Recent Australian class action highlights

Back to Litigation Committee publications (/LPD/Dispute_Resolution_Section/Litigation/Publications.aspx)

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With a 25-year-old class action regime that is well established for all types of matters (consumer, competition and shareholder claims) and which does not face the significant interlocutory 'hurdles' which still beset collective redress in the United Kingdom and the European Union, the Australian class action space continues to evolve rapidly.

More and more funders are attracted to the market and there has been a spike in filings following the somewhat sensational findings flowing from the recent Royal Commission into the 'bad behaviours' in the banking and financial services sector.

We briefly summarise below major recent class action developments, further appeals to watch in 2019 and the key recommendations of the recent inquiry conducted by the Australian Law Reform Commission into class action proceedings and litigation funding.

Notable recent cases

Competing class actions

A dominant feature in the recent class action landscape in Australia has been the rapid rise of competing class actions and in particular shareholder class actions. Usually following well-publicised corporate wrongdoing or 'stock drops', this occurs where numerous parties represented by their own lawyers and funded by different litigation funders separately commence their own class actions against the same corporate defendant.

Australian courts do not have a North American style process of certification of class actions at a pre-commencement hearing. Instead, it has been left to Australian judges to grapple with which action ought to proceed and which actions ought to be stayed, and which principles should be applied in coming to a decision – similar to the 'carriage motions' in Canada. Suffice to say the situation is still very uncertain and predicting the outcome is fraught. This makes for great uncertainty and is dissuading funders from investing significant sums in claims preparation when they may only have a one in four-or-five chance of 'winning'. We may well see arrangements being made between lawyers and funders to jointly bring claims to avoid this 'lottery' style result.

The GetSwift case

Justice Lee's decision in *GetSwift* in the Federal Court was the first major decision on this issue. His Honour chose to allow one of three competing class actions to proceed and to permanently stay the two other actions. Justice Lee was particularly attracted to the funding model in the winning action, which was based on the lesser of a multiple of expenses paid (either 2.2 times if settlement is reached on or before 12 April 2019 and 2.8 times after that date) or 20 per cent of the net proceeds. That was a relatively novel funding structure, and it appealed to Lee J because it would 'prevent windfalls' to litigation funders, in comparison with more conventional funding fees based on a flat percentage of a settlement sum or judgment. Lee J eschewed factors such as first to file or the equality of the legal firms in that case.

On appeal, the Full Court confirmed the court's power to permanently stay overlapping proceedings. Other realistic options available include consolidation, declassing orders, joint trials of all proceedings as open classes (ie, the 'wait and see' approach) and closing the classes in one or more proceedings, leaving one as open class, and a joint trial of them all. Which of these options is the most appropriate will depend on the particular case – there is no 'one-size-fits-all' approach.

The Full Court also emphasised that the first to file will not be determinative (in part to 'strongly discourage' the hasty filing of cases with insufficient due diligence), and that there should not be a 'rush to the bottom' in terms of funders' commissions and legal fees, but rather there should be more focus on selecting the proceeding with a funding and costs model likely to best motivate the applicant's solicitor and funder to achieve the best outcome for the applicant and class members.

The Applicant sought to appeal the Full Court's decision in the High Court, but its special leave application was dismissed in April 2019.

BHP

Three separate 'stock drop' shareholder class actions were commenced against BHP Billiton Limited and BHP Billiton Plc over the Brazilian dam collapse in 2015 which killed 19 people (related proceedings have been commenced by SPG in the UK seeking US$5bn). In a December 2018 judgment, Justice Moshinsky sought to apply the *GetSwift* selection principles and chose Phi Finney McDonald (PFM) to lead a class action, staying the two other competing actions (one of which was run by Johnson Winter & Slattery (JWS)). PFM's action is funded by G&E KTMC Funding LLC, which will be entitled to a commission of 'an amount less than 18% of the Gross Recovery'. The commission is inclusive of expenses paid by the funder in the course of funding the litigation, including legal costs and disbursements.

This decision was appealed by JWS and Maurice Blackburn. In May 2019, the Full Federal Court adjourned the appeal and gave the parties further time to see whether a joint proposal for the consolidation of the proceedings can be agreed.

Common fund orders

Most class actions in Australia are commenced on behalf of an 'open class' of class members who meet a particular group definition set by the lead Plaintiff. Often, a significant proportion of class members in an open class have not signed a funding agreement with the litigation funder, which means they have no contractual obligation to pay any share of their settlement to the litigation funder.

To encourage litigation funders and lead Plaintiffs to continue commencing 'open class' actions, thereby promoting wider access to justice, the courts in 2016 began permitting 'common fund orders.' Such orders oblige *all* group members in a class action to pay a commission to the litigation funder, whether a funding agreement has been signed between them or not. Common fund orders have since been widely adopted.

