JONES DAY

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COMMENTARY

Disclosure of Litigation Funding Agreements in Australian Class Actions

Key Points

- The Federal Court of Australia practice note dealing with class actions requires that litigation funding agreements be disclosed, subject to redactions to conceal information which might reasonably be expected to confer a tactical advantage on the other party.
- Legal professional privilege is not generally available as a ground to protect the agreement from disclosure.
- However, certain types of clauses in a funding agreement can be redacted due to confidentiality, if disclosure would confer a tactical advantage on the opposing party. This may include:
  - Specified percentage amounts and other potential rewards to which the funder might be entitled;
  - Details of an agreed settlement mechanism that may be able to be exploited for tactical advantage; and
  - Provisions dealing with termination and the consequences of termination of the funding agreement.

Background

In *Coffs Harbour City Council v Australia and New Zealand Banking Group Limited (trading as ANZ Investment Bank)* [2016] FCA 306, Justice Rares was required to rule on interlocutory applications for disclosure of the redacted portions of litigation funding agreements entered into by the applicants, including Coffs Harbour City Council (the "Council"), in six proceedings brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth). Five proceedings were brought against McGraw-Hill Financial Inc and its subsidiary, Standard and Poor's, in respect of ratings given to synthetic collateralised debt obligations ("CDOs") purchased by the Council. Another proceeding was brought against Australia and New Zealand Banking Group Limited ("ANZ"), the vendor of a CDO. The applicants alleged that the respondents breached their duty of care and engaged in misleading and deceptive conduct, breach of contract and breach of their fiduciary duties relating to advice they gave prior to the global financial crisis and the sale of CDOs.

As part of these proceedings, pursuant to Federal Court of Australia, *Practice Note CM17—Representative*

proceedings commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth), 9 October 2013, the Council was ordered to provide ANZ with a copy of any agreement under which a litigation funder, in this case Litigation Capital Partners LLP Pte Ltd (the "funder"), was to contribute to the cost of the proceedings. Paragraph 3.6 of practice note CM 17 provides:[1]

> 3.6 At or prior to the initial case management conference each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party.

The Council argued that it was entitled to redact specific passages in the funding agreement, consistent with the requirements of the order for its production, on the grounds that it was subject to legal professional privilege, or on the grounds that the material sought to be redacted would confer a tactical advantage on ANZ if disclosed.

The Legal Professional Privilege Argument

In concluding that the subject matter sought to be redacted was not subject to legal professional privilege, Rares J reiterated the established position at common law that, in general, funding agreements are not created for the dominant purpose of the giving or receiving of legal advice or of being used in existing or anticipated legal proceedings, and as such are not protected from disclosure. In this case, the funding agreement merely formalised the relationship between the interested parties on the Council's side, being the funder, the lawyer, the members of the class and the representative party. Therefore, it was held that there was nothing to suggest that a claim of legal professional privilege was sustainable.

The Confidentiality Argument

Rares J stated that the rationale for permitting redactions to be made to funding agreements under CM 17 is "the protection of confidential information". Included in this is the premise that information may be confidential if its disclosure would confer a tactical advantage or would reveal the amount of resources available to the funded party, or if it would reveal information contemplated by provisions in other current and draft practice notes. He had already indicated to the Council that some of their redactions, including "boilerplate" clauses, did not appear to have a confidential aspect to them.

However, the funding agreement specified percentage amounts and other rewards available to the funder in certain scenarios. It was considered that if this information were disclosed, the respondents could be in a position to exploit a tactical advantage during settlement discussions. They could potentially use these clauses to structure particular offers which would seek to exploit differences between various interested parties or people in the represented class, which will not always coincide. Therefore, Rares J held that this subject matter was protected from disclosure.

Similarly, provisions of the funding agreement relating to the specific settlement mechanism agreed to by the parties to the funding agreement were also held to be protected, because disclosure would allow for the potential exploitation of the information by the respondents. In its arguments, the Council gave the example that if the opposing party had knowledge of which particular barrister would be briefed under the dispute resolution clause, the opposing party might be able to structure an offer with the knowledge that the barrister would be likely "to act consistently with his or her own inclinations as to approaches to issues".

Finally, the provisions dealing with the circumstances in which the parties could terminate the funding agreement, and the

1 It should also be noted that on 13 January 2016, the Federal Court made a consultation draft class action practice note publicly available for comment, as part of the process of preparing new practice notes. This draft practice note provides a similar provision that any litigation funding agreement disclosed may be redacted "to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding", including "information as to the funds available to the applicant" and information "which might reasonably be expected to indicate an assessment of the risks or merits of the proceeding or any claim in or aspect of the proceeding".

consequences of such a termination, were also held to be confidential, because their disclosure could confer on the respondents "tactical advantages or insights of which they would not otherwise have knowledge".

In conclusion, the court stated that its ruling relating to the redactions dealt only with the situation of the litigation at that specific point in time. For example, in the future the court may be required to determine the appropriateness of the award in the funding agreement (which would make the funding agreement public), or the provisions dealing with settlement or termination may lose their confidential aspect.

Lawyer Contacts

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