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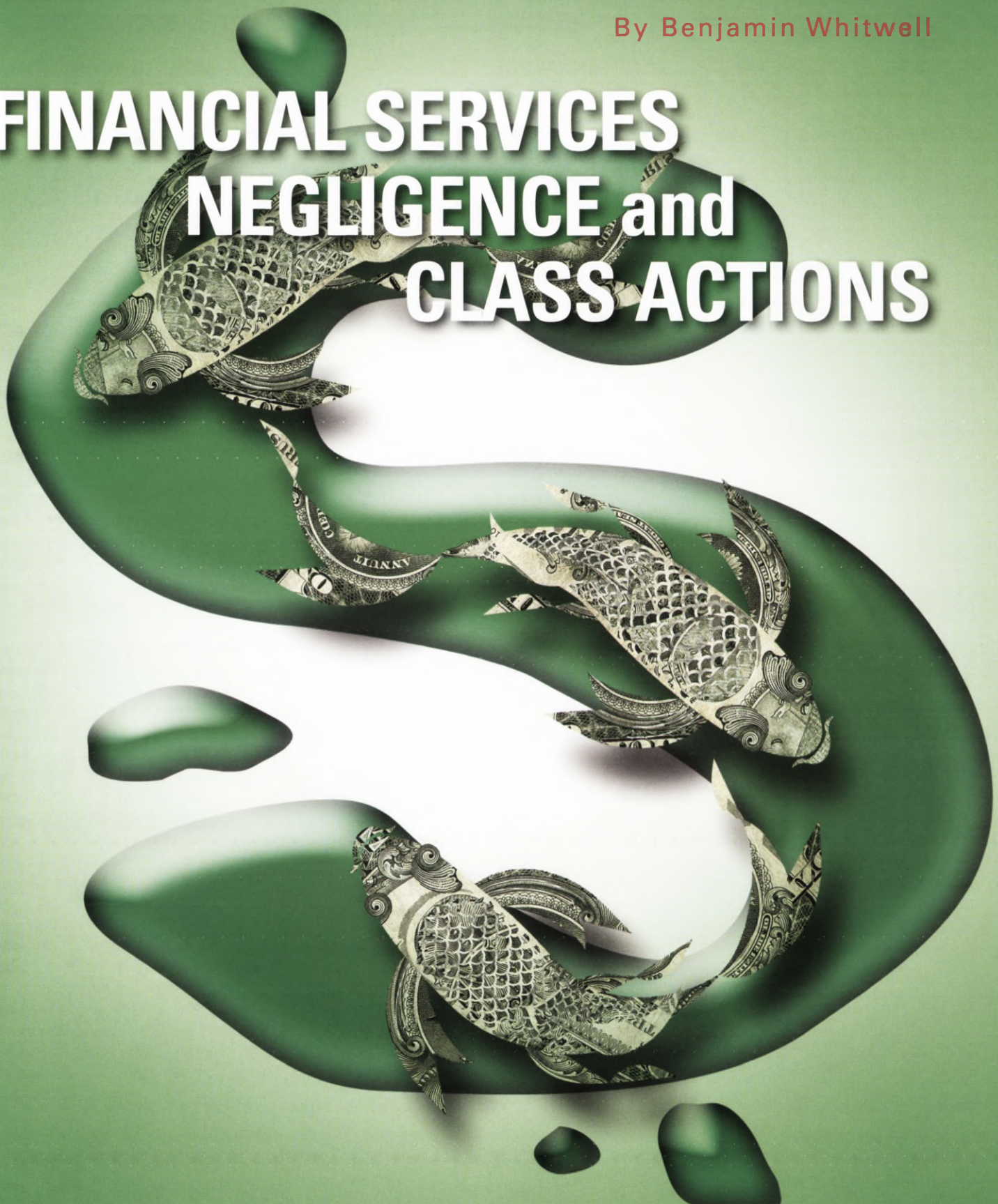
FINANCIAL SERVICES NEGLIGENCE and CLASS ACTIONS



This article discusses the key issues to consider before commencing a class action arising from professional negligence in the financial services in the Federal Court of Australia or Supreme Courts of Victoria or NSW. I first discuss likely causes of action and defences, and then the key requirements for commencing a class action.[1] >>

CAUSES OF ACTION

Contract

A contract with a financial adviser may be written, oral or a combination of both. Advice is provided which the client pays for, and usually relies on and follows.

