FEDERAL COURT OF AUSTRALIA

Duck v Airservices Australia [2018] FCA 1541

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| File number: | ACD 97 of 2017 |
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| Judge: | **BROMWICH J** |
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| Date of judgment: | 12 October 2018 |
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| Catchwords: | **REPRESENTATIVE PROCEEDINGS** – representative proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) – application for common fund order – whether appropriate to make common fund order – **held**: common fund order appropriate  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) Pt IVA, ss 23, 33ZF*Federal Court Rules 2011* (Cth) r 1.32  |
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| Cases cited: | *Blairgowrie Trading Ltd v Allco Finance Group Limited (Receivers & Managers Appointed) (In Liq)* [2015] FCA 811; 325 ALR 539*Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422*Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98, 252 FCR 1*Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191*Pearson v State of Queensland* [2017] FCA 1096*Perera v Getswift Limited* [2018] FCA 732; 357 ALR 586  |
| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 3 September 2018 (Applicant)17 August 2018 (Respondent) |
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| Registry: | Australian Capital Territory |
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| Division: | Fair Work |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 18 |
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| Category: | Catchwords |
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| Counsel for the Applicant: | Mr G Donnellan |
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| Solicitor for the Applicant: | Adero Law |
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| Counsel for the Respondent: | Ms Kate Eastman SC and Mr A Hochroth |
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| Solicitor for the Respondent: | Ashurst |

ORDERS

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|  | ACD 97 of 2017 |
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| BETWEEN: | CATHERINE DUCKApplicant |
| AND: | AIRSERVICES AUSTRALIARespondent |

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| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 12 October 2018 |

THE COURT ORDERS THAT:

1. A common fund order be made in terms that reflect the reasons of the Court.
2. The parties file a joint or competing proposed order within 7 days or such other period as may be agreed upon and notified by email to the associate to Justice Bromwich.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

