LESSONS FROM RECENT CASES ON CLASS ACTIONS

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Kelly v Willmott Forests Ltd (in liq)(No.4) (2016) 112 ACSR 584

- **Context**
  - Managed investment scheme in forest plantations
  - Alleged omission in PDS that upfront application fees insufficient to cover cost of planting and maintaining trees, before harvest.
  - Class members may have received tax benefits, but did not receive return and their interest became worthless.
  - Investors left with liability to lenders financing their investments
  - Respondents are directors of the responsible entities; and lenders of investment loans for acquisition of interests
  - Group consists of ‘client class members’ and (majority) ‘non-client’ class members. No litigation funder

- Features of proposed settlement (relating to ¾ schemes)
  - No compensation paid to applicants or class members;
  - No reduction in loan balances
  - $3.1m paid by respondents, outlaid to reimburse sub-group of class members who retained applicant's lawyers, for costs which totalled $6.086m
  - $2m of contributions pooled by group members to meet respondents' security for costs returned
  - Lenders agreement not to enforce loan contracts for those in default until 60 days after approval of settlement
  - Applicants make admissions (binding on group members)as to validity & enforceability of loan agreements

- Applicants agree that if a class member obtains damages or compensation in any third party proceeding (eg a financial adviser), class member will indemnify the lender
- Applicants provide broad releases to respondents (on their own behalf and on behalf of group members)

- Reasons for rejection of settlement application
  - Significant detriment for some group members flowing from admissions concerning the validity and enforceability of loan agreements
  - Group members not informed of risk of *Anshun* estoppel in lenders' subsequent enforcement proceeding & (contrary to submission) group members unlikely to be estopped in relation to unique claims or defences
  - Inability for group members to opt out if apprised of gaps in the presentation of the case (incl absence of independent forensic accountant's opinion)
  - Potential conflicts of interest
    - Those who registered and those who did not;
    - The solicitor's duty to the applicants and registered group members, and non-client members;
    - The solicitor's interest in receiving legal costs and group's interest in minimizing costs
  - Reasonableness of applicant's legal costs not established

- Applicants’ lawyers not adequately informed so as to give advice (to the Court) on prospects if case continued

- Lessons from rejection of application
  - Provide for extension of opt-out period if there is a differential in benefits as between group members
  - Inform group members the basis for any detrimental terms
  - Disclose, if not manage, conflicts to group members
  - Independent costs assessor to prove reasonableness of costs
  - Ensure counsel fully informed before s/he renders advice to the Court on prospects
  - Unnecessary for respondent to express views on merits of the case
  - Concealing problematic issues from group members won’t enlist judicial assistance.

Timbercorp Finance P/L v Collins & Tomes [2016] HCA 44 (9 November 2016)

- Context
- 2009: Timbercorp group collapses. Group invests in agribusiness projects on behalf of nearly 20,000 investors
- Oct 2009: class action commences; brought by investors. Claim concerns deficiencies in PDS & misleading conduct (by silence).
- Sep - Oct 2011: class action fails (proceeding dismissed).
- Oct 2013: VSCA dismisses appeal

- In 2014, Timbercorp Finance commences separate proceedings against several borrowers (Mr and Mrs Collins; Mr Tomes) to recover loan monies
- Collins and Tomes were group members to the failed class action
- Collins and Tomes seek to advance defences not raised in class action (ie non-entry into loans; representation of limited recourse by lender)
- By its Defence, Timbercorp pleads *Anshun* estoppel (& abuse of process), asserting borrowers precluded from raising these defences
- Sep 2015: Trial Judge answers question for separate determination – borrowers not precluded from advancing these defences
- June 2016: VSCA dismisses appeal

- Decision by High Court on 9 November 2016
- Appellant's Arguments in favour of Anshun estoppel
  - Obvious connection between the result sought to be achieved in group proceeding and borrower's individual claims: avoiding repayment of loans
  - Group members' acquisition of interests in schemes was a fundamental assumption in group proceeding;
  - Unreasonable for group members not to opt out of group proceeding, and/or not to raise their special defences as claims in the group proceeding;
  - Where group members have similar or related claims as lead plaintiff, they should be brought in the one proceeding (cf hundreds of separate proceedings based on much of the same evidence)
  - Group members are 'privies in interest' with the representative party

- High Court's rejection of arguments on *Anshun* estoppel
  - Group members are 'privies in interest' with representative party only to the extent to the claim gives rise to common questions of fact or law. This does not extend to individual claims of group members (whether or not the individual claims should have been raised in the group proceeding).
  - Anshun estoppel only arises where matter in the second action is "so relevant" to the subject matter of the first action that it would be "unreasonable" not to rely upon it. Here:
    - The group members' individual issues (viz loan agreements) were not so relevant to the common issues agitated in the group proceeding (viz circumstances in which investors entered into the managed investment schemes)
    - It was not unreasonable for individual issues not to be raised in the group proceeding: in the group proceeding the *existence* of loan agreements was assumed, but their *efficacy* was not determined.

