage as a result of Dovuro's breach of its duty of care. (Unlike the first declaration, which dealt with Dovuro's duty of care not only to the Wilkins but also to group members, the second declaration said only that 'some damage was suffered by the [Wilkins] as a result of such a breach of duty'. This second declaration reflected the primary judge's finding (183) that the Wilkins had suffered some damage as a result of Dovuro's breach of duty. There was no finding that any group member had suffered damage.)"

For the proposition that declarations "of that kind should not be made", their Honours cited *Graham Barclay Oysters Pty Ltd* in the passage from the judgment of Gummow and Hayne JJ which I have discussed.

[71] Statements in these two judgments in the High Court, that an interlocutory declaration is a form of order not known to the law, must be understood in the context of the authorities for that proposition which was cited in *Graham Barclay Oysters*. The word "interlocutory" is used in different contexts, but the sense which is relevant here is apparent from the cases cited by Gummow and Hayne JJ. In this context, the term is synonymous with "interim", a word which has been used to describe this impermissible form of order. For example, in *Sutherland v Take Seven Group Pty Ltd*,[41] Young J (as he then was) said that:[42]

> "[T]he court can, in an interlocutory application, make a final declaration, even though there is no such thing in Australian law as an interim declaration."

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41 (1998) 29 ACSR 201.

42 (1998) 29 ACSR 201 at 205.

Similarly, Upjohn LJ, in the passage in his judgment in *International General Electric Company of New York Ltd* which is set out above, said that what could not be granted was "some interim declaratory order", a description also used in the same case by Diplock LJ.[43] And in *Clarke v Chadburn*,[44] Sir Robert Megarry VC, citing *International General Electric Company of New York Ltd*, said that in some cases it might be proper to make a declaration of rights in interlocutory proceedings and that:[45]

> "Such a declaration would finally determine the point, and would not operate only as a declaration for the interim."

[72] Of course, it is not uncommon for some issues to be determined in advance of the other issues in a proceeding, a course which is facilitated by procedural rules such as r 483 of the UCPR. Where there is a determination of a separate question, r 484 provides that the court may grant the relief which the nature of the case requires. The separate determination of such a question has a final effect, in that, as was said in *Bass v Permanent Trustee Co Ltd*:[46]

> "The primary judge's hand is tied in respect of all matters of fact and law involved in that determination."

The High Court there adopted this passage from the judgment of Diplock LJ in *Fidelitas Shipping Co Ltd v V/O Exportchleb*:[47]

> "Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence."

[73] Similarly, in *AED Oil Ltd v Puffin FPSO Ltd*,[48] the Victoria Court of Appeal said:[49]

> "Even if it were accepted that an interlocutory or interim declaration is not available in Australia, this will not, in our opinion, exclude the possibility of a declaration of rights in the course of interlocutory proceedings where the declaration finally determines an aspect of matters in dispute and does not operate only as a declaration for the interim."

[74] The word "interlocutory" can also be relevant to the existence of a right of appeal against an order. In *Warramunda Village Inc v Pryde*,[50] Finkelstein J cited:[51]

> "A number of authorities which have held that a declaration granted at the conclusion of a trial on liability, is an interlocutory order."

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43 (1962) 1 Ch 784 at 790.
44 [1985] 1 WLR 78.
45 [1985] 1 WLR 78 at 81.
46 (1999) 198 CLR 334 at 360 [57] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
47 [1966] 1 QB 630 at 642.
48 (2010) 27 VR 22.
49 (2010) 27 VR 22 at 27 [24].
50 (2002) 116 FCR 58.
51 (2002) 116 FCR 58 at 76 where the cases are there cited.

As Finkelstein J there noted, in none of those cases was it suggested that a declaration should not have been granted at the conclusion of the hearing on liability.[52]

[75] It is necessary then to distinguish between the different meanings of "interlocutory' according to the context. In *Australian Telecommunications Corporation v Barnes*,[53] the Court of Appeal of this court held that a declaratory judgment on a certain issue finally determined that issue although it was an interlocutory order for the purposes of an appeal. What is precluded is a declaration, the operation of which is for the interim or is provisional. The declaration which was made in *Graham Barclay Oysters* was provisional in the sense that rather than declaring that the defendants were liable to the group members, it was in terms that they were liable provided that it was proved that damage had been suffered.

