

Australian Court Refuses to Stay Overlapping Class Actions

IN SHORT

The Background: The defendant was faced with two "open" class actions (i.e. including all putative group members) in relation to the same allegations.

The Issue: The defendant sought a court order permanently staying either one of the two actions.

The Outcome: The Court refused to stay either of the actions, instead eliminating the overlap by closing the class in one action (limiting it to group members who had contracted with the lawyers and funder) and allowing the other action to proceed with an "open" class.

Background

In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, the Court considered the defendant's application for a permanent stay of either of two open class actions commenced against it in circumstances where:

- The two class actions had been commenced within a month of each other, following the release by Bellamy's Australia Limited of profit downgrades connected with a changing regulatory landscape affecting its sales of baby formula and food in China.
- The class definitions and the causes of action alleged in the actions were in substance the same, which meant that there was an entire overlap of group members and issues between the actions.
- The plaintiff and more than 1,500 group members in one action had entered into agreements with one law firm and one litigation funder. The plaintiff and more than 1,000 group members in the other action had entered into agreements with a different law firm and different litigation funder.
- The plaintiff in each action proposed to make applications for common fund orders, which the Court considered made it necessary to determine the overlap as a priority (rather than taking the "wait and see" approach to overlapping classes that has been taken in other cases).



The Court found that the current class action regime, which does not have a certification process, permits multiple class actions and that there must be powerful and significant reasons to grant a stay.



Decision

The Court found that the current class action regime, which does not have a certification process, permits multiple class actions and that there must be powerful and significant reasons to grant a stay.

The Court acknowledged that an important consideration was that the stay of one of the actions would eliminate the duplication of costs but was ultimately not prepared to grant a stay, as doing so would have substantially affected the contractual funding and retainer arrangements of more than 1,000 group members in whichever action was stayed.

The Court found that the appropriate way to deal with the actions was to eliminate the overlap by having one open class and one closed class, which required consideration of which action was preferable for the group members who had not yet signed up with either of the law firms and litigation funders. The Court outlined the following considerations as relevant to that question:

- The experience of the legal practitioners and the costs they expected to charge.
- The funding terms in each action.
- The resources made available by each firm of legal practitioners.
- The number of group members already signed up to each action.
- Whether the plaintiff in each action would seek a common fund order and the terms of any proposed common fund order.

- The litigation funders' positions in relation to security for costs and their resources to meet an adverse costs order.

Despite the fact that many of these considerations were neutral between the actions, the Court found that one of the litigation funders had more opaque and evolving funding terms and had less financial strength. On the basis of those issues, the Court found that the action involving that litigation funder should be converted to a closed class.

Whilst the overlapping classes will be eliminated, the Court acknowledged that the continuation of both actions could create inefficiencies and intimated that case management directions will need to be made, including that the plaintiffs in the actions should have only one counsel team and there should be a joint trial.

THREE KEY TAKEAWAYS

1. Despite recent approval of common fund orders (see our [Commentary](#) in November 2016), litigation funders may continue "book building" (entering into funding agreements with group members) to prevent class actions supported by them being stayed in favour of competing class actions.
2. The Court has outlined the factors it will consider when deciding between competing class actions, which will act as a checklist for litigation funders.
3. In most cases, defendants will continue to be faced with the additional complexity and costs associated with competing class actions unless and until a class action certification regime that addresses competing class actions is introduced in Australia.

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