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Class Action Insights

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Welcome to the third edition of *Class Action Insights*.

The recent settlement of the Great Southern class action raises a number of interesting and important issues, not only because the court took the unusual step of publishing its reasons for judgment after the settlement had been announced. Our feature article takes an in-depth look at the various aspects of the settlement which raise important issues for defendants to consider in structuring a class action settlement.

Our second article looks forward to some of the developments on key issues that are expected during 2015. These include determinations on the ability of litigation funders to recover on a 'common fund' basis, the causation question in shareholder class actions and further clarification of the law of penalties and the workings of the proportionate liability regime – all of which have the potential to significantly influence the shape of the class actions landscape in the year to come.

Court approval of class action settlements: novel elements of the Great Southern class action settlement

Late last year, the Supreme Court of Victoria approved the settlement reached by the parties to the group proceedings that were commenced following the collapse of the Great Southern Group.* The terms of the settlement, and the circumstances in which the settlement was reached, had a number of interesting and unusual features. Similarly, the settlement approval process gave rise to a number of novel issues, both of a procedural nature and related to the substantive elements of the settlement. This article discusses some of these issues and what they mean for class actions generally.

Background

Following the collapse of the Great Southern Group in May 2009, a series of group proceedings were commenced in the Supreme Court of Victoria on behalf of investors who acquired interests in Great Southern Managed Investment Schemes (***MISs***) between March 2005 and July 2008 (the ***Great Southern group proceedings***). The plaintiffs' principal claim was that the responsible entity of the MISs, Great Southern Managers Australia Limited, issued product disclosure statements that were 'defective' under Part 7.9 of the *Corporations Act 2001* (Cth).

The defendants to the Great Southern group proceedings included members of the Great Southern group of companies and certain directors of Great Southern, as well as Bendigo and Adelaide Bank and its related entities (the ***BEN Parties***) and Javelin Asset Management Pty Ltd (***Javelin***). The BEN Parties and Javelin hold loans taken out by investors to fund the purchase of their MIS interests. No allegations of wrongdoing were made against the BEN Parties or Javelin. However, the plaintiffs sought consequential relief against them, including declarations that the loans were void and unenforceable.

The trial of the Great Southern group proceedings ran for more than 90 sitting days, between October 2012 and October 2013, before his Honour Justice Croft. On 23 July 2014, the parties were informed that judgment would be handed down on 25 July 2014. Later that day, the court was advised that the Great Southern group proceedings had been settled. Therefore the judgment, prepared and ready, was not handed down on 25 July. Instead, the plaintiffs filed an application for court approval of the settlement, in accordance with the *Supreme Court Act 1986* (Vic).

A number of aspects of the settlement received particular attention in the approval process, including that:

- under the settlement, group members who had loans with the BEN Parties or Javelin acknowledged and admitted that their loans were valid and enforceable (the ***enforceability clauses***);
- a significant proportion of the funds available under the settlement was allocated to reimbursing the legal fees paid by those plaintiffs and group members who had funded the class actions; and
- a large number of objections to the settlement were made by group members.

Who should hear a settlement approval application?

One of the interesting procedural issues that arose in the course of the hearing of the Great Southern settlement approval application was the question of which judge should hear and determine that application.

When parties to a class action settle the proceeding and seek the court's approval of the settlement, the approval application is ordinarily heard not by the trial judge but by another judge. This practice exists to avoid a situation where the trial judge's ability to deliver a judgment, in the event the settlement is not approved, is compromised or perceived to be compromised. Such a situation could arise by virtue of the judge being aware of the proposed terms of settlement or by virtue of the judge being privy to the confidential opinions of the plaintiffs' counsel and solicitors that are provided in the course of a settlement approval application. If a trial judge was compromised in this way, it may have the result that he or she cannot proceed to give judgment and a re-trial is required; this would clearly be a significant waste of the court's and the parties' resources.