It is an implied term of any contract that the financial adviser must exercise reasonable care and skill:[2] Established market behaviours may also amount to an implied term in contract.[3]

Tort

A financial adviser owes a duty to their client to take reasonable care when providing advice where it may reasonably be expected that the client will rely on it.[4] Where a financial adviser carelessly makes a misrepresentation, irrespective of whether the financial adviser acted dishonestly or recklessly, liability in tort to pay resulting damages may arise.[5]

Notably, over the past 10 years, countless financial advisers, have recommended high-risk investment strategies to clients who were at the conservative end of the spectrum with regard to their attitude to risk.[6]

Fiduciary duties

Not all fiduciary duties are the positive duties of investigation and advice that might otherwise be expected. They also include proscriptive obligations, such as not to obtain any unauthorised benefit from the relationship, and not to be in a position of conflict.[7] Where those duties are breached, the fiduciary must account for any profits made and must make good any losses arising from such a breach.[8]

Statute

Misleading and deceptive conduct

Three separate statutory causes of action may be available for misleading and deceptive conduct:

(a) Sections 151,155 and 156 of the Australian Consumer Law (ACL), at Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) (the CCA);
(b) Section 1041H of the *Corporations Act* 2011 (Cth) (the Corporations Act); and
(a) Section 12DA of the *Australian Securities & Investments Commission Act* 2001 (Cth) (the ASIC Act).

The important decision to be made here is which of the above sections applies to the conduct which is the subject of the claim. The CCA includes a carve-out and therefore does not apply to the supply or possible supply of services that are 'financial services', as that expression is defined in the ASIC Act.[9]

In each of the sections referred to above, the words 'misleading and deceptive conduct' have the same meaning and the same tests apply:

1. Conduct is misleading or deceptive if it leads a person into error or if it induces or is capable of inducing error or leads to an erroneous assumption or misconception;
2. Conduct is misleading or deceptive if it causes, or is likely to cause, a person to misinterpret, or be deluded as to, the relevant facts; and
3. Conduct is likely to mislead or deceive if there is a real but not remote possibility of it doing so.

If a person does no more than pass on information supplied by another which turns out to be false, they have not contravened the statutory 'misleading and deceptive' conduct provisions, so long as it is apparent that they are not the source of the information and they expressly or impliedly disclaim any belief in its truth or falsity and are merely passing it on for what it is worth.[10] However, where it can be shown that a financial adviser has adopted the statements made in another statement and has relied on those as the basis for the recommendations being made to the retail client, then it will likely be found that the financial adviser and its Australian Financial Services (AFS) licensee have engaged in conduct which is 'misleading and deceptive'.[11]

Causation

The misleading or deceptive conduct must be a cause of the claimant's loss.[12] Once conduct is found to be 'in relation to financial services', then ss151, 155 and 156 of the ACL are excluded, even though parts of the conduct would otherwise fall within Part V of the ACL.[13] However, conduct which is anterior to and separate from the provision of 'financial product advice' (such as entering into an agreement appointing an authorised representative to provide 'financial product advice') is generally not 'in relation to' 'financial services' under s131A of the ACL.[14]

Misleading and deceptive conduct – Corporations Act[15]

Section 1041H of the Corporations Act provides that a person must not engage in conduct in relation to a 'financial product' that is misleading or deceptive or is likely to mislead or deceive.[16]

In s764A of the Corporations Act, 'financial product' is deemed to include certain things (including relevantly a security).[17] Conversely, in s765A, a 'financial product' is deemed to exclude certain things. Until 2009 a credit facility within the meaning of the regulations was excluded.[18] However, in 2009 the section was amended: it still excludes a credit facility within the meaning of the regulations but now includes margin-lending facilities. Accordingly, if a retail client's financial adviser has recommended an inappropriate gearing strategy, then s1041H is the section to rely on. However, be aware that proportionate liability provisions might apply.[19]

Misleading and deceptive conduct – the ASIC Act[20]

