Equity Division
Supreme Court
New South Wales

Case Name:	**Australian Retirement Group Pty Ltd v The Commonwealth Bank of Australia Ltd (No 4)**
Medium Neutral Citation:	[2023] NSWSC 1571
Hearing Date(s):	13 December 2023
Date of Decision:	15 December 2023
Jurisdiction:	Equity - Commercial List
Before:	Ball J
Decision:	(1) Pursuant to ss 173 and 183 of the Civil Procedure Act 2005 (NSW) (the Act), the discontinuance of the Proceeding is approved on the terms set out in the Deed of Settlement dated 4 September 2023 annexed as annexure "A" to the Affidavit of Andrea Lee sworn on 19 September 2023 (Deed of Settlement). (2) Pursuant to s 183 of the Act, the Plaintiffs are authorised, nunc pro tunc, to enter into and give effect to the Deed of Settlement (and all transactions contemplated by it) for and on behalf of the group members who have not opted out of the Proceeding. (3) Pursuant to s 179 of the Act, the persons affected and bound by the discontinuance are the Plaintiffs, the persons identified in Order 2 above, the Defendant and Hall Partners. (4) Pursuant to s 183 of the Act, the releases, covenants, and plea bar in the Deed of Settlement are to operate without prejudice to the right of any party to the Deed of Settlement to make an application to enforce the Deed of Settlement in a new proceeding. (5) Pursuant to s 183 of the Act, the group members listed at Annexure A to these orders are taken to have validly opted out of these proceedings.

Catchwords:	CIVIL PROCEDURE — Representative proceedings — Settlement or discontinuance — Court approval — Where claim is not strong — Not realistic for the proceedings to continue without litigation funding
Legislation Cited:	*Civil Procedure Act 2005* (NSW)
Cases Cited:	*Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388 *Findlay v DSHE Holdings Ltd* (2021) 150 ACSR 535; [2021] NSWSC 249
Texts Cited:	*Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, vol 1 (September 2018)
Category:	Consequential orders
Parties:	Australian Retirement Group Pty Limited (First Plaintiff) Peter Gower Walsh (Second Plaintiff) The Commonwealth Bank of Australia Limited (Defendant)
Representation:	Counsel: T Hall (Solicitor for the plaintiffs) I Ahmed SC (Defendant) Solicitors: Hall Partners (Plaintiffs) Herbert Smith Freehills (Defendant)
File Number(s):	2016/86790
Publication Restriction:	None

JUDGMENT

1 By a notice of motion filed 16 November 2023, the plaintiffs seek the Court's approval to terms of settlement of these proceedings. The plaintiffs bring the proceedings as representatives of persons who borrowed money from Bankwest (now a subsidiary of the defendant, Commonwealth Bank of Australia (***CBA***)) prior to 19 December 2008, who fall within the definition of a "small business" customer contained in the Banking Code of Conduct and who were placed into the Credit Asset Management (***CAM***) division of Bankwest and were not subsequently "rehabilitated". The group members also include persons who guaranteed those borrowings. The Court's approval to the settlement is required under s 173 of the *Civil Procedure Act 2005* (NSW) (***the CPA***), which provides:

> (1) Representative proceedings may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court.

2 The proceedings were commenced in 2016. As is apparent, they have progressed slowly, often as a consequence of delays by the plaintiffs, which, more recently at least, have been caused by problems in obtaining funding for the proceedings, about which something more will be said shortly.

3 The claims made in the proceedings are complicated, but in substance it is alleged that following the acquisition of Bankwest by CBA, CBA engaged in unconscionable conduct by treating the loans of group members as non-performing and bringing them to an end in a way that was harsh, unconscionable and in breach of provisions of the Banking Code of Conduct. The conduct is said to include pushing the relevant group members into loan-to-value defaults by obtaining improper valuations or wrongly claiming that the group members' facilities were in default in some other way with the intention of placing the relevant loans under the management of CAM with the aim of bringing them to an end.

4 Under the terms of the proposed settlement:

(a) The plaintiffs will discontinue the proceedings;

(b) CBA will be paid $2.9 million in respect of its legal costs by AmTrust Europe Limited, which provided an indemnity as security for CBA's costs;

(c) CBA will contribute $375,000 towards the plaintiffs' legal costs as at the date (that is, 4 September 2023) of a deed executed by the parties which records the terms of settlement;

(d) CBA will pay an amount not exceeding $75,000 in respect of the plaintiffs' costs after the date of the deed;

(e) CBA will pay the second plaintiff, Mr Peter Walsh, $20,000 in recognition of his role as a representative party;

(f) Each group member has been given an opportunity to opt out of the proceedings and if a group member has done so, CBA covenants not to rely on the expiration of any limitation period as a defence to a claim in any new proceeding which is commenced by that group member provided that the claim arises out of the subject matter of these proceedings and proceedings are commenced in an Australian court within 90 days of the approval of the settlement by the Court (and the expiration of any appeal from the Court's decision). In all, 22 Group Members have exercised a right to opt out of the proceedings or indicated that that is what they wish to do;

(g) CBA agrees not to take any further steps against a group member to enforce a claim which it may have pursuant to any loan facility that is the subject of these proceedings or any guarantee given in respect of such a facility except in certain circumstances. Those

circumstances are precisely defined in the deed of settlement but in substance they are where (1) a group member is a party to other proceedings concerning a loan facility covered by this proceeding; or (2) a group member was a party to proceedings of that type and those proceedings have been resolved (by compromise or judgment); or (3) a group member is named as a person to whom the agreement does not apply.

