

Court Rejects Common Fund – for now

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On 7 August 2015, Wigney J handed down his eagerly awaited judgment¹ on whether the Federal Court had the power to create a ‘*common fund*’ and, if it did, whether it would exercise that power. This effectively would allow a litigation funder to be the funder of an entire open class action, notwithstanding that group members had not signed any funding agreement with it.

If successful, the making of a ‘*common fund*’ or ‘*common funder*’ would have enormous implications for the conduct of class actions going forward which would affect the rights of applicants, group members, respondents and their insurers.

The two Applicants in the Allco Finance Group class action (**Class Action**), who are the only two group members to have entered a litigation funding agreement with International Litigation Funding Parties Pty Ltd (**ILFP**), sought orders for:

1. Court approval that amounts payable to ILFP under the funding agreement are reasonable (being a % of all money recovered - see terms below); and
2. a declaration that the Applicants are entitled to pay those amounts from all money recovered from any settlement / damages for the entire class.

Wigney J held that:

- the Court had discretionary power to make such an order pursuant to s33ZF of the Federal Court Act (**the Act**) which confers a wide discretionary power on the Court to “...*make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding...*”; and
- justice did not require such an order to be made at this particular point in time in the Class Action. In so finding, the Judge did not rule out the possibility that such an order could be made later in the proceeding. However, as the proceeding is at an early stage, he considered that the proposal was not appropriate or necessary to ensure that justice is done in the proceeding and consequently there was no reason to make the proposed order at this stage, other than to provide some commercial certainty for the funder.

¹ ***Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)*** [2015] FCA 811

BACKGROUND

A litigation funding agreement usually provides that the funder pays all or some of the plaintiffs' costs and indemnifies them for any adverse costs order, with the funder receiving between 25% to 40% of all money recovered on behalf of signed up group members, after all costs have been reimbursed.

The Class Action is an open class action on behalf of all Allco shareholders who purchased Allco shares in the 6 month period 21 August 2007 to 27 February 2008. The Class Action had previously been considered by another funder, IMF (Australia) Ltd which had not been able to sign enough group members to make an economically viable closed Class Action². The Class Action was eventually filed by Maurice Blackburn with ILFP support shortly before expiry of the limitation period.

The ILFP funding agreement with the two Applicants provides that the Applicants would:

- receive all damages/settlements on behalf of the class (the 'common fund'); and
- deduct from the common fund the cost of the litigation and the funding commission to ILFP, which was in the range of 32.5% - 35% of each group members' share.

The Applicants advanced six reasons why the Court should make the proposed orders:

- (1) They were analogous to other instances where the court ordered costs from a common fund – e.g. liquidators;
- (2) Ensured an equal and equitable outcome between all Group Members;
- (3) Secures a beneficial outcome for all Group Members – based on the suggestion that it would not be commercially viable for ILFP to continue funding without the orders;
- (4) Consistent with policy objectives of Pt IVA of the Act i.e. it enhances access to justice, reduces costs and promotes efficiency of court resources;
- (5) Appropriately protects Group Members' rights – retains opt-out and court supervision powers;
- (6) Consistent with similar proceedings in Australia, US and Canada.

The Respondents submitted that the orders were unconventional, unprecedented and contrary to the Class Action Rules. Further, the orders were beyond the Court's powers and, if not, the Court should nevertheless refuse to exercise any discretion it may have.

DECISION

The Court held that it had the power to make the order under s33ZF of the Act. However, Wigney J held that the orders were not required to ensure justice in the Class Action, particularly at such an early stage when there was insufficient evidence to determine the number of Group Members, the value of the claims, the amount to be paid to ILFP and whether such payments were reasonable.

He considered the orders were more to do with creating commercial certainty and viability for ILFP and, in part, the Applicants. Each of the issues raised by the Applicants were, or could be, addressed by other means, including the existing rules and case law which could avoid any perceived inequality between Group Members. As the Court concluded that the orders were not appropriate or necessary to ensure that justice is done in the Class Action, the Court's discretion was not to be enlivened.

² Approximately 1,400 people had registered their interest. A closed class action is brought on behalf of designated group members only – usually those party to a litigation funding agreement.

However, in making those findings, Wigney J said that it does not mean that the Court will not make such orders at some later stage of the proceeding. He also considered that “...in some respects, the Applicants’ Submissions made out a fairly compelling case for reform”. He considered that the ‘grim reality’ is that class actions would not be commenced without litigation funders and as Pt IVA did not address litigation funders (particularly the issue of only some group members being signed up) and while the Courts had the discretion to deal with these issues, it would be preferable for that to occur by legislative reform rather than piecemeal by judicial discretion.

GOING FORWARD

Class actions are now big business, involving both law firms and litigation funders quoted on the ASX. As such, and given the potential returns, their frequency can only increase as every potential claim and cause of action is vigorously investigated. This decision has significant ramifications for all class actions and, in particular, the Class Action.

The establishment of a ‘common fund’ or ‘common funder’ can only increase the prevalence and quantum of class actions. The former by allowing solicitors and funders to bring class actions with only one or two applicants, notwithstanding having had years and numerous opportunities to engender better support. The inability to gain group support for a class action raises questions as to whether such class actions are really brought for the benefit of the group members who, despite having had ample opportunity to pursue their rights, have at best shown a complete indifference or reluctance to participate, and yet proceedings can nevertheless be brought in their name. We also expect a common fund to increase the race to file first, as there would be greater spoils and greater certainty for those that could first obtain the ‘common fund’ order in any dispute.

The increased quantum arises because the 30 - 40% funder’s commission would have to be taken from the entire settlement (rather than only those party to the funding agreement), meaning that the settlement amount will have to increase to account for that increased deduction and leave a reasonable sum for group members.

As a significant factor in the failure of the application was its timing, we envisage that similar applications will be made either later in the Class Action or in different proceedings. Given that perceived inevitability, it probably is a matter that requires legislative reform.

The decision also raises additional issues in the Class Action. The continued funding by ILFP of an open class would be contrary to submissions made to the Court about the inability of the Class Action to continue (at least in its current form) if the application was refused. The Applicants referred to the possibility of closing the class after re-advertising and seeking greater support. However, Wigney J considered that would involve significant difficulties as closing the class would require requisite leave of the court and the Applicants would have the inherent problem of purporting to be representative of the class, while seeking orders that would be beneficial to some and detrimental to others.

We await with interest further developments in this area.

Wotton + Kearney act for the primary insurer of Allco Finance Group.

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