In accordance with the general practice, the application for approval of the Great Southern settlement was referred by Justice Croft, the trial judge, to his Honour Justice Judd. Ultimately, however, for the reasons discussed below, the application was referred back to Justice Croft, and heard and determined by him.

For the court to approve a settlement, it must be satisfied that the settlement is fair and reasonable having regard to the interests of the group members as a whole. In assessing whether the settlement is fair and reasonable, one of the factors a court will consider is the plaintiffs' prospects of success in the proceeding. Another is the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement.

When the approval application came before Justice Judd, his Honour raised the unique and difficult position he was in – he was being asked to consider the approval of the settlement where one of the relevant factors is the plaintiffs' prospects of success. Written, but not handed down, were the trial judge's reasons, being 'a fully informed and definitive statement of the parties' prospects'.[1] However, Justice Judd was not privy to those reasons. Further compounding the situation was the fact that Justice Judd found that the confidential opinion provided by the plaintiffs' counsel did not assist in the assessment he was required to make.

Ultimately, this conundrum was resolved by the application for approval of the settlement being referred back to Justice Croft, with Justice Croft's agreement. Importantly, this referral was done on the condition that the parties agreed that, if Justice Croft did not approve the settlement, they would not object to him publishing the Great Southern reasons as reasons for judgment. This ensured that the resources of the court and the parties that had been expended in the course of the proceeding over a number of years would not be in jeopardy if the settlement was not approved.

Having the application heard by Justice Croft was a sensible course to take in the circumstances of this case. It meant that the parties and group members could be assured that the application for approval of the settlement was determined by the judge best placed to make an informed decision as to the fairness of the settlement.[2]

The public interest in publishing reasons where a proceeding has settled

It is not a frequent occurrence that a proceeding settles at a point in time when a trial has been conducted and the judgment has already been written. When this scenario does arise, however, there is generally a presumption that the trial judge's reasons will not be handed down. But, in a novel turn, this presumption was challenged and displaced in the Great Southern settlement approval application hearing.

Looking to UK, New Zealand and Queensland authorities, Justice Croft confirmed that the court has a discretion as to whether to proceed to release its reasons in circumstances where a proceeding has settled post-trial.[3] There are a number of reasons why a court may exercise its discretion and consider doing this, including for public interest reasons.

Before hearing the parties' submissions on whether the settlement ought to be approved, Justice Croft considered whether the Great Southern trial reasons ought to be released before the hearing of the settlement approval application, so as to inform that hearing. After hearing the parties' submissions on this point, his Honour determined that he would not follow this course, but he would publish the reasons in conjunction with any judgment approving the settlement or, if settlement was not approved, judgment would be handed down.[4] Thus, on 11 December 2014, the Great Southern reasons were published as an annexure to the settlement approval judgment.

His Honour confirmed that the court retains a discretion whether or not to proceed to release reasons in circumstances where the parties have settled the proceeding. In this case, there were specific circumstances that informed the court's decision to publish the Great Southern reasons. The Great Southern reasons, and, in particular, the findings in relation to the plaintiffs' prospects of success, provided one of the key bases upon which the settlement approval application was assessed. Given the number and nature of objections made to the settlement, it was in the interests of transparency that the reasons be published. Doing so allowed all parties and group members to understand the basis for his Honour's decision to approve the settlement.[5]

The court also referred to the importance of publishing the reasons in light of the extensive publicity and public speculation that had surrounded the Great Southern group proceedings. Justice Croft held that it was 'in the public interest that the reasons be published to inform the public discussion and understanding of the nature of the Great Southern proceedings.'[6] It was also considered a matter of fairness that the court's assessment of the allegations made against individuals in the proceedings be known publicly.

The approach adopted by Justice Croft shows that, in circumstances where a proceeding settles after a judgment has been written, it remains a real possibility that the court will decide to publish its reasons. The significant size and complexity of many class actions, with the associated expenditure of resources by the court and the parties, and the level of public interest that class actions often attract, may mean this step may be more likely to be considered by the court in the context of a class action.

