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Class Actions: Common Fund Orders Moving Towards Certainty at Last?

Common fund orders or CFOs have been part of the Australian class actions landscape since 2016. The first CFO in a class action was made by the Full Court of the Federal Court on 26 October 2016 in the QBE class action (Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited [2016] FCAFC 148). A common fund order is an order made in a class action proceeding that both the costs to be reimbursed to a funder and the funding commission payable to that funder be borne equally by all group members regardless of whether such group members have signed a litigation funding agreement.

First CFO made in 2016

The CFO that was initially made in the QBE class action was what has become known as an "interim common fund order". It was an order made at an early stage of the class action with the effect that if the class action was to produce a successful outcome for group members, those group members would be required to pay a funding commission to the funder (the "Interim CFO"). The amount of that funding commission was not specified in the Interim CFO, but only in a later judgment approving the settlement of the class action, where it was ordered that 23.2% of the gross settlement sum be paid to the funder in the form of a common fund order. This type of order – made after the resolution of a claim and pursuant to Section 33V(2) of the Federal Court of Australia Act 1976 (Cth) (the "FCA Act") – has become known as a "settlement common fund order" ("Settlement CFO").

Interim CFOs: advantages

There are a number of advantages of an Interim CFO (ie, a CFO made at an early stage of the proceedings).

Generally, an Interim CFO will indicate a maximum commission for the funder. This means an Interim CFO can assist group members in making an informed decision as to whether to participate in the class or opt out knowing the amount of the commission they are likely to pay to a funder.

Further, an Interim CFO gives certainty to a funder that if the class action is successful, all group members will be required to contribute to a funding commission. This certainty avoids the need to "book build" by requiring group members to each individually sign litigation funding

agreements. Book building is an expensive and uncertain exercise, and is arguably contrary to the "opt-out" regime for class actions enshrined by the FCA Act. It leads to closed class actions where there is a risk of concurrent or follow-on class actions rather than one open class proceeding which deals finally with the issues common to the group members. Further, there are some types of class actions where it will be very expensive and difficult to book build to a viable commercial level as the number of group members is large and the amount of compensation for individual group members is low (eg, class actions for overpayment of bank or superannuation fees).

An Interim CFO also gives the court flexibility in relation to setting a funding commission. As the order is an interim one, there is always the ability to alter the amount of the funding commission upon a settlement approval application. This flexibility ensures fair outcomes for group members and is a demonstration of the court exercising its supervisory jurisdiction. If a CFO is not able to be made by the court, the court would be compelled to apply the contractual funding commission and spread that commission equally across group members (a "funding equalisation order"). A funding equalisation order offers less flexibility to the court in setting a funding commission that is in the best interests of group members.

Development of CFO jurisprudence

The jurisprudential journey with respect to common fund orders has not been a smooth one but rather one with many twists and turns. These twists and turns can be attributed to:

- firstly, applications made by defendants seeking to oppose Interim CFOs presumably with the objective that if the Interim CFO is disallowed, a funder will have less commercial comfort in funding the claim and may cease to fund the class action; and
- secondly, discomfort expressed by some members of the judiciary in exercising judicial power to require group members to pay a funding commission to a litigation funder in the absence of any contractual obligation of that group member to do so.

In the period from 2016 to late 2019 following the QBE class action, both Interim and Settlement CFOs were made in a number of class actions both in the Federal Court and a number of the state supreme courts (see Post-Money Max Settlements in Funded Part IVA Proceedings by Professor Vince Morabito 17 December 2020). It seemed that a jurisprudence was developing where the courts were prepared to make Interim CFOs which framed the likely commission for group members determining whether to opt out or stay in the class action (although the amount of this commission could always be altered upon a settlement approval application). An example of this is Pearson v State of Queensland [2017] FCA 1096. Based on this jurisprudence, litigation funders began funding more class actions on an "open basis" and without undertaking any book build; funders began to have comfort that a book build was unnecessary as the court would be likely to make an Interim CFO.

Challenges to interim CFOs

In 2019, however, challenges were brought by defendants to the ability of the court to make an Interim CFO in the Federal Court in Lenthall v Westpac Life Insurance Services Limited and in the Supreme Court of NSW in Brewster v BMW Australia Ltd. Following a joint sitting of the Full Federal Court of Australia (in Lenthall) and the NSW Court of Appeal (in Brewster), both courts found that there was sufficient power for the court

to make an Interim CFO using the general case management power to make orders appropriate or necessary to ensure that justice is done in the proceedings. However, these decisions were overturned by the High Court in the landmark decision of BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45 (BMW v Brewster) handed down in December 2019, in which the High Court held that neither Section 33ZF of the FCA Act nor Section 183 of the Civil Procedure Act 2005 (NSW) empowers a court to make an Interim CFO.

Impact of BMW v Brewster

At the time it was delivered, the decision of BMW v Brewster was considered to be seismic. Much like the recent reactions to the decision of the UK Supreme Court in 2023 in R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023], UKSC 28 commentary was awash with dire predictions of the end of funded class actions in Australia. In reality, the decision has had much less of an impact than was anticipated by some commentators.