Section 12DA(1) of the ASIC Act provides that 'a person must not, in trade or commerce, engage in conduct in relation to 'financial services' that is misleading or deceptive, or is likely to mislead or deceive'.[21] Where loss is suffered pursuant to a breach of s12DA, the person may recover against any person involved in the contravention.[22] Importantly, 'fault' is immaterial to any liability imposed by s12DA.[23]

The ASIC Act provides definitions and exclusions as to what constitute 'financial products'.[24] Further, it provides that both a security and a credit facility (within the meaning of the *Australian Securities & Investments Commission Regulations 2001* (Cth)) are a 'financial products'.[25] So, a margin loan is arguably a financial product for the purposes of the ASIC Act.[26]

One of the most critical factors affecting the application of the Corporations Act and ASIC Act as consumer protection regimes with respect to financial services is that much, if not all, of each regime applies only to 'retail clients'.

Retail client versus wholesale client

At its most basic, a financial product or financial service is provided to a person as a 'retail client', unless the price for the provision of the financial product or financial service equals or exceeds $500,000.[27]

Self-managed super funds regularly change investments and, as a result, funds invested can be in excess of $500,000. Section 761G(7) of the Corporations Act, read with reg7.1.26 of the *Corporations Regulations* 2001 (Cth), provides the basis for a trustee of a super fund to fall within the definition of 'retail client', unless they are a 'wholesale client' for another reason.

Breach of implied contractual warranties

Section 12ED(1) of the ASIC Act provides that in every contract for supply of 'financial services' by a person to a 'consumer' in the course of a business, there is an implied warranty that the services will be rendered with due care and skill.

The implied contractual warranties only apply to 'consumers'. A person is a 'consumer'[28] provided the 'price of the services' did not exceed the 'prescribed amount'.[29] The 'price of the services' purchased by a person is taken to have been the 'amount paid or payable by the person for those services'.[30]

Importantly, if the price of any financial service exceeds the prescribed amount, the person may still be a 'consumer' under s12BC(1)(b) of the ASIC Act, provided the person can show that the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.[31]

DEFENCES AND LIMITING LIABILITY

Limitation of actions

Limitation of actions can be a hot bed for potential challenges to any actions that are commenced. The cause of action accrues at the time damage is suffered.[32] This will vary depending on the cause of action being pressed: claims for breach of contract will accrue at the date of the actionable breach, whereas claims for negligence and most statutory claims will accrue at the date that a client suffers financial loss.

On a no-transaction basis, in seeking to put the plaintiff in the position he would have been in if the advice had never been received and/or the investment never made, time runs from when the advice was acted on and the investment was made.[33] The problem arising from this position is that there have been a number of recent collapses involving tax-effective agri-schemes. These types of investment typically have no secondary market, involve huge administrative fees and, most importantly, have 'locked in' investment terms that range anywhere from 10 to 20 years.

In those circumstances, where an investment collapses more than six years after a client's investment was made, there will be arguments that statutory limitations in both tort and contract apply, rendering any proceedings out of time.

However, in a High Court decision in April 2013, the majority judgment of French CJ, Hayne and Kiefel JJ held:

> 'In general terms, in a case involving a loan of monies, damage will be sustained and the cause of action will accrue only when recovery can be said, with some certainty, to be impossible'.[34]

Insurance and illegality

Illegality as a defence is available of itself.[35] This is significant where an insurer will not be liable in circumstances where a policy (or a provision in a policy, sought to be relied on) taken out by a defendant, of itself, contravenes legislation.[36]

Where proceedings are commenced, relying on any of the causes of action discussed in this paper, where the defendant may have engaged in criminal conduct, or in >>

fact did engage in criminal conduct, that conduct of itself not giving rise to the loss suffered, not form a basis for the insurer to deny cover pursuant to the claim as made.[37]

It has also been long argued by insurers, and formed part of their discussions with plaintiff parties, that the insurance cover held by the defendant includes what amounts to a deductible for the insurer's legal costs when they step into the shoes of the defendant, as permitted by the laws of subrogation. Significantly, this position (if adopted by an insurer) is now open to challenge.[38]

PROFESSIONAL NEGLIGENCE IN CLASS ACTIONS[39]

Commencing a proceeding as a class action is no magic bullet. It does not make a legal case any stronger; it is merely a vehicle to bring similar or related claims on behalf of a group of persons who have suffered damage or loss.