Finality and certainty vs the pursuit of individual claims or defences

As referred to above, a novel feature of the settlement was the enforceability clauses. Because a number of group members raised objections to the enforceability clauses, this aspect of the settlement was given extensive consideration by Justice Croft in his assessment of whether the settlement was fair and reasonable.

In general, the objections were made on one or more of the following bases:

- that the enforceability clauses went beyond the relief sought by the BEN Parties in the group proceedings and therefore the settlement deed was not fair;

1 See the memorandum from Justice Judd to the parties, referred to in *Clarke (as trustee of the Clarke Family Trust) & Ors v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) & Ors* [2014] VSC 516 (the ***settlement approval judgment***), [13].

2 The issue of which judge should hear a settlement approval application also arose in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19. In that case, the trial judge heard and determined the settlement approval application (see [4]-[9]). Similarly, in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, the trial judge, Justice Gordon, heard the settlement approval application with the consent of the parties.

3 Settlement approval judgment, [23].

4 *Clarke (as trustee of the Clarke Family Trust) & Ors v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) & Ors* [2014] VSC 584.

5 Settlement approval judgment, [24].

6 Settlement approval judgment, [23].

- that the opt-out notice did not adequately put group members on notice of the risk that they might lose individual defences or counterclaims if the group proceedings settled;
- that the enforceability clauses were not fair and reasonable; and
- that the enforceability clauses would prevent group members from raising individual defences or counterclaims relating to their Great Southern loans if the BEN Parties subsequently commenced any debt recovery proceedings.

A sub-group of group members also applied for orders that they cease to be group members, arguing that if they remained as group members, and the settlement was approved, they would not be able to raise individual defences to the validity of their loans.

These arguments were considered both by Justice Croft in his decision approving the settlement, and by Justice Judd, who heard the applications made by the group members who sought to cease to be group members. Given the nature of the objections to the enforceability clauses, the court's consideration of the objections focused on the opt-out procedure, the principles of estoppel and abuse of process and the importance of certainty and finality in class actions.

The importance and purpose of the opt-out procedure

Justice Croft held that the enforceability clauses did not detract from the fairness and reasonableness of the settlement.[7] Any group member who wished to preserve the right to bring an individual claim arising from the subject matter of the group proceedings should have opted out. If a group member does not opt out, they must be taken to have chosen to be bound by the issues to be determined in the group proceedings, however they are ultimately resolved. This mechanism provides adequate protection to individual claims while also maintaining a solid foundation for the class actions regime, which promotes finality. Justice Judd expressed similar views in his decision refusing the applications by the objectors to cease to be group members.[8]

In order for this mechanism to function as it should, the adequacy of the opt-out notice becomes critical. According to Justice Judd, the notice must be sufficient to define the scope of the proceeding and permit a meaningful decision by a group member.[9] In this case, the opt-out notice was adequate. The argument by some group members that the opt-out notice did not properly put them on notice of the risk that they might lose individual defences or counterclaims in the event the group proceedings settled, or that the settlement went beyond anything contemplated in the notice, was firmly rejected by the court. Justice Croft held that the opt-out notice referred to the nature of the claims made in the proceedings and made it clear that the enforceability of the loan deeds was central to the Great Southern group proceedings.[10] It did not matter that the BEN Parties and Javelin had not sought declaratory relief as to enforceability of the loan deeds.

The court's findings on these issues highlight the importance of carefully considering the content of an opt-out notice in a class action. Had the opt-out notice in these proceedings not been adequately drafted, it may have provided a stronger basis for group members to argue that they cease to be group members or the court may have had a different attitude to the fairness and reasonableness of the enforceability clauses.

Pursuit of individual claims or defences

Both Justice Croft and Justice Judd emphasised that the enforceability clauses were consistent with the doctrines of issue estoppel, *Anshun* estoppel and abuse of process.