5 The settlement was reached in the context where:

(a) Prior to 1 October 2020, litigation funding had been provided by JustKapital Limited and Shine Lawyers had carriage of the proceeding on behalf of the plaintiffs;

(b) JustKapital ceased to provide litigation funding on 29 September 2020;

(c) Since 20 May 2021, Hall Partners have been acting for the plaintiffs. Neither Hall Partners nor the plaintiffs have been able to arrange alternative funding.

6 The fundamental question on an application under s 173 of the CPA is whether the settlement "is fair and reasonable in the interests of the group members considered as a whole": see *Findlay v DSHE Holdings Ltd* (2021) 150 ACSR 535; [2021] NSWSC 249 at [12] per Stevenson J. That requirement requires the Court to consider whether the settlement is fair and reasonable as between the parties and as between Group Members

7 I am satisfied that the settlement is fair and reasonable.

8 It is not realistic for the proceedings to continue without litigation funding. The plaintiffs do not have the capacity to fund the proceedings. The claims made in the proceedings are complicated. Although the Court has not been provided with any estimate of the length of the final hearing, it is apparent from the nature

of the case that it would be likely to last several weeks. It is obvious that the proceedings could not continue without competent legal representation. That could not be obtained unless the plaintiffs obtained litigation funding or competent counsel were prepared to appear on a contingency basis.

9 It is not realistic to think that the plaintiffs will be able to obtain alternative litigation funding or representation by counsel on a contingency basis. They have not been able to do so to date, although there is little evidence before the Court about what steps have been taken in that regard. More significantly, though, it is apparent that the difficulties with the proceedings make it unrealistic to expect that the plaintiffs would be able to obtain litigation funding or that counsel would be prepared to appear on a contingency basis. The underlying claim appears to have poor prosects of success. Leaving the details aside, the essential claim is that on acquiring Bankwest, CBA took the view that it wanted to divest itself of a group of performing loans and acted unconscionably to achieve that result. Why CBA or Bankwest under its control would act in that way cannot be explained. As was observed in the *Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, vol 1 (September 2018) at 186 when commenting on the allegation made in these proceedings:

> So if, contrary to the facts as they unfolded, the loans were sound and well-secured, why would CBA deliberately set out to bring the loans to an end? **What motive could it have for 'engineering' default or not extending a loan if the borrower was meeting what was due and the loan was well-secured?** What motive could CBA have to act in ways that would not maximise its profit from the transaction? (Emphasis in original).

10 Of course, the Court is not bound by the views of the Commissioner. But the point made by the Commissioner is a strong one to which there is no apparent answer. Moreover, the comments of the Commissioner on the prospects of success of claims of the type brought in these proceedings and the reasons given by the Commissioner are likely to weigh heavily with anyone contemplating providing funding for the current proceedings.

11 In addition, it is quite apparent that, although it has been possible for the plaintiffs to identify some common questions that arise in relation to the claims brought on behalf of group members, the individual claims of group members are very much fact specific. They depend on the particular circumstances of each group member and the particular way in which CBA dealt with that group member. As a result, even if some or all of the common questions were answered in the favour of group members, it is likely that it would be necessary for there to be separate hearings in relation to each group member's claim both in relation to liability and relief. That would make a global settlement more difficult to achieve and would make the proceedings unattractive to a litigation funder.

12 Included in the evidence filed in support of the application was a helpful confidential advice obtained by the plaintiffs from Mr Rayment SC and Mr Smorchevsky on the reasonableness of the proposed settlement. It is neither necessary nor appropriate to set out the terms of that advice. It is sufficient to observe that that advice supports the view that, particularly in the light of the evidence filed by the plaintiffs, the claim is not a strong one.

13 In that context, the settlement is reasonable. It provides a real benefit to many group members because CBA agrees not to take any further action against them. For example, as a result of that agreement (if approved), Mr Walsh will no longer face the prospect of being made a bankrupt. On the other hand, the settlement permits any group member to opt out of the proceedings (and settlement) on terms that will permit that group member to commence its own proceedings, notwithstanding the possible expiration of a limitation period. A number of group members have chosen to exercise that option. Although it might be said that that option is of little value because of the costs of pursuing an individual claim, it needs to be remembered that it is likely that any group member would have to incur substantial costs in pursuing its claim to finality because the determination of the common questions would still leave many issues unresolved in relation to each group member's claim.

