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Competing Class Actions – the Court considers how best to address the problem

4 JUNE 2018

With the increasing number of both litigation funders[1] and plaintiff class action law firms, the threat of multiple competing class actions in respect of the same issues are an ever increasing risk, problem and costs for both insurers and insureds alike. The recent decision in GetSwift seeks to address that problem.

While multiple class actions are dealt with in the US at the certification stage[2], in Australia they are dealt with on an individual basis on the facts and circumstances of the particular matter and dependent on the reasoning of the particular judge. This has led to considerable uncertainty (and increased cost) as to whether: (1) more than 2 open class actions will be allowed to proceed[3]; (2) other open class actions will be closed – with an effective 'beauty parade' to determine the one open class action going forward[4]; or (3) whether competing class actions are an abuse of process that permit a court to stay all but one of them and, if so, which one?

The recent decision of Lee J in ***Perera v GetSwift Ltd***[5] has provided some clarity on the issue, particularly the latter point. This article looks at:

1. why Lee J determined that one open class action could continue and the other 2 be permanently stayed;
2. how this decision sits with previous judgments; and

[1] Now up to 25 operating in Australia.
[2] Which was deemed unnecessary in Australia because it was thought that Part IVA gave the Court extensive case management powers to prevent or manage *"problems of duplication and waste"*.
[3] ***Smith v Australian Executor Trustees Ltd*** [2016] NSWSC 17 (**AET**)
[4] ***McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*** [2017] FCA 947 (**Bellamy's**)
[5] [2018] FCA 732

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3. what the future may hold for competing class actions.

Background

GetSwift is a technology company founded in 2015 and listed in 2016. On 11 December 2017 it announced a $75 million capital raising at $4 per share. Following media reports in January 2018 that it had not disclosed the termination of some customer contracts and issues with its revenue forecast, GetSwift's shares were placed in a trading halt on 22 January 2018 (while at $2.92) and dropped to $0.51 on being reinstated on 21 February 2018.

Three class actions were filed, those being:

Applicant	Law Firm	Funder	Period	Members Signed Up	Funder's Commission	Est Costs to Mediation
Perera	Squire Patton Boggs	International Litigation Partners No 18 Pte Ltd	24.02.17 – 19.01.18	103 (2,575,804 shares)	Lesser of 25% of net proceeds or 22.5% of gross proceeds	$1.97 million
McTaggart	Corrs Chambers Westgarth	Vannin Capital Operations Ltd	24.02.17 – 19.01.18	208 (1,545,374 shares)	Between 10% - 30% depending on when settled	$2.69 million
Webb	Phi Finney McDonald	Therium Capital Management Ltd	24.02.17 – 19.01.18	None (common fund order)	The lesser of: 1. 2.2 x expenses before 12.04.19; 2. 2.8 x expenses after 12.04.19; or 3. 20% net proceeds	$2.79 million

The Decision

At the outset it is important to note that the decision was based on the group members and allegations of the competing proceedings both being "substantially the same" – such that each class action could be compared with each other. This also has implications about the ability to distinguish the judgment (see below).

Lee J considered there were five potential options to resolve the issue of competing class actions: (1) consolidation; (2) permanent stay; (3) declassing; (4) closing the classes; or (5) joint trial. All of the options, other than 'permanent stay', were dismissed due to lack of agreement between the parties and/or a waste of the parties' and/or the Court's resources / costs. The remaining issues for determination were: (1) whether the Court had the power to stay proceedings; (2) whether the criterion for a stay were satisfied and if so; (3) which class actions should be stayed.

Ultimately, Lee J determined:

1. the Court has the inherent power to stay proceedings if there is an abuse process, although *"what amounts to abuse of court process is insusceptible of exhaustive formulation as development continues"*;

2. there were no significant differences in the scope, causes of action or case theories in the 3 proceedings such that there was no reason why the group members' claims could not be in the one open class action;

3. in light of point 2 above, to allow more than one open class action would: (1) mean increasing costs and inefficiencies, and be contrary to the case management objective to resolve claims as quickly, inexpensively and efficiently as possible; and (2) not be necessary to enforce the Applicant's rights and would only mean the court being used to the benefit of the lawyers and litigation funder;

4. more than one open class action would be vexatious to GetSwift when there is no justifiable reason to face 2 or 3 open class actions;

5. the matter is likely to settle,[6] such that more than one class action would only increase costs and thereby reduce the amount available to group members;

6. in the above circumstances any duplicate proceeding would not be efficient or effective and, in the interest of justice, should not continue;

7. to allow duplicate open class actions to proceed and thereby allow unnecessary multiplicity, is not appropriate to enforce group members' rights under Part IVA and would bring the administration of justice into disrepute. Particularly where it would be unfair to GetSwift and group members because of the exposure to unnecessary increased costs;

8. the circumstances described above amounted to an abuse of process – a doctrine described as *"fluid"* and *"adaptable"*; and

9. if he was wrong, he considered it *"contrary to good conscience to allow duplicative proceedings which have become vexatious or undue"* such that it would be necessary to *"enjoin"*[7] / prohibit the Perera and McTaggart Proceedings.

