

THE SHAREHOLDER



IMF (Australia) Ltd

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Westpoint

ION

Sons of Gwalia

Village Life

HIGH COURT GIVES LITIGATION FUNDING THE GREEN LIGHT...

Litigation funding has been found not to be against the public interest by the High Court of Australia in its August decision in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* ('Fostif').

The decision created an unprecedented level of attention on the future of class actions in Australia, with *The Australian Financial Review* running a report across its front page the day after the decision. Since then, its opinion pages have been swamped with articles examining the decision and its implications.

IMF believes the three main effects of Fostif will be:

- cases funded by third party funders will not be delayed by interlocutory disputes over whether there is an abuse of process;
- funders involvement in cases they fund will increase; and
- more capital will be directed to the market and more cases will be the subject of funding.

Over the past 5 years, the progression of a number of funded cases through the courts has been interrupted and delayed by applications by defendants that the proceedings should be stayed on the basis that the funding amounts to an abuse of process. The genesis for this argument lay in ancient rules of maintenance and champerty which made it illegal to assist others in the prosecution of a cause of action (maintenance) in return for a share of the recoveries (champerty).

The immediate result of the High Court decision is that these interlocutory disputes will cease, certainly in the states which have abolished maintenance and champerty as a crime and a tort, which will allow for the faster determination of the real issues in the proceedings.

Further, it is now clear that control by funders of the litigation does not itself amount to an abuse of process. Funders will be able to become more involved in the proceedings they fund. This will allow funders to better manage their investments,

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...BUT QUESTIONS REMAIN ABOUT REPRESENTATIVE PROCEEDINGS

While Fostif gave the green light to funded litigation, the decision adds to the uncertainty about how to properly design a representative proceeding, which allows groups of persons to join together and seek compensation for their losses.

The High Court's decision in Fostif found that the proceedings could not continue as a representative proceeding due to fatal shortcomings in the pleadings. This decision follows that of Justice Stone in the *Aristocrat* proceedings, the practical affect of which is to make unviable funded pro-

ceedings for groups of claimants that wish to join together to bring proceedings in the Federal Court. (The Stone J decision was discussed in detail in Issue 2 of *The Shareholder*.)

The High Court in Fostif found the plaintiff had failed to properly plead that there was, at the time of the commencement of the proceedings, numerous persons who had the "same interest" in the proceedings. This is a requirement of the Uniform Civil Procedure Rules, under which the case was brought.

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CONCEPT SPORTS BEGINS RUN OF SETTLEMENTS

On 3 October 2006, IMF announced that proceedings against the sporting apparel company Concept Sports – which listed in June 2004 before a massive profit downgrade on 18 August 2004 saw its share price fall from 65c to 19c that day – have settled. The terms of the settlement are confidential.

The claim alleged the prospectus issued by Concept Sports did not contain all of the information investors and their professional advisors would reasonably require to make an informed assessment of the financial position, performance, profits and prospects of Concept Sports. It also alleged that misleading and deceptive statements and representations were made in the prospectus and that the company breached the continuous disclosure laws.

The settlement of the Concept Sports case was followed by the settlement of another three cases in IMF's portfolio:

Geneva Finance; Australian Coal Technology; and Sentinel (Financial Wisdom).

The Sentinel case settled after test cases were successful in the Supreme Court of Victoria and in the Court of Appeal. IMF funded investors who invested through Sentinel Financial Services, which acted as an investment adviser between 1993 and 1997 for a group of 200 airline pilots. It was claimed that those advisers acted in a negligent and fraudulent manner and caused losses of about \$30 million to that group of investors.

IMF has a new-look website that contains up-to-date information on IMF's past and present cases.

Visit www.imf.com.au for more information.

ALLSTATE CHALLENGE TO SHAREHOLDER RIGHTS

The administrators of Allstate Explorations are challenging the Australian Securities and Investments Commission's decision to allow two shareholders of Allstate to apply for summons to examine the administrator and others associated with the administration.

IMF is funding the shareholders seeking to conduct the examinations.