1. On 22 December 2017, the applicant, Ms Catherine Duck, commenced a closed class representative proceeding – that is, a class action – against the respondent, Airservices Australia, under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***). The closed class comprised 76 members who have signed a funding agreement. Ms Duck relies upon an amended originating application and an amended statement of claim. Those documents were filed on 27 March 2018 in accordance with an order made by Jagot J on 20 March 2018. By that means, the definition of group members changed to an open class with the Court’s approval. A further amended originating application and a further amended statement of claim were filed on 28 August 2018, which in part clarified the class.
2. For present purposes, the nature of the class action may be shortly stated as seeking to recover the difference between the benefits Ms Duck and other members of the class obtained under contracts of employment with Airservices Australia and what she contends they were entitled to be paid under one or both of two enterprise agreements. A central and indispensable contention by Ms Duck is that the enterprise agreements in question cover the class members. Airservices Australia dispute that such coverage is provided. The parties have agreed, and the Court has ordered, that this preliminary dispute be determined by way of a separate question, which is yet to be heard.
3. Attempts at settlement have been unsuccessful. On the limited information available, it seems unlikely that this will change unless and until the separate question is heard and determined in Ms Duck’s favour. If that does not occur, the class action will almost certainly be at an end. If it does occur, it remains unclear as to whether settlement is likely to follow, or whether there will remain significant factual disputes going to liability to be resolved at a trial. This includes questions of whether Ms Duck and the class members are excluded from coverage by either of the enterprise agreements and whether or not Airservices Australia had falsely, or misleadingly and recklessly, represented the effect of those agreements to group members.
4. On 27 July 2018, Ms Duck filed an interlocutory application by which she sought what is commonly referred to as a common fund order, relying principally upon the power in s 33ZF(1) of the *FCA Act*, but also s 23 of that Act and r 1.32 of the *Federal Court Rules 2011* (Cth). The making of a common fund order is one of a number of means by which the legal costs of the proceeding and the commission cost of a litigation funder are met by all members of a class who either succeed in, or achieve a settlement in, a class action.
5. The parties agreed that the determination could be made in chambers based on an affidavit in support of the application and written submissions. Airservices Australia neither consents to, nor opposes, the orders being sought, but provided helpful submissions to assist the Court.
6. The Full Court in ***Money Max*** *Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191 at [168] held that there is little doubt that s 33ZF(1) of the *FCA Act* provides power to make a common fund order. That basis for making such an order was relied upon by Lee J in ***Lenthall*** *v Westpac Life Insurance Services Limited* [2018] FCA 1422 at [25], but in the face of a contention by the respondents in that case that *Money Max* was wrongly decided on the question of the Court’s power to make such orders. The respondents in *Lenthall* have recently filed an application for leave to appeal, which in part seeks to challenge the correctness of this aspect of *Money Max*. However, I must proceed upon the basis that *Money Max* is correctly decided.
7. The possible size of the class applicable in this proceeding appears on the evidence to be some significant, but undetermined, proportion of just over 1,200 individuals, being persons who reside both in Australia and overseas.
8. The central question guiding the exercise of discretion is whether, as required by s 33ZF(1), I “*think*” that a common fund order of the kind sought, with any adjustments, is “*appropriate or necessary to ensure that justice is done in the proceeding*”. In *Money Max*, the Full Court emphasised that the focus must be on justice in the extant proceeding, rather than by reference to broad policy considerations, although that limitation would not preclude having regard to the evident policy objectives behind Pt IVA of the *FCA Act*.For present purposes it is sufficient to confine the question raised by s 33ZF(1) to whether such an order is appropriate, bypassing the temptation to decide whether the arguably higher threshold of “*necessary*” has also been met.
9. Ms Duck’s arguments in favour of granting the common fund order may be summarised as follows:
10. funded group members, being those who have already signed the agreement with the funder, will likely be better off under the proposed common fund order because they will have the benefit of a Court-approved means of calculating the funding commission, which is likely to result in a lower commission than they are contractually obliged to pay under the existing funding agreement;
11. unfunded group members, being those who have not signed the existing funding agreement, will likely be better off as, in the absence of such an order, the funder may withdraw funding. In the event that it does not withdraw funding, the funder will apply for a funding equalisation order which is likely to leave unfunded group members worse off than under the proposed common fund order, because they will be liable to pay a higher commission in accordance with the existing agreement;
12. a common fund order will reduce material “*book-building*”costs;
13. the proposed funding terms were appropriate and contained standard protections available to group members in Court-approved funding terms;