The issue then was which of the competing proceedings would be permanently stayed. A 'beauty parade' (i.e. a "comparative multifactorial assessment") was effectively conducted, following which Lee J decided to permanently stay the Perera and McTaggart Proceedings, and allow the Webb Proceeding to continue. That assessment is summarised at **Annexure A**. Lee J determined the key differentiators in favour of the Webb Proceeding to be:

1. the funder linking its commission to expenditure, such that it could not benefit from a windfall settlement – consequently, more funds ought to be available to members;

2. the *"novel"* proposal that a costs referee be appointed to review the Applicant's costs periodically and manage case strategy e.g. reduce the scope of documents to be discovered – consequently costs could be saved, such that more funds ought to be available to members; and

3. the potential for a court appointed expert – which could save the costs of numerous experts so that more funds would be available to members.

[6] As have all shareholder class actions to date.
[7] An equitable relief.

Other Decisions

Lee was at pains to say that his judgment was on the facts of the case and that it was not a *"one size fits all judgment"*[8], so he distinguished the following cases:

1. **Bellamy's** in which Beach J considered the issue of competing class actions but decided to close one class rather than permanently stay it, because in excess of 1,000 members had signed up to each class action. Lee J distinguished the competing GetSwift Proceedings on the basis that only 103 and 208 members had been respectively signed up.

2. **AET** in which Ball J allowed 2 competing class actions to be heard together because the cases advanced in each were sufficiently different such that there was a prospect that one case could have won and yet the other may have lost. Again Lee J distinguished the competing GetSwift Proceedings but on the basis that the cases advanced were substantially the same.

The issue going forward

It appears accepted by most that competing class actions are a significant problem that increase costs, undermine the efficiency of the Courts, are vexatious to defendants and reduce the available damages, such that they are of no benefit to anyone but the Plaintiff lawyers and funders. On that basis, in seeking to restrict and address competing class actions, Lee J's judgment should be commended. However, as it was predicated on the basis that the competing proceedings were *"substantially the same",* the decision is capable of being easily distinguished if a competing class action raises different common issues, different time periods or advances conflicting case theories. As noted above, it was not a *"one size fits all"* judgment.

Lee J acknowledged that lawyers will always try and circumvent restrictions, which in the US led to legislative reform,[9] whereas in Australia the issue of slightly differentiating class actions will be left to individual judges using their case management powers. The judgment may be as easy to circumvent by merely filing in the State Supreme Courts of NSW, Victoria or now Queensland – which are not subject to Part IVA legislation. In our view, the issue is too important to have inconsistent approaches by different judges in different jurisdictions applying different tests.

Other notable issues that arise out of the judgment are:

1. the reliance on abuse of process is somewhat strained - to label proceedings an abuse of process is severe, and usually only occurs in extreme circumstances.[10] We question how proceedings, which were acknowledged as being *"commenced bona fide for a proper purpose",* can somehow be held to be an abuse of process[11] merely because another law firm files a similar claim months later. The adverse consequences that can flow from a finding of abuse of process could cause Judges to be reluctant to make such a finding – which inevitably will raise questions as to how similar the class actions have to be in order to be *"an abuse of process"*;

2. Lee J held that a book building process by solicitors/funders was a waste of time and money – which could not form part of the costs of the litigation. This can only lead to a 'rush to file'

[8] Quoting Foster J in ***Cantor v Audi Australia Pty Ltd (No 2)*** [2017] FCA 1042.
[9] **Securities Litigation Uniform Standards Act 1998.**
[10] Melbourne City Investment decisions..
[11] With all the consequential detrimental connotations and effect that arises therefrom including reputational issues and costs recovery/exposure.

mentality without any proper due investigation of the class and/or the merits of the claim, thereby promoting even further multiplicity of claims. However, there is also now the risk to claimant law firms/funders that any money spent on due diligence and drafting detailed particularised pleadings will be lost, if another law firm which has not yet filed pleadings or got any group members, can still be awarded the claim at a later date (as happened in this matter); and

3. The reduction in litigation funder rates has to be appreciated and acknowledged as beneficial to plaintiffs, defendants and insurers – and has recently been followed in the numerous AMP class actions. However, one of the significant attributes of the funding agreement in this matter (being a multiple of costs, rather than necessarily a percent of damages), raises the question of whether that promotes a closed or open class – given that the funder's return will be similar to both. Having multiple closed classes is beneficial to no-one.

