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OPT-IN CLASS ACTIONS NOT PERMITTED IN AUSTRALIA

In *Larsson v WealthSure Pty Ltd* [2013] FCA 926, a class action had been commenced against WealthSure Pty Ltd in relation to financial services provided by an authorized representative of WealthSure, Mr Oberg.

Members of the group on whose behalf the representative proceedings were commenced were identified by reference to three criteria:

1. Persons who were clients of Mr Oberg and who, between November 2008 and May 2012, provided monies to Mr Oberg to invest on their behalf;
2. Persons who, by reason of matters referred to in the pleadings, suffered loss and damage as a consequence of providing monies to Mr Oberg to invest; and
3. Persons who "have appointed" Maddocks Lawyers to act for them in the proceedings.

The third criteria was subject to challenge on the basis that it impermissibly allowed for an opt-in approach to class actions.

BACKGROUND: OPT-IN AND CLOSED CLASS GROUP DEFINITIONS

The class action regime under Part IVA of the *Federal Court of Australia Act 1976* (Cth) requires that the group on whose behalf the proceedings are being brought must be defined in the pleadings but there is no need to identify particular group members. Further, group members do not need to consent to their inclusion in a class action, but group members must be given an opportunity to opt out, or exclude themselves, from the proceedings.[1]

This open form of group definition, although specifically adopted as a way to provide access to justice, was problematic for litigation funders. Litigation funders recover a proportion of group members' damages pursuant to a contractual arrangement. Consequently, litigation funders sought to limit or control who was able to be part of a class action in Australia so as to prevent free-riding, i.e. participating in the class action but not being required to pay a share of their recovery to the funder. The

mechanisms employed were an opt-in group definition, which was rejected by the courts, and a "closed class" definition, which was ultimately accepted by the courts.

In *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, a shareholder class action sought to employ the following group definition:[2]

> This proceeding is commenced by the Applicant on its own behalf and on behalf of the other persons for whom the solicitors for the Applicant have instructions to act at any particular time, who at some time during the period between 20 September 2002 and 26 May 2003 inclusive ... acquired an interest in shares in Aristocrat and who suffered loss and damage by or resulting from the conduct of Aristocrat referred to below.

It was a term of the retainer agreement that the person also enter into a funding agreement with Insolvency Litigation Fund Pty Ltd, which was a wholly owned subsidiary of IMF (Aust) Ltd.

Justice Stone identified at least two grounds for objection to the above group definition. First, rather than being able to be a member of the group without taking any positive step, a person is required to opt in to the group by retaining a specified firm of lawyers. This is antithetical to an opt-out procedure.[3] Second, the court found it an extraordinary proposition that the group definition should be used to confine a group to the clients of one solicitor. Stone J stated that there was no support in principle or authority for this proposition, and it was repugnant to the policy of Part IVA of the *Federal Court of Australia Act 1976* (Cth).[4]

However, the use of a "closed class" method of group definition was permitted by the Full Federal Court of Australia in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275. A closed class is where the group membership is defined, not just by their being a member of the group who claims a right to a remedy, but by a limiting characteristic, such as having also entered into a funding agreement with a litigation funder or a retainer with a particular law firm, prior to the commencement of the class action. In *Multiplex*, the represented group was defined, inter alia, on the basis that they "had as at the commencement of the ... proceeding entered a litigation funding agreement with International Litigation Funding Partners, Inc. (ILF)."[5]

Justice Jacobson considered the group definition in the *Aristocrat* class action and found that it impermissibly defined the group by reference to persons who retained a specific law firm both before and after the commencement of the relevant proceeding.[6] Individuals were able to take a positive step that would enable them to become part of (i.e. opt in) a class action already on foot. A group definition framed that way was inconsistent with one or more sections of Part IVA and therefore would not be permissible.[7] This, Justice Jacobson observed, was quite different from the *Multiplex* class action group definition, which limited the group at the time the proceedings were commenced.[8] As such, in the *Multiplex* class action, there was no possibility of an individual opting in to existing proceedings.

VALIDITY OF CRITERIA BASED ON GROUP MEMBERS APPOINTING PARTICULAR SOLICITORS

Counsel for the applicant in *Larsson v WealthSure Pty Ltd* submitted that the third criterion in the group definition should be read as a reference to persons who had, at the date of commencement of the proceedings, directly appointed Maddocks Lawyers to act for them, so that the reasoning in *Multiplex* applied and the reasoning in *Aristocrat* did not.

Justice Buchanan had difficulties with this reasoning. The language used to define the group clearly allowed the possibility of joining the group by appointing Maddocks Lawyers to act, even after the proceedings were commenced. The situation was analogous to *Aristocrat* and not *Multiplex*.

Two other circumstances were taken into account by the judge. It was the case that one of the persons identified as a group member did not appoint Maddocks Lawyers until after the proceedings were commenced. Further, the applicant and all other group members had changed solicitors. Maddocks Lawyers were no longer appointed to act for them. The applicant contended that the third criterion was

nevertheless satisfied by all but one of the group members at the time the proceedings were commenced. However, the judge thought that it could also be argued that the condition required by the third criterion was a continuing one. On that view, no member of the group satisfied the third criterion.

Consequently the applicant was prepared to amend the pleading to make it comply with the approach in *Multiplex*.

DISCONTINUANCE OF CLASS ACTION

Having identified the difficulties that the class action faced due to an impermissible group definition, Justice Buchanan turned to consider section 33N(1)(b) of the *Federal Court of Australia Act 1976* (Cth) which provides for a class action to be discontinued if it is in the interests of justice to do so because all the relief sought can be obtained by means of a proceeding other than a class action.

Justice Buchanan observed on a number of occasions that the claims pressed by group members would require evidence of individual circumstances, including the advice furnished to each by Mr Oberg and the loss suffered.[9] Further, the only significance of the proceedings remaining as a class action was that group members other than the applicant would be immunised from the possibility of a costs order in favour of the respondent if the case with respect to that group member was unsuccessful.[10]

Justice Buchanan found that:[11]

> the proceedings in their present form are flawed. I have given consideration to whether I should permit them to be amended to overcome those flaws but, ultimately, I think that the proceedings are not by their nature proceedings which are innately suitable to proceed as representative proceedings.… The proceedings are, in reality, proceedings which seek to vindicate the individual interests of a limited and known group of persons who might ordinarily be expected to advance their claims as applicants in their own right.

His Honour further found that the costs protection for group members did not favour the continuation of the proceedings as a class action.

LAWYER CONTACTS

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ENDNOTES

1 Sections 33E, 33H and 33J of the *Federal Court of Australia Act 1976* (Cth).

2 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 at [3].

3 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 at [117].

4 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 at [126].

5 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at [44].

6 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at [167]–[168].

7 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at [142].

8 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at [142]–[143].

9 *Larsson v WealthSure Pty Ltd* [2013] FCA 926 at [15], [40].

10 Section 43(1A) of the *Federal Court of Australia Act 1976* (Cth).

11 *Larsson v WealthSure Pty Ltd* [2013] FCA 926 at [42].