The first step is to establish whether the group will be able to meet the threshold requirements for commencing a representative proceeding.[40] They are:

- The claims must be by at least seven persons (it is important to note that you don't need seven clients, but you must be aware of at least seven persons who meet the following criteria[41]);
- The claims must be against the same person;
- The claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- The claims of those persons must give rise to a substantial common issue of law or fact.

Jurisdiction

The Federal Court has the jurisdiction to hear representative proceedings and is limited only by its jurisdiction to deal with federal subject matter, including claims under federal legislation, or by or against federal agencies or offices, or in associated or accrued jurisdiction.[42] Fortunately, with regard to proceedings arising out of professional negligence in financial services matters, the principal Acts involved (as identified above) are the CCA, the Corporations Act and the ASIC Act; all being federal Acts and being within the inherent jurisdiction of the Federal Court of Australia.

While Australian states and territories may have provisions provided in their court rules permitting representative proceedings, only the Victorian and NSW governments have seen fit to provide for 'class action' regimes.[43] Provided there is a nexus to the state, a class action may be commenced in either of those jurisdictions.

Claims against the same person

Section 33C(1)(a) of the *Federal Court of Australia Act* 1976 (Cth) (FCA) requires that the claims arising out of the same, similar or related circumstances where there is a substantial issue of law or fact must be against the same person.[44]

This only becomes an issue where there are multiple defendants, which is likely moot for the purposes of a class action arising in professional negligence, as the proceedings will be against only one AFS licensee. The reasons are discussed below.

There is no such requirement in NSW.[45]

Related circumstances of claims

Section 33C(1)(b) of the FCA requires that the claims of all represented group members and those of the representative plaintiff or plaintiffs are in respect of, or arise out of, the same, similar or related circumstances.[46]

Importantly, s33C(2)(b) provides that a representative proceeding may be commenced whether or not it is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members or involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members. So, a representative proceeding may be commenced by a representative plaintiff on behalf of persons who have suffered damage as a result of financial product advice received from an AFS licensee.[47]

It is important to appreciate that the bar set by s33C(1) is not high.[48]

Quite often in financial services related matters, representative plaintiffs and group members relied on oral representations. Almost always, this proves to be a point of challenge by respondent parties, even in proceedings where reliance is not pleaded. In *Connell v Nevada Financial Group Pty Ltd,* Drummond J said,

> 'It is not, I think, an objection to proceedings being brought as representative proceedings and found upon an oral (or a written) representation made to the various class members that the representation may have been made on different occasions and in a different form of words to each class member, so long as the court can be satisfied that the substance and effect of what was orally represented is the same. But, in such cases, the court must be satisfied that the substance and effect of what was orally represented in the same.' [49]

Later, in *Williams v FAI Home Security (No 2)*, Drummond J held:

> '[T]here needs to be some leeway allowed where there have been representations made to various persons of a particular class in circumstances where there will be a divergence in the actual words by which the representations were conveyed.'

And on that basis,

> '[A] pleading should be allowed to stand even though there may be some differences in the actual words spoken to each group member'.[50]

In *Philip Australia Limited v Nixon*, Spender J held an alternative view to that expressed by Drummond J, when he considered whether a class action on behalf of persons suffering from various ailments, directly linked to smoking cigarettes were related:

> 'Closer to the present case, if each of A, B, C...and Z had suffered loss or damage in reliance on a particular deceptive advertisement by Widget at the times and places posed, with the advertisements in each case being different (including, for instance, advertising different products), but each one being part of Widget's campaign over the years to persuade people to buy its products, again the claims, in my opinion, would not arise out of 'the same, similar or related circumstances' within the proper meaning of those

words in section 33C(1)(b) of the Act.'[51]

By way of perhaps a simpler illustration, a group of claims may be related arising out of motor vehicle accidents involving Volvos. This of itself, while the claims arise out of similar facts (MVAs and Volvos), would not meet the requirements of s33C(1)(b) with regard to relatedness, because those would be regarded as merely superficial common features.[52]