Conclusion

While we accept that it will be difficult to have rigid procedural rules on whether competing class actions are similar enough to be stayed, or are different enough to continue, and that there should be significant judicial discretion[12] on how to address competing class actions, it is too important an issue to all parties[13] to have inconsistent judgments, either in the same court or across the various State and Federal jurisdictions[14].

While a US style certification process was not deemed necessary in 1992, the issues of today, such as competing class actions and common fund orders, were not contemplated at that time. Arguably, now is the time for some form of legislative procedural reforms to deal with these issues, in order to provide the consistency and certainty that all parties require.

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[12] Determined on the particular facts and circumstances in each case.
[13] The applicants, the group members, the defendants and the court.
[14] Which will only promote forum shopping.

ANNEXURE A
Comparative Multifactorial Assessment

Factor	Lee J's View
Experience of the lawyers	Each law firm had the requisite expertise.
Available legal resources	Each law firm had the requisite legal resources.
State of preparation	Lee J accepted that the Webb Proceeding was behind the other 2 class actions because a statement of claim had not been filed but did not consider that this would cause any delay, as appropriate directions for the prompt filing of a statement of claim could be made.
Funding resources	This factor was considered in detail but ultimately Lee J determined each funder could provide sufficient funds and security for costs such that this was not a distinguishing factor.
Substantive merits of the proceedings	The relief sought and *"case theory"* of the Perera and McTaggart Proceedings[15] were substantially the same / very similar such that this was not a distinguishing factor.
Substantive merits of the individual cases of the Applicants	Lee J determined that all 3 Applicants provided an *"appropriate vehicle"* for the determination of issues that transcend the Proceedings such that this was not a distinguishing factor.
Existence of funding agreements	Lee J did not give any weight to funding agreements; instead choosing to espouse the benefits of common fund orders in open class actions. In doing so Lee J distinguished Beach J's observations in Bellamy's on the basis that: (1) each Applicant had agreed to common fund orders; and (2) the sign up to the Perera and McTaggart Proceedings was *"small"*[16].
Number of funded members	Lee J did not give any weight to the number of funded members for the same reasons as above.
Absence of a funding agreement	McTaggart queried whether the absence of a funding agreement and therefore clauses governing conflicts between the interests of the funder and members caused an issue for the Webb Proceeding. Lee J dismissed this on the basis that he expected the lawyers to comply with their duties.
Costs	Lee J determined that the higher estimated cost estimates provided by the McTaggart and Webb Proceedings were *"more likely to be accurate"* than the lower estimate provided by the Perera Proceeding.

[15] Lee J was silent on the Webb Proceeding as no statement of claim had been filed.
[16] 103 and 208 members signed up compared to 1,500 and over 1,000 respectively.

Measures for controlling legal costs	Lee J emphasised the benefits of Webb's *"novel"* proposal that a costs referee be appointed to periodically review Webb's legal costs and only those costs assessed as reasonable being included for part-payment of Webb's legal costs. For example, a costs referee could: (1) obviate the need for a costs assessor at the conclusion of the matter; (2) reduce the scope of discovery; and/ or (3) insist that junior barristers conduct discovery instead of lawyers due to the lower rates likely charged.
Measures for controlling experts	Lee J similarly emphasised the benefits of Webb's proposal that the Court appoint (or the parties jointly engage) a forensic economist to assist the Court on causation and quantification of loss. While Lee J stopped short of saying that a Court appointed expert would be appropriate in the Webb Proceeding, he emphasised the *"likely…very significant costs"* saving.
Public policy	Perera submitted that as a matter of public policy the Court should entertain Webb's proposal because Perera and McTaggart had committed resources and time to investigating the claim and book building. Lee J described this public policy point as being "overblown" and the costs incurred book building where incurred to further the commercial interests of the funders and *"should not be encouraged in the context of open classes likely to be subject of common fund orders."*
Prejudice to third parties	Lee J accepted that International Litigation Partners and Vannin had *"sunk costs"* but noted that they would be *"relieved of ongoing obligations"*. Further, Lee J dismissed *"the hoped for commercial return"* to not be significant so as not to be important. In terms of members opting for certain funders (and the privity of contract that arises), Lee J did not consider it *"to be of real significance in the overall mix"*.
Funding Models	Lee J favoured *"tethering the return to funders to the risk associated with the expenditure of legal costs"* and the subsequent advantage that it prevents funders from benefitting from *"windfalls"*.