SQUIRE PATTON BOGGS

Group Costs Orders in Australia

This article forms part of our litigation funding series and looks at the first application in the Victorian Supreme Court (VSC) awarding a group cost order (GCO). We also consider the potential benefits of GCOs having regard to the increasing need to book build and develop a commercially viable class in litigation funding in order to attract and maintain interest and support from litigation funders for representative actions. Absent a significant award or settlement, litigation funders' return on investments may be limited, thereby impacting their levels of commitment.

Victorian Supreme Court – First Group Cost Order

On 7 February 2022, the VSC handed down its first decision awarding a GCO under section 33ZDA of the Supreme Court Act 1986 (GCO Application). Slater & Gordon commenced representative proceedings on behalf of persons who acquired shares in an ASX-listed entity, G8 Education, between May 2017 and February 2018 and suffered loss or damage as a result of alleged breaches of the Corporations Act 2001 (Cth) and the Australian Securities and Investment Act 2001 (Cth).

The plaintiff's lawyers brought the GCO Application seeking its legal fees be calculated as 27.5% of any award or settlement recovered in the proceedings, shared among the plaintiff and all group members. Although the percentage recovery is ultimately determined at the finalisation of the proceedings, an order was made by the court that Slater & Gordon would not seek a percentage higher than 27.5%.

Although alternative funding methods may have been available to the plaintiff's lawyers, if the GCO was not successful, such as litigation funding or proceeding on a no win, no fee basis, the court ultimately determined that the application ought to be granted despite opposition from the contradictor.

A GCO is only available in Victoria and is yet to be fully tested to completion of proceedings, including the implementation of any settlement scheme. As such, it is still too early to ascertain whether the mechanism will work as the legislature intended and without any unforeseen inefficiencies or adverse consequences (including delays) for group members, and, importantly, be taken up widely by plaintiff lawyers as a means of potentially benefiting both group members and plaintiff firms.

Whether other state or territory governments, or the federal government, consider implementing similar mechanisms remains to be seen – although it is unlikely that the current federal government will take any steps inconsistent with its focus on greater regulation and scrutiny of the litigation funding market.

GCO Benefits

Depending on the perspective from which GCOs are assessed, there are numerous potential benefits to them. The following benefits may accrue from a representative group perspective:

- **Certainty** to group members at the commencement of proceedings on what the total costs will be in terms of deductions from any award or settlement.
- **Larger pool of group members** increase the potential award or settlement pool, incentivising plaintiff lawyers and thereby making the potential claim (more) viable and associated risks commercially acceptable.
- **Removes book building** by including all group members within the proposed class, without the need to incur significant costs and time to book build. Given the uncertainty surrounding litigation funding with the proposed reforms, the development of a viable class to ensure any award or settlement is commercial when compared to the potential costs, expenses and risks involved in undertaking litigation is essential. Significant costs can be incurred in book building and the GCO removes some of those costs pressures and uncertainties. They also overcome the associated delays in setting up a viable class on a book build basis.
- **Increased group member returns**, as group members' portion of the award or settlement is not proportionately deducted for the litigation funding fee and legal costs, meaning the overall return to group members is higher. Proceedings funded by litigation funders in recent times continue to be criticised, as group members (shareholders or creditors) are seen to be getting no or limited returns and awards are paid out to the litigation funder and their lawyers. GCOs, like some of the proposed litigation funding reforms, are intended to redress that imbalance and bring about meaningful returns to group members.

- **Minimises conflicts** that may arise between litigation funders and group members over the running of proceedings, strategic directions and proposed settlement proceedings. Under the Australian Solicitor Rules, solicitors are required to act in the best interests of their clients and on their instructions. In GCO-based representative actions, situations in which a conflict might arise between a solicitor and client would likely be less prevalent than within the context of a litigation funder supporting a class action where both the funders and group have the same lawyers for part, if not the whole, of proceedings. However, given GCOs are yet to be tried and tested to completion of a proceeding, it is too early to assess the potential conflict considerations in those proceedings.
- **Increased solicitor accountability** by capping the potential legal costs recovered. GCOs can be useful in holding plaintiff lawyers and barristers accountable for the fees sought to be charged, preventing issues occurring similar to *Banksia Securities*.[1]
- **Representative actions with genuine prospects** will only be commenced if there are reasonable prospects of success. Given the risk ultimately lies with legal firms for the payment of adverse costs and not receiving any payment of fees, plaintiff lawyers will, it is hoped, have greater regard to the potential prospects, risk and returns before commencing lengthy, costly and disruptive proceedings.

GCOs and the Pressures on Litigation Funders

This week the potential challenges faced by litigation funders in an uncertain market from a regulatory perspective was highlighted when a New York-based litigation funder withdrew its support for the Priceline class action. That decision was made as a result of insufficient group members signing a funding agreement.[2] The funder sought to have 100 group members sign up and only 30 agreed to join despite numerous notices being issued.

Given the regulatory changes in the litigation funding market and the difficulty facing funders in obtaining a recovery from group members who have not signed LFAs, funders may face increasing pressures to book build and develop viable classes. If that proves to be difficult, as was the case in Priceline, litigation funders will have their own thresholds at which withdrawing support must become a serious consideration irrespective of the adverse costs and investments this may risk.

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1 *Laurence John Bolitho & Anor v Banksia Securities Limited (Receivers and Managers Appointed) (In Liquidation) & Ors* [2021] VSC 666

2 *Ranya Youseff & Ors v Australian Pharmaceutical Industries Limited & Ors*