by all members of the minority in the present case. However, Barwick C.J. himself relaxed the requirement to that of a 'substantial corporate activity', while Mason J. and Murphy J. spoke in terms of trade being, '*so slight and so incidental*' or 'not insubstantial' respectively.

It is to be hoped that courts will not hesitate to sanction this expansion of the law, particularly in view of the wide reading given to the concept of trade in other areas, notably the interpretation of section 51(i) of the Constitution. Such an extension of Commonwealth power might well be seen as essential with the vast increase in the amount and complexity of commercial corporate activity, and without a favourable reading of section 51(xx), the effectiveness and coverage of much Federal legislation will be significantly reduced. The Trade Practices Act is of course an obvious and important example, but the success of any proposed National Companies' legislation similarly depends much on a sympathetic court.

PETER NANSCAWEN*

PRUDENTIAL ASSURANCE CO. LTD v. NEWMAN INDUSTRIES LTD AND OTHERS

Practice — Parties — Representative proceedings — Action in tort — Suit by minority shareholder on behalf of itself and other shareholders — Shareholder seeking declaration of entitlement to damages for conspiracy against directors of company and seeking damages — Whether jurisdiction to entertain representative action where cause of action of each member of class a separate cause in tort for which proof of damage necessary — Whether court should exercise discretion to make representation order.

Proponents of the class action often cite the *dictum* of Moulton L.J. in *Markt v. Knight Steamship Co. Ltd*[1] as a major obstacle in the path towards an effective legal procedure to enable many persons to combine to recover damages in one action. His Lordship's statement that no representative action can lie where the sole relief sought is damages has been the accepted learning for some seven decades. Of course, this is not the only hindrance in the way of a useful procedure, but it is indicative of the pedestrian interpretation of the rules allowing representative actions.[2]

Though class action commentators readily admit that the ability to launch mass damage cases would not solve the myriad practical problems entailed in such large scale suits,[3] the possibility of suing might give rise to some pioneering actions which could point out limitations in the present procedure and, perhaps, suggest a few

[44] (1974) 48 A.L.J.R. 26, 29; (1974) 130 C.L.R. 533, 543.

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[1] [1910] 2 K.B. 1021, 1040 f. (C.A.).

[2] 'Though bearing different names, class actions and representative actions essentially seek the same objective, namely to permit one person to sue on behalf of others. But only in the United States may damages be recovered in this way'; The Law Reform Commission (Cth), *Access to the Courts: Class Actions; Discussion Paper*, (A.L.R.C. 11), 1979, 8.

[3] See generally 'Practice Notes: Seminar on Class Actions, Sydney, 28th May, 1979' (1979) 53 *Australian Law Journal* 670 f.; Mobbs M., 'Background to Class Actions' (1979) 9 *Australian Social Welfare* 21 f.; Robertson S., 'Case for Postponing Class Actions' (1979) 52 *Rydge's* 134 f.

answers. This recent judgment of Vinelott J. in the Chancery Division of the High Court of Justice[4] is an interesting application of the representative rule to actions in tort.

The plaintiff, a minority shareholder in Newman Industries Ltd (the first defendant), objected to a take-over transaction — subsequently approved by an extraordinary general meeting — whereby Newman acquired nearly all the assets and certain liabilities of another company. Prior to the shareholders' meeting, Newman issued an explanatory circular which was signed by the second defendant, who at the time occupied the chairs of both companies involved in the takeover. The plaintiff brought an action framed originally as a derivative action[5] combined with a personal claim for damages against the second and third defendants, the chairman and vice-chairman,[6] for conspiracy. The statement of claim alleged that the circular was tricky and misleading and contained statements which the defendants could not honestly have believed. A further allegation of misconduct on the part of the individual defendants as directors of Newman was made.

Subsequently the plaintiff decided to convert its claim for damages for conspiracy against the second and third defendants into a representative action whereby relief would be sought not only for itself but for all shareholders in Newman — at the date of the general meeting resolution — who like the plaintiff had suffered loss. Leave was sought to amend the writ and statement of claim accordingly. The amended statement of claim included pleas for relief in the form of a declaration that the plaintiff and all similarly affected shareholders in the first defendant were entitled to damages for the plaintiff and all similarly affected shareholders. Counsel for the defendants maintained that the Court had no jurisdiction to make a representative order because the cause of action of each member of the purportedly represented class was a separate cause in tort in which proof of damage was a necessary ingredient. Even if the Court found it had such jurisdiction, the defendants urged the bench not to exercise its discretion in favour of the plaintiff's application to amend the statement of claim in this case.