In *Woodcroft-Brown v Timbercorp Securities Limited*,[53] the respondent applied to have the matter dismissed pursuant to s33C(1)(b) on the grounds that the 33 managed investment schemes that were the subject of the proceedings were so different that they could only be viewed as related on a superficial level. In rejecting the application, Judd J said the range of causes of action pleaded and alleged conduct engaged in by the respondent, 'transcend[ed] the differentiating features of the various schemes'.[54] Judd J then held:

> 'The existence of such individual issues arising in a group proceeding is no impediment to such a proceeding. The claims of all persons in the group are in respect of or arise out of related circumstances.'[55]

Common issue of law or fact

Section 33C(1)(c) of the FCA requires that the claims of all representative group members and those representative plaintiff or plaintiffs give rise to a substantial common issue of law or fact.[56] Just like s33C(1)(b), the bar set for establishing a substantial common issue of law or fact is low.

As the section provides, the common issue may be one of law or fact. It is not a requirement that there must be both. It therefore follows that the representative plaintiff and group members need not share all law or facts, but merely a common issue of law or fact.

You might think, given the competing authorities,[57] that this requirement would be more difficult to establish where there are multiple respondents, for example, in proceedings involving financial services negligence where multiple authorised representatives of the AFS licensee are named parties to the proceedings. However, the nature of such proceedings means that meeting this requirement should be a relatively simple task, supported by either the facts or the law.[58]

The meaning of 'substantial'

The majority in *Silkfield Pty Ltd v Wong* held that an issue is 'substantial' if the resolution of it would have a major impact on the litigation, because the issue is at the core of the dispute between the respondent and each group member.[59] However, on appeal, the High Court instead held that the 'substantial common issue' requirement is directed to issues which are 'real and of substance', and that it was not necessary to show that litigation of the common issue would be likely to resolve wholly, or to any significant degree, the claims of all group members.[60] A representative applicant need only show that the common issue or question is real; it need not be a major or core issue, nor one significantly contributing to the resolution of the group members' claims.[61]

It then follows that individual group member evidence regarding reliance and damages, which is required to be established for each individual group member, is irrelevant to whether a substantial question of law or fact is established.[62]

In *Green v Varzen Pty Ltd*, the Federal Court considered the proper construction of s33C(1)(c). As is the case with nearly every financial services negligence claim, the representative applicant and group members pleaded reliance on advice received from financial advisers, which was oral, written and implied; and reliance on oral representations made on an individual basis to the representative applicant and each group member. It is undeniable that there would be material variations in the representations made and the degree to which reliance was placed on those representations. Finkelstein J held that while there will be some factual variations, it does not follow that s33C(1)(c) is not satisfied. Rather, it is enough if there is at least a common nucleus of operative facts or common course directed towards a particular group.[63]

The representative party

The task of identifying a representative party is a critically important one. Section 33C requires that each group member must meet certain criteria in order to be part of the group. This is particularly significant for determining who, out of an often limited pool of willing group members, should be the representative party. The representative party must meet the s33C criteria in the broadest sense, in order to be able to create the broadest group definition and best represent the circumstances of all group members to be represented. Failure to find such a person will likely result in a swathe of challenges to the constitution of the proceedings, arising out of either the representative party's personal circumstances, the pleaded case, a lack of relatedness among group members, or whether a substantial common issue of law or fact exists.

Apart from this consideration, there is also a shopping list of further statutory requirements for the representative party.[64]

The pleading

The next critical element in any class action pleading is the group definition. The represented group is defined with reference to the representative plaintiff's circumstances, whose issues and facts need to substantially represent the issues and facts of the represented group in the same way as the cause of action for the representative plaintiff and group members must arise out of the same, similar or related circumstances. Section 33H of the FCA provides that the originating application must:

a. describe or otherwise identify the group members to whom the proceeding relates; and
b. specify the nature of the claims made on behalf of the group members and the relief claimed; and
c. specify the questions of law or fact common to the claims of the group members.

