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COMPETING CLASS ACTIONS: WHEN IS A PERMANENT STAY OF A PROCEEDING WARRANTED?

18 September 2017 | Australia
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Following recent consideration of the issue of competing class actions in Canada and the United States, Australia too is beginning to see the development of a body of jurisprudence regarding the principles to be applied when competing (and substantially identical) class actions are filed against a single defendant based on the same set of circumstances.

The recent *Bellamy's Australia* decision highlights that in certain circumstances a permanent stay of a competing class action in Australia may be ordered. While it was not ordered in this case, if competing open class proceedings based on the same claims are commenced and they do not involve a substantial number of group members having signed litigation funding arrangements in one or both of the proceedings, a court in Australia may be minded to stay one of the proceedings.

Otherwise in the absence of vexation, oppression or an abuse of process, competing class actions (even if substantially identical) will likely continue jointly in circumstances where a court is able to apply specific case management principles which protect the rights of applicants (including their right to choose which plaintiff law firm and funder to contract with) while simultaneously shielding, as far as possible, the respondent from duplicated work and costs.

SUMMARY

For defendants, having to defend multiple and competing class actions arising from the same subject matter is not only inconvenient, it can be a significant drain on corporate resources. This was acknowledged by the New South Wales Supreme Court in a 2016 decision regarding the case management principles to be applied to competing class actions. In that matter, Justice Ball considered that it was still in the interests of justice for two competing class actions (albeit with differently pleaded cases) to be heard jointly, notwithstanding the additional cost burden that such an approach would place upon the defendant company.[1]

Notwithstanding judicial consideration in both Canada and the United States, the question as to how courts would deal with competing class actions framed in essentially identical terms and brought on behalf of identical open classes, however, remained largely unanswered in Australia. In the recent decision *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (***Bellamy's Australia***) Justice Beach of the Federal Court of Australia had the opportunity to consider this issue, when Bellamy's Australia Limited (**Bellamy's**) sought to permanently stay one of two essentially identical open class actions commenced against it.

Beach J ordered that the two competing proceedings could continue but that the class in one of the proceedings be closed. In this way the overlap between group members was eliminated. The two proceedings (one with an open class of group members and one with a closed class of group members) would then be heard by way of a joint trial.

BACKGROUND

Bellamy's is a publically listed Tasmanian company which produces organic milk formula and other related products for infants. In December 2016, Bellamy's informed the Australian Securities Exchange (**ASX**) that its expected revenue for FY17 would be lower than anticipated, following which the price of its shares declined.

Plaintiff law firm Slater + Gordon filed proceedings against Bellamy's on 23 February 2017 alleging that Bellamy's had breached its continuous disclosure obligations by not keeping the market informed in a timely manner as to its lower than expected profit forecast for FY17, and alleging that it engaged in misleading or deceptive conduct (the **McKay Class Action**).

On 8 March 2017, another plaintiff law firm, Maurice Blackburn, filed a class action against Bellamy's (the **Basil Class Action**), which made similar claims to those in the McKay Class Action and which alleged the same causes of action against Bellamy's based on essentially the same alleged facts. Importantly, both the McKay Class Action and the Basil Class Action were open class actions,[2] covering effectively the same claim period and brought on behalf of the same group members.

On 20 March 2017, Bellamy's filed an interlocutory application in both the McKay Class Action and the Basil Class Action seeking to have one or other of the McKay Class Action or the Basil Class Action stayed on the basis that it would be an abuse of process, vexatious and/or oppressive for both class actions to proceed given their essentially identical character and the fact that they were being brought on behalf of the same group members.

THE OPTIONS OPEN TO THE COURT

The following five options were open to the court:

1. consolidate the two proceedings;
2. stay one of the proceedings;
3. make a 'declassing' order under s 33N(1) of the *Federal Court Act;*
4. close one class and leave the other open; or
5. leave both classes open and order a joint trial of the proceedings (the 'do nothing scenario').[3]

THE DECISION

Following consideration of the above options the Court rejected options 1, 3 and 5 at the outset and the question became which of options 2 or 4 ought to prevail. Ultimately, and as set out below, Justice Beach held that the appropriate approach in this matter was to close the Basil Class Action and allow the McKay Class Action to proceed as an open class.[4]