Justice Croft found that, given the nature and extent of the issues in the group proceedings, whether the proceeding had settled or gone to judgment, these doctrines would have operated to bar subsequent claims or defences by group members that went to the enforceability of their loan deeds.[11] Accordingly, it could not be the case that the enforceability clauses resulted in the settlement not being fair and reasonable. In fact, the enforceability clauses simply provided certainty for all parties as to group members' rights and ensured the BEN Parties and Javelin were not left in a position where they continued to be faced with extensive litigation concerning the group members' loans.

Justice Judd drew attention to the distinction between individual issues that flow from the claims made in a group proceeding (such as issues of reliance, causation and damage) and entirely different causes of action that may be available to an individual.[12] The former are a natural extension of the group proceeding and accordingly the question does not arise of a group member being estopped from agitating those issues. By contrast, to preserve and pursue entirely different causes of action, a group member must opt-out or the doctrines of issue estoppel, *Anshun* estoppel and abuse of process will prevent him or her from subsequently pursuing those claims.

The decisions of Justice Croft and Justice Judd are significant because they confirm that positive acknowledgments of the kind found in the Great Southern settlement are the corollary of the doctrines that would, in any event, operate upon conclusion of a proceeding. It also indicates the court's willingness to take an approach that is consistent with one of the objects of the class actions regime – that is, the final resolution of multiple claims.

Legal fees

Apart from the enforceability clauses, one of the other substantive components of the settlement that the court analysed in considerable detail in assessing whether the settlement was fair and reasonable was the moneys to be used to reimburse the legal fees paid by those plaintiffs and group members who were represented by Macpherson + Kelley Lawyers (***M+K***), the law firm acting on behalf of the plaintiffs.

It was a term of the deed of settlement that M+K clients would be reimbursed their legal costs incurred in respect of the conduct of the group proceedings. One of the objections made to the settlement by some group members was that the settlement was unfair because it favoured M+K clients or because non-M+K clients would not be reimbursed for their legal costs (paid to other law firms).

His Honour formed the view that there was no force to such objections. Because the reimbursement was for fees actually paid by the plaintiffs and some group members to M+K, and it was only M+K

7 Settlement approval judgment, [109].

8 *Clarke v Great Southern Finance Pty Ltd (in liquidation)* [2014] VSC 569, [46].

9 Ibid.

10 Settlement approval judgment, [98].

11 Settlement approval judgment, [126].

12 *Clarke v Great Southern Finance Pty Ltd (in liquidation)* [2014] VSC 569, [49].

and no other firm that conducted the group proceedings on behalf of the plaintiffs, it was appropriate that these persons be reimbursed.[13] Justice Croft was satisfied on the basis of the evidence before him that the amount allocated for reimbursement purposes under the settlement was the actual amount paid by M+K clients to fund the proceedings. This approach ensured that the individuals who had funded the group proceedings would not be out of pocket and would be returned to the same position as those group members who had not contributed to the funding of the proceedings. It did not result in any inequality between group members.

The way the reimbursement was structured was important to the court's consideration of the arrangement. Ordinarily, where a settlement agreement proposes to pay legal costs from a general pool of funds, the court has to assess, aided by an independent expert assessment, whether the legal fees and disbursements to be deducted from the general pool are fair and reasonable (as a separate question to whether the settlement overall is fair and reasonable). However, in this case, the funds allocated for the reimbursement were to be paid out of a separate fund, rather than operating as a first charge on a general fund established under the terms of settlement. The court held that there was no basis for it to infer that a reduction in the fund for reimbursement of legal fees paid would result in an increase in the funds otherwise available for distribution to group members. Justice Croft placed importance on this and took the view that, because of this structure, an independent expert assessment of the reasonableness of the fees and disbursements charged by M+K to its clients was not necessary.[14]

This aspect of the settlement and the attitude of the court towards it as part of the approval process is a reminder of the importance of giving due consideration to how to address the costs component of a settlement. Whether an arrangement such as this one will be appropriate will depend on the particular circumstances of each case and factors such as how the litigation has been funded.