14. the proposed orders will reduce the scope for conflict to arise between the interests of funded and unfunded group members;
15. it is in the interests of justice that the costs of the proceeding should be shared between all group members; and
16. all group members, including unfunded group members, will have the opportunity to opt out of the proceeding after being fully informed of the effect of the proposed common fund order.
17. Ms Duck also submits that the proceedings would not have been commenced but for the presence of funding and that such funding may be withdrawn if a common fund order is not made. I do not consider it is appropriate to have regard to those submissions as they concern the interests of Ms Duck and the existing group members, and the interests of the funder, rather than the interests of justice in the proceeding, which are not the same. Any issue of sharing costs and thereby reducing the individual share of costs is already accommodated by the factors identified in Ms Duck’s submissions summarised at [9(1)], [9(2)] and [9(6)] above.
18. Ms Duck submits that a number of individuals initially expressed interest in participating, but only passively by reason of concerns about compromising their ongoing employment. There is no evidence that there is any actual risk to ongoing employment. This issue is best addressed by reference to the category of group members who would prefer, for a multiplicity of reasons, to be only a passive participant, without reference to any unproven pejorative basis directed at Airservices Australia for preferring that arrangement.
19. Ms Duck submits that this is not a case in which it was necessary to notify class members prior to making this application in order to protect their interests. While this did cause me some concern, I am ultimately satisfied that this concern can be met as part of the information provided during the “*opt out*” process due to commence in the near future.
20. Rather than relying on the existing funding agreement, or any other basis, to set a fixed commission rate or calculation method, the proposal advanced by Ms Duck is that the appropriate basis for the commission be determined at a later stage by the Court. As noted below, that position can be further protected by a clause in the order that no group member be any worse off by reason of a common fund order being made. I consider below some more recent authority favouring the fixing of the calculation method upfront.
21. Airservices Australia, after helpfully outlining the general principles applicable and a number of salient issues, makes the following observations and raises the following concerns about Ms Duck’s application:
22. the orders sought, appropriately from the perspective of Airservices Australia, do not set a fixed commission for the funder, but rather provide for the commission to be approved by the Court on settlement or judgment;
23. there is a live question of whether or not group members would be better off under a common fund order than if a funding equalisation order were made at a subsequent stage in the proceedings and for that reason this was an appropriate case for a “*no worse off*” order of the kind made in *Money Max* to be imposed – in reply submissions Ms Duck expresses a willingness to have the order made subject to such a clause, which the Court considers appropriate in this case;
24. sharing the burden of legal costs could equally be achieved through a funding equalisation order;
25. there was no evidence to support the proposition that any “*book building*” exercise would continue if a common fund order was not made – in reply submissions, which I accept, Ms Duck maintains that book building costs are a relevant consideration, pointing to the absence of challenge to the affidavit evidence to the effect that this remained an issue and also pointing to considerable commercial incentives to continue book building if a common fund order were refused;
26. it is not appropriate to have regard to the submission that proceedings would not have been commenced but for funding and the funding may be withdrawn if a common fund order is not made – as noted above at [10], that is a position the Court has independently reached;
27. the funding terms proposed are not, as submitted by Ms Duck, materially the same as standard terms previously approved by the Court, with appropriate protections, because there are material differences at paragraphs 15, 16(a)(iii), 17 and 20(c)(ii) of the terms approved in ***Pearson*** *v State of Queensland* [2017] FCA 1096 – Ms Duck addressed each of those differences in reply submissions, as addressed in the following comments:
	1. paragraph 15 of the *Pearson* funding terms, which deals with confidentiality obligations on the funder, should be inserted. To the extent that Ms Duck is concerned that this will override certain permitted disclosures under the existing funding agreement, paragraph 15 of the *Pearson* funding terms can be tailored for this to be avoided or otherwise addressed;
	2. it is appropriate, as proposed by Ms Duck in the alternative, to insert a clause akin to paragraph 16(a)(iii) of the *Pearson* funding terms, including the schedule, so that procedures for dealing with a disputed proposed settlement are in the common fund order, rather than being left to a conflicts management policy which is required to be implemented as part of the terms;
	3. there is no difficulty in not making provision for appeal costs as no appeal funding is in contemplation; and
