

was happy to leave it at that. It's correct to say we ought to have picked up on it but it's perfectly understandable in the scheme of things with a busy trial coming. And the way it was flagged didn't exactly jump out at you off the page, your Honour, particularly when one goes to 2016 and sees a reference to section 180. In terms of
 5 prejudice – and, of course, on the face of the pleading, the connection between 2016 and 2305A. But new paragraph 2305A in section 2016 wasn't immediately apparent.

Dealing then with prejudice, I would invite your Honour to compare the situation my clients would have occupied had section 216 been pleaded originally and the position
 10 they would now occupy if ASIC is allowed to introduce it at this stage. Now, that captures, in a sense, prejudice that has already gone plus future prejudice whereas ordinarily the focus is just on the future prejudice. But it's not correct to say that the wasted time and cost involved with the summary judgment application and appeal
 costs.

15 HIS HONOUR: Past prejudice is relevant but it has significantly less weight than future prejudice.

MR FRANCO: I think that's - - -
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HIS HONOUR: Because past prejudice has been suffered and will be suffered no matter what the outcome.

MR FRANCO: I would accept less weight. Whether it's significant or not is a
 25 question of degree. But I think that's the conceptually correct analysis, with respect. And if the application is allowed, no doubt there will be something I wish to say about costs. But even looking forward, the fact that this past prejudice has been suffered doesn't mean that it's irrelevant to the future prejudice because a lot of my client's money has already been spent. And the team it has now – your Honour may
 30 have had a Mr Doyle rather than a Mr Franco addressing you if my client's funding situation was different. So there is some connection between the two.

HIS HONOUR: I'm not sure you're making a submission that that's a prejudice.

MR FRANCO: I'm not. I think your Honour could take judicial notice of that fact.
 35 So in terms of the personal impact, your Honour is familiar with what the High Court said in Aeon, particularly with regards to natural persons. And it's not simply the fact that this has been delayed and past prejudice has been suffered. It's also the impact upon a client or the litigant of the other party being seen to change its case.
 40 Now, in terms of the prejudice going forward, the – I will proceed on the proposition that it's not going to be suggested that my clients ought to have taken steps to stop the Storm model being applied to a class of clients. That was the original pleading. I'm not sure if it's still the intent that that's what this new pleading is intended to say.

45 HIS HONOUR: Well, the new pleading is on exactly the same basis as the plea of unreasonableness in relation to section 180, subsection (1). So all of the allegations in relation to section 180, subsection (1) are picked up in relation to 2305A.