The application was made under Order 15 Rule 12(1) of the Rules of the Supreme Court 1962 (Eng.), which in the view of Vinelott J. did not 'differ in any material respect from r. 10 of the Rules of Procedure',[7] the model for our own Order 16 Rule 9 of the Rules of the Supreme Court 1958:

> Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested.[8]

His Honour felt that

> [t]he purpose of r. 10 was to make the jurisdiction and practice of the old Courts of Chancery permitting, in appropriate cases, proceedings to be commenced by representative plaintiffs applicable to *all proceedings* in any division of the High Court.[9]

Obviously after the amalgamation some proceedings would come to the High Court that until the introduction of rule 10 had been the sole province of the common law

[4] *Prudential Assurance Co. Ltd v. Newman Industries Ltd and others* [1979] 3 All E.R. 507.

[5] *I.e.* an action by a minority shareholder (Prudential Assurance) claiming relief on behalf of a company (Newman).

[6] Like the chairman, the third defendant held the position of vice-chairman in both companies as well as being a shareholder in the company being taken-over.

[7] [1979] 3 All E.R. 507, 511.

[8] Rules of Procedure r. 10 scheduled to the Supreme Court of Judicature Act 1873 (Eng.).

[9] [1979] 3 All E.R. 507, 512 (emphasis added).

courts. In such cases, a representative action would be permitted if it were analogous to the old Chancery cases.[10]

But, understandably enough, the initial interpretations were cautious, leading to an unduly narrow application of the rule. One early case, the decision of the Court of Appeal in *Temperton v. Russell*,[11] stands to this day in the text books[12] for the proposition that the rule is not applicable to actions of tort:

> The plaintiff in this case sues for damages, and the action, assuming it to lie at all, as to which we pronounce no opinion, is founded on tort. The old Court of Chancery had no jurisdiction to grant relief in such an action; and, although its rules as to parties to actions or suits maintainable in it have now to be applied in all Divisions in the High Court when exercising the old jurisdiction of the Court of Chancery, the rules ought not to be construed as creating a jurisdiction in one Division, which was never exercised by any court in the country before the rules were made.[13]

However, eight years later Lord Lindley was of opinion that the 'unfortunate observations' made by the Court of which he was a member had been 'happily corrected' in the House of Lords decisions of *The Duke of Bedford v. Ellis*[14] and *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*.[15]

Though the celebrated *Taff Vale* case revolved around the question of whether a trade union may be sued in its registered name, the appellant railway company raised the ancillary argument that it might be able to sue representatives of the recalcitrant union. The respondents countered by arguing that although *Temperton v. Russell*[16] included an *obiter dictum* which had later been impugned by Lord Macnaghten in *Duke of Bedford v. Ellis*,[17] it was still good law. At least two members of the House accepted the appellant's assertion. Lord Macnaghten noted that in *Temperton's* case there had been no real attempt to select responsible union officers who were genuinely representative. Rather the random selection process in that case had been designed to intimidate the unionists.[18] But if the appellant in *Taff Vale* had sued truly representative members on behalf of themselves and other union members 'an injunction and judgment for damages could [have been] obtained'.[19]

After examining these authorities, Vinelott J. concluded that the effect of the rule, and its predecessors, 'was to confer on the High Court of Justice jurisdiction to entertain a claim founded on a tort against a defendant as representative of a class'.[20] On the other hand, his Honour also accepted the defendant's contention that a distinction was to be drawn between the *Taff Vale* case where the defendants would have been jointly liable for conspiracy and the instant case where each member of the class had a separate cause of action in tort.[21] Thus, the *Taff Vale* judgment would not, by itself, justify a representative suit in the present case.