	4. akin to the *Pearson* funding terms, the proposed funding agreement may only be terminated by order of the Court on application by the applicant, funder or a group member. In the event of termination of the funding agreement on application by the funder, paragraph 20(c)(ii) of the *Pearson* fundingterms required the funder to indemnify the applicant and group members for any legal costs and disbursements reasonably incurred and payable to the applicant’s lawyers up to the date of termination. Paragraph 21(c)(ii) of the *Pearson* funding terms provided a parallel indemnification in the event that the proposed funding agreement were to be terminated on application by the applicant or a group member. If paragraph 20(c)(ii) or 21(c)(ii) of the *Pearson* funding terms are not to be inserted, the applicant’s lawyers should be aware that the Court would most likely look unfavourably upon recourse against the applicant or group members for any legal costs and disbursements that exceed what the funder is obliged to pay by reason of exceeding the funding cap agreed upon before termination of the funding agreement took place;
28. the scope for conflict between group members is unlikely to arise because, since *Money Max*, there has been disapproval of orders being made that would bar group members from participating in a judgment: see *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98, 252 FCR 1 at [70]-[76];
29. the problem with “*free riders*” (that is, group members taking a share of the benefits without contributing to the legal costs or funding) is equally addressed by funding equalisation orders;
30. there is no evidence of any victimisation of any group member by Airservices Australia, which does not know the identity of any current employees who have signed funding agreements, such that the Court should not base any common fund order on the prospect of victimisation of employees – again, a point independently reached by the Court at [11] above; and
31. it may be that a combined notice approach would be appropriate by which group members would be advised of their statutory right to opt out and also be informed that a common fund application had been made, giving them an opportunity to object – in light of the conclusions reached below, it is not necessary to consider that option further.
32. The position of not having any basis for determining the commission payable until a later time in the proceedings, as was found to be appropriate in *Money Max*,has since been questioned by Lee J as not necessarily being the best way to address the problem of windfall profits and appropriate incentives: see *Perera v* ***Getswift*** *Limited* [2018] FCA 732; 357 ALR 586 at [285] to [291], quoted again by his Honour in *Lenthall* at [60]. However in this case, no alternative of the kind that was before Lee J in *Lenthall* was proposed.
33. In *Lenthall*, the proposal, which was accepted by Lee J, was a funding rate of the lesser of three times the total spend on legal costs and disbursements and adverse costs orders, or 25% of the gross recovery. In reaching that conclusion, his Honour referred to a variety of rates and funding agreements in other cases, and trends towards greater levels of funder completion and lower funding rates emerging, albeit with a focus on securities class actions: see [20]-[24]. Even if such a proposal had been advanced in this case, I would have needed some persuading that this was appropriate. A significant reason is that there is at least a reasonable possibility that the separate question will either end the proceeding, or provide a solid platform for it to settle. In those circumstances, the *Lenthall* approach may not merely be inappropriate, at least at this early stage, but also distort decision-making about the conduct of the litigation. Although, for the reasons Lee J has identified in *Getswift* at [286], the Court may have difficulty in ultimately deciding how the funding commission should be determined, there is presently no easy way of avoiding that, and it remains a better approach in the circumstances of this case than the approach his Honour adopted in *Lenthall.* Of course, that may change as the proceeding progresses.
34. With some hesitation, having regard in particular to some of the reservations expressed by Wigney J in refusing to make a common fund order in *Blairgowrie Trading Ltd v Allco Finance Group Limited (Receivers & Managers Appointed) (In Liq)* [2015] FCA 811; 325 ALR 539, I am satisfied that it is appropriate to make the common fund order sought in this case, with certain adjustments referred to above at [14]. The most important considerations in reaching that conclusion are that:
35. the proceeding is now an open class action, rather than a closed class action, which will advance the objective in this proceeding of ensuring justice is done by maximising the size of the class, thereby reducing the pro-rata legal costs and commission costs of each member of the class who does not opt out – an outcome that is also in the interests of Airservices Australia in reducing the risk of multiple proceedings;
36. each member of the open class will be able to make the opt out decision at a single point in time, taking into consideration both participation and the costs of participation by way of reduction of any award or settlement;
37. no further book building costs will need to be incurred; and
38. given the ongoing employment relationship between Airservices Australia and at least some of the class, supporting the move to an open class in this way, and the orderly progress of the proceeding, will facilitate passive participation of the kind clearly contemplated by Pt IVA of the *FCA Act*, without needing to delve into any reasons for anonymity being sought to be maintained.
39. The parties are directed to furnish to the Court an agreed or competing draft order to give effect to these reasons within seven days or such shorter or longer time as may be ordered. I am aware that the opt out and other processes may require more to be done collaterally to the making of the order than can be achieved in seven days, so the alternative will be for the parties to agree upon different timing and to notify my associate accordingly.

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| 1. I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.
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Associate:

Dated: 12 October 2018