It is not necessary to name, or specify the number of, the group members.[65]

Allegations pleaded in a class action statement of claim are>>

typically directed to the conduct with respect to the applicant only. This is the proper course to take for an action arising in financial services professional negligence. As has already been identified, individual reliance on oral representations which led to damage are particular to each person. Accordingly, if pleadings are directed to the circumstances of the representative party applicant and the represented group collectively, then the pleading is likely to be criticised because 'the critical allegations in the proceedings are going to necessitate an examination of the individual circumstances of the particular group member to determine whether the allegation is made good'.[66]

Challenging the carrying on of class actions / representative pleadings

While s33C of the FCA pertains to the commencement of proceedings, s33N[67] pertains to continuing or carrying on proceedings commenced under this regime. Section 33N(1) of the FCA provides:

> 'The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue if it is in the interests of justice to do so because:
>
> a. the costs are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
> b. all the relief sought can be obtained by means of a proceeding other than a representative proceeding; or
> c. the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
> d. it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.'

In regard to s33N of the FCA, Lindgren J said:

> 'Section 33N(1) refers to the Court's being 'satisfied that it is in the interests of justice' that the proceeding 'no longer continue' under Pt 4A because of one of the reasons specified. Such concepts cannot be applied to the anterior right to commence the proceeding.'[68]

He also said, *inter alia*:

> '...A consideration as to whether the proceedings would, or would not, provide an efficient means of dealing with the claims of group members would almost certainly involve an assessment of the findings which might be made in an applicant's case and of the extent to which they would be likely to resolve the other claims.'[69]

An example of when the Federal Court exercised its powers under s33N to order that a proceeding no longer continue under Part IVA of the FCA, is *Meaden v Bell Potter (No.2)* where Edmonds J said,

> 'The allegations made in the statement of claim are not, as is sometimes the case in representative proceedings, directed to the conduct with respect to the applicant, Ms Meaden, but, without exception, are allegations that Bell Potter engage in certain conduct with respect to "the Claimants".
>
> It is plain that the allegations as pleaded pertain not only to the applicant but to the individual circumstances of each and every claimant. All of the critical allegations in the proceedings are going to necessitate an examination of the individual circumstances of the particular group member to determine whether the allegation is made good.'[70]

He also said:

> '...the fundamental problem with this case is that it is impossible to see how the trial of an action based on evidence from and concerning only [the Applicant] will determine any issue of sufficient significance to render it a process that has any real utility. There is such a lack of commonality that any determination of Ms Meaden's claim would offer no real guide as to how the balance of the claims would be determined were they to proceed to be determined individually.'[71]

CONCLUSION

The discussion above details issues and requirements that are critical in an initial consideration of whether a matter involving professional financial negligence might be suitable to be commenced as a class action. ■

Notes: 1 For a detailed analysis of the law regarding professional negligence as it applies to financial services, see S Walmsley SC, A Abadee and B Zipser, *Professional Liability in Australia* (2nd ed, 2007), Chapter 8 'Financial Services Professionals', 927– 981. With respect to class actions, I recommend D Grave, K Adams and J Betts, *Class Actions in Australia* (2nd ed, 2012). **2** *Ogden & Co Pty Ltd ats Reliance Fire Sprinkler Co Pty Ltd* [1975] No 1 Lloyd's Rep 52, cited in S Walmsley SC, A Abadee and B Zipser, *Professional Liability in Australia* (2nd ed, 2007) at 954. This duty applies to both contract and tort, see *Astley v Austrust Limited* (1999) 197 CLR No 1; *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 555. **3** See *Con Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Limited* (1986) 160 CLR 226 at 236.5. **4** See *Ali v Hartley Poynton Limited* (2002) 20 ACLC 1006 at [268] and [269]; *Bonds & Securities (Trading) Pty Ltd v Glomex Mines NL & Ors* [1971] 1 NSWLR 879 at 891; *Meddick & Meddick v Cutten & Harvey* (1984) 36 SASR; *Presser v Caldwell Estates Pty Ltd* [1971] 2 NSWLR 471 (CA) Mason JA at 491; and *Hedley Byrne & Co Limited v Heller & Partners Limited* [1964] AC 465. **5** See *Hedley Byrne & Co Limited v Heller & Partners Limited* [1964] AC 465. **6** See *Ali v Hartley Poynton Limited* (2002) 20 ACLC 1006 at [268] and [269]. **7** Beware, some AFS licensees include a clause in their service contracts that they can act contrary to their clients' interests. See also FOFA: 'acting in client's best interests' requirements. **8** See *Breen v Williams* (1996) 186 CLR 71 per Gaudron and McHugh JJ at 113; *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165 per McHugh, Gummow, Hayne and Callinan JJ at [74]; and *Eric Preston Pty Ltd v Euroz Securities Limited* (2011) 274 ALR 705 per Siopsis J at [426] – [432]. **9** Section 131A of the CCA provides the ACL does not apply to the supply or possible supply of services that are 'financial services', including contracts for the supply or possible supply of those services (but not certain provisions related to linked credit providers). The expression 'financial service' is defined in s2 of the ACL to have the same meaning as in s12BAB of the ASIC Act. Conversely, s1041H of the Corporations Act and s12DA of the ASIC Act only apply to conduct in relation to the supply of 'financial services'. **10** See *Yorke v Lucas* (1985) 158 CLR 661 at 666; (1985) 61 ALR 307 at 309; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; 212 ALR 357; [2004] HCA 60, at [39] – [40]; *Orix Australia Corporation Limited v Moody Kiddell & Partners Pty Ltd* [2006] NSWCA 257 at [59]; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital*

