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CLASS ACTIONS AND LITIGATION FUNDING (A LAYMAN'S GUIDE)

Recent publicity has turned the spotlight on class actions against giant public corporations like GIO, Multiplex, Telstra, Aristocrat Leisure and Amcor. Although these cases have a strong corporate flavour, class actions are also available in other areas such as contaminated water supplies or defective pharmaceutical or medical products. There is no limit to the range of potential claims, whenever large numbers of people are affected.

This kind of litigation has resulted in a new and rapidly developing service industry in the form of "litigation funders". These are companies with substantial financial resources who are able to "invest" in this kind of litigation by taking on the risks, in exchange for a share of the successful outcome – often about one third of the result.

To put this into perspective, imagine a situation where there are 4,000 individuals, each with a small claim averaging say \$10,000.00 per person. Each claim, taken alone, would be too small and too risky to contemplate litigation. Not only that, but imagine how crowded the court system would become if all 4,000 individuals were to launch separate legal proceedings. Instead, by bundling these claims into one class action, we have a claim for potentially \$40 million – a sum which can easily justify litigation, using a funder who is willing and able to carry the risks, and stands to make well over \$10 million if the litigation succeeds.

The 4,000 individuals who elect to participate, are able to do so free of the risks which would normally arise if the litigation fails.

THE LAW HAS REVERSED ITS POSITION!

Not long ago, litigation like this was regarded as contrary to public policy and an abuse of court process. The ancient laws refer to this kind of litigation as "maintenance and champerty" – an old English expression involving meddling in someone else's litigation, where the meddler had no interest other than making a profit by sharing in the result. This was referred to as "trafficking" in litigation.

How times have changed. Now, the Supreme Court rules enable class actions to be brought, permitting claimants to participate voluntarily, by what is referred to as an "opt in" process.

The law no longer rejects the role of the litigation funders but instead sees some real benefits in the service provided by them. For example:

they enable potential litigators with small claims to secure practical access to their legal rights, in other words it gives them access to justice;

it is even suggested (by Justice Kirby) that this is a fundamental human right which ought to be readily available to all;

the process avoids a multiplicity of separate actions;

litigation funding enables small claimants to have the benefit of legal representation which they could not otherwise afford;

the process enables the litigation funder to marshal substantial resources, to gather evidence and to retain solicitors and barristers, all of which would be beyond the reach of most individuals with small claims;

these proceedings allow for a just, quick and cheap resolution of issues where large numbers of plaintiffs have the same interest;

not only does the litigation funder carry the risk of the legal costs but it is often required to put up security for costs, exposing the funder to the risks, perils and costs of litigation which small claimants could not afford.

Having regard to these benefits, there are real public policy reasons for permitting litigation funders to continue to resource and fund these class actions.

Not surprisingly, large "plaintiff" law firms representing the claimants have grown and benefited from these claims. Even the giant "defendant" law firms, usually engaged by corporations to defend them against these actions are very substantial beneficiaries of this kind of litigation.

People are often suspicious of lawyers drumming up costs by encouraging unnecessary legal proceedings. Whether this is true or not, a significant advantage of combining litigation funders with plaintiff law firms is that they are outcome, not hourly rate, focused, and thus have a real interest in curtailing rather than protracting legal proceedings – to the benefit of all concerned.

Mike Lyons

VPro Lawyers & Corporate Consultants