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COMMENTARY

Concurrent Australian Class Actions Allowed to Proceed Due to Different Funding Arrangements and Case Strategy

Key Points

- Australian courts have broad powers to make orders to manage cases of multiple representative proceedings, or class actions, brought against the same defendant(s) if it is in the interests of justice to do so—for example, under ss 166 and 183 of the *Civil Procedure Act 2005* (NSW) in New South Wales and under ss 33N and 33ZF of the *Federal Court of Australia Act 1976* (Cth) federally.
- In *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17, the Supreme Court of New South Wales addressed the problem of two partially overlapping classes through allowing group members to decide which class action they would opt out of or the court would make orders removing them from the class action they had not affirmatively joined.
- The decision shows, at least in New South Wales, a reluctance on the part of the Court to select a class or consolidate proceedings, where there are differences in funding arrangements and case strategy.

Background

Australian Executor Trustees Limited ("AET") was the trustee for holders of debentures issued by Provident Capital Limited ("Provident") under the provisions of Chapter 2L of the *Corporations Act 2001* (Cth) (the "Act"). Following the collapse of Provident in 2012, two class actions were brought by the beneficial debenture holders against AET for the recovery of loss and damage under s 283F of the Act arising out of alleged breaches by AET of duties it owed to them under s 283DA.

The class action first in time (the "Creighton class action") was brought by an open class (the "Creighton Class"), through Slater & Gordon on a conditional fee basis. If successful, members of the Creighton Class would be billed for Slater & Gordon's professional costs and disbursements, a 25 percent premium on professional fees and the costs of the insurance Slater & Gordon took out to cover its indemnification of the class members.

The second class action (the "Smith class action") was brought by a closed class (the "Smith Class"), comprising a category of debenture holders who had signed an agreement with a litigation funder. If successful,

members of the Smith Class would pay between 30 percent and 40 percent of the amount recovered, a share of the legal costs and a share of the management fee of $5,000 per month to its litigation funder. The Smith Class had already been successful in seeking orders for the preparation of the matter for hearing, including summonses and orders for the production of certain documents, under s 596A of the Act, which provides for the mandatory examination of a corporation's affairs where the corporation is in external administration.

Whilst both class actions were in substance concerned with the same event and there was a substantial overlap in pleadings and evidence relied upon between the class actions, there were also substantial differences. One such difference was the difference in dates by which each class action alleged that AET should have taken steps consistent with its duties under s 283 of the Act to ensure a receiver was appointed for Provident; this distinction resulted in a difference in the loss claimed.

The Court found that there was little prospect of the legal representatives of each class cooperating with one another.

Submissions as to What Should Be Done

The positions as to what should be done about the two class actions taken by each of the parties were as follows:

- AET sought orders that one of the class actions be stayed until further order of the Court, that the class actions be consolidated or directions for the appointment of a litigation committee which would manage the proceedings on behalf of members of both class actions;
- The Creighton Class sought a stay of the Smith class action until a determination of the Creighton class action; and
- The Smith Class submitted that both class actions should be permitted to continue but that they should be heard together and an order should be made that evidence in one be evidence in the other.

Legal Principles

Ball J held, and the parties accepted, that the Court had power to make any of the orders the parties sought, under the broad powers given to the Court to case manage class actions under sections 166 and 183 of the *Civil Procedure Act 2005* (NSW).[1]

In seeking guidance on the factors to be considered if the class actions were consolidated so that only one class was permitted to proceed, Ball J considered two Canadian authorities[2] and *Kirby v Centro Properties Limited*,[3] a decision of the Federal Court of Australia. Ball J summarised the factors relevant to ordering consolidation into the following non-exhaustive list:

a) The experience of the practitioners seeking to bring the class actions;
b) The likely costs to be incurred by the firm acting for the group members;
c) The terms of the funding for the class action;
d) The nature and scope of the causes of action advanced in each action and the theories advanced as being supportive of the claims advanced;
e) The presence of any conflicts of interest;
f) The number, size and extent of involvement of the proposed representative plaintiffs;
g) The relative priority of commencing the class actions; and
h) The status of each class action, including preparation.[4]

