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COMPETING CLASS ACTIONS: PERMANENT STAYS AND CLAIM SELECTION

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Legal Briefings – By **Damian Grave, Helen Mould, James Page and Jane Hywood**

The recent decision of the Federal Court of Australia in GetSwift to permanently stay 2 out of 3 competing class action claims and to select the claim allowed to go forward represents a significant development in class action litigation in Australia.

COMPETING CLAIMS

Competing class actions are an increasingly common feature of the Australian class action landscape, especially in the context of securities class actions. Competing actions occur where multiple class proceedings are commenced against a single defendant, involving substantially identical allegations based on the same factual circumstances.

Competing actions present significant challenges for the efficient and cost-effective conduct of class action proceedings, potentially adding substantial cost, complexity and delay to the resolution of claims.

APPROACHES

In jurisdictions such as the United States and Canada, the legislative regime and case law provide a clearer framework for dealing with competing class actions. In Australia, this is a developing area and the relevant principles are far less certain.

The August 2017 decision of the Federal Court in *Bellamy's*[1] highlighted that in some cases it may be appropriate to order a permanent stay of a competing class action, though the Court did not do so in the particular circumstances of that case.

This issue has now received further consideration from the Federal Court, with the handing down this week of Justice Lee's decision in *GetSwift*.[2] On this occasion, the Court has permanently stayed competing claims, permitting only one of three actions to proceed.

The *GetSwift* decision (available here) is likely to have significant implications for litigation funders and plaintiff law firms in Australia, where the market for class action litigation and litigation funding has grown significantly over the last decade.

BACKGROUND

Listed software company GetSwift experienced a decline in its share price of approximately 80% in February 2018. In the weeks that followed, two competing securities class actions were commenced against it, each with the backing of a litigation funder. On 20 February 2018, Squire Patton Boggs filed the first action, with funding from International Litigation Partners (the **Perera Proceeding**). The second action was commenced by Corrs Chambers Westgarth on 26 March 2018, with funding from Vannin (the **McTaggart Proceeding**).

Orders were made requiring the applicants in the Perera Proceeding and the McTaggart Proceeding to put before the Court their proposals for how to deal with the issue of the competing actions, with evidence and submissions on certain matters.

Following this, Phi Finney McDonald sought leave to intervene, flagging that it proposed a third proceeding, funded by Therium (the **Webb Proceeding**).

OPTIONS AND RELEVANT FACTORS

Consistently with *Bellamy's*, *GetSwift* confirms that the available options for dealing with competing class actions include:[3]

1. consolidating the proceedings;
2. making a 'declassing' order under the *Federal Court Act*;
3. ordering a joint trial of all proceedings;
4. staying one or more of the proceedings; or
5. making class closure orders in one or more of the proceedings.

GetSwift confirms that "*there is no dispute that in appropriate circumstances the Court has the necessary power to either stay one or other of the class actions. The issue is whether those circumstances exist*."[4]

In *GetSwift*, the Court took the view that such circumstances did exist, and that the correct course was to permit only one of the three claims to proceed. The Court determined that to allow more than one of the actions to proceed was unnecessary for enforcement of group members' rights, and would cause Court processes to be used in a way that was unfair both to GetSwift and group members by unnecessarily increasing costs.[5]

Of importance going forward, will be the approach taken by the Court in its assessment as to which action should proceed. In this regard, the Court undertook a "*multifactorial comparative assessment*"[6] as to which of the actions was the "*preferred vehicle*"[7] for the claim. The factors considered included:

- the experience of the legal practitioners in each proceeding and the resources available to them;
- the estimated costs associated with each proceeding;
- the state of preparation of each proceeding;
- the financial position of the funders;
- the funders' positions on provision of security for costs;
- the substantive merits of each proceeding;
- the existence of funding agreements;
- potential "moral hazard" in the particular funding structures on offer;
- differences in the cost control measures proposed by the claim proponents;
- public policy considerations;
- potential prejudice to the funders and lawyers associated with the claims not allowed to proceed.

The key criterion, and the determinative factor, was the Court's assessment of the comparative returns available to group members. However, in this regard, the Court emphasised that any "*principled assessment between class actions is not so crude as to be determined by reference only to the relative size of the funding commission spruiked in promotional material*".[8]

In this case, the Court took the view that the funding model proposed in the Webb Proceeding was superior, and would produce a better outcome for group members. The funding model provided that the funding commission would be based on the lesser of:

a. a multiple of the expenses paid by the funder in the proceeding, being 2.2 times if the parties settled within a year or 2.8 times if the parties settled subsequently; or

b. 20% of the net litigation proceeds (ie the settlement sum less approved legal costs).

The Court considered that this approach achieved a better calibration between risk and reward than was the case with the other funding models on offer.

The Court also viewed favourably what it characterised as the openness of the Webb proceeding to adopting "*innovative*" cost control measures such as periodic independent reviews of the reasonableness of the costs incurred and the appointment of court appointed experts in relation to materiality and loss and damage to place opinion evidence before the Court "*in the most efficient and useful way*".[9]

RAMIFICATIONS

The decision by the Federal Court in *GetSwift* to permanently stay competing claims, to permit only one claim to proceed, and to select the claim allowed to go forward represents a significant development.

Notwithstanding that these are case management decisions "*rooted in the particular circumstances of the cases*",[10] they will influence the approach of market participants going forward.

The decision marks a turning point toward a much increased level of competition in the market for class action litigation and litigation funding, and more activist Court supervision of the use of its processes and its protective role in relation to group members.

ENDNOTES

1. *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947.

2. *Perera v GetSwift Ltd* [2018] FCA 732.

3. [88], [105].

4. [166].
5. [345].
6. [328].
7. [330].
8. [7].
9. [328].
10. [6].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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