Allstate and Beaconsfield Gold, the joint venture owners of the Beaconsfield mine in northern Tasmania, which has been closed since a rock fall in April killed Larry Knight and trapped Todd Russell and Brant Webb for two weeks, are in discussions to ensure the mine is capable of re-opening.

If the administrators' challenge fails, people could be questioned under oath about the 2002 sale of a \$77 million debt to Macquarie Bank for \$300,000 and other financial dealings.

The administrators are claiming ASIC breached the natural laws of justice in allowing the shareholders to apply to

conduct examinations because, in part, they were not given any opportunity to make submissions about the application.

But the shareholders of Allstate want to ask questions about the Macquarie deal in light of the fact that the mine was operating profitably and generating positive cash flow at the time of the deal.

After the Anzac Day accident, Macquarie Bank said it would donate the income from up to \$47 million of debt to establish a trust fund for Beaconsfield miners however this has not been done with Macquarie saying it could not find a trustee willing to take on the project because of the looming court action.

Macquarie now proposes to sell the debt and give the proceeds to the workers.

Issue 4 of *The Shareholder* will provide a further update on this case.

RARE COURT RULING ON CONTINUOUS DISCLOSURE A WIN FOR SHAREHOLDER

A shareholder of Jubilee Mines has been awarded damages following the company's failure to disclose material information to the Australian Stock Exchange.

The case, known as *Kim Riley v Jubilee Mines* [2006] WASC 199, is one of very few court decisions that have considered a company's obligations under the continuous disclosure regime.

In his decision, Master Sanderson sounded a warning to listed companies – including small cap companies that might not necessarily have the resources of their larger listed peers – that the courts will be vigorous in their enforcement of the continuous disclosure regime.

In a Postscript to his judgment, Master Sanderson said: "Every listed company is subject to the same disclosure requirements. These reporting requirements are one of the obligations imposed in exchange for the benefits of being listed. Particularly in an area of the market where rumor is rife, material information must be disclosed....."

"If there is any doubt about whether the information is material, then the company ought to err on the side of caution and make the release [to the ASX]."

Moreover, the decision related to the continuous disclosure provisions that existed in the *Corporations Act* between 1994 and 2001, which required any breach to be intentional, negligent or reckless. This is no longer a requirement of the current regime.

Master Sanderson said that Mr Riley would have sold some of his shares for a price 3 cents higher than he did if the announcement was made when it should have been; other shares would have been retained and sold later, for a higher price. After making various discounts for contingencies, the Court awarded Mr Riley, who was represented by Slater & Gordon, damages of \$1.86 million.

LITIGATION FUNDING GETS GREEN LIGHT ...CONT FROM PAGE 1.

thereby reducing some of the risks in civil litigation.

As noted by Justices Gummow, Hayne and Crennan: "That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted."

The laws against maintenance and champerty have been abolished in NSW, South Australia, Victoria and

the ACT.

Since the *Fostif* decision, IMF has rewritten all of its Funding Agreements (the new Agreements can be found on IMF's website) to provide for IMF to project manage the litigation on behalf of the funded parties.

IMF is also expecting that new litigation funders will enter the market. This will come not only from more shareholders and investors taking advantage of more funded cases, but as increasing numbers of *defendants* seek out the expertise of litigation funders to project manage their litigation and to lay off to the funders some of the risks of litigation.

Keith Steele, a partner at Freehills, told the AFR in September that: "While litigation funding might increase the amount of litigation against corporate Australia it might also provide an opportunity for corporate Australia if there is a developed funding market for corporate Australia to itself access.

"I suppose the issue there will be the extent to which a company is willing to accede control of the litigation, but in certain types of cases—if it is just about the money, just about salvage—provided there is some degree of protection for reputation, there is no reason why corporate Australia might not take advantage of it."

QUESTIONS REMAIN ...CONT FROM PAGE 1.

The practical implication of the decision is that the people seeking to be represented by the plaintiff will need to be known at the time the proceedings are commenced and relief must be sought for them in order for them to benefit from the representative's case.

However, it is not always possible to identify all the persons who have been harmed from certain conduct – such as a situation when the identity of all the potential class members is known only by the defendant (for example, the list of all the investors in a scheme).

