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Money Max may mean more class actions in Australia

BEN RIGBY 09 NOVEMBER, 2016

A landmark decision on litigation funding in Australia threatens to pave the way for more cases to commence, of a larger size, and at a faster rate than ever before.

A landmark decision by the Full Federal Court of Australia to allow "common funds" in class actions, *Money Max v QBE Insurance*, has changed the law, ensuring that everyone who benefits in a class action will be required to contribute to the cost of running the action, rather than only those people signed up via a litigation funding agreement.

Jenni Priestley of **Clyde & Co** told *CDR* that historically the courts had been "reluctant to make common fund orders". Speaking in advance of the decision, Priestley said: "Last year the Federal Court refused to do so in the *Allco* matter," heard in spring 2015.

Speaking then to *CDR*, **Jenny Campbell** of **Allens** noted: "The full Federal Court (sitting as a court of first instance) heard an application for orders that would allow litigation funders to take a commission from all participating class members and not just from those who have signed funding agreements."

The courts elected not to approve a 'common fund' order which, Campbell said, would have made "funding class actions in Australia significantly more attractive". Now the Australian courts have decided to take a fresh tack to the subject.

MONEY MAX CONSIDERED

The case, heard before Justices **Murray, Beach** and **Gleeson**, saw the claimants represented by leading class action litigation firm **Maurice Blackburn**, instructing **Michael Lee SC** of **Level 22 Chambers**, with **William Edwards**, while the defendants were represented by Allens, which instructed **Michael O'Bryan QC** of **Ninian Stephen Chambers** with **Ross Foreman** of **PG Hely Chambers.**

In a joint judgment, the court made it clear that the interests of claimants would be protected by judicial oversight; a key aspect of their decision to allow such orders, as was access to justice.

"A common fund approach may be said to enhance access to justice by encouraging 'open class' representative proceedings as a practical alternative to the 'closed class' representative proceedings which are prevalent in funded shareholder class actions. Open class proceedings are more consistent with the opt-out representative procedure envisaged by the legislature," The court held.

Oversight of the funding commission charged by the funder was additionally safeguarded by a condition that "no class member could be worse off under the orders than he or she would be if such orders were not made".

The onus, therefore, was on those class members choosing to opt-out to be aware of those requirements, knowing a reasonable funding commission at a court-approved rate would be deducted from any settlement.

LITIGATION FUNDING COMES OF AGE

Also influential was consideration of empirical research on litigation funding in class proceedings, showing its use had significantly increased, with Maurice Blackburn deposing "that since 2003 there has only been one shareholder class action in Australia resolved without the involvement of a litigation funder".

As the court said: "[L]itigation funding charges have become a standard part of the costs to be paid by class members in shareholder class actions," adding "it is time that the court gives further consideration to [those class members], in relation to the reasonableness of litigation funding charges".

By allowing litigation funders to charge a "commercially realistic but reasonable percentage funding commission to the whole class", the justices believed that funders would be less likely to bring class actions, just limited to those who had signed up to a funding agreement alone.

That, they said, "should reduce the potential for conflicts of interest" between claimants who were funded and registered as class members, and unfunded class members, as well as between claimant solicitors, and unfunded class members, who were unrepresented by them.

It would also "inhibit competing class actions and avoid the multiplicity of actions which they represent", the court noted, which "cause significant delay, increased costs and wastage of the resources of the parties and the courts".

MARKET REACTION

Herbert Smith Freehills partner and class actions specialist **Ruth Overington** said the decision had a number of ramifications, including an increase in class action litigation.

"The removal of the need for funders to enter into funding agreements eliminates one of the key obstacles for funders when they come to decide whether or not to fund a class action. As a result, we would expect to see more 'open' class actions which will be of a larger size," Overington said.

In a blog, **Clive Bowman** of Australian litigation funder **IMF Bentham** disagreed, noting there were other reasons why that was attractive, chiefly, certainty, "irrespective of whether a common fund order is made, most class actions will ultimately end up being conducted on an open class basis", to achieve finality.

To him, “common fund orders are unlikely to result in more open class, class actions but the availability of such orders might result in more class actions commencing on an open basis”.

Overington said: “There will also be fewer competing class actions being pursued against the same defendant in relation to the same conduct. As a result, we are likely to see funders looking to commence a class action quicker in an attempt to get in before their competitors.”

Bowman, however, phrased that possibility differently, arguing “it seems likely that there will be a ‘beauty parade’ where the legal and funding team with the most experience, financial capacity, claimant support, and offering the most benefits, prevails as the preferred lawyer and funder to conduct and fund the class action”.

