



Australian Lawyers with Financial Interest in Litigation Funder Restrained from Acting in Class Action

- In July 2014, in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3)* [2014] VSC 340, Ferguson JA of the Supreme Court of Victoria found there was a serious risk of a conflict of interest where a legal practitioner was a sole director and sole shareholder of the lead plaintiff in a securities class action. Consequently the legal practitioner was restrained from acting for the lead plaintiff.¹
- On 26 November 2014, in the case of *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 (“*Banksia Securities*”) Ferguson JA found that a solicitor and senior counsel with a pecuniary interest in the outcome of the case, beyond their legal fees, should be restrained from acting for the lead plaintiff. The concern was that the substantial (direct and indirect) shareholding of the two legal practitioners in the litigation funder which was funding the class action may impinge, or have the appearance of impinging, on the integrity of the judicial process. In particular, “the practitioner may not fulfil or may not be seen as fulfilling their obligations to the Court”.²
- *Banksia Securities* is illustrative of the Supreme Court of Victoria’s continuing willingness to restrain a legal practitioner from acting so as to safeguard the proper administration of justice, and the appearance of justice, where a legal practitioner

has a financial interest in litigation over and above the legal fees that the practitioner will earn from the litigation.

Background

Mr Laurence John Bolitho, the lead plaintiff in a securities class action initiated in December 2012 against Banksia Securities Limited, was being represented by Mr Mark Elliott (as instructing solicitor) and Mr Norman O’Byrne SC. The litigation funder is BSL Litigation Partners Limited (“BSL”) of which Mr Elliott is secretary and one of its three directors. Mr O’Byrne’s wife and Mr Elliott (through his superannuation fund and another company he controls) are major shareholders in BSL, with each holding about 45 percent of the shares. Before the litigation funder was established, Mr Elliott agreed to indemnify Mr Bolitho against any costs or liabilities arising out of his role as lead plaintiff and they later entered into a “no win, no fee” costs agreement which contained a 25 percent uplift fee. After apparently failing to find an existing litigation funder to fund the class action, Mr Elliott arranged for the establishment of BSL. BSL adopted the same retainer agreement as between Mr Elliott and Mr Bolitho and each group member was given the opportunity to enter into an agreement with BSL. The litigation

funding agreement provides that, upon a successful resolution of the dispute, BSL is entitled to up to 30 percent of any recovery and to be reimbursed for the costs incurred in the litigation by BSL.

Banksia Securities Limited made an application to the court to restrain Mr Bolitho from retaining both Mr Elliott and Mr O'Bryan in the class action. Mr Bolitho sought to oppose the application and continue his retainer with Mr Elliott and Mr O'Bryan. However, the court's inherent jurisdiction allows for the restraining of the lawyers, not the restraining of litigants, and so the application was dealt with on that footing.

The court accepted that Mr Bolitho had received independent legal advice about the funding agreement and the intersecting interests between the litigation funder (BSL), Mr Elliott, and Mr O'Bryan. Mr Bolitho also gave an undertaking that he would seek independent advice concerning any settlement offer if one was made.

Restraining Legal Practitioners from Acting

Ferguson JA made the following observations about the test applicable to determining whether to restrain a legal practitioner:³

- The test is whether the hypothetical observer (a fair-minded, reasonably informed member of the public) would conclude that the proper administration of justice requires that a lawyer should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.
- The jurisdiction is exceptional and is to be exercised with caution.
- Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause.
- The timing of the application may be relevant, in that the cost, inconvenience, and impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief.

Her Honour further noted that one of the circumstances in which restraint of the legal practitioner may be warranted is where the practitioner has a financial interest in the litigation

over and above the legal fees that he or she will earn from the litigation: the concern being that the practitioner may not fulfill or may not be seen as fulfilling their duty to the court.

Regulatory Framework

Ferguson JA noted that there is a regulatory framework for litigation funders which requires funders to maintain adequate practices for managing conflicts of interest.⁴ While the definition of "litigation funding scheme" does not include a lawyer or legal practice that provides services on a "no win, no fee" basis,⁵ the Australian Securities and Investment Commission ("ASIC"), in its Regulatory Guide, contemplates that a lawyer may have "an interest in the litigation funder of proceedings in which they are retained" so long as adequate conflict avoidance procedures are in place.⁶ However, any such arrangement is still subject to the lawyer fulfilling their ethical duties to their client and to the court.