[76] The declarations which are sought within the present statement of claim would pronounce upon the existence of some but not all of the necessary elements of the causes of action. If they were granted before the determination of other questions, and in particular that of whether any damage was suffered by the plaintiffs and the represented owners, that would not make them interim or interlocutory declarations in the impermissible sense. Subject to an appeal, the parties and the represented owners would be bound by them. The power of a court to give a declaratory judgment is wide and is not limited to a declaration which is in terms that a cause of action does or does not exist. In *Warramunda Village v Pryde*, Finkelstein J accepted this passage from Zamir and Woolf: *The Declaratory Judgment*, page 53:[54]

> "[the word right] certainly includes equitable as well as legal rights. It also covers the case where the plaintiff has no cause of action. In practice, the court will grant a declaration where there is no more than a statement of fact, or a statement of fact and law, provided it will serve to further the applicant's legal interests; that is assist in establishing his 'rights', using that term in a very broad sense. The difficulty will, therefore, only arise if the parties are seeking to have the court resolve a dispute which involves no real issue."

[77] The broad discretionary power to grant declaratory relief is "confined by the considerations which mark out the boundaries of judicial power" so that "declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions."[55] A declaration which is made provisionally or only until a further or other order, would not determine a controversy. But a controversy would be determined by a declaration as is sought here, although as in *Carnie*, that would not be a determination of the entire cause of action.

[78] In my conclusion, the court would be empowered to make declarations which are to the effect of those presently sought in the statement of claim, notwithstanding that they would leave open other questions for determination before the existence or otherwise of the alleged causes of action could be decided. Therefore, at least upon

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52 Ibid.

53 (1995) 125 FLR 335.

54 Set out in *Warramunda Village v Pryde* (2002) 116 FCR 58 at 79-80 [76].

55 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.

that basis, there is relief which is presently claimed which would be beneficial to the plaintiffs and the represented owners.

[79] And there are other possible forms of relief which again would benefit the plaintiffs and the represented owners. For example, what currently presents as the common issue of the causation of damage, by the diminution in value of each property from the public notoriety surrounding the facility, might warrant the grant of other declaratory relief. In particular, it might permit the grant of a declaration that the Council is liable to pay damages to the plaintiffs and the represented owners, leaving those damages to be assessed. That would not be an interim or provisional declaration, because the fact of some damage, as caused by the Council's negligence, would have been established. The fact that such a declaration is not presently claimed is not critical, because the question here is what relief might be given upon the facts which are pleaded and it is open to a court to make a declaration though not specifically claimed.[56]

[80] Therefore I am satisfied that, in respect of the negligence claims, this case was able to be brought as a representative proceeding under r 75. It remains to be seen, as the litigation progresses, whether it should remain as a representative proceeding, whether at all or in some more confined form. I therefore decline the application to strike out that part of the proceeding which is a representative proceeding (apart from the nuisance claim).

Another question: leachate

[81] There is a particular complaint made by the Council about the allegations that it failed to take care to manage and control leachate. It is argued that there is no allegation that any of the owners has been directly affected by the migration or escape of this material and no loss is said to have flowed from the Council's negligence. It is said therefore that the allegations, insofar as they refer to leachate, ought to be struck out as irrelevant pursuant to r 171.

[82] At least at this stage, it is not plain that they are irrelevant allegations. The statement of claim is likely to undergo some amendment as a result of this judgment and the successor to this pleading might reveal more clearly the relevance of the allegations in respect of leachate. At present, however, the plaintiffs' case appears to be that this was a contributing factor to the notoriety surrounding the operation of the facility, which is the ultimate cause of the losses for which they sue. In particular, there is the allegation within paragraph 53(h), that by September 2009, "the issues of Landfill Gas and Leachate release at the Suntown Landfill Facility had become publicly associated with the Specific Stage 3 Area and a stigma had attached to that particular part of the Estate … ."

[83] I therefore decline to strike out the allegations about leachate.

Orders

[84] The nuisance claim, as a representative claim, should be struck out. It will be ordered that paragraphs 60 to 65 of the amended statement of claim, filed 7 August 2013, be struck out.

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56 *Warramunda Village Inc v Pryde* (2002) 116 FCR 58 at 79 and the cases there cited.

[85] It is likely that other parts of the statement of claim will also have to be deleted or amended because in some places they appear to be directed towards a claim in nuisance. At least for that reason, there will have to be some amendments of the balance of the pleading. I will direct that the plaintiffs file and serve a further amended statement of claim within 28 days of this judgment.