- Not unreasonable for group members not to opt out: they had no need to in order to preserve their position with respect to separate claims;
- Group members had no relevant ‘control’ over the group proceeding.
- No ‘abuse of process’ in some group members agitating individual issues in subsequent proceedings.
  - No damage to administration of justice in the judge case-managing the group action being deprived of the opportunity, in that proceeding, to manage individual issues.
  - The case managing judge was aware of the possibility of such issues, and their determination was unnecessary to the management of the group proceeding.

Lessons from Timbercorp

- *Anshun* estoppel may run, but only if, in the subsequent proceeding, a group member raises an action that the lead plaintiff could have run, which was capable of generating common issues, which was relevant to the class action such that it was unreasonable not to raise it.

- Ensure the pleading uses the plaintiff's claim as a vehicle to determine only the plaintiff's personal issues and 'common' issues – and no more.
  - Avoid *Anshun* arguments

- Inform group members (in opt out notice) of likelihood of ability to run individual issues after determination of common issues, unless group member wishes to bring own application for case management of individual issues.

Money Max Int P/L v QBE Insurance [2016] FCAFC 138 (26 October 2016)

- Background
  - Policy of ‘opt out’
  - Litigation funding and preference for ‘closed class’
  - Multiplex decision
  - Measures to close the class (s 33ZF)
  - Development of competing class actions

- **The idea behind common fund orders**: effectively spread litigation costs, and litigation funding costs, equally to all group members – funded and non-funded - who stand to benefit from the group action

  - ‘open’ class actions can lead to:
    - insufficient incentive (potential return) for litigation funders;
    - ‘free riders’
  - ‘closed’ class actions can:
    - reduce access to justice;
    - generate complexities at settlement stage (need for equalisation orders)
    - encourage competing class actions

- What the Full Federal Court approved:
  - Undertaking by funder, lead plaintiff and plaintiff's solicitors, to the Court and to each other, to comply with their obligations under funding terms approved by the Court
  - Funding terms (as approved by Court) to prevail over inconsistent provisions in funding agreements & retainer agreements
  - Upon 'resolution', Applicant & Group members to pay from the 'resolution sum' (from common account), prior to distribution of group members:
    - Total monies paid by the Funder (costs of plaintiff's lawyers, adverse costs orders, security for costs)
    - Commission, expressed as a percentage sum of 'resolution sum' approved by the Court.
    - Costs for appeal, expressed as percentage of the 'resolution sum'
    - GST

- Features of the Full Court's orders:
  - Deferring the rate of funder's commission (probably, at point of settlement approval or distribution of damages)
  - No group members worse off than if orders not made
  - Information about deduction of funding commission from portion of settlement sum or damages disclosed before exercise of right to opt out

- Why the Full Federal Court approved common fund orders:
  - Benefit of judicial approval of rate of funding commission;
  - Class members left no worse off than if equalisation funding order subsequently made;
  - Disclosure now assists informed decision to opt out;
  - Benefits to group members

- Power (s 33ZF) to make common fund orders:
  - The test is whether the order is necessary or appropriate to ensure justice is done
  - Is the order reasonably adapted to the purpose of seeking or obtaining justice?
  - Not to be read down in any way impeding orders being made now
  - Judicial power is engaged through the Court's supervisory jurisdiction to protect group members;
  - A 'dispute' does exist, as 2 group members objected to the application

- The orders here were ‘appropriate’:
  - Class members were properly informed before deciding whether to opt out;
  - Beneficial for Court scrutiny of funding terms;
  - Applicant and funded group members likely to be better off (lower commission rate)
  - All group members are treated equally;
  - Reduced potential for conflicts as between funded and non-funded group members

- Policy considerations favoured making the orders:
  - Litigation funding charges recognised as “standard cost” for group members in investor class actions
  - As a matter of practice, open class actions become closed;
  - Acceding to the application will encourage open class actions.

- Lessons
  - Is there any further utility for ‘closed class’ actions?
  - Advise the litigation funder that as the price for such orders:
    - ultimately the Court will settle the rate of commission; and
    - The Court will strive to ensure that no ‘non-funded’ group member will be left worse off
    - Is the litigation funder confident it has a critical mass from its funded group, when the commission level bargained for may later be overridden?
  - Inform group members upfront
    - the circumstance that group members were notified of application for common fund orders (prompting only 2 objections) favoured acceptance of application
  - Extend time for opt out to allow group members to evaluate application