Markets Limited (2008) 68 ACSR 595; [2008] NSWCA 206 at [273] – [276]. **11** See *ASIC v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1; *ASIC v Online Investors Advantage Inc* [2005] QSC 324; *National Exchange Pty Ltd v ASIC* [2004] FCAFC 90. **12** See *INL Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [25] and [55] – [57]; *Henvill v Walker* (2001) 206 CLR 459 at [13] and [14] per Gleeson CJ; and *King v Yurisich* (2006) 234 ALR 425 at [90]. **13** See *Cleary v Australian Co-op Foods Limited (Nos 2 and 3)* (1999) 32 ACSR 701 at 731; *Re NRMA Limited* (2000) 156 FLR 412; 34 ACSR 261; 81 ACLC 533; [2000] NSWSC 408; and *Donald Financial Enterprises Pty Ltd v APIR Systems Limited* (2008) 67 ACSR 219 at [174]. **14** See *Avoca Consultants Pty Ltd v Millennium3 Financial Service Pty Ltd* (2009) 73 ACSR 307; [2009] FCA 883 per Barker J at [232] – [239]. **15** See s1041E of the Corporations Act for misleading and deceptive statements. **16** 'Financial product' is defined in s763A of the Corporations Act. Also see the misleading and deceptive statement provision at s1041E. **17** For a definition of 'securities' see s92 of the Corporations Act. **18** A 'credit facility' was not a 'financial product' if it involved the provision of credit for any period, with or without prior agreement between the credit provider and the debtor, and whether or not both credit and debit facilities are available; see reg 7.1.06 of the *Corporations Regulations* 2001 (Cth). **19** See s1044B of the Corporations Act. **20** See s12DB of the ASIC Act regarding misleading and deceptive statements. **21** See also Part 2, Div 2 of the ASIC Act, 'Unconscionable conduct and consumer protection in relation to financial services'. **22** See s12GF of the ASIC Act. **23** See *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 per Gibbs CJ; and *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Limited* (1978) 140 CLR 216 per Stephen J (with whom Jacobs J agreed). **24** See s12BAA of the ASIC Act. **25** See s12BAA(7)(a), (k) of the ASIC Act. **26** See reg.2B(1), (2) and (3) of the *Corporations Regulations 2001* (Cth). **27** See s761G of the Corporations Act and read with reg.7.1.18 of the *Corporations Regulations 2001* (Cth). **28** See s12BC(1) of the ASIC Act. **29** See s12BC(3)(a)(i) of the ASIC Act: $40,000. See also s12BC(3)(a)(ii) of the ASIC Act. **30** See s12BC(3)(b) of the ASIC Act. **31** See *Leveraged Equities Limited v Goodridge* (2011) 191 FCR 71 at [416]. **32** See *Hawkins v Clayton* (1988) 164 CLR 539 at 587 – 588; *Scarcella v Lettice* (2002) 51 NSWLR 306 at [22]. **33** *Ibid.* **34** See *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd & Ors* [2013] HCA 10 at [32]. **35** S Walmsley SC, A Abadee and B Zipser, *Professional Liability in Australia* (2nd ed, 2007) at 969. **36** *Thomas Cheshire and Co v Vaughan Bros and Co* [1920] 3 KB 240, cited in S Walmsley SC, A Abadee and B Zipser, *Professional Liability in Australia* (2nd ed, 2007) at 969. **37** See ss54 of the *Insurance Contracts Act 1984* (Cth). **38** See *Morgan, In the matter of Brighton Hall