Client Alert
December 2019

High Court rules against Common Fund Orders

In March 2019, we reported on decisions of the Full Federal Court and the NSW Court of Appeal which upheld the validity of "common fund orders" (**CFOs**) made by those courts under section 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and section 183 of the *Civil Procedure Act 2005* (NSW) (**CPA**). CFOs require all members of a class to contribute to the cost of funding an action out of any recovery, irrespective of whether the members have signed a litigation funding agreement with a funder agreeing to make such a contribution.

Those courts found that the conferral, by section 33ZF of the FCA Act and section 183 of the CPA, of the power to make any order which is appropriate or necessary to ensure that justice is done and which may be exercised by the court on the court's own motion, extended to the making of a CFO, while also holding that the making of CFOs under each of those sections was an exercise of judicial power or incidental thereto.

As we later reported in May 2019, the unsuccessful appellants in those cases appealed to the High Court of Australia (**HCA**), which heard the appeal in August 2019.

This morning (4 December 2019), the HCA handed down its decision in the two proceedings (*Brewster v BMW Australia Ltd* and *Lenthall v Westpac Life Insurance Services Limited*) and, by majority (per Kiefel CJ, Bell and Keane JJ, with whom Nettle and Gordon JJ agreed), allowed the appeal, proscribing the making of CFOs under section 33ZF of the FCA Act and section 183 of the CPA as currently enacted.

High Court's Decision

The majority found that, although the powers conferred by sections 33ZF of the FCA Act and section 183 of the CPA are broad, they do not extend to the making of a CFO because a CFO is not an order ensuring that justice is done by regulating how the matter is to proceed (which is the question those sections are directed to).

In particular, the plurality concluded that *"it is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court*."

In other words, the question of how an action should proceed in order to achieve a just result (which is what the sections are directed to) is radically different to the question of whether an action *can* proceed at all with or without a CFO.

While the plurality acknowledged the costs and burden associated with a "book build" and the fact that access to justice may be expected to be improved in a general way by the availability of litigation funding, they concluded that it does not follow from those matters that the making of a CFO is either necessary or appropriate to ensure that justice is done in a particular proceeding and, therefore, within the contemplation of sections 33ZF and 183. The majority found that *"there is no warrant to supplement the legislative scheme by judicial involvement to ease the commercial anxieties of litigation funders or to relieve them of the need to make their decisions as to whether a class action should be supported based on their own analysis of risk and reward."*

Gageler and Edelman JJ (dissenting) considered that the High Court ought dismiss the appeals, holding that that a CFO may be appropriate or necessary to ensure that justice is done in a proceeding.

Implications for funders and defendants

Today's decision has profound ramifications for the litigation funding industry and for defendants and may result in a decline in class actions, at least pending a legislative solution.

Without the prospect of a CFO under the present legislative framework, litigation funders will need to revert to book building exercises in order to ensure their returns from each group member (as distinct from funding equalisation orders which distribute the costs equally amongst group members). The decision is also likely to have a significant impact upon continuing proceedings where CFOs are currently in place, while it is also possible that we will see an increase in funding commissions which have been the subject of increasing scrutiny and pressure by courts.

The decision of the majority did not consider whether orders of an equivalent kind are permitted under provisions other than section 33ZF of the FCA Act or section 183 of the CPA.

Legislative solutions?

There is currently a bill before the Victorian Parliament (the *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic)) which proposes to permit the implementation of contingency fees for class actions in Victoria and for the legal costs payable to the plaintiff law firm to be calculated as a percentage of any award or settlement that may be recovered in the proceeding, with that liability being shared among the plaintiff and all group members. This amendment has been described as having a similar effect to a CFO as the contingency fee is shared among the plaintiff and the group members. Given the similarity, it is possible that the Victorian Supreme Court will permit an order equivalent to a CFO in respect of costs funded by a litigation funder where costs funded by a law firm would (in effect) attract the same treatment under the proposed legislation.

If enacted, it is also likely that Victoria will see an upturn in the volume of class actions.

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