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Court of Appeal clarifies lead plaintiffs' authority to settle class actions

The Commercial Bar Association of Victoria

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The Victorian Court of Appeal has ruled that a settlement deed containing releases and acknowledgements beyond the scope of common issues in the Great Southern class action is binding upon group members, despite the High Court's holding that representative plaintiffs and group members are not privies in relation to uncommon issues.

Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd [2017] VSCA 51

A recent case note [1] addressed:

- the High Court's ruling in Timbercorp that representative plaintiffs were not privies to group members beyond pleaded common issues; and
- how Timbercorp might impact the future conduct and settlement of group proceedings in Australia.

Since that note, the related "Great Southern" class action has been revisited by the Victorian Court of Appeal. In Pekell Delaire [2] the Court ruled that a settlement deed that contained releases and acknowledgements that went beyond the scope of the common issues in the class action was binding on group members. The deed in question had been approved prior to Timbercorp and the approval order had not been appealed.

One of the group members disputed the efficacy of the releases and acknowledgements in the settlement deed in response to a statutory demand issued by a released financier party. That group member relied upon, among other things, the Timbercorp reasoning. The Court of Appeal dismissed this challenge, and held that the settlement deed could bind group members in respect of matters beyond the common issues because:

- a settlement approval order under s 33V of the Supreme Court Act 1986 (Vic) (Act) could, and in this case did, supply the privity which the High Court had observed was otherwise absent in respect of the individual claims of group members;
- as a consequence, the parties could settle a group proceeding on whatever terms were agreed and approved by the Court; and
- each of the group members was on notice of the application to approve the settlement deed, and had the opportunity to opt out of the group proceeding before approval of the deed.

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The respondent to the class action (the scheme financier) separately sought declarations as to the general application of the settlement deed. The Court declined to grant that relief, as it had not been sought in the Court below, the immediate appellant was not a representative of all group members and other group members were not properly on notice of the respondent's application. As a matter of practicality, however, the Court of Appeal's decision seems likely to render declaratory relief unnecessary.

A critical feature in *Pekell Delaire* was that the order approving the settlement deed had not been appealed or otherwise challenged. The decision emphasises the importance of finality in litigation. The Court's observations as to the ability of a Court order to supply to a lead plaintiff the privity that Part 4A of the Act otherwise might not supply, needs to be understood in that context. Parties seeking approval of future settlements under Part 4A must address whether *Timbercorp* means that an order approving a settlement deed that strays beyond the common issues ought to be made in the first place.

Moreover, the reasoning in *Pekell Delaire* again emphasises the importance of the anterior notices to, and communications with, group members regarding the scope of the proceeding and the content of a proposed settlement.

The Commercial Bar Association of Victoria - Bridget Slocum

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