JONES DAY

COMMENTARY

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IN SHORT

The Situation: The question in *Fernandez & Anor v State of New South Wales & Ors* [2019] NSWSC 255 was whether, in a situation where there are multiple defendants, it is necessary that a class representative have a claim against each defendant to the proceedings.

The Decision: Justice Peter Garling considered that question by reference to s 158(2) of the Civil Procedure Act 2005 (NSW) ("CPA"), which is unique to New South Wales ("NSW"), and answered in the negative.

Looking Ahead: The decision in *Fernandez v NSW* sets the bar at a lower level for the commencement of class actions in NSW than in other jurisdictions in Australia. Consequently, if the interpretation persists, NSW may attract more multidefendant class actions.

Background

In *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153 and *Cash Converters International Limited v Gray* [2014] FCAFC 111, the Federal Courts considered s 33C(1) of the Federal Court class actions legislation. Section 33C(1) provides that where "seven or more persons have claims against the same person" a proceeding may be commenced by one or more of those persons as representing some or all of them.

The Full Court of the Federal Court in *Bray* and *Cash Converters* found that s 33C(1) does not require that each group member have a claim against each defendant to the proceedings. The Full Court's decision proceeded on the basis that a class representative is required to have a claim against each defendant.

> As a result of the decision in *Fernandez v NSW*, class representatives are only required to have a claim against one defendant to bring representative proceedings under the CPA.

Facts

The plaintiffs, Mr. Fernandez and Ms. Fotu, commenced proceedings under the CPA on behalf of group members who were persons who had guaranteed to one of the defendants the payment of monies owed by patients. The patients were generally non-Australian permanent residents who had received care in public hospitals and were not eligible for Medicare benefits.

The defendants were the state of New South Wales and 15 local health districts ("LHDs"). NSW public hospitals (under the control of the LHDs) were required to ensure that payment arrangements were made on admission to hospital of non-Australian permanent residents not entitled to Medicare benefits. LHDs could obtain personal guarantees from an Australian citizen, assuring payment, before treatment was provided to the patient.

The plaintiffs both gave guarantees in respect of the provision of health services to family members who were not Australian residents. The plaintiffs claimed that the LHDs lacked authority to procure the guarantees from them and the group members. The defendants

claimed (among other things) that the plaintiffs lacked standing to commence and conduct proceedings against the fourth to 16th defendants, because the plaintiffs did not have a claim against those defendants.

Decision

The NSW legislation s 157(1) mirrors s 33C(1) of the Federal Court class actions legislation. Both sets of legislation also address standing and state "a person has a sufficient interest to commence representative proceedings against another person on behalf of other persons if the person has standing to commence proceedings on the person's own behalf against that other person."

However, NSW also has the following text in section 158(2): Class representatives may commence proceedings on behalf of group members "against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings." In reaching a decision, Justice Garling noted that s 158(2) was the "critical provision."

Having regard to the purpose of the CPA and the wording of s 158, his Honour concluded that the preferable interpretation of s 158(2) was "that it is not necessary for a plaintiff to have a claim personally against each [defendant] joined to the proceeding. What is necessary, in accordance with s 158 of the CPA, is that either a plaintiff or a group member has a claim against at least one of the [defendants]." Justice Garling found there is no reason why a plaintiff may not adequately represent group members in proceedings even though that plaintiff does not have a claim against all defendants.

Ramifications

As a result of the decision in *Fernandez v NSW*, class representatives are only required to have a claim against one defendant to bring representative proceedings under the CPA. This further relaxes the position expressed in *Bray* and *Cash Converters* and means that NSW is now out of step with the position of the Federal Court and the Courts in Queensland and Victoria. While the CPA does contain other threshold requirements for all class actions (see s 157(1)), potential ramifications of the more lenient approach include:

- **Larger class actions**: It is easier to commence multidefendant proceedings and to add class representatives and group members.
- **Less cohesive class actions**: The decision could lead to less cohesive class actions with more noncommon issues.
- **Issues with adequacy of representation**: The question remains whether the decision will affect the adequacy of representation in class actions. It is possible that some class representatives may not be in a position to adequately represent all group members where the group members are permitted to have claims against different defendants.

THREE KEY TAKEAWAYS

1. As a result of *Fernandez v NSW*, it is no longer necessary that a class representative in NSW have a claim against each defendant to commence representative proceedings.
2. The requirements for class actions in NSW are now out of step with the position in other Australian jurisdictions.
3. If the interpretation in *Fernandez v NSW* persists, NSW may attract more multidefendant class actions.


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