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A new era of class litigation?

Ramifications of the decision of Kirby v Centro Properties Ltd [2008] FCA 1505

The Federal Court recently made unprecedented orders in relation to the management of two separate class actions arising out of the collapse of Centro Properties Ltd (**Centro**) by proposing a Litigation Committee be formed to make recommendations as to whether to merge the two proceedings and to nominate which firm of lawyers is best positioned to act on behalf of the class as a whole. The decision demonstrates that the Court will not tolerate multiple class proceedings being run simultaneously when the proceedings relate to the same factual scenario and plead the same causes of action. It is significant because:

1. it provides comfort to potential defendants that they will not have to face the same battle on two fronts; and
2. it serves as a warning to law firms to ensure the interests of class members are paramount when making strategic decisions regarding proceedings and that those interests are not subrogated to the interests of the law firm.

Two class actions

In May 2008, two groups of investors in the Centro group commenced separate proceedings in the Federal Court against Centro. Both sets of investors claim the price of securities in Centro were improperly inflated as a result of Centro making misleading statements to the market about the financial positions of companies in the group and failing to make continuous disclosure.

The groups have separate legal representation and can be differentiated by the fact that the first group, commenced in the name of Richard Kirby is a “closed class” of 955 plaintiffs whilst the second group, commenced in the name of Nicholas Vlachos is an “open” class. This means that to benefit from the Kirby proceedings, investors must have entered into a funding agreement specific to the litigation.

The Vlachos class is not limited by any such agreement, but rather encompasses any purchasers of the relevant securities during a specified period.

Application to stay one class action

Faced with two simultaneous Court proceedings, Centro (supported by the Kirby class) asked the Court to stay the Vlachos proceedings until the Kirby proceedings were finalised. Such an order would result in the Kirby proceedings operating as a test case, binding the Vlachos class to the outcome.

The Kirby class proposed that if the Vlachos action were stayed, Kirby would amend its group definition to create an open class so that Vlachos group members would become members of the Kirby group without the need for them to enter into a litigation funding agreement.

Judicial comment on class actions & conduct of legal representatives

The Court was unequivocal that it was neither desirable nor acceptable for both actions to continue simultaneously as this would not only potentially result in inconsistent decisions but would also cause inefficiencies and duplication of costs, particularly those of the defendant.

In this regard, his Honour Justice Finkelstein noted the wide powers of the Court under section 33ZF of the *Federal Court Act* to make any order to ensure that class actions are run fairly and expeditiously. Thus, his Honour could alternatively order that the Vlachos action proceed and that the Kirby action be stayed.

Justice Finkelstein expressed concern that the proposal being made by the Kirby group (to expand the class) was not necessarily a proposal in the best interests of the current members of that class but rather was a proposal which would benefit the legal representatives and the litigation funder of the Kirby class by allowing them to retain control of the proceedings and generate legal fees. His Honour stated:

So far as the evidence presently stands it appears that [Kirby's lawyers have] gone along with [Centro's lawyers'] proposal notwithstanding that it may affect adversely Mr Kirby and the group he represents in terms of making the proceedings more difficult to settle. If there is a benefit to Mr Kirby's group, it is not immediately apparent.

His Honour noted that each of the proceedings could be characterised as “lawyer-driven litigation”, being litigation where the lawyer investigated the potential for a claim and recruited the plaintiff and often the group. He stated:

Sometimes the person who is named as the plaintiff is simply a figurehead, with little at stake, and who is usually not very well informed about the theories of their case.

His Honour stated that on the material before him he could not have any certainty which proposal was favoured by members of the respective classes or even Mr Kirby himself. Notwithstanding that Mr Kirby had instructed his lawyers to agree to expand the class, His Honour stated that this “may not be good enough” in circumstances where Mr Kirby had not received independent legal advice.

Litigation Committee

With these factors in mind, his Honour was faced with the choice of which of the two proceedings to stay. He decided to “ignore altogether” the interests of the lawyers and litigation funders, to give no weight to the fact that Mr Kirby and Centro had nominated the Vlachos proceedings as the proper proceedings to be stayed and to leave out of account the fact that the Kirby action was commenced first in time.

Recognising that the decision he was asked to make would have a profound impact on the members in each group, his Honour was loath to proceed without knowing the views of members of both proceedings.

Ultimately his Honour expressed a preference to appoint a Litigation Committee to provide him with a recommendation as to whether it is in the represented groups’ interests to open the class. His Honour envisaged that members of both groups would be invited to nominate themselves as members on the Committee, providing reasons why their nomination should be accepted (eg size of financial interest, ability or experience in monitoring solicitors). The nominations would be returned to the Court which would, in conjunction with the lawyers, finalise membership of the Committee.

His Honour allowed the parties 21 days to make written submissions regarding whether the Litigation Committee ought to be instituted and if so, in what form and with what powers, but his judgment clearly indicated that he was minded to establish such a committee.

Auction process to appoint lawyers

Justice Finkelstein commented that any order to combine the group or stay one of the proceedings would essentially amount to a choice between which lawyers would run the litigation and “as a consequence, obtain the not inconsiderable benefit that will result from a successful action”. He stated he would be better placed to make that choice if he had information about the respective lawyers including:

- the experience of the firm and the particular lawyers in securities class action litigation;
- the dollar amount of the costs the firm expected to charge;
- details of the funding for the class action, including any commission charged; and
- the amount to be paid as fair compensation to the lawyers whose action did not proceed.

Thus in essence, the two law firms involved have been asked to enter into what his Honour referred to as “an auction process”, with the winning bid to be determined by the judge after receiving a recommendation from the Litigation Committee.

Conclusion

Class actions are a relatively new phenomenon in Australia and this decision indicates that the Federal Court will not shy away from using its wide discretionary powers to actively manage and shape such actions. Further, the Court is concerned to ensure that the interests of not only group members, but also importantly defendants, are not unacceptably mistreated as a consequence of the class action process.

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