Vinelott J. also referred to the other House of Lords decision on the rule, *Duke of Bedford v. Ellis*,[22] and in particular to the central passage from the speech of Lord Macnaghten in that case which concluded with the observation, '[i]n considering

[10] *Ibid.*
[11] [1893] 1 Q.B. 435.
[12] See, for instance, 50 *English and Empire Digest* (Replacement Volume) 466, paras 1604, 1606.
[13] [1893] 1 Q.B. 435, 438 *per* Lindley L.J.
[14] [1901] A.C. 1; [1900-3] All E.R. Rep. 694.
[15] [1901] A.C. 426, 443.
[16] [1893] 1 Q.B. 435.
[17] [1901] A.C. 1.
[18] [1901] A.C. 426, 439.
[19] *Ibid.* 443 *per* Lindley L.J.
[20] [1979] 3 All E.R. 507, 513.
[21] *Ibid.*
[22] [1901] A.C. 1.

whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members'.[23] His Honour interpreted this passage as follows:

> What he [Macnaghten L.J.] is saying in this passage, as I understand it, is that in considering whether the action by the plaintiffs suing in a representative capacity for declarations that growers were entitled to preferential rights could be maintained, it was no objection that as between themselves (and, I would add, as between themselves and other members of the class on whose behalf they sued) they might have had separate causes of action for accounts and repayment of excessive charges previously imposed.[24]

In the *Prudential Assurance* case, counsel for the defendants sought to distinguish the *Duke of Bedford* decision on the ground that there the declaration dealt with the growers' common preferential rights under a private 1828 Act. These rights could have been asserted by any member of the represented class whether they had suffered damage from interference with that right or not. However, the plaintiff's representative claim in *Prudential Assurance* was not a joint cause of action belonging to the class as a whole but one derived from separate causes of action in tort. In order to obtain judgment in his representative capacity, the plaintiff would have to show that each class member had a cause of action, in other words, it would be necessary to prove that each member had suffered some damage. The defendants cited *Markt v. Knight Steamship Co. Ltd*[25] and *Lord Aberconway v. Whetnall*[26] in support of this argument.

Briefly, the facts of *Markt v. Knight Steamship Co. Ltd* are as follows. During the Russo-Japanese War of 1904-5, the plaintiffs shipped cargo on a general ship of the defendant for a voyage from New York to Japan. The ship was intercepted by a Russian cruiser on the suspicion that it was transporting contraband of war and was sunk. Both ship and cargo were lost. The plaintiffs were described as suing on behalf of themselves and other owners of cargo lately laden on board for damages.

From an examination of the writs, a majority of the Court of Appeal in *Markt* could find no evidence of any common element in the contracts which would support a declaration that the defendant carrier was liable to every shipper of cargo, on board its ill-fated steamer, for breach of contract and duty in or about the carriage of goods by sea. As Vaughan Williams L.J. explained:

> There is nothing on the writ to shew that the bills of lading and the exceptions therein were identical or that the goods the subject of the bill of lading were of the same class either in kind or in relation to the rules of war, under which the same article may be contraband or not according to its destination. . . . These shippers no doubt have a common wrong in that their goods were lost by the sinking of the *Knight Commander* by the Russian warship; but I see no common right, or common purpose, in the case of these shippers who are not alleged to have shipped to the same destinations.[27]

Similarly, Fletcher Moulton L.J. could find no common interest or connection[28] and also, after noting the imprecise definition of the class, spoke of the impossibility 'for the Court to give any judgment as to the rights of parties by virtue of their being members of a class without its being defined what constitutes membership of the class'.[29]

The *lack of common interest* aspect in these decisions appears to be a straightforward finding of fact sanctioned by Lord Macnaghten's statement in *Duke of*

[23] *Ibid.* 7.
[24] [1979] 3 All E.R. 507, 514.
[25] [1910] 2 K.B. 1021 (C.A.).
[26] Reported with *Lord Churchill v. Whetnall* (1918) 87 L.J. Ch. 524.
[27] [1910] 2 K.B. 1021, 1026, 1029 (C.A.).
[28] *Ibid.* 1039 f.
[29] *Ibid.* 1034.