Conclusion

The approval process for the settlement of the Great Southern group proceedings demonstrates the procedural and substantive complexities and issues that can arise in the course of seeking the court's approval of a class action settlement. When negotiating a settlement, parties to a class action must give consideration to not only what they may agree to as between themselves, but also to whether the court is likely to be satisfied with the arrangements reached.

* Allens acted for Bendigo and Adelaide Bank and its related entities in the Great Southern Group proceedings.

13 Settlement approval judgment, [69]-[70], [137].

14 Settlement approval judgment, [150].

Developments to watch in 2015

Class actions have become one of the most dynamic elements of the Australian civil justice system. That trend will continue into 2015, as important developments on a number of key issues are expected.

Regulation of litigation funders

The availability of third party litigation funding has a significant impact on the number of class actions commenced in any given year. The previous Federal Government introduced legislation that removed most barriers to entry into the third party funding market on the basis that third party funding is desirable because it facilitates access to justice through class actions. As a result, third party funders are not currently subject to any regulation beyond the general law (to the extent the funder is subject to Australian law) and a requirement to have adequate processes in place for managing conflicts of interest.

That position has, however, come under review. In late 2013, the Attorney-General indicated that the regulation of the third party funding industry was under 'active consideration'. Then, in December 2014, the Productivity Commission's report into 'Access to Justice Arrangements' recommended that third party funders should be subject to a licensing regime that focuses on capital adequacy and disclosure requirements.

A licensing regime would inevitably impose a barrier to entry (or to continued operation) for current and would-be funders. The extent to which such a barrier may impact on the availability of funding is likely to depend on how the offshore funders respond.

Common fund orders

In recent years, a number of applications have been made for orders that would effectively entitle third party funders to receive a commission from the total 'fund' recovered in a class action, and not just from the group members who have signed funding agreements. Orders to that effect (often known as 'common fund' orders) have been made by consent in the course of two separate class actions against National Australia Bank. Other attempts have either failed or been superseded by a settlement.

An application in the shareholder class action against Allco Finance was heard by the Federal Court over two days in December 2014. Judgment is currently reserved. This was the first occasion on which the issues relating to 'common fund' orders were the subject of a full hearing.

The potential impact of 'common fund' orders is, in our view, often misunderstood. It has been suggested that they are harmless because they do not increase a defendant's exposure to a judgment. While that is true, they make bringing large-scale class actions a more lucrative business proposition for third party funders and will inevitably increase the amount required to settle claims. They also reduce the likelihood that funders will 'book build' before agreeing to fund a claim and, as a result, are likely to lead to more 'open class' claims being filed at an early stage (perhaps before the claims have been fully investigated).

The causation question

Despite the fact that shareholder class actions have accounted for more than 20 per cent of all class action filings since the first class actions regime was established in 1992, no shareholder class action has been the subject of a final judgment. As a result, the question of whether causation in shareholder claims can be established through market-based causation has yet to be resolved. This issue has significant implications for the continuing viability of shareholder class actions.

In March 2015, Justice Perram of the Federal Court gave the first judicial indication as to how the issue might ultimately be resolved in a non-disclosure case brought by 77 shareholders of Babcock & Brown. Although it was not necessary for the court to consider issues of causation (because the case was decided on other issues), his Honour indicated that, had it been necessary to decide, 'it is likely' that he would have accepted that causation could be established by reference to market-based causation (so long as the claimants were not aware of the 'non-disclosed material').

The causation question was also considered by Justice Farrell of the Federal Court in December 2014 in the context of an application for leave to amend the class definition in a shareholder class action to include persons who could only have a claim based on market-based causation. In considering the viability of such a claim, her Honour emphasised that the cases relied upon by both sides required reliance (in some form) to be demonstrated as an element of causation. Her Honour was, however, willing to allow the amendment because, given that market-based causation claims have not yet been considered by the High Court, the state of the law is not so settled that a market-based causation claim could be said not to have reasonable prospects of success.