The combined effect of the *Aristocrat* and *Fostif* decisions is that it will be more difficult for shareholders and other investors to utilize representative proceedings to take action in both the Federal Court and, now, the NSW Supreme Court.

IMF is proposing that the NSW Supreme Court adopts an amended version of Part IVA of the Federal Court Act, which would facilitate funded actions on behalf of all investors by empowering the Court, in an opt out representative proceeding, to make such orders as are just with respect to the payment of the cost of the litigation funding from

any damages or money paid under the settlement. (See Box on right.)

The Law Council of Australia is supporting IMF's proposal and has included analysis of the issue in its submission on litigation funding to the Standing Committee of Attorneys General.

IMF facilitated a discussion between a number of parties interested in the issue in September. The Round Table was attended by senior partners from the major plaintiff law firms, partners from a number of defendant firms, two senior barristers, representatives of institutional investors and insurers, and members of various law reform commissions and legal professional bodies.

Similar reform proposals have been made in Victoria. Law firm Maurice Blackburn Cashman is proposing amendments to the Victorian Order 18 to expand the threshold test of "same interest" to align it with section 33C of Part 4A of the Supreme Court Act of Victoria.

The next issue of *The Shareholder* will provide an update on these reform initiatives.

IMF'S PROPOSED CHANGE FOR NSW SUPREME COURT RULES

33ZK Representative proceeding funding

Where the representative party has obtained conditional or unconditional litigation funding for the proceeding:

(a) the litigation funding agreement will, subject to any claim for confidentiality in respect of the quantum of the funding or the consideration payable for the funding, be filed and served by the representative party upon the defendant or defendants within seven days of the commencement of the proceeding or the commencement of the funding agreement, whichever is the later;

(b) the Court may require the litigation funder to pay any cost order in the proceeding in favour of the defendant or defendants; and

(c) the Court may in an opt out representative proceeding, upon application of the representative party being filed at the commencement of the proceeding, make such orders as are just with respect to the payment of the stated consideration for the litigation funding, or any portion thereof, from any money paid under a settlement, paid into the

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NEW IMF WEBSITE; CIVIL JUSTICE REVIEW

NEW IMF WEBSITE AT WWW.IMF.COM.AU

IMF has launched a new website, which provides clients and interested parties with detailed information relating to IMF's past and present cases.

The website provides up to date information on the many cases in IMF's current portfolio, including a description of the causes of action, claim size and estimated completion dates, details of the stage of the proceedings, along with important dates for upcoming events for each matter. IMF's investment managers will keep this information updated.

The website has a simplified design for all users to quickly move about and find what they're looking for. The publications section contains links to recent presentations made by IMF to the capital markets, along with submissions to government on legal reform issues, and IMF's submissions relating to the regulation of litigation funding.

If you have any feedback on the site, email IMF's IT manager Andrew Arena at aarena@imf.com.au

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VICTORIAN CIVIL JUSTICE SYSTEM UNDER REVIEW

The Victorian Law Reform Commission has launched a review into the civil justice system in an attempt to reduce the

significant time delays and excessive costs prevalent in Victoria. Other jurisdictions will no doubt be watching the review closely, as the issues being examined in Victoria are common in all Australian jurisdictions.

The Civil Justice Review is being led by Dr Peter Cashman. Submissions were due on 30 November 2006 and the Review is expected to report to the Victorian Attorney-General in September 2007.

IMF has provided a submission to the review, primarily addressing the questions on cost and delay. The submission will be made available on the IMF website.

IMF argued in its submission that reforming the civil justice system is vital to ensure that the risks of bringing actions are reduced. These risks relate to costs, not only their quantum but the difficulties in predicting them at the outset of a case, and delays, which are often caused by strategic tactics utilized by defendant lawyers.

IMF PRESENTS AT CLAYTON UTZ, BELL POTTER SECURITES

IMF managing director John Walker addressed a class action seminar hosted by Clayton Utz in Sydney on 21 November. A number of institutional investors also addressed the conference, telling the audience they were increasingly likely to take part in funded actions as a result of their fiduciary responsibilities. John Walker also made a presentation to the Bell Potter Small Caps Conference in Sydney on 29 November.