Decision

The Court dealt with each matter in turn but, except for the funding arrangement of each class, ultimately found most of the considerations inapplicable or irrelevant.[5] The Court also distinguished the Canadian authorities because in Canada, the class action regime requires a class to obtain court certification before proceeding with an action.[6]

The Court found that, whilst it would be clearly unjust for AET to defend two concurrent class actions where there would be an overlap in individual plaintiffs, especially as the prospect of settlement always loomed so large in class actions,[7] the multiplicity in class actions itself was not oppressive. The Court stated that the class action regime in Part 10 of the *Civil Procedure Act 2005* contemplated group members being able to opt out of a class action and either bring another class action or individual proceedings.[8] Further, the Court held that it should not be the rule that there can be only one class action and the Court should select one class over another.[9]

In this case, Ball J came to the view that for the Court to select one class over another was inappropriate.[10] In reaching this conclusion, his Honour emphasised the fact that the two classes "offer[ed] true alternatives in the sense that they have different funding models and frame their cases in significantly different ways".[11]

The problem in the present case was that every member of the closed Smith Class was also a member of the open Creighton Class unless he or she had opted out (but not vice versa). The members of the Smith Class were suing AET twice.

Ball J adjourned the proceedings to allow for group members to opt out of one or more class actions. The legislative scheme governing class actions mandates that group members be given an opportunity to opt out of a class action.[12] If members of the Smith Class did not opt out of the Smith class action, so that they remained part of the Smith class action, orders would be made that they had opted out of the Creighton class action.[13] This way, the primary concern that AET would be defending two sets of proceedings brought by the same individuals would be eliminated without the Court making a decision on the plaintiffs' behalf.[14] Ball J also made orders that the two hearings be heard together and that evidence in one be evidence in the other.

Ramifications

Ball J's decision in *Smith* represents a modification on one of two approaches Australian courts have taken to date in respect of competing class actions. Courts in Australia have either consolidated proceedings from the outset, as in the case of the Longford gas plant class action[15] and the Nufarm shareholder class action,[16] or permitted multiple class actions to proceed in parallel, as in the case of the Centro class actions.[17] The decision in *Smith* extends the approach taken in *Centro* by adapting it to deal with a situation where there is an overlap in group members of class actions.

At present, it seems likely that concurrent class actions will be dealt with through case management decisions of individual judges. The decision in *Smith*, however, shows, at least in New South Wales, a reluctance on the part of the courts to make a selection where it is difficult to assess the merits of each class action due to differences in funding arrangements and, to a lesser extent, case strategy.

The disadvantage of the approach of the Court in *Smith* is that the defendant is still required to deal with two class actions and the duplication of claims.

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/contactus/.

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Endnotes

1 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [19].

2 *Locking v Armtec Infrastructure* [2013] ONSC 331 and *Mancinelli et al v Barrick Gold Corporation et al* [2015] ONSC 2717.

3 [2008] FCA 1505; 253 ALR 65.

4 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [20].

5 For (a) see *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [34] and [41]; for (b) and (c), see [33] and [39]; for (d), see [35], [39] and [41]; (e) did not arise on the facts; for (f), see [32], [38] and [43]; for (g) and (h), see [36] and [42].

6 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [21].

7 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [25].

8 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [22].

9 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [21].

10 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [29].

11 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [47].

12 *Civil Procedure Act 2005* (NSW), s 162.

13 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [45] and [49].

14 *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 at [47].

15 *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 at [73]-[74].

16 *Verbatt Pty Ltd v Nufarm Limited* (NSD1847/2010), Orders, Middleton J, 9 August 2011.

17 In *Kirby v Centro Properties Limited* [2008] FCA 1505; 253 ALR 65, Finklestein J dismissed an application for a stay of one class action amongst multiple class actions and suggested that a litigation committee could be appointed to manage the multiple class actions. Nothing became of his Honour's suggestion, however, (he later recused himself from the proceedings) and the other applications made by the respondents were subsequently also dismissed, by consent: *Kirby v Centro Properties Limited* (VID326/2008). Orders. Ryan J. 5 December 2008; *Kirby v Centro Retail Limited* (VID327/2008). Orders. Ryan J. 3 December 2008; *Vlachos v Centro Properties Limited* (VID366/2008). Orders. Ryan J. 28 November 2008. The class actions ultimately proceeded to be case managed together.