Pecuniary Interest in the Outcome of the Case

After reviewing the facts known to the hypothetical observer, Ferguson JA concluded that this was not merely a case where the legal practitioner had an interest in protecting his fees under a "no win, no fee" arrangement; rather, Mr Elliott had an interest in the *subject matter* of the litigation and such an interest is prohibited at common law.⁷ Her Honour held that any litigation funding agreement success fee arising from the class action would benefit Mr Elliott (though not in his capacity as a solicitor in the same proceedings). In the circumstances, Ferguson JA considered that the 45 percent interest in the litigation funder (as well as the quantum of the claim) took the facts "beyond something that might be seen as insufficiently significant to give rise to concern".⁸ Furthermore, the fact that Mr Elliott was wearing "a number of hats" (as both solicitor for Mr Bolitho and director and secretary of BSL) increased the likelihood of a conflict arising.

The court held there was a risk (or perceived risk) that Mr Elliott's ability to act objectively and independently in discharging his duty as a solicitor would be compromised in view of his substantial financial interest in the outcome of the class action, thus adversely affecting the integrity of the judicial process. The 45 percent interest of Mr O'Bryan's wife in BSL further impacted the position of Mr Elliott, because it meant that Mr Bolitho was not represented by any independent

senior lawyers unconnected to BSL. On balance, Ferguson JA found that the restraint of Mr Elliott would not delay the class action, having regard to the timing of the application (early in the proceeding) and the fact that the litigation funding agreement contemplated the replacement of Mr Elliott. Therefore the public interest consideration in allowing a party to choose their own lawyer was outweighed by the serious risk of a conflict of interest.

In relation to the position of Mr Bolitho's senior counsel, Ferguson JA came to the view that Mr O'Bryan should similarly be restrained from representing Mr Bolitho in the proceeding. Her Honour noted there would be a real risk to the proper administration of justice if Mr O'Bryan were to continue representing Mr Bolitho, irrespective of the fact that the relevant shareholder was Mr O'Bryan's wife (not Mr O'Bryan himself). The court concluded that Mr O'Bryan's family's significant financial interest in BSL would lead the hypothetical observer to perceive that his independence as an officer of the court may be compromised. It is particularly noteworthy that Ferguson JA considered that the risk of conflict was not sufficiently assuaged by the legislative protections in place which make class action settlements subject to court approval and allow a court to make appropriate orders to ensure justice is done in the proceeding.⁹

Ferguson JA noted that in reaching the conclusion that she did, she should not be taken to have formed any view about whether either Mr Elliott or Mr O'Bryan breached or were likely to breach their statutory duties to the court or any professional conduct rule. Her Honour also refrained from making orders as although Mr Elliott and Mr O'Bryan were aware of the application they were not represented at the hearing.

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Claire Goulding, a summer clerk in the Sydney Office, assisted in the preparation of this Commentary.

Endnotes

1. See Jones Day Commentary, "Litigation for Profit in Australia-Court Imposes Limits Where Serious Conflicts of Interest Exist" (August 2014) <<http://www.jonesday.com/Litigation-for-Profit-in-AustraliaCourt-Imposes-Limits-Where-Serious-Conflicts-of-Interest-Exist-08-14-2014/>>.
2. *Bolitho v Banksia Securities Limited* (No 4) [2014] VSC 582, [19].
3. See *Kallinicos v Hunt* (2005) 64 NSWLR 561, 582-583, *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* (No 3) [2014] VSC 340, [39].
4. *Corporations Act 2001* (Cth) s 911A(2)(k); *Corporations Regulations 2001* (Cth) reg 7.6.01AB(3).
5. *Corporations Regulations 2001* (Cth) reg 5C.11.01(1)(b)(vi).
6. Australian Securities and Investments Commission, *Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest*, Regulatory Guide 248 (as at April 2013) RG 248.13(b).
7. See *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186, 203.
8. *Bolitho v Banksia Securities Limited* (No 4) [2014] VSC 582, [52].
9. *Bolitho v Banksia Securities Limited* (No 4) [2014] VSC 582, [48(y)] [57(w)], [62]. See *Supreme Court Act 1986* (Vic) ss 33V, 33ZF.

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