Bedford v. Ellis.[30] However, the defendants in *Prudential Assurance* were more interested in Fletcher Moulton L.J.'s second objection, which to his mind was 'absolutely fatal'[31] to the representative claim of the plaintiff shipper. His Lordship observed that the relief sought was damages and went on to say:

> Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.[32]

This passage has subsequently been assumed by some commentators to lay down a hard and fast rule.[33] But Vinelott J. read the passage in the context of the whole judgment where earlier his Lordship had suggested that '[d]efences may exist against some of the shippers which do not exist against the others, such as estoppel, set-off, *etc.*'.[34] His Honour understood this to mean

> that the form of the relief asked [namely in the amended writ, a declaration that the defendants were liable to every member of the class in damages] might have precluded the defendants from establishing in a subsequent action by a member of the class represented a defence [for instance, estoppel] which otherwise would have been available to him.[35]

In Vinelott J.'s opinion, it was this 'point which Fletcher Moulton L.J. had in mind'[36] when he wrote his oft-quoted sentence on damages and separate proof[37] and not the formulation of a general rule.

The second authority relied upon by the defendants in the instant case, *Lord Aberconway v. Whetnall*,[38] really was an example of a misconceived representative action. By a misrepresentation, Whetnall had induced Lord Aberconway and two other plaintiffs into subscribing to his personal fund. The plaintiffs on behalf of themselves and all other subscribers brought a representative action to recover all contributions on the ground that they were extracted from the donors by misrepresentation. Eve J. objected to the breadth of the class description which would cover all subscribers whether they had received the circular containing the alleged misrepresentation or not.[39] Even if this had not been a problem, the action was still flawed for the following reasons:

> [a] dozen different reasons may have prompted favourable replies to the appeal, not one of which would have entitled the donor to a return of his contribution, if he had been a plaintiff in this action; and yet if the argument is sound that this is a proper representative action, such a one although he could not recover his money were he himself a plaintiff must still have his contribution returned to him because three other persons, who for this purpose I am content to assume can successfully maintain an action for the recovery of their money, have chosen to elect themselves as his representatives. The position is an impossible one.[40]

These two cases, however, did not establish the wider proposition of the defendants in *Prudential Assurance* 'that the court has no jurisdiction in any circumstances to entertain' a representative action 'where the cause of action of the plaintiff and of each member of the class is, or is alleged to be, a separate cause of action founded in

[30] [1901] A.C. 1, 7.
[31] [1910] 2 K.B. 1021, 1035.
[32] *Ibid.* 1040 f.
[33] *E.g. The Supreme Court Practice (Eng.)* 1973 r. 198; 50 *English Empire Digest* (Replacement Volume) 466, para. 1603.
[34] [1910] 2 K.B. 1021, 1040.
[35] [1979] 3 All E.R. 507, 516.
[36] *Ibid.*
[37] [1910] 2 K.B. 1021, 1040 f.
[38] (1918) 87 L.J. Ch. 524.
[39] *Ibid.* 526.
[40] *Ibid. per* Eve J.

tort'.[41] However, throughout these judgments and the other authorities considered, Vinelott J. was able to isolate three recurrent conditions which, if satisfied, would enable a plaintiff to bring such a representative action.

First, no order can properly be made in favour of a representative plaintiff if the effect might in any circumstances be to confer a right of action on a class member, who would not otherwise have been able to claim such a right in a separate action or to bar a defence which the defendant might otherwise have been able to raise in such separate proceedings.[42] As foreshadowed in the observations of Fletcher Moulton L.J. in *Markt* earlier referred to and in the cryptic judgment of the Court of Appeal in *Jones v. Cory Brothers & Co. Ltd*[43] which was also discussed by Vinelott J.: this condition might be infringed in a representative action seeking damages for the class in tort because the defendant may have different defences against individual members of the class[44] or because individual members of the class may be entitled to different measures of damages.[45]

However, Vinelott J. did not regard these considerations as raising insuperable difficulties to the mounting of representative actions in such cases. He held that they could be overcome by awarding declaratory relief to the class in respect of the common elements of the claim, leaving it open to each member of the class thereafter to come forward and establish his individual entitlement to damages.[46] These individual actions would proceed from the findings in the earlier proceeding as embodies in the declaration, but would enable the defendant separately to raise matters relevant to particular claims. Interestingly, Vinelott J. recognized that there may be cases where a global award of damages — to the class as a whole — might appropriately be made at the original hearing.[47]

