JONES DAY

COMMENTARY

JUNE 2018

IN SHORT

The Situation: Competing class actions, particularly in relation to shareholder claims, have increased in Australia and imposed unnecessary costs on respondents. In *Perera v GetSwift Limited* [2018] FCA 732, Lee J of the Federal Court of Australia was tasked with managing three competing class actions.

The Result: His Honour ultimately stayed two class actions while allowing the third to continue.

Looking Ahead: The judgment provides useful insight into the various ways in which a court might deal with competing class actions, as well as the justifications and sources of power that may be relied upon to permanently stay a class action.

Respondents in securities class actions should be aware that:

- The judgment in *GetSwift* is the first time that the Federal Court has dealt with competing shareholder class actions by preventing one or more of the class actions from progressing.
- It remains to be seen whether this will become the norm, although staying competing class actions while allowing a single class action to continue may prove less costly and time consuming for respondents.
- Justice Lee showed a clear preference for the making of a common fund order rather than simply implementing the terms of the funding agreement, and requested each party to specify the details of the common fund order to which their funder would agree.
- The decision shows a growing preference for common fund orders in securities class actions.

Two class actions had been commenced against GetSwift—one represented by McTaggart and the other by Perera. The Perera class action comprised 103 class members, while the McTaggart action comprised 441. The class members in both proceedings had entered into funding agreements with different litigation funders. Justice Lee case managed the two actions jointly and eventually permitted each applicant to file submissions as to why, if only one class action were to proceed, it should be their action. Before this issue was resolved, a prospective third applicant, Webb, intervened in the proceedings and later filed third class against GetSwift under Part IVA after being granted leave to do so by Lee J. His Honour was content for each of the three applicants to make submissions on the way in which the Court should proceed; the parties' submissions were premised upon the high likelihood that the matter would settle.

> His Honour decided that the relevant power in this case was the Court's jurisdiction to order a stay where there is an abuse of process.

Powers of the Court

Justice Lee noted that there were generally five options open to courts to rely upon to deal with competing class actions: (i) consolidating the proceedings; (ii) closing the class in all but one of a number of competing class actions; (iii) allowing a joint trial; (iv) staying proceedings; and (v) ordering that a proceeding not continue as a class action under s 33N of the *Federal Court of Australia Act 1976* (Cth), otherwise known as de-classing proceedings. His Honour then identified three appropriate responses to dealing with the competing class actions in this case: (i) staying two proceedings and allowing a third to continue; (ii) de-classing two proceedings and allowing a third to continue; or (iii) the novel approach of relying on the court's equitable jurisdiction to grant an injunction to prevent two of the class actions from proceeding while allowing a third to continue. His Honour ultimately found that the best way forward was to permanently stay the class actions filed by Perera and McTaggart, while allowing the class action brought by Webb to continue.

Justice Lee outlined that there were multiple sources of the Court's power to order a stay of two class actions and the continuation of the other. Ultimately, his Honour decided that the relevant power in this case was the Court's jurisdiction to order a stay where there is an abuse of process, although alternative sources for the power to permanently stay class action proceedings existed in the plenary power under s 22 of the *Federal Court of Australia Act* and the power to de-class a proceeding under s 33N, in addition to equitable relief.

In justifying this approach, his Honour noted that the continuation of the Perera and McTaggart class actions would constitute an abuse of process because they would bring the administration of justice into disrepute for the following reasons: (i) they were not necessary to enforce the substantive rights of the group members; (ii) they would expose group members to unnecessary costs; (iii) they would be unfair to the defendant; and (iv) allowing them to continue would be contrary to the overarching purpose to as enshrined in s 37M of the *Federal Court of Australia Act*. The fact that Perera and McTaggart had brought bona fide claims was not enough to prevent Lee J from finding that their actions would constitute an abuse of process. Furthermore, any disadvantage suffered by the applicants in the stayed class actions was ameliorated by the fact that they were able to pursue their claims as group members in the remaining class action.

Relevant Considerations in Selecting Which Class Action Continued

The parties raised a number of arguments to assert why their class action ought to be the one that continued, including the experience of the practitioners and the resources available to them, the state of preparation of each class action, the resources of the funder and their proposals for security for costs, the merits of the cases of the individual applicants, the number of funded group members that had signed funding agreements or retainers, measures for controlling legal costs and expert costs. However, the main factor that determined who would bring the proceeding was the funding model. In assessing the funding model, his Honour paid particular consideration to the common fund order proposed by each party.

Justice Lee reasoned that Mr Webb had the most desirable funding model. Mr Webb's legal representatives had negotiated with their funder that the funder would agree to the court making a common fund order that they be paid the lesser of:

- a multiple of the expenses that the funder had paid in the proceeding (being 2.2 times if the parties enter into a settlement agreement on or before 12 April 2019, or 2.8 times if there is a successful resolution after 12 April 2019); or
- 20 percent of the net litigation proceeds (e.g., the settlement sum less approved professional fees and disbursements).

The funder of the Perera class action sought a commission ranging between 25 to 40 percent of any favourable settlement or judgment award and also indicated a willingness to accept a common fund order for the lesser of 25 percent of net proceeds or 22.5 percent of gross proceeds. The funder of the McTaggart class action had agreed to accept between 10 and 30 percent of the proceeds of any settlement or judgment award, based on the duration of the litigation, and also indicated a willingness to accept a common fund order on basically the same terms.

The Webb funding model was found to be preferable as it had the advantage of producing a direct correlation between the amount ventured and the likely return. The Webb proposal had other novel elements. First, a referee would be appointed to monitor costs on an ongoing basis rather than just review at the end of the litigation, and secondly, the funder was prepared to accept the appointment of a joint expert or a court-appointed expert in relation to loss causation and quantification of loss.

THREE KEY TAKEAWAYS

1. The decision in *GetSwift* is a welcome development that sets out a way forward for bringing competing class actions under control.
2. Allowing single class actions to continue may prove less costly and time consuming for respondents.
3. As a case management decision, his Honour's reasoning does not necessitate that future judges will follow suit and order permanent stays to resolve competition among class actions. However, respondents now have precedent for seeking a stay in relation to competing class actions.

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