“Without the need to sign up a minimum number of claimants to funding agreements to make the case financially viable, funders will instead be looking to make a decision early as to both the merits of the potential case, and the number of affected persons,” Overington countered.

A PARTICULAR RULING

From a **Clyde & Co** perspective, **Dean Carrigan** said that while the decision was “undoubtedly ground-breaking, is not of general application to all current and future class actions,” suggesting that it was a ruling based on particular facts.

Noting that “Australia already has one of the world’s most liberal, developed and active class action and litigation funding environments”, Carrigan said that “this is not a seismic change to the existing landscape”.

Others agreed that there were good reasons to doubt the case would lead to a flood of poorly assessed class actions being backed by funders. While the decision would be welcomed, thanks to the certainty it provided, and the commission to be received, the case, said Clyde’s **Janette McLennan**, does “not necessarily result in a doomsday scenario of class action floodgates opening in Australia, so insurers need not be unduly alarmed just yet”.

Stephen O’Dowd from **Harbour Litigation Funding** agrees there are clear benefits; for him, the main benefit to be gained from securing an early common fund order is a reduction in the costs of the book build, meaning that focus in signing up participants to the class before commencement may no longer be so fundamental.

However, as McLennan notes, “funders will still need to apply rigour about which cases to take on, but there may be more clarity earlier about whether or not an action is likely to be brought”.

O’Dowd agrees, noting in a briefing that: “Class actions in Australia require a significant financial commitment, often over several years, and results are unpredictable even in apparently strong claims.”

POOR CLAIMS CONSIDERED

The idea that poorly assessed claims will arise is not one O’Dowell supports, saying such claims are “more likely to fail, leading to a funder writing off its investment and being liable for the defendant’s costs”.

Equally, as **John Edmond** of Clyde & Co notes: “Not all Australian class actions are funded, and even where they are, the dominant consideration for funders is the relative prospects of successfully bringing the proceeding – although the rate of return on the investment is undoubtedly also an important consideration.”

O'Dowd adds: "The 'floodgates' argument assumes that the take up for common fund applications will be high. This remains to be seen. From a funder's perspective, assessing the pros and cons of a common fund does not appear straightforward."

Money Max, of itself, does not turn cases with limited prospects of success into an attractive funding proposition, although there is always the risk that similar orders are made in other claims over time, says Edmond, this "may cause funders to fund cases that previously would have been considered marginal and would not have secured funding".

Instead, Edmond notes, it may have a chilling effect; if the proportion of recoveries available for distribution to claimants decreases relative to the funds going to funders, this could in fact have a longer-term suppressing effect on the appetite of claimants to participate in class actions – possibly even reducing their number.

A QUESTION OF COMMISSION

Among the questions bearing on funders, following *Money Max,* is the need for them to take decisions on funding cases without knowing what rate of commission will be achievable, because the court ruled that this would be determined by the court, not the funder, notes Overington.

As Campbell herself comments: "The decision accepted the broad notion of a common fund, but not in the way the funder wanted. The court accepted that group members would likely be worse off under the funder's proposal."

",To address that concern, it deferred consideration of the amount of the funding commission to later in the proceedings and will not permit the funder to recover more than it would have recovered if the common fund order was not made."

She adds: "While the acceptance of a common fund approach is likely to have broader implications in the class action landscape, this is a win for **QBE**."

O'Dowd merely agrees that the case is certainly "a further step along the path to increased judicial supervision of funding arrangements", while, as Edmond noted, "some uncertainty remains for the funder, as it is the court that will set the commission rate; and that the rate will only be set later, at the end of the proceedings".

CONCLUSION

Overington said the court considered the need to enhance access to justice and ruled that encouraging open class actions would do so. "This decision is likely the first of many in which the court will have an increasingly vocal say about the role and value of litigation funders in class actions in Australia," she said.

Campbell was more sanguine about that, saying: "'It will remain to be seen how the notion of common fund will develop in subsequent cases and what effect it will have on the broader class actions landscape."

As she notes: "The safeguards attached to this form of common fund approach may not be attractive to funders and may not lead to the opening of the floodgates some have suggested. That said, funders will see the acceptance of the general concept as a positive development and will no doubt look to develop an approach to funding that takes maximum advantage."

Bowman agrees, saying: "There is no reason to think there will be a 'race to the court door' to file class actions." As to whether the case appeals to the High Court, time will tell.

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