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COMMON FUND ORDERS IN CLASS ACTIONS CONSIDERED AGAIN

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Earlier this year, Justice Lee of the Federal Court handed down the decision of *Perera v GetSwift Limited* [2018] FCA 732 (Getswift), which dealt with the issue of competing class actions[1]. Whilst the decision is currently the subject of an appeal, as it stands, it provides a useful insight into how competing class actions can be determined and observations about the conduct of class actions more generally. Drawing on many of those observations and giving further support to the principles laid down by the Federal Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 (Money Max), Justice Lee's decision in *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 (Lenthall) deals with the contentious issue of common fund orders.

Given the findings that have been made to date by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services (Royal Commission) and the spike in class actions that will likely follow, the decision of Lenthall is significant and will be closely followed by potential class action participants.

BACKGROUND

Common fund orders generally require all members of a class, including (and importantly) those that have not entered into a funding agreement, to contribute equally to the legal and litigation funding costs of the proceedings. Since the full Federal Court decision of Money Max, it has been well recognised that common fund orders can be made by the Federal Court pursuant to its general power to make orders appropriate or necessary to ensure that justice is done in the proceeding (section 33ZF of the *Federal Court Act 1976* (Act)). Common fund orders provide obvious advantages to litigation funders and as a consequence, have been advanced in a number of class actions since Money Max, including in Lenthall.

The Lenthall proceedings were commenced by four applicants against Westpac Banking Corporation and Westpac Life Insurance Services Limited (collectively Westpac) as a consequence of advice to purchase insurance products from Westpac Banking Corporation's financial advisers. The applicants have alleged that the advice was inappropriate and more particularly that the advisers were required, but failed, to advise them of policies of insurance offered by third party insurers where those policies were equivalent or better and available at a lower premium than the products they were recommended. Westpac is defending the proceedings and Justice Lee noted that the proceedings would give rise to more complicated issues than an 'orthodox securities class action' like Getswift, which was based on a decrease in the company's share price.

The applicants had entered into a funding agreement with JustKapital Litigation Pty Ltd (JKL) and brought an application for a common fund order binding other group members. The application was opposed by Westpac on two main grounds, including that the order was generally unnecessary and its terms were inappropriate, the most contentious aspect of which, was the relatively high commission sought by JKL[2]. In line with the decision in Getswift, Justice Lee thought it appropriate to deal with these issues at a preliminary stage of the proceedings.

In relation to the first ground of opposition, Westpac (perhaps ambitiously) sought to argue that the Federal Court cannot make orders creating new legal rights for the benefit of entities that are not parties to the proceedings, the inference being that Money Max was 'wrongly decided'. Westpac went on to argue that:

1. The power conferred by section 33ZF in the Act was limited and that the exercise of discretion to make a common fund order could only be made where the refusal to make such an order would result in a particular injustice to the applicant. Westpac argued that in this case, the applicants would not suffer any injustice if their proposed order was refused.
2. In any event, Money Max was distinguishable from the present case because in the former case, the common fund order was coupled with a so-called 'floor condition', which meant that the common fund order could not leave group members any worse off than if the order was not made.

This objection was dismissed by Justice Lee, who was unprepared to depart from the fundamentals laid down in Money Max.

In relation to the terms of the common fund order, Westpac argued that the commission sought could not be justified. In support of this, it argued that:

1. The commission did not reflect a competitive market rate, given the applicants' solicitors had only approached one funder other than JKL, part of their reluctance being that such approaches would expose the applicants to liability for breach of the JKL funding agreement. Westpac claimed that limited evidence had been adduced as to its competitiveness and it referred Justice Lee to his Honour's earlier decision in Getswift, which had a lower proposed multiple and percentage rate (the funder was to receive the lesser of 2.2 to 2.8 times its costs or 20% of net recoveries).
2. There was real doubt surrounding JKL's ability and willingness to fund the proceeding on an ongoing basis, given public announcements it had made that it would be exiting the litigation funding business in a 'timely and profitable manner'.

3. Whilst there was a proposal for a referee to deal with the legal costs, this only dealt with prospective costs and not the $1.2 million in costs that had already been incurred.

This objection was also dismissed by Justice Lee. In doing so, and in relation to the above, Justice Lee noted that:

1. Caution needs to be exercised in comparing rates of commission between cases because of the individual circumstances of different cases and the dynamic nature of the litigation funding market. Justice Lee noted that Lenthall was a case giving rise to more complicated issues than Getswift and would, therefore, be perceived by litigation funders as carrying more risk and requiring a higher commission. Justice Lee considered it unlikely that a better outcome for the group members would have been obtained had more litigation funders been approached by the applicants' solicitors.
2. It was not relevant that JKL had stated that it would be exiting the litigation funding market because it had indicated an intention to fund 'legacy cases' and would be required to give an undertaking to comply with its funding terms. Further a referee could (and would in this case) be ordered to assess all relevant costs.
3. There were seven factors identified in Money Max supporting a common fund order, each of which was satisfied in this case. Amongst other things, these included that JKL would likely meet its obligations; the funding rate (subject to the below) was reasonable in all the circumstances; it was not evident that another funder would propose more favourable terms; and the legal costs were likely to be very considerable and without litigation funding it is likely that the proceeding would not advance to resolution at a mediation or on the merits.

The only limitation imposed by Justice Lee was that the common fund order should be struck by reference to the lesser of a multiple of costs or net (rather than gross) recoveries, given this would reduce the risk of the commission being disproportionately high for lower settlement sums.

CONCLUSION

The decision of Money Max was, and continues, to be one of the drivers of the active and growing litigation funding market in Australia. To the extent that Lenthall gives further support to the principles laid down in that decision and endorses the appropriateness of common fund orders, including where the commission rate appears to be relatively high, the decision will be viewed positively by litigation funders and plaintiff law firms advancing class actions.

The decision also provides further guidance on how applications for common fund orders will be considered by the Federal Court, including in the context of many of the observations made in Money Max and Getswift. Given the findings that have been made to date by the Royal Commission, the decision of Lenthall is significant and will be followed closely by potential class action participants.

Lenthall v Westpac Life Insurance Services Limited [2018] FCA 1422

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[1] Getswift article.

[2] The original application sought an order that JKL be paid a commission of no more than 30% of the gross settlement or judgment sum (35% on appeal), although at the time of the hearing, the applicants sought an order for a commission equal to the lesser of three times the total spend on legal costs and disbursements and adverse costs orders, or 25% of the gross

recovery in any resolution.

AUTHORS

ANDREW WARD
SPECIAL COUNSEL

+61 7 3231 6305
andrew.ward@bnlaw.com.au