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# Positive class action developments for D&O insurers

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***Perera v GetSwift Limited* [2018] FCAFC 202**

## AT A GLANCE

- D&O insurers in Australia have welcomed the recent Full Federal Court decision in the GetSwift case[1]. The decision is helpful for D&O insurers because it provides some clarity on how the Court should exercise its power to permanently stay competing open class actions and allow only one open class action to proceed against a respondent.
- The Court decided that there was no "one-size fits all" principle to assess which open class action should proceed and which should be stayed.
- The Court expressed a clear preference for a selection process that maximises the likelihood of the best outcome for the applicant and group members, rather than simply the lowest cost, while also maintaining a healthy level of competition amongst funders and lawyers.

## The issue

### What happens where there are competing open class actions against one respondent?

The increasing prevalence of multiple, open securities class actions in Australia has been an issue for some time. However, 2018 has seen the issue assume greater significance with many instances of competing securities class actions being commenced this year on an open class basis. This creates an overlap of group membership across each of the competing class actions and presents significant case management challenges for the Court and parties.

The high water-mark, and a clear sign that the issue needed addressing, was the commencement of five separate securities class actions on an open basis this year against Australian financial giant AMP Limited regarding the same issues and substantially the same time period. The collective view of stakeholders is that a solution, or at least some firm direction from the courts or legislature, is desperately needed. That direction has now arrived in the form of the *GetSwift* decision.

[1] *Perera v GetSwift Limited* [2018] FCAFC 202

## The case

### Seeking a permanent stay of two of three open class actions

The *GetSwift* decision involved three competing open securities class actions, with essentially the same facts and allegations, against logistics technology company GetSwift Limited. GetSwift sought a permanent stay of two of the three actions on the basis that they were an abuse of process because:

- GetSwift should not be forced to defend multiple proceedings regarding the same issues, and
- multiple proceedings are not in the interests of group members when one open class action was capable of vindicating all of their rights and interests.

In the past, competing class actions have been resolved either by agreement between applicant groups (and, specifically, their respective lawyers and funders) allowing the consolidation of proceedings into one (for example, *Johnson Tiles Pty Ltd v Esso Australia Ltd*[2]), or by one or more of the competing actions being closed, leaving only one proceeding remaining with an open class of group members (for example, *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*[3]).

However, in *GetSwift,* no agreement was reached to consolidate proceedings and no applicant group advanced class closure as a fall-back position. Accordingly, the stay application was run, in essence, on an "all or nothing" basis.

## The decision

### Permanent stay of two of three competing class actions upheld by the Full Federal Court

At first instance, the Federal Court granted permanent stays of two of the three competing open securities class actions. The Full Federal Court upheld this decision (albeit offering differing reasons on some issues) and, in doing so, set out an important set of principles about how stay applications for competing open class actions should be considered and guidance on how a court should assess which of the competing actions remains open and which should be stayed.

The Full Court found that:

- Three class actions brought against the same respondent for substantially the same claims and on behalf of the same group members were likely to involve the increased use of judicial and court resources, move more slowly and less efficiently through the interlocutory stages, and incur increased costs for both the applicants and respondent
- The Federal Court has power to permanently stay competing class actions, and
- The judge, at first instance, appropriately exercised his powers to stay two of the three competing class actions by considering all of the circumstances of the case, including:
  - the position of each of the three open class actions (noting none advocated for a closed class as a fall-back position)
  - the relevant interests of justice
  - the interests of the respondent in having to deal with multiple class actions regarding the same matter (involving increased legal costs and exposure to adverse costs orders)
  - the interests of the applicants and group members
  - the broader interests of ensuring that class actions are run expeditiously and cost-efficiently, and
  - the available alternative remedies available, which include declassing and class closure.

Just as importantly, the Full Court went on to consider the first instance judge's decision to choose one action over the other two. The first instance judge found in favour of one action because that action was "very likely, in most scenarios at all stages of the proceeding, to produce a better return for group members".

The Full Court did not disturb the first instance judge's decision in respect of the "winning" open class action, but it did make some very important observations about the process that should be adopted by suggesting that the first instance judge's approach, while open, should not be slavishly followed or adopted as the "right" way.