The second condition for a representative action in tort is that 'there must be a common ingredient in the cause of action of each member of the class'.[48] In the opinion of Vinelott J. both *Markt* and *Lord Aberconway* were distinguishable from the present case on this ground. The third condition requires that the court be satisfied that the interests of all the members of the class are best served by allowing the plaintiff to sue in a representative capacity. Vinelott J. specifically mentioned the need to decide all issues common to every class member after full discovery and in the light of all evidence capable of being adduced in favour of the claim.[49] The condition requires, in other words, that since a judgment in a representative action binds all members of the class without their explicit leave, the action must be conducted capably and efficiently. This proposition opens a Pandora's box of ancillary issues not canvassed by Vinelott J., such as notice requirement and the competence of the plaintiff's counsel to conduct such a complex case on behalf of so many people.[50]

[41] [1979] 3 All E.R. 507, 517.
[42] *Ibid.* 517, 520.
[43] Reported with *Thomas v. Great Mountain Collieries Co.* (1921) 56 L.J. 302; *Jones v. Cory Bros* stood for the proposition that no representative action was allowable where damages were sought for tort and/or breach of statutory duty.
[44] In *Jones v. Cory Bros* as Vinelott J. suggested: '[I]t might have been open to the defendant in separate proceedings to establish that his [a member of the class represented] failure to attend work was not the consequence of the breach of statutory duty, but was due, for instance, to illness' [1979] 3 All E.R. 507, 519.
[45] See *e.g. Preston v. Hilton* (1920) 48 O.L.R. 172 (nuisance); *Goodfellow v. Knight* (1977) 2 C.P.C. 209 (loss to co-partners of injured plaintiff); *Seafarers International Union of Canada v. Lawrence* (1977) 3 C.P.C. 1 (defamation).
[46] [1979] 3 All E.R. 507, 521.
[47] *Ibid.* 520.
[48] *Ibid.*
[49] *Ibid.*
[50] See generally, The Law Reform Commission (Cth), *op. cit.*

Alternatively the defendants had argued that even if the action in the present case was suitable for resolution as a representative claim, the Court ought, in its discretion, to refuse leave to amend accordingly the writ and statement of claim. One of the more interesting reasons[51] was that if the claim did proceed as a representative action, the effect would be to extend the limitation period available to class members from six years to twelve or even more. Vinelott J. rejected this contention:

> The only effect of an order in favour of the plaintiff in its representative capacity will be that the issues covered by that order will be *res judicata* . . . the Limitation Act 1939 [Eng.] will continue to operate in the same way as it would have operated if no order had been made in the representative action. Any member of the class will have to bring his own action to establish damage within six years from the date when the cause of action accrued.[52]

Though Vinelott J. was obliged to find that time will still run in order to uphold the action, this ruling is not entirely satisfactory. It may work to bar the claims of individual members of the class, particularly in cases where the hearing on the common elements is protracted or appealed.[53]

As the Court had jurisdiction to entertain such a representative action, Vinelott J. was prepared to exercise his discretion in favour of the plaintiff[54] and allow the proposed amendments in principle, though the plaintiff was invited to consider some alterations in form.[55]

This decision is significant in several respects, not the least of which being that it is the most recent British pronouncement on the state of the art. It clears up the confusion surrounding the *dictum* of Lindley L.J. in *Temperton v. Russell*[56] and affirms the jurisdiction of the court to entertain a representative action by a plaintiff on behalf of a class, each member of which purportedly has a separate cause of action in tort, provided that certain conditions are not infringed. His Honour cogently framed those propositions in language which does not impose restrictive rules that may thwart future developments. The judgment also touches upon problems — periods of limitation, notice requirements and quality of the plaintiff's case and counsel — that must be resolved by either the legislature or the judicature before more developments take place.

After the *Prudential Assurance* case, possible extensions in the application of the representative rule could well follow the Canadian lead. For example, the courts might be prepared to allow class actions for damages which can be ascertained in a

[51] Counsel for the defendants also argued: No order should be made for it would add numberless claims in fraud; if claim had been originally in the form of a representative action, the defendants might have wished to adduce evidence that no member had suffered damage; and plaintiff cannot pursue two representative claims (*i.e.* the derivative one and the amendment). All were rejected [1979] 3 All E.R. 507, 520 f.

