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COMMENTARY

Class Action Against Government Settles–Plaintiff Pays Defendant's Costs

Key Points

- Class actions against governments and public authorities following natural disasters and other incidents are becoming increasingly frequent in Australia.
- In 2010, a class action was brought against the State of Victoria in relation to claims following an outbreak of an abalone disease along the Victorian coast in 2006. The class action was unsuccessful at trial and the plaintiff appealed to the Victorian Court of Appeal. Prior to the appeal being heard, the class action was settled on the basis that the plaintiff would pay $2,570,000 to the State in relation to its costs.
- The Victorian Supreme Court's judgment approving the settlement provides guidance on the issues that need to be addressed where the plaintiff is to pay the defendant's costs. In particular, where a settlement follows a loss by the plaintiff at trial, the court has to pay particular regard to the tension that can arise between the interests of the litigation funder and that of the class in pursuing a settlement rather than an appeal.

Background

In 2006, abalone and abalone habitats along the western and central parts of the Victorian coast were infected with a herpes-like virus resulting in a disease known as Abalone Viral Ganglioneuritis (the "disease").

In November 2010, a class action pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) (the "Act") was commenced on behalf of Victorian abalone licence-holders, abalone divers and others affected by the outbreak of the virus and disease. The representative party was Regent Holdings Pty Ltd ("Regent"), which held an Abalone Fishery Access Licence. The defendants to the proceedings were the State of Victoria and Southern Ocean Mariculture Pty Ltd ("SOM"), which operated an abalone aquaculture farm alleged to have been the source of the outbreak and spread of the virus. The plaintiff and all group members had entered into litigation funding agreements with Omni Bridgeway SA which, in return for 40 percent of any amounts received from the litigation, agreed to be responsible for:

- paying the plaintiff's lawyer's professional costs;
- reimbursing the plaintiff's lawyer for disbursements; and
- any adverse costs order against Regent, including security for costs.

The claims against SOM were compromised by a settlement approved by the Court pursuant to section 33V of the Act on 18 September 2013 (the "SOM Settlement"). All group members consented to the terms of the settlement which are not publicly available. The plaintiff's lawyers informed the group members that the proceeds of the proposed settlement would be used to pay the litigation funder, security for the State's costs amounting to $2,570,000 and the plaintiff's lawyer's legal fees. The group members were also informed that following such payments, it was unlikely they would receive any money.

The claim against the State was that it owed a duty of care to protect Regent and the group members from economic loss caused by the escape of the virus and disease from a privately owned farm into the wild. The proceedings against the State went to trial.

On 7 November 2013, Beach JA dismissed the proceedings and gave judgment in favour of the State. His Honour concluded that no duty of care was owed by the State to Regent to protect Regent from economic loss caused by an escape of the virus or disease from SOM's farm. Furthermore, while not strictly necessary, the judge found that if such a duty had existed, the State had not committed any breach. His Honour also concluded that Regent's claim would fail at a causation level, as there were a number of possibilities as to how the disease could have come into existence.[1]

Regent appealed against the decision of Beach JA.

Settlement–Plaintiff to Pay Defendants Costs

Regent entered into a Deed of Settlement with the State on 15 December 2014 (the "State Settlement"). The State Settlement provided that Regent would pay a "Settlement Sum" of $2,570,000 in satisfaction of the State's costs, which would be paid out of the amount received in the SOM Settlement. Under the State Settlement no group member would receive any payment.[2]

Regent applied to the Court under section 33V(1) of the Act for approval of the State Settlement. Regent put forward the following reasons in favour of the State Settlement being approved:

- the settlement did not discriminate between group members;
- the State had substantially compromised its costs;
- no group member had objected to the terms of the settlement;
- all group members had consented to the SOM Settlement on the basis that those funds would be used to fund the action against the State;
- the prospects of Regent succeeding on appeal had to be assessed by reference to Beach JA's findings at trial and the confidential advice on the prospects of success obtained from counsel; and
- in the event that Regent was successful on appeal, it would not necessarily be the case for other group members who stood at different levels of economic abstraction.[3]

Justice Ginnane approved the State Settlement pursuant to section 33V(1) on 18 August 2015. Applying the principles laid out in *Downie v Spiral Foods Ltd* [2015] VSC 190, His Honour noted the supervisory jurisdiction of section 33V which requires the court to consider whether a proposed settlement is "fair and reasonable as between the parties to the litigation, having regard to the claims of the group members" and "in the interests of group members as a whole".[4]

