JONES DAY

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COMMENTARY

Federal Court of Australia Permits Respondents to Settle Individual Claims of Class Action Members

Key Points

- In some class actions, it may be convenient and cost-effective for the respondent to settle with class members individually. However, respondents have in the past been restrained from making such offers in some situations.
- In *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020 ("*Capic v FMCA*"), the Federal Court of Australia declined to restrain the respondent from making settlement offers to individuals on the basis that the offers were neither unfair nor unjust.
- The Court held that, unless exceptional circumstances are shown, settlement offers made to individual class members are not unfair or unjust if they are in writing, accurately explain the consequences of accepting and not accepting the offer, allow a sufficient period of time for acceptance that permits a genuine opportunity to obtain legal advice and makes it clear that the recipient is entitled to seek and might benefit from independent legal advice.

Background

In May 2016, Ms Capic filed a class action proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) against the Ford Motor Company of Australia Limited ("Ford Australia"). The class action concerned alleged defects in the automatic transmission mechanism ("PowerShift mechanism") in a range of identified models of the Ford Focus, Ford Fiesta and Ford EcoSport, which Ford Australia imported, sold, supplied and distributed in Australia.

Ms Capic claimed relief, on behalf of herself and members of an open class who had purchased the identified models between 2011 and 2016, for breach of a statutory guarantee under the Australian Consumer Law and for misleading and deceptive conduct arising out of the promotional literature distributed by Ford Australia on the PowerShift mechanism. The forms of relief claimed were a refund, damages and/or aggravated damages.

Ms Capic engaged a firm of solicitors ("Firm") on a no-win no-fee basis and without a litigation funder. The Firm maintained a website on which persons visiting could register and, upon doing so, they could, but need not, enter into a fee agreement with the Firm. As at the end of June 2016, 3,462 people had registered on the website and, by the end of July 2016, some 2,001 people had entered into retainer agreements with the Firm.

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Ford Australia's Letters of Offers

Ford Australia wrote to a number of vehicle owners offering a full or partial refund or to allow the owner to exchange the vehicle for another model (in which case the owner was required to pay the difference in price). Each type of offer was in a standard form letter. If a recipient accepted the offer, he or she agreed, amongst other matters, to a confidentiality undertaking and to release Ford Australia, the relevant Ford dealer and associated parties from any claims relating to the vehicle.

Each offer was drafted to give the recipient at least 28 days to consider it.

Since June 2016, each letter of offer also included an information sheet that stated relevantly that:

- a class action has been commenced against Ford Australia;
- accepting the offer will constitute full and final settlement of any claims against Ford Australia and the vehicle owner will not be able to participate in the class action; and
- the vehicle owner "may wish to seek legal advice and may benefit from this".

Perram J accepted that Ford Australia's letters were responses, on each occasion, to the vehicle owner making contact with Ford Australia and/or the dealer rather than, as was contended on behalf of Ms Capic, the letters being at Ford Australia's initiative.

Interlocutory Application

The proceeding before Perram J primarily concerned an interlocutory application brought by Ms Capic, which sought, by injunction, to restrain Ford Australia from sending the offers of settlement.

Ms Capic also sought an injunction to restrain Ford Australia from communicating with class members who were clients of the Firm and sought to impose a protocol by which Ford Australia would need to communicate with class members.

Legal Principles

In dealing with Ford Australia's offers to individual vehicle owners, Perram J found guidance in the Federal Court's decision in *Courtney v Medtel Pty Ltd* [2002] FCA 957; (2002) 122 FCR 168 ("*Courtney*"). In *Courtney*, Sackville J (as His Honour then was) ultimately granted an injunction restraining the respondents in the class action from making settlement offers for a period of time.