However, the power of the Federal Court and the Supreme Court of New South Wales to make common fund orders was recently challenged. An unprecedented decision was made for the appeals to be heard by both the New South Wales (NSW) state and Federal appeal courts concurrently, which commenced on 4 February 2019. Each court issued judgments at the same time in March 2019, affirming the power of the courts to make common fund orders at any time during a proceeding. However, the cases are both on appeal to the High Court and so there is still a question mark over the power of a court to make common fund orders.

Court turf wars

Five separate shareholder class actions were commenced against AMP arising from adverse evidence given against that company in the Royal Commission. Four were commenced in the Federal Court and one in the NSW Supreme Court. The issue then was which court would claim sole jurisdiction to hear all of the cases. At one stage there were threats of anti-suit injunctions as between the judges and the two courts seeking to prevent the other from dealing with the cases. In August 2018, the Full Federal Court transferred the four class actions commenced in the Federal Court to the Supreme Court of NSW, where it was determined that only one case should proceed (which was consolidated with one of the other five proceedings by agreement between the applicants' firms), and permanently stayed the other proceedings.

To avoid this unseemly 'turf war', the Federal and Supreme Courts are in the process of agreeing protocols for dealing with similar situations in the future.

Scrutiny of costs

The deduction of funding fees and the reimbursement to the funder for legal costs from settlement amounts must be approved by the court. The courts have recently demonstrated greater scrutiny over those deductions. The Victorian Court of Appeal in *Botsman* approved a $64m settlement but rejected the funder's commission of $12.8m and legal fees of $4.75m, sending the matter back to the trial judge to assess the reasonableness of those amounts. Australian Funding Partners Ltd, the litigation funder, sought to appeal this decision to the High Court, but its special leave application was dismissed in May 2019.

This uncertainty increases funding risk and makes it even harder for funders to confidently 'model' returns as part of their initial due diligence and assessment processes before deciding to fund. Notwithstanding the above, the payment of unprecedentedly high funding fees has been approved by the Court in the last twelve months. For example, a litigation funding fee of $92m was approved by the Court in August 2018 from a settlement of $215m paid by S&P Global Inc.

Confidentiality of settlement terms

Traditionally, most settlements amounts paid out have remained subject to strict confidentiality terms. However, the courts have recently indicated that even if the parties agree to confidentiality, judges in approving settlements (which is required in class actions) may nevertheless reveal settlement amounts paid out, as well as amounts paid to funders and lawyers, as part of its 'open' justice principle which is important for the public in having confidence in the class action process actions. Both the Victorian Court of Appeal in *Botsman* and Justice Lee in *Liverpool* discouraged wide-ranging confidentiality orders being sought in the context of settlement approvals. They said parties should not assume that such orders will be made by consent, given that settlements of class actions have an important public dimension.

Orders for production of insurance policies

Australian courts have usually been reluctant to order that defendants disclose their insurance policies (and the limits of their insurance) to plaintiffs. This has also, until recently, been the case in class actions. However, the Federal Court has recently in at least two class actions ordered the defendants to produce their insurance policies. The courts have taken the view that knowledge of likely 'recoveries' assists in the administration of justice, in either facilitating settlements or avoiding expensive cases where there may be no money at the end of the day. This trend will, we think, continue and be a factor insurers will need to take into account.

Settlements and insurance policies

Justice Stevenson's decision in *Bank of Queensland* highlights just how critical the wording of claim aggregation clauses can be in insurance policies in determining how many deductibles apply where companies are faced with 'related' multiple claims, multiple losses and multiple wrongful acts in class actions. Stevenson J found that the Bank of Queensland's (BOQ's) policy aggregation wording was not sufficient and that if 192 separate deductibles of $2m each (one for each of the class action claimants) were to apply meaning, BOQ was effectively uninsured for the $12m settlement agreed. This decision has been appealed and brokers and insurers are carefully reviewing their policy aggregation wordings.

Law Reform Commission inquiry

There has been increasing debate in Australia in response to the growing role and prevalence of litigation funders, particularly in class actions, and the related rise in the number of class actions filed. The Australian Law Reform Commission'sReport on Class Action Proceedings and Third-Party Litigation Funders wass submitted to the Attorney-General on 21 December 2018 and published on 24 January 2019. The Australian Law Reform Commission (ALRC) analysed the current litigation funding landscape against principles of fairness and efficiency, protection of litigants and maintenance of the integrity of the civil justice system, and formulated 24 recommendations to ensure these principles are met. The key recommendations, particularly as to the regulation of litigation funders, include:

- requiring that all class actions be initiated on an 'open class' basis;

- providing the court with an express statutory power to make 'common fund orders' and to resolve competing representative proceedings;

