Barry.Nilsson. LAWYERS

MONEY MAX & ORS IN THE MONEY WITH CLASS ACTION SETTLEMENT AGAINST QBE APPROVED

20 JULY 2018 | CLASS ACTIONS

The Federal Court of Australia has recently approved a settlement of $132.5 million inclusive of costs between QBE Insurance Group Limited (QBE) and registered class members who acquired shares in QBE between August and December 2013, and who suffered loss as a result of QBE's alleged wrongful conduct. The relevant loss was a sharp decline in QBE's share price as a result of a profit downgrade announcement made by QBE to the ASX in December 2013. The action was funded by International Litigation Funding Partners Pty Ltd (ILF).

IN ISSUE

- The quantum and reasonableness of the proposed settlement.
- The quantum of legal costs ($22.51 million) and the litigation funding commission ($30.75 million) which the lead applicant sought approval of.
- The importance of adhering to class registration procedures in order to benefit from pre-trial settlements.

THE BACKGROUND

The case was factually and legally complex. In short, the proceeding arose from a profit downgrade statement made by QBE to the ASX on 9 December 2013, as a result of developments affecting its North American business.

The corporate losses the subject of the 9 December 2013 announcement were confirmed in early 2014, resulting in a ripple effect on the financial results of QBE's North American operations. The news of the expected losses also had an effect on QBE's share price in Australia, which declined significantly following the 9 December 2013 announcement. Whilst the claimed total loss is not referred to in the judgment, it is clear that there was (differing) expert evidence as to the measures of inflation per share and that the claimed quantum was vast. The applicants' solicitors (Maurice Blackburn) indicated in a press release following commencement of the action that class members sought to recover more than $200 million in compensation for shares purchased at inflated prices. Murphy J noted that even if the lead applicant was successful on liability in all respects, there were risks associated with establishing quantum in the amount claimed.

The lead applicant (on behalf of the class members) asserted that QBE was (or ought to have been) aware of the circumstances that were disclosed in the announcement made on 9

December 2013 before it was made, and that its previous public statements (from August 2013) were misleading and deceptive. The clam was based upon alleged contraventions in that regard of the *Corporations Act, ASIC Act* and the *Australian Consumer Law*. On that basis, it was alleged that investors who had purchased shares in QBE between announcements made on 20 August 2013 and 9 December 2013 had likely purchased at inflated prices.

THE DECISION AT TRIAL

Murphy J had no difficulty in concluding that the $132.5 million settlement was reasonable, having regard to the complexity and risks of the litigation and the size of the settlement (in light of the attendant risks).

There were questions, however, in relation to the quantum of legal costs ($22.51 million) and the litigation funding commission ($30.75 million) which the lead applicant sought approval of. The decision focussed on these two issues. As to legal costs, due to his concerns about the quantum of those costs, Murphy J appointed a costs assessor as an independent referee to assess the reasonableness of the claimed costs. That assessment was in addition to a report obtained from a costs consultant by the applicants' solicitors. On the basis of reductions proposed by those reports, Murphy J ultimately approved costs of $21,875,678. Whilst Murphy J noted this was significantly higher than the range of costs usually approved in shareholder class actions which settle before trial, he acknowledged this was an unusually large and complex proceeding and effectively comprised 3 shareholder actions in one.

As to the funding commission, Common Fund Orders made in November 2016 authorised payment of a commission within specified parameters. Murphy J was, after careful consideration, ultimately satisfied that the funding commission of $30.75M (representing 23.2% of the gross settlement) was fair and reasonable, commercially realistic and proportionate to ILF's investment and risk. Murphy J noted that ILF had taken on substantial obligations and significant financial risk to fund this large, complex and expensive case, at a time when the risks could not be accurately assessed and the outcome was far from certain. Amongst other matters, Murphy J referred to a 23.2% funding rate on the gross settlement as being within the broad parameters of the funding rates available in the market, and lower than many available funding rates. Significantly, Murphy J recognised the important role that litigation funding played in providing access to justice for the class members.

Murphy J expressed concern at a clause in the settlement deed which precluded QBE from making any submissions with respect to approval of the applicants' costs or as to the amount of the funding commission. He invited QBE to make any such submissions and confirmed that such clauses should be discouraged in class action settlement deeds.

Finally, there were numerous investors who failed to register their interest in the class action and were excluded from the proceeds of settlement. Murphy J confirmed the position that deadlines set in class closure orders should be taken seriously. Taking such orders seriously means that a class member who does not register before the class deadline should not be permitted to share in a settlement unless the Court is satisfied it would be unjust to exclude them.

IMPLICATIONS FOR YOU

Whilst settlement was approved by the Court, the unusually high amount ($22.51 million) of claimed costs and disbursements was the subject of close scrutiny. This is a repeated theme in class action settlement approval decisions, with the Courts appearing to favour the

appointment of an independent costs referee to assist in making an assessment of reasonableness. Indeed, the use of Court appointed referees more broadly in the class action context reflects the adoption by the Courts of a pragmatic approach to determining specific (and invariably complex) issues in these proceeding.

Any terms of proposed class action settlements that exclude or reduce the ability of defendants to make submissions on the reasonableness of claimed costs and funding commissions should not be agreed to.

The important role of litigation funders in a proceeding of this type was acknowledged by Murphy J. This is a timely acknowledgement, following the recent ALRC Discussion Paper on Class Action Proceedings and Third-Party Litigation Funders (which Murphy J featured in as one of the Judicial Experts).

Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited [2018] FCA 1030

Jack Young, a vacation clerk at Barry.Nilsson., assisted in writing this case note.

AUTHORS

BELINDA RANDALL
SPECIAL COUNSEL

+61 8 6424 0400
belinda.randall@bnlaw.com.au