Perram J applied Sackville J's finding that s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) (the general power provision under Part VIA) allows the Court "to constrain or regulate, in appropriate circumstances, communications between a respondent and unrepresented [class] members". Perram J found that the role of such orders was supervisory, that is, to prevent unfairness or injustice. In this sense, His Honour found that the use of s 33ZF(1) in the context of settlement offers should mirror provisions in Part IVA that provided for the making of supervisory orders in specific contexts, such as ss 33X (Notice to be given of certain matters) and 33V (Settlement and discontinuance—representative proceeding). His Honour also noted from *Courtney* that "unfairness and injustice are not limited to unlawful behaviour". Further, it is the interests of the non-party class members which must be considered, "not the interests of those running the class action".

His Honour then cited, with approval, the standards that Sackville J had held in *Courtney* should generally be met in relation to settlement offers, ("*Courtney* standards"), namely:

- the offer and any accompanying material should be in writing;
- the documentation should accurately explain the consequences of accepting and not accepting the offer;
- the offer should allow a period for acceptance that is sufficient for the class member to obtain legal advice, should the class member wish to do so; and
- the documentation should make it clear that the class member is entitled to seek and might benefit from independent legal advice.

Decision

Applying the *Courtney* standards to Ford Australia's offers, Perram J found that the additional notice and the fact that each offer was drafted to provide at least 28 days for acceptance, meant that the standards were met. His Honour then expanded upon Sackville J's standards and stated at [23]:

> There may be cases where a more rigorous regime may be necessary. As is often the case, context is everything. If the [class] members are definitionally under some disability relating to education or cognition, plainly a different approach may need to be taken.

Perram J addressed a number of submissions as to specific disadvantages or vulnerabilities that allegedly characterised class members. It was submitted on behalf of Ms Capic that many of the class members:

- may be "desperate and vulnerable";
- lacked bargaining power in relation to the offers;
- were unaware of their rights under the Australian Consumer Law; or
- were not adequately informed about consequences of accepting Ford Australia's offer and were not encouraged to obtain legal advice.

Perram J rejected each of these characterisations on the basis of the evidence before him. With respect to the first two submissions, His Honour referred to the fact that the class was composed of both retail and wholesale purchasers and the relative affluence connoted to the owners by the types of cars the subject of the class action.

In contrast, His Honour accepted Ford Australia's submission as to characterisation. His Honour held at [26]:

> On the other hand, Ford pointed to some elements of the context which it said were important. It was, for example, inevitable according to Ford that people who felt their vehicle was defective would return it to the dealer from which it had been purchased and seek its repair or replacement, for vehicles generally come with warranties. That initial return of the car might engender a series of further returns and escalating, or at least continuing, disputation. It was this process which, according to the evidence, might lead to an offer eventually being made. A critical aspect of this process was that it was initiated by the customer, not Ford. It is not the case, as it was by contrast in *Courtney*, that Ford is seeking to contact [class] members to settle their claims. Rather, in the real world Ford has to deal with complaining customers as it has to be entitled, so it was submitted, to resolve their complaints. The presence of the class action, although not irrelevant, ought not to be permitted to obscure that aspect of the relationship.

Having found that Ford Australia's offers had met the *Courtney* standards and that there were no exceptional circumstances, Perram J dealt with a number of other submissions made on behalf of Ms Capic. His Honour rejected all of them on the basis that they did not impinge upon principles of fairness or justice so as to provide a basis upon which the Court could exercise its power under s 33ZF.

Accordingly, Perram J declined to make the injunction restraining Ford Australia from making the offers.

By the time the application was heard, Ford Australia indicated that it had no desire to communicate with the Firm's clients and was now in a position not to do so. Given that the offers were made in communications started by vehicle owners, Perram J found that a protocol restraining Ford Australia from initiating contact was unnecessary. As such, the other applications were also dismissed.

Ramifications

The Federal Court's decision in *Capic v FMCA* provides support to respondents' ability in class actions to deal with individual complaints on a case-by-case basis. In most situations, if offers to individuals are made in the course of communications initiated by potential class members and they meet the *Courtney* standards, the respondent will be protected from a restraining injunction. Accordingly, care must be taken in the wording of offers.

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For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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