DECEMBER 2013

CAN DISCONTINUED CLASS ACTIONS BE RECONSTITUTED IN THE FEDERAL COURT OF AUSTRALIA?

KEY POINTS

- Class actions that are discontinued pursuant to s33N of *Federal Court of Australia Act 1976* (Cth) ("FCA Act") can be reconstituted as class actions through the Federal Court setting aside the interlocutory orders.
- Setting aside the order is a matter of discretion. The court's reasoning suggests that the discretion should not be exercised unless there has been some change to the nature of the proceedings so that the earlier reasoning which supported discontinuance was no longer valid.

INTRODUCTION

Meaden v Bell Potter Securities Limited (No 6) [2013] FCA 1176 involved an application to vacate an order made under s33N of the FCA Act which had the effect of discontinuing the proceedings as a representative proceeding, i.e., class action. The question to be determined by the court was whether a proceeding can be reconstituted as a proceeding under Part IVA after a 33N order has been made and, if so, whether an applicant who was not a group member be the representative of a reconstituted Part IVA proceeding.

BACKGROUND

On 27 April 2012, Edmonds J ordered that the proceeding no longer continue under Part IVA of the FCA Act as a representative proceeding.[1] Justice Edmonds found that a trial of an action based on evidence from and concerning the representative party Ms Jillian Meaden would not determine any issue of sufficient significance to render it a process that had any real utility for resolving group members' claims. The basis for the order was ss33N(1)(c) and (d) of the FCA Act which provide:

1 *Meaden v Bell Potter Securities Limited (No 2)* [2012] FCA 418.

> (1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:
> ...
> (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
> (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

An application for leave to appeal this order was refused by Emmett J, who stated at the conclusion of his reasons that:

> It will always be open to the applicant, or to another claimant, to seek to have the proceedings reconstituted as a proceeding under Part IVA after the criticisms that have been made of the statement of claim and the present constitution of the proceeding have been addressed.[2]

Section 33P of the FCA Act provides that where the court makes an order under s33N that a proceeding no longer continue under Part IVA, the proceeding may subsequently be continued as a proceeding by the representative party on its own behalf against the respondent. On application of a person who was a group member for the purposes of the proceeding, the court can order that person be joined as an applicant to the proceeding.

Accordingly, the proceeding was continued by the applicant Ms Meaden, who was the original representative party, against the respondent. On 1 November 2012, His Honour made an order joining 43 persons, being group members to the initial proceeding, and a further 25 persons, including Mr Brett Tyack, as applicants, making it a multi-applicant proceeding.

On 19 April 2013, the applicants filed and served the interlocutory application which sought that:

- the order under s33N of the FCA Act be vacated;
- further or in the alternative that the proceeding continue as a representative proceeding under Part IVA of the Act;
- that each present applicant (other than Brett Tyack) be given leave to discontinue as applicants and be regarded as group members represented by the remaining applicant, Mr Brett Tyack; and
- that Mr Tyack have leave to file an amended application and second further amended statement of claim.

POWER TO RECONSTITUTE

The respondent submitted that the court did not have the power to convert the proceeding into a representative proceeding under Part IVA of the FCA Act after it had made an order under s33N. Alternatively, if the court had the power, it should not exercise its discretion to vacate the order it previously made.

The applicants submitted that while there is no express power allowing for the reconstitution to a representative proceeding, there were a number of plenary powers, including ss23, 33ZF, and 37P(2) of the FCA Act and rr1.21, 1.31(2) and 1.32 of the *Federal Court Rules 2011* (Cth) ("the FCR"), which would permit the orders. The respondents disagreed and set forward arguments against the use of each of the heads of purported power.

Justice Edmonds chose not to utilise any of the above powers and instead was satisfied that r39.05(c) of the FCR, which allows for an interlocutory judgment or order to be set aside, provided sufficient power for the court to set aside or vacate the s33N order as requested in paragraph (a).

2 *Meaden v Bell Potter Securities Limited (No 3)* [2012] FCA 739 at [15].

In relation to paragraph (b) above, his Honour concluded that he was not satisfied that the court had power to make such an order. His Honour followed the analogous case of *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* [1999] FCA 1161.

Further, although s33ZF could not be used when a representative proceeding was not on foot, once the s33N order was vacated, the court could then rely on s33ZF(1) to appoint a group member as representative of the group in place of Ms Meaden. However, this power did not extend to appointing persons who were not group members such as Mr Tyack as the representative party. Mr Tyack was joined as an applicant when the proceeding ceased to be a Part IVA proceeding and became a multi-applicant proceeding. This did not provide him with the status of group member as the class had already been closed. In effect, the order requested in paragraph (c) above sought to allow Mr Tyack to "opt in" as a group member after the commencement of the proceedings. His Honour found that making such an order was not within the court's power.

DISCRETION TO RECONSTITUTE

Justice Edmonds indicated that, although the court had the power to make the order sought in paragraph (a), the effect of such an order would be to reconstitute the proceeding with the original representative applicant. As nothing had changed in regards to the unsuitability of that representative party, he must refuse to exercise the court's discretion in vacating the order.

His Honour further opined that if the court did have the power to make the orders sought in paragraph (c), the court's discretion should not be used to appoint Mr Tyack as group representative. It was accepted, however, that the court would have considered the issue of discretion for another group member to be appointed representative. The question of whether this discretion would be exercised could not be contemplated further without knowledge of the identity of this hypothetical group member, as the decision would ultimately depend on their suitability to be made representative of the group and whether the trial of their action will determine for all group members the common questions.

LAWYER CONTACTS

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.

John Emmerig
Sydney
+61.2.8272.0506
jemmerig@jonesday.com

Michael Legg
Sydney
+61.2.8272.0720
mlegg@jonesday.com