The Babcock & Brown case provides limited preliminary judicial support for the availability of market-based causation (in the form of obiter). However, particularly in circumstances in which Justice Farrell's (albeit interlocutory) judgment suggests that her Honour may well reach a different conclusion if and when that case goes to trial, the position remains uncertain.

The next potential forum for a final decision on this issue may be a case brought by 117 shareholders of HIH Insurance Limited, which was heard by the Supreme Court of NSW in early 2015 (and in which judgment is currently reserved).

A run on penalties class actions?

The law of penalties (as understood by most people) changed in September 2012 when, in one of the bank fees class actions, the High Court found that a fee could be a penalty even if it was not levied in response to a breach of contract. This displaced the commonly understood law that a fee could only be penal if levied in response to

breach of contract. As a result, many contracts that were drafted with the old law in mind, may in fact impose penalties and therefore be subject to challenge.

One aspect of the test for whether a fee is penal requires a comparison between the amount of the fee and the amount of the loss that may be suffered as a result of the conduct that led to the fee being charged. The Full Federal Court is currently reserved in an appeal (in another of the bank fees class actions) about whether indirect costs may be taken into account in that comparison. The Court's decision will be delivered on Wednesday, 8 April 2015.

Subject to the possibility of an appeal to the High Court, this decision is likely to determine the viability of other penalties class actions that have either been commenced or foreshadowed.

Contingency fees

In December 2014, the Productivity Commission recommended the removal of the general prohibition on the charging of contingency fees by the legal profession. It is, however, by no means certain that the prohibition will be lifted. Indeed, the Attorney-General has made it clear that he is opposed to lifting the prohibition.

It is difficult to predict what effect lifting the ban (if it were to happen) might have on the class action landscape. Despite the prevalence of third party funding, many class actions are run by solicitors on a no win – no fee basis. The one certainty is that providing greater incentives for lawyers to fund class actions will not reduce the number of class actions.

A potential hole in the proportionate liability regime

In mid-2014, two Full Federal Court decisions reached opposite conclusions in considering whether liability for claims under the Corporations Act which are not apportionable (such as under section 1041E) should be treated as apportionable if they arise from the same facts that give rise to a liability that is apportionable (for example, under section 1041H).

The question will be resolved by the High Court following a hearing in March 2015 in *Selig v Wealthsure Pty Ltd*.

If the High Court determines that such liabilities are not apportionable, it will be open to plaintiffs to structure claims in a way that (if they can meet the relevant standard) will allow them to avoid the proportionate liability regime to claim solely against a deep-pocketed (or insured) concurrent wrongdoer.

Spotlights

Lowering the bar for multi-defendant claims

A class action can only be commenced where seven or more group members have claims against the same person. Uncertainty has surrounded the question of whether this means that, in a multiple-defendant class action, each group member must have a claim against each defendant.

In September 2014, in the Cash Converters class action, the Full Federal Court resolved this uncertainty by confirming that it is not necessary for each group member to have a claim against each defendant. It would also seem not to be necessary for seven or more group members to have a claim against each defendant (so long as seven group members have a claim against one defendant and the representative applicant(s) has a claim against each defendant).

This outcome expands the scope for secondary defendants to be joined to class actions in circumstances where their interest in the outcome of the broader issues may be relatively minor. Such claims may, however, be vulnerable to an application that they should not continue as a class action, on the basis that it is not an efficient and effective means of dealing with them (for example, under s33N of the Federal Court Act).

A review of collective redress regimes across the globe

Our alliance partner, Linklaters, has published a review of the availability and operation of collective redress regimes in 20 jurisdictions across the Americas, Africa, Asia and Europe. We contributed the Australian chapter.

Linklaters found that collective redress procedures differ widely between jurisdictions, and range from the sophisticated and highly developed proceedings that are a regular occurrence in the US and Australia to actions that are restricted to certain sectors or disputes, such as the *KapMuG* in Germany, which operates in the context of capital markets disputes only.

Our Recent Publications

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