The impact of the BMW v Brewster decision has ultimately been limited partly due to the fact that in that decision, what was considered to be beyond power was an interim CFO. The High Court did not directly consider the question of power to make a Settlement CFO as this question was not before it. As such, this question, being the more important one for the future of funded class actions, has been considered by the lower courts in the aftermath of BMW v Brewster.

On 20 December 2019, the Federal Court issued a new class actions practice note (GPN-CA) providing that the Federal Court will still consider appropriate applications for orders sharing the costs of class actions at the conclusion of proceedings of this kind. This was a clear indication by the Federal Court that it was likely that its judges would continue to make Settlement CFOs following BMW v Brewster.

Indeed, since December 2019, both the Federal Court and the state supreme courts of NSW and Victoria have made Settlement CFOs in a number of class actions with the issue of "power" being resolved by reference to Section 33V(1) and/or (2) of the FCA Act (eg, Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3) [2020] FCA 1885; 385 ALR 625; Smith v Commonwealth of Australia (No 2) [2020] FCA 837; Haselhurst v Toyota Motor Corporation Australia Ltd [2022] NSWSC 1076).

In the words of Lee J in Davaria Pty Limited v 7-Eleven Stores Pty Ltd [2020] FCAFC 183, "an intermediate court of appeal is required to follow the seriously considered dicta of a majority of the High Court. And no dicta of a majority of judges can be identified in BMW v Brewster for the proposition that there is a want of power to make a Settlement CFO."

2023: A bump in the road to CFOs

A hurdle to the use of Settlement CFOs appeared in February 2023 when Justice O'Callaghan in Davaria Pty Ltd v 7-Eleven stores Pty Ltd (No 13) [2023] FCA 84 agreed with the position put by Foster J in Cantor v Audi Australia Pty Ltd (No 5) [2020] FCA 637 that the effect of BMW v Brewster was that the court did not have power to make a common fund order either as an Interim CFO or in the context of a settlement approval.

The decision of O'Callaghan in Davaria v 7-Eleven caused considerable ripples in the funded class actions space in Australia. The effect of O'Callaghan J's judgment was that a funder

could provide all of the funding for a case and that case could succeed but that the court had no power to make a Settlement CFO. As such, a funder's commission would be limited by the number of persons who had signed funding agreements.

This decision, if applied, would make many existing and prospective class actions unviable from a litigation funding perspective. The decision was also contrary to a number of other decisions handed down post BMW v Brewster where the court had resolved the issue of "power" by distinguishing the High Court decision which dealt only with Interim CFOs.

Clarity from the Full Federal Court

The uncertainty following Davaria v 7- Eleven has been clarified by the decision of the Full Court of the Federal Court of Australia in Elliott-Carde v McDonald's Australia Limited [2023] FCAFC 162 in which the Court unanimously confirmed that it has the power under Section 33V(2) of the FCA Act to make orders for settlement common funds orders. The Federal Court noted the wide judicial discretion conferred by Section 33V(2), finding that "none of the terms used in Section 33V(2) would, as a matter of natural meaning, be read as precluding a settlement CFO."

The appointed contradictor had argued that for a court to set a funding commission by way of a Settlement CFO was outside of the scope of judicial power but the Federal Court rejected this submission, finding that the making of a settlement CFO was simply the exercise of a discretionary power and that courts commonly "set rates of return of interest, calculate economic loss, and fix the remuneration of executors, trustees, liquidators and salvors, which tasks can involve commercial assessments and considerations of risk".

The current position

The position in relation to CFOs would now appear to be somewhat settled in Australian class actions, being that:

- there is no power for the court to make an Interim CFO; and
- there is clear power for the court to make a Settlement CFO.

The inability to obtain an Interim CFO means that group members are required to make their decision as to whether to opt out from a class action without the benefit of an estimate of what proportion of any settlement sum they may be required to pay to a funder.

This uncertainty also exists for litigation funders who currently make their investment decisions for Australian class actions in the absence of knowledge as to what the likely return for their investment may be. This position may be contrasted with the position relating to GCOs made in the Supreme Court of Victoria where orders can be made at an early stage of a class action allowing a plaintiff law firm to charge its fees as a percentage of the amount recovered rather than on a time or scale fee basis. This disparity could be relieved by legislative intervention expressly giving courts the power to make Interim CFOs.

In the meantime, the courts are working to plug this legislative gap. Although constrained by the inability to make Interim CFOs, the decisions granting Settlement CFOs are moving towards a greater degree of consistency and certainty. In the decision approving the settlement reached in Haswell v Commonwealth of Australia (No 3) [2023] FCA 1093, Lee J made a Settlement CFO of 25%, referring to the Settlement CFO of 25% made in three earlier PFAS class actions and noting that "[t]o take such an approach in this

proceeding has the virtue of consistency with the way in which the other, similar class actions have been resolved."

Such a consistent approach should be welcomed both by litigation funders and by group members to class actions as it promotes certainty to litigation funders making investment decisions and to group members making decisions about their involvement in a class action.

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