- allowing the Federal Court to appoint an independent referee to assess the reasonableness of legal costs prior to the court approving settlement;

- allowing the court, where appropriate, to put out to tender the task of administering payments to class members (commonly done by the solicitors for the Plaintiffs) to outside third parties such as accounting firms (the process of assessing class member entitlements and paying class member settlement from the settlement sum);

- creating a statutory presumption that funders will provide security against adverse cost orders in a form that is enforceable in Australia and expressly empowering the court to award costs against funders and insurers who fail to comply with the overarching purposes of the Federal Court of Australia Act 1976(Cth) (the 'Act'), which is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible;

- amending the law to provide that litigation funding agreements will only be enforceable following court approval, and to create an express statutory power for the court to reject, vary, or amend the terms of litigation funding agreements. The report also recommended requiring funding agreements to provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order and an irrevocable submission of the funder to the jurisdiction of the Australian courts;

- strengthening existing measures to mitigate conflicts of interest, particularly in the tripartite relationship of the funder, solicitor and plaintiff or class member; and

- permitting class action solicitors to charge percentage-based or 'contingency' fees to enable medium-sized class actions to proceed and provide a greater return to litigants (with a number of limitations including that actions funded by percentage-based fees cannot also be directly funded on a contingent basis).

The ALRC has also recommended a review of the enforcement tools available to regulators, around continuous disclosure obligations

and obligations relating to misleading and deceptive conduct.

With the conservative government being returned to power (unexpectedly) in the recent May elections, contingency fees are unlikely to be introduced but there may be a review of the laws around the continuous disclosure obligations on listed companies, which are some of the most plaintiff friendly in the world.

An inquiry was also conducted by the Victorian Law Reform Commission, with a report tabled in the Parliament of Victoria on 19 June 2018. The report made various recommendations, a number of which are similar to the recommendations made by the ALRC.

Outlook

The pace of development within the class action space in Australia is showing no signs of slowing. Developments to watch out for in the coming six to 12 months include:

how the courts continue to grapple with and resolve competing class actions and whether we move more towards a US 'certification'-type model or a Canadian 'carriage-motion'- type model;

what action may be taken by the Federal and Victorian governments following the reports arising from the Law Reform Commission inquiries. There is a good chance that there will be a legislative response in areas previously left to the courts, particularly in relation to costs management, resolving competing class actions. and the increased regulation of litigation funders;

whether the government takes up the ALRC's recommendation to commence a separate review of the law on continuous disclosure and misleading or deceptive conduct. Any changes arising from such a review would have wide-reaching consequences; and

the High Court's decision in the Westpac and BMW appeals, which could have significant ramifications in relation to common fund orders.

Notes

1 *Perera v GetSwift Ltd* [2018] FCA 732, delivered on 23 May 2018.

2 For example, an action may be commenced on behalf of all persons who bought shares in a company in a particular period and have suffered loss.

3 See *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148.

4 Arising from orders made in *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 142 in the Federal Court and in *Owen Brewster v BMW Australia Ltd* [2018] NSWSC 160 in the NSW Supreme Court.

5 *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; *Brewster v BMW Australia Ltd* [2019] NSWCA 35.

6 *BMW Australia Ltd v Brewster & Anor* [2019] HCATrans 94; *Westpac Banking Corporation & Anor v Lenthall & Ors* [2019] HCATrans 95.

7 *Marion Antoinette Wigmans v AMP Limited; Fernbrook (Aust) Investments Pty Ltd v AMP Limited; Wileypark Pty Ltd v AMP Limited; Andrew Georgiou v AMP Limited; Komlotex Pty Ltd v AMP Limited* [2019] NSWSC 603.

8 *Botsman v Bolitho* [2018] VSCA 278.

9 *Australian Funding Partners Ltd v Botsman & Ors* (M179/2018).

10 See *Liverpool City Council v McGraw-Hill Financial, Inc* (*now* known as S&P Global Inc) [2018] FCA 1289.

11 *Botsman v Bolitho* [2018] VSCA 278.

12 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289.

13 For example, see *Kirby v Centro Properties Ltd (ACN 078 590 682)* [2009] FCA 695.

14 Under a statutory power which allows the court to make orders it considers necessary or appropriate to ensure justice is done in the proceeding: see section 33ZF of the Federal *Court of Australia Act 1976* (Cth).

15 *Bank of Queensland Ltd v AIG Australia Ltd* [2018] NSWSC 1689.

16 *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134, 2018).

17 **www.lawreform.vic.gov.au/sites/default/files/VLRC_Litigation_Funding_and_Group_Proceedings_Report_forweb.pdf (http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Litigation_Funding_and_Group_Proceedings_Report_forweb.pdf)**.

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