Article Information

Author: Greg Whyte, Lillian Rizio
Service: Class Actions, Dispute Resolution & Litigation, Litigation Funding
Sector: Agriculture & Food

Funder succeeds in declaration enforcing its class action agreements

Piper Alderman assisted LCM Operations Pty Ltd (LCM) in its successful declaration which upheld the enforceability of its class action funding agreements in the Gladstone Fisheries class action. The decision is a landmark one. It confirms the validity of the class action funding business model in jurisdictions whose legislatures have not abolished the tort of maintenance and champerty (ie Queensland, Western Australia, Tasmania and the Northern Territory). That is, funders are able to fund class actions with minimal fear of prosecution under the torts of maintenance and champerty.

The central issue before the court was whether the terms of LCM's funding agreements were, by reason of maintenance and champerty, unenforceable as contrary to public policy. There was no question as to whether the funding agreements constituted an abuse of process of the court.

The proceeding

The Gladstone Fisheries class action was commenced pursuant to Queensland's class action regime (Part 13A of the *Civil Proceedings Act 2011* (Qld) (**CPA**)) and comprises commercial fishers, fish handlers and wholesalers in the Gladstone region of Central Queensland. LCM funds the class action, pursuant to a suite of class action funding agreements.

It is alleged that the defendant, Gladstone Ports Corporation Limited (**GPC**), is responsible for the classes' losses resulting from the contamination to the waters where they carry out their fishing operations, as a result of dredging undertaken by GPC.

Maintenance and champerty

The torts of maintenance and champerty are creatures of the common law. Maintenance is '*the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification*'. Champerty is an aggravated form of maintenance, by which the maintainer receives a share of the proceeds of the action. Historically, contracts offending maintenance and champerty were illegal, and therefore unenforceable, as they were found to be contrary to public policy.

The doctrines are of ancient origin. They arose out of a need to protect the integrity of the legal process from extrinsic influences; mainly the rich and powerful barons of that time, as England's medieval legal system was highly susceptible to distortion from these influences.

During the twentieth century, courts began to recognise that the public policy concerns underlying the doctrines were no longer relevant. This was evident from the High Court's decision of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, where the court held that the mere provision of commercial litigation funding, even involving maintenance and champerty, did not provide a basis to stay the class action as an abuse of process.

In doing so, the court questioned why well-established doctrines of abuse of process (and other procedural mechanisms available to the courts) did not sufficiently address fears of third party litigation funding corrupting the administration of justice. As such, maintenance and champerty may still result in a contract being unenforceable as contrary to public policy, but the circumstances in which that occurs is of limited practical significant.

New South Wales and Victoria have enacted legislation abolishing the torts. This is in contrast to Queensland, Western Australia, Tasmania and the Northern Territory, whose legislatures have not. As such, the ongoing existence of the torts at common law and potential ramifications to litigation funding in these jurisdictions remain relevant.

The judgment

The court upheld the enforceability of LCM's funding agreements, as the terms of the agreements did not provide any level of unlawful or improper control of the litigation to LCM.

The court found that Queensland's class action regime authorises commercial litigation funding agreements in respect of class actions in Queensland. As such, LCM had '*lawful justification*' to provide direct financial assistance to the plaintiffs and group members, in return for a share of the fruits of the action.

GPC argued that the Queensland Parliament's decision not to enact legislation abolishing the torts of maintenance and champerty meant that "public policy" in Queensland followed a different path to that of other States which had enacted such legislation. This argument was rejected.

This is because in enacting section 103K(2) *CPA*, the Queensland Parliament specifically adopted the precise wording of the equivalent New South Wales provision. It therefore adopted the same underlying public policy as the New South Wales Parliament; that public policy being that class action regimes permit commercial litigating funding in the way LCM was conducting its business.

The court did not go so far as to hold that the common law no longer recognised the torts of maintenance and champerty, declining '*to offer them a burial*'. This is because it was unnecessary to decide the point, as GPC did not seeking any relief in reliance on the tort. Rather, GPC argued that the public policy underpinning the torts rendered the funding agreements unenforceable. Nevertheless, the court noted in passing that '*the logical conclusion is that the torts no longer exist*', which accords with the court's remarks in *Fostif*.

The future of litigation funding

The lawfulness of LCM's class action funding agreements in Queensland and jurisdictions in which the tort is yet to be abolished is now is clear.

As to commercial litigation funding generally, the position is less clear as some Australian jurisdictions are yet to officially bury the torts of maintenance and champerty. Until that occurs, public policy considerations will continue to loom large as a spectre over the enforceability funding agreements. However, it should be noted that courts retain the power to stay a proceeding for abuse of process, or if the terms of a funding agreement provide the funder with unlawful control over the litigation.

Piper Alderman acted for LCM in relation to the application.

The judgment can be located here: *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd (No 4)* [2019] QSC 228.