> The Full Court acknowledged that "there is no one right answer to case management questions that arise when dealing with competing class actions."

[2] (1999) ATPR 41-679
[3] [2017] FCA 947

## No "one size fits all" solution, but guidance on the selection process

The Full Court acknowledged that "there is no one right answer to case management questions that arise when dealing with competing class actions. There cannot be a 'one size fits all' and different judges will take a different view of some of the incommensurable and conflicting considerations that may arise. It should be kept in mind that there is no 'silver bullet' solution to case management problems of competing class actions and each of the 'solutions' can be said to have some or other problem."

Having made that general observation, and having identified some of the problems with each of the case management methods available to manage competing class actions, the Full Court highlighted the following considerations which ought to be taken into account in the selection process:

- The Court should not give undue focus to lower costs and funding charges as doing so is likely to promote a "rush to the bottom" by funders and solicitors keen to win the tender. Specifically, the Court should "focus less on achieving the lowest possible costs and funding charges in any selection process, and more on selecting the proceeding with a funding and costs model likely to best motivate the applicant's solicitor and funder to work assiduously to achieve the best outcome for the applicant and group members and to take responsible risks in that regard."
- The Court should be astute to select the proceeding with the legal team that is "most likely to achieve the largest settlement or judgment, i.e. the most experienced and capable."
- The Court must strongly discourage a rush to court in large and complex proceedings by dispelling any perceived "first mover advantage."
- As the selection process is conducted in full view of the respondent, it is likely that the respondent "will obtain a reasonable understanding of the approximate size of the 'war chest' available for the case against it", with the risk the respondent's solicitors can use this information to their strategic advantage. The Full Court emphasised that the Court should be careful to avoid the interests of the applicant and group members being damaged in this way (although precisely how is unclear).
- The costs associated with stay applications and consequences for unsuccessful lawyers and funders are undesirable and may lessen competition, which has been "the single most important matter giving rise to reduced costs".

## Implications for class action respondents and their D&O insurers

For five key reasons, the *GetSwift* decision is significant for class action respondents and their D&O insurers.

1. **It provides much needed guidance on the relevant principles, procedures and probable outcomes where a respondent is met with competing open class actions.**

   The recent commencement of five separate open class actions against AMP Limited highlights the need for the guidance provided by the *GetSwift* decision. Importantly, AMP's application for a stay of the multiple open class actions against it (essentially, the same application sought in *GetSwift*) will be heard by the Supreme Court of New South Wales on 6 and 7 December 2018 and will provide a working example of case management principles for competing open class actions post-*GetSwift*.

2. **The GetSwift decision highlights the Federal Court's concern about case management principles being compatible with sustainable funding models and balancing the interests of both group members and respondents.**

   The Full Court was at pains to emphasise the importance of avoiding (or at least discouraging) a "race to the bottom" in both speed of commencement of proceedings and offering the cheapest funding model. The Full Court flagged the obvious problems with the Court favouring the quickest and cheapest class action vehicle in its selection process. The Full Court expressed a clear preference for a selection process, which maximises the likelihood of the best outcome for the applicant and group members rather than simply the lowest cost, while also maintaining a healthy level of competition amongst funders and lawyers.

3. **The decision places the onus on class action lawyers and funders to address the case management issues created by competing open class actions and find a solution or risk having their action stayed.**

   While the manner in which interested parties will respond remains to be seen, the decision still represents a significant shift that considerably simplifies matters for respondents.

4. **It highlights the significance and acceptance of common fund orders as the preferred method for open class actions.**

   Common fund orders are relatively new to the Australian landscape and permit a litigation funder to recover a contribution towards its commission and fees from all group members, irrespective of whether a group member has entered into a funding agreement. The Full Court emphasised the benefits and compatibility of a common fund order with a singular (as opposed to competing) open class action.

5. **Finally, the decision demonstrates why class action litigation in Australia remains a challenge for D&O insurers and their advisers.**

   While the *GetSwift* decision is obviously a positive one, it highlights the uncertainty confronted by all class action participants as jurisprudence develops and solutions are found by the courts through their case management powers.

## Need to know more?

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