14 Some group members will not obtain the benefits of the settlement (or be bound by the releases given on behalf of group members). It is reasonable that the benefits and releases should not extend to group members who have brought other claims against CBA. There is no reason why a group member should get the benefit of the settlement of these proceedings (or be bound by the releases given as part of the settlement) when there are other proceedings on foot relating to the same loans or other proceedings of that type have been resolved.

15 That leaves the group members who are specifically excluded from the benefits of the settlement of these proceedings. It appears that they have been excluded because loans obtained by them continue to be managed by CBA. Three things may be said in relation to those group members. First, those group members are not any worse off as a consequence of the settlement. They were free to opt out of the proceedings, with the result that the settlement will not be binding on them. Even if they have not opted out, they will not be bound by the releases given in the settlement deed. Moreover, under s 182 of the CPA, the running of the limitation period that applies to the claim of the group member to which these proceedings relate is suspended. Consequently, the group members who are excluded from the benefits of the settlement are unlikely to be prevented from bringing their own claim if they choose to do so even if they have not opted out.

16 Second, it seems reasonable that CBA should not provide releases in favour of group members whose loans continue to be under active management.

17 Third, and arising out of the second point, there is no reason to think that CBA would have agreed as part of a settlement to release group members whose loans are still under active management. Accordingly, it was reasonable for the plaintiffs to agree to a settlement that excluded group members who fell within that class from obtaining the benefits of a release in circumstances where the settlement provides significant benefits to other group members. The only realistic alternative is that no settlement would be reached with the likely result that the proceedings would eventually be dismissed.

18 On the question of the reasonableness of the settlement, it is also worth observing that group members were given an opportunity to object to the settlement and were on notice of the hearing of the motion. Although a number of group members sent correspondence to Mr Hall objecting to the way that they were treated by CBA, none filed a formal objection to the settlement, and none appeared at the hearing to object to it orally.

19 The settlement also provides for the payment of a relatively modest amount of legal fees by CBA. That is plainly of significant benefit to the plaintiffs, since it will relieve them of the burden of having to pay legal fees themselves in circumstances where they continued the proceedings after litigation funding was withdrawn. It is also appropriate that Mr Walsh should receive a modest amount to compensate him for the time he spent as one of the representative parties: see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388 at [76] per Jessup J.

20 By an amended notice of motion filed in Court on the day of the hearing, the plaintiffs sought an order that the group members listed in Annexure A to the motion be taken to have validly opted out of these proceedings. That order was sought in circumstances where most of those named in the Annexure have filed formal opt-out notices with the Court, but two have not. In the case of those two (Mr Denis Ryan and Mr Darren Guy), I am satisfied from correspondence they have sent to Mr Hall that they regarded themselves as having opted-out or intended to do so. Consequently, I am satisfied that it is appropriate to make that order.

21 Accordingly, the orders of the Court are:

(1) Pursuant to ss 173 and 183 of the *Civil Procedure Act 2005* (NSW) (***the Act***), the discontinuance of the Proceeding is approved on the terms set out in the Deed of Settlement dated 4 September 2023 annexed as annexure "A" to the Affidavit of Andrea Lee sworn on 19 September 2023 (***Deed of Settlement***).

(2) Pursuant to s 183 of the Act, the Plaintiffs are authorised, *nunc pro tunc*, to enter into and give effect to the Deed of Settlement (and all transactions contemplated by it) for and on behalf of the group members who have not opted out of the Proceeding.

(3) Pursuant to s 179 of the Act, the persons affected and bound by the discontinuance are the Plaintiffs, the persons identified in Order 2 above, the Defendant and Hall Partners.

(4) Pursuant to s 183 of the Act, the releases, covenants, and plea bar in the Deed of Settlement are to operate without prejudice to the right of any party to the Deed of Settlement to make an application to enforce the Deed of Settlement in a new proceeding.

(5) Pursuant to s 183 of the Act, the group members listed at Annexure A to these orders are taken to have validly opted out of these proceedings.

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Annexure A

1. Mark Charles Howlett
2. Vanessa Howlett
3. Reclar Pty Ltd
4. Howmar Pty Ltd
5. Marvarla Pty Ltd
6. Goldenend Pty Ltd
7. Mayspring Pty Ltd
8. Jason Capillari
9. James Martinek
10. Patricia Martinek
11. George Fotopoulos
12. Victor Berger
13. Sodina E Hour
14. Sophanaro Uoy
15. Offshore Investments (Aust) Pty Ltd
16. Kylie Hassett
17. Blair Hassett
18. Brian Daniel Byrnes
19. Tam Legends Group Pty Ltd
20. John Quinn
21. Denis Ryan
22. Darren Guy

I certify that this and the 10 preceding pages are a true copy of the reasons for judgment herein of Justice Ball.

Dated: 15 December 2023
Associate: Maria Kourtis