Justice Ginnane considered the State Settlement to be in the interests of the group members as it would provide certainty and protect the group members from liability for costs.[5] His Honour noted that all group members had consented to the settlement and there was no differential treatment of group members, as no group member would receive any payment.[6]

The judge concluded that the amount of the settlement was reasonable, taking into account an assessment of the costs each party had incurred, which included an estimate of the State's costs to be $6,720,252.30.[7] His Honour further made note of the fact that the amount would be paid out of the SOM Settlement and that the litigation funder had already received payments under the SOM Settlement.[8]

Finally, in approving the State Settlement, His Honour considered Regent's prospects of success and concluded that given the complexity surrounding the questions of causation and damages, there was a strong possibility that Regent would be unsuccessful.[9]

Ramifications

Class Actions Against Government. Class actions against governments and public authorities following natural disasters and other incidents are becoming increasingly frequent, with significant class actions having been brought in relation to the 2007 Australian equine influenza outbreak, 2009 Victorian and 2013 New South Wales bushfires and 2011 Queensland floods.

The potential financial exposure arising from this type of claim is illustrated by the 2009 Victorian bushfires. The Kilmore East-Kinglake bushfire was one of the Black Saturday fires in Victoria in 2009. Proceedings were brought against the owner and operator of the power line (AusNet Electricity Services Pty Ltd, formerly SPI Electricity Pty Ltd), a maintenance contractor charged with carrying out a periodic inspection of the power line (referred to as UAM) and various entities of the State of Victoria charged with the management of forest lands, the fighting of fires, and the policing of emergencies. After a 208-day trial, the matter settled for about $500 million, comprising contributions from AusNet/SPI of $378.6 million, UAM of $12.5 million and the State parties paying $103.6 million.[10]

However, the settlement of the abalone class action against the State of Victoria illustrates the complexities surrounding class actions based on common law and statutory duties of care, in particular, in relation to questions of causation.

Liability for Costs and Litigation Funders. In the settlement approval judgment, Ginnane J held that the settlement would protect the group members from liability for costs.[11] Interestingly, no mention was made of section 33ZD of the Act which states that a court "may not order a group member … to pay costs" unless he or she had been a sub-group representative party pursuant to section 33Q of the Act or there was a determination of an issue that related only to an individual group member pursuant to section 33R of the Act. Neither section 33Q nor section 33R applied here.

Only the representative party, Regent, was liable for costs if the appeal failed. But even then, the costs exposure was really an exposure of the litigation funder which had agreed to be responsible for any adverse costs orders against Regent.[12] Consequently, the settlement may have been more in the interests of the litigation funder than the group members. The funder was able to bring the unsuccessful litigation to an end and cap its liability. The alternative may have been group members who, with no risk of costs orders against them, may have sought to exhaust all avenues of litigation. The group members and funder may have had conflicting desires in relation to the course of the litigation. However, a litigation funder usually has the ability to terminate a funding agreement. The content of the termination clause would then be of significance, but this aspect of the funding agreement was not discussed in the judgment, although the judgment does cryptically refer to "the confidential affidavit about the attitude of Omni Bridgeway to the litigation and the state of what was described as the 'war chest issue'".[13]

The existence of a litigation funder can ensure that, subject to continuing solvency, there is an entity that can pay a defendant's costs when a class action fails. The funder may also take a much more commercial view of whether a class action should continue or be settled than might group members. However, the existence of the litigation funder can also complicate matters on the plaintiff's side if there are conflicting interests amongst the representative party, group members, the plaintiff's lawyer and the litigation funder.

Lawyer Contacts

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Endnotes

1 *Regent Holdings v State of Victoria* [2013] VSC 601 and Jones Day *Commentary*, "Abalone Industry's Lost Class Action Claim Against State of Victoria Provides Lessons for Future Government Claims in Australia" (December 2013).

2 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [27].

3 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [23].

4 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [25].

5 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [30].

6 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [34].

7 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [42]-[44].

8 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [42].

9 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [34].

10 *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663.

11 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [30].

12 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [15] setting out the terms of the funding agreement.

13 *Regent Holdings Pty Ltd v State of Victoria* [2015] VSC 422 at [54].