[52] [1979] 3 All E.R. 507, 520.

[53] *Cf.* the American practice in Note, 'Developments in the Law — Class Actions' (1976) 89 *Harvard Law Review* 1318, 1448 f.

[54] *Cf. Hirst v. Housing Commission of Victoria* (Case no. 6107/1978) unreported decision of the Supreme Court of Victoria, 15 February 1979, where King J. was not prepared to exercise his discretion in favour of a plaintiff who sought to amend his writ so as to sue on behalf of himself and all tenants affected by the defendant's raised rents. The reason being that 'if a litigant has deliberately foregone the opportunity of taking a particular course of action he should not be allowed to take it up again simply because he chooses to do so'. King J. also applied *Smith v. Cardiff Corporation* (1954) 1 Q.B. 210 (lack of common grievance amongst tenants).

[55] [1979] 3 All E.R. 507, 521. Specifically they were the excision of the definition clause 'who like the plaintiff have suffered damage and are entitled to damages' and the explicit description of those declarations which constitute the common element of any claim by any class member.

[56] [1893] 1 Q.B. 435.

global amount. The Ontario Court of Appeal in *Farnham v. Fingold*[57] held that where there was no need for separate calculations, damages capable of being distributed by simple mathematical formulae could be claimed. A recent decision of the same Court accepted the novel device of claiming the same amount of damages for each class member as a way of avoiding separate calculations.[58]

Clearly, if it be thought necessary to establish a class action procedure in Australia, the best way would be by a thorough legislative enactment which could deal with the subservient issues of machinery, costing practice and ethics.[59] Indeed, the Australian Law Reform Commission favours this approach in its recent discussion paper.[60] But no matter what form the Commission's final recommendations may take, and more importantly whatever their fate,[61] an avenue for development, as in the Canadian experience, might exist through the courts which, after all, created the original procedural rules.

GRANT STILLMAN*

R. v. THE SMALL CLAIMS TRIBUNAL AND MUNRO; EX PARTE ESCOR INDUSTRIES PTY LTD (No. 2)

Administrative Law — Consumer Protection — Small Claims Tribunal — Jurisdiction with regard to a 'small claim' — Claim by ultimate purchaser seeking enforcement of a manufacturer's warranty — Small Claims Tribunal Act 1973

THE FACTS

Early in 1977 Dr John Munro purchased a Franklin Caravan from a dealer, Page Bros. Franklin is a division of Escor Industries Pty Ltd. A 12 month warranty was given with the caravan. However, when during that period defects appeared in the van, Escor claimed that they were not liable under the warranty because the damage was due to 'unfair wear and tear'.

[57] [1973] 2 D.R. 132.

[58] *Naken v. General Motors of Canada Ltd* (1978) 7 C.P.C. 209 (breach of warranty). See also Williams N. J., 'Class Actions — The Canadian Experience' (1979) 53 *Law Institute Journal* 721.

[59] *E.g.* Draft Bill in Law Reform Committee of South Australia, *36th Report: Class Actions* (1977) and Model Act in Williams N. J., 'Consumer Class Actions in Canada — Some Proposals for Reform' (1975) 13 *Osgoode Hall L.J.* 1.

[60] Australian Law Reform Commission, *op. cit.* 36 f.

[61] The South Australian report has been shelved pending nationwide proposals. *Adelaide Advertiser* 2 July 1979.

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[1] The normal practice of the Registrar of the Small Claims Tribunals, due to the strict requirements which apply to a 'small claim', is to register the claim against the other contractual party. This was of particular importance before collateral contracts were accepted in the *Escor* decision as satisfying the contractual requirement of a 'small claim'. The claimant in this case varied from the norm by jointly naming Escor and Page as traders. The Registrar believes that if this had not been done, the case would probably have never gone to the Supreme Court. Escor would have been joined as an interested third party and similar orders made. (Both the collateral contract point and the joining of third parties are discussed later in this case note): Telephone conversation with Mr J. Folino, Registrar of the Small Claims Tribunals, May 26 1980.