In reaching his decision, Justice Beach made clear that closing one class while leaving the other to continue as an open class would not be the appropriate course in all matters involving competing class actions. Rather, and according to his Honour;

"…but for the fact that in both proceedings more than 1000 group members in each case have committed themselves to litigation funding agreements and retainer agreements with their respective litigation funders and solicitors, I would have permanently stayed one of the proceedings."[5]

In other words, a permanent stay of one proceeding remains a viable (and, in some circumstances, preferable) course for courts to adopt on application by a defendant facing competing class actions framed in essentially identical terms, brought on behalf of identical classes.[6]

The Court was inclined to stay one of the proceedings in circumstances where:

1. "neither of the two proceedings have a substantial number of group members signed up to funding agreements; or

2. only one of the two proceedings has a substantial number of such signed up group members."[7]

However, the Court stated that the context before it did not involve either of these scenarios. The Court noted that in circumstances where a 'very significant' number of group members have made an active choice to enter into contractual arrangements with a specific plaintiff law firm and associated litigation funder, absent any vexation, oppression or an abuse of process, it was 'loathe' to permanently stay one of the proceedings as to do so would deny group members of their right to choose.[8]

It follows that an important component of this decision lies in its elucidation of the principles relating to class closure and the case management principles to be applied in a matter involving competing class actions.

CLASS CLOSURE IN COMPETING CLASS ACTIONS IN AUSTRALIA

On the question of which competing class action should be closed in circumstances where a permanent stay (or other such order) is not in the interests of justice, Beach J considered which proceeding was preferable for unsigned group members. The Court suggested that the following non-exhaustive set of factors (some of which cross-over with considerations applied in the U.S. and Canada) ought to be considered:

1. the experience and resources of the practitioners in each class action;
2. the costs expected to be charged by each plaintiff law firm;
3. the funding terms in each class action (including the position adopted by each funder on the question of security for costs);
4. the order in which the actions were commenced (which is particularly relevant if one proceeding had been on foot a while before the latter was commenced);
5. the number of group members signed up in each class action; and
6. the possibility of a common fund order being made in each class action and the proposed terms of any common fund order.[9]

On balance, Justice Beach found that the appropriate class to close in this matter was the class in the Basil Class Action based primarily on the financial position of the funder and the funding arrangement in place in that proceeding. Nevertheless, the question of class closure will necessarily involve a close examination of the facts of each proceeding in light of the non-exhaustive criteria set out above.[10]

CASE MANAGEMENT OF COMPETING CLASS ACTIONS

Once the question of class closure had been dealt with, Justice Beach considered that the appropriate case management procedures for competing class actions ought to be those which minimise the duplication of work as much as possible.[11] To that end, his Honour decided that:

1. only one counsel team should be briefed for the applicants in both proceedings;

2. the applicants in both proceedings ought to negotiate 'as one' on practical issues such as discovery;

3. there should be a joint trial, with evidence in one proceeding being evidence in the other; and

4. the solicitors for the applicants in both proceedings ought to use reasonable endeavours to progress their respective proceedings in step and consult with one another before taking any key steps in the proceeding, such as preparing and filing evidence or filing or progressing interlocutory applications.[12]

Justice Beach stated that it might also be appropriate to appoint an independent lawyer to review the work undertaken by the applicants' solicitors to ensure the elimination of duplication of costs. While the above mechanisms were designed to reduce the overall costs borne by the group members, the Court also foreshadowed making orders to ensure that the respondent is not exposed to greater cost than would otherwise be the case if there had been only one proceeding on foot.[13]

The full judgment is available here.

ENDNOTES

1. *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited,* [2016] NSWSC 17 at [23].

2. In a securities class action a class will be "open" when the definition of the class includes, for example, all shareholders who purchased securities within a certain time period. A class will be "closed" if the definition of the class limits the shareholders who purchased within the period to those that have also signed a litigation funding agreement with a particular litigation funder.

3. *Bellamy's Australia* at [9].
4. Ibid at [7].
5. Ibid at [8].
6. Ibid at [96].
7. Ibid at [55]
8. Ibid at [54]-[56].
9. Ibid at [71].
10. Ibid at [94].
11. Ibid at [46].
12. Ibid [113]-[116].
13. Ibid [118].

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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