Securities Pty Ltd (in liq)* [2013] FCA 970. **39** Any reference in the following passage to a section of the *Federal Court of Australia Act* 1976 (Cth) also includes a reference to the *Supreme Court Act 1986* (VIC) (VSCA) which is substantially identical, unless otherwise provided. **40** See s33C of the *Federal Court of Australia Act 1976* (Cth). **41** See *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164 at 166; *Tropical Shine Holdings Pty Ltd (t/as KC Country) v Lake Gesture Pty Ltd* (1993) 45 FCR 457 per Wilcox J at 462. **42** D Grave, K Adams and J Betts, *Class Actions in Australia* (2nd ed, 2012) at page 96. **43** See Part 4A of the *Supreme Court Act* 1986 (VIC) and Part 10 of the *Civil Procedure Act* 2005 (NSW). **44** See s157 of the *Civil Procedure Act 2005* (NSW) (CPA). **45** See s158(2) of the CPA. **46** See s157(1)(b) of the CPA. **47** See s157(2) of the CPA. **48** See s157(1) of the CPA. **49** *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 at 728 **50** *Williams v FAI Home Security (No 2)* [2000] FCA 726 at [12] **51** *Philip Australia Limited v Nixon* (2000) 170 ALR 487, at [9]; see also per Sackville J at [165] – [166]. **52** See *Marks v GIO Australia Holdings Limited* (1996) 63 FCR 304 at 311 – 312; *Soverina Pty Ltd v Natwest Australian Bank Limited* (1993) 40 FCR 452. **53** *Woodcroft-Brown v Timbercorp Securities Limited* (2010) 77 ACSR 361. **54** *Ibid,* at [15]. **55** *Ibid,* at [16]. **56** See s157(1)(c) of the CPA. **57** See *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487; *Bray v F Hoffman – La Roche Limited* (2003) 130 FCR 317; McBride v Monzie Pty Ltd (2007) 164 FCR 559; *Kirby v Centro Properties Limited* (2010) 189 FCR 301 (NB: this list is not exhaustive). **58** See *Bray v F Hoffman – La Roche Limited* (2003) 130 FCR 317; *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ACSR 326. **59** See *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 at 169. **60** See *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at [28] – [30]. **61** D Grave, K Adams and J Betts, *Class Actions in Australia* (2nd ed, 2012) at 167. **62** *Marks v GIO Australia Holdings Limited* (1996) 63 FCR 304 at 315; *Nixon v Philip Morris (Australia) Limited* (1999) 95 FCR 453 at [89]; *Johnson Tiles Pty Ltd v Esso Australia Limited No. 2* [1999] ATPR 41-679 at 42-683 ; *McBride v Monzie* (2007) 164 FCR 559; and *Smith v University of Ballarat* (2006) 229 ALR 343 at [30]. **63** *Green v Varzen Pty Ltd* [2008] FCA 920 at [13]. **64** See ss33A, 33D, 33P, 33T, 33W, 33ZC, 33ZJ of the FCA and VSC; Sections 155, 158, 163, 167, 171, 180, 184 CPA. **65** See s33H(2) of the FCA. Also see s161 of the CPA. **66** See *Meaden v Bell Potter (No. 2)* (2012) 291 ALR 482 at [19]; see also [65]. **67** See s166 of the CPA. **68** See *Multiplex Funds Management Limited v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; 244 ALR 600; [2007] FCAFC 200 at [4]. **69** *Ibid,* at [128]. **70** *Meaden v Bell Potter (No.2)* [2012] FCA 418, at [17] and [19]. **71** *Ibid,* at [65].

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