

Indonesian seaweed grower commences class action in Northern Territory over oil spill

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Key points

- The Montara Oil Field Class Action, which was commenced in the Federal Court of Australia (FCA), concerns the claims of Indonesian seaweed growers for the loss of income allegedly caused by an oil spill that occurred off the northern coast of Australia in 2009.
- The FCA has clarified that, where a state limitation of actions statute provides a court with general power to extend a limitation period, it possesses the power to consider and determine whether to extend the limitation period not only for claims brought in traditional proceedings, but those brought on behalf of class members by a representative party in a class action. The *Limitation Act 1981 (NT) (Limitation Act)* is a limitation statute to which this principle applies.

Where a class action proceeding is instituted and the claims of class members are out of time, the Court will treat each class member as an individual plaintiff (who is being represented in the instant proceedings by the representative party) for the purpose of considering applications to extend the limitation period on each of their claims.

Summary

On 24 January 2017, Griffiths J handed down judgment in *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* [2017] FCA 14 (*Sanda v PTTEP*). His Honour determined that:

- The commencement of class action proceedings in the FCA on behalf of class members, under Part IV of the *Federal Court of Australia Act 1976 (Cth)* (Federal Court Act), constitutes the institution of those proceedings by each and every one of the class members;
- Each class member is to be treated as an individual ‘plaintiff’ for the purpose of the class action; and
- The Court, in the course of class action proceedings, is capable of considering and determining whether to extend the limitation period on the claims in negligence belonging to each individual class member pursuant to s 44 of the *Limitation Act*, which provides the Court with the general power to extend any limitation period if it is satisfied of certain conditions being met.

It is noted that the substantive proceedings involve Indonesian citizens bringing proceedings in an Australian court in respect of events occurring in the Territory of

Ashmore and Cartier Islands (an external territory of Australia). The dispute is being determined according to the law of the Northern Territory of Australia due to the combined effect of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Commonwealth) and the *Ashmore and Cartier Islands Acceptance Act 1933* (Commonwealth), which provide that the law of the Northern Territory applies to certain regions of the Territory of Ashmore and Cartier Islands.

Background

The substantive proceedings, out of which this proceeding emerged, arose in the context of the oil spill that occurred at the Montara Oil Field in the Timor Sea in 2009. The environmental impact of the oil spill allegedly caused thousands of seaweed farmers in Indonesia to lose their livelihoods when their seaweed crop was decimated by the dispersing oil slick, the legacy of which was the sterilisation of the water. This allegedly caused a significant drop in seaweed production for a number of years. Sanda, an Indonesian seaweed grower, instituted a class action on behalf of a closed class of Indonesian seaweed growers against PTTEP Australasia (Ashmore Cartier) Pty Ltd, the production licensee and operator of the Montara Oil Field, for the allegedly negligent administration of the oil field that resulted in the spill.

It was not contentious that Sanda and the class members had commenced proceedings after the expiration of the relevant statutory limitation period of three years, stipulated by s 12 of the *Limitation Act*. To sustain the action, Sanda would have to apply for an extension of the limitation period in respect of not only his own claim, but those of the class members he represented.

The immediate proceeding concerned a separate question for the Court's determination — was the Court capable of considering and determining whether to extend the expired limitation period in respect of each class member's claim? It was not contentious that the Court was capable of doing so in respect of the representative plaintiff's claim. However, s 44 of the *Limitation Act* is ambiguous on the status of represented class members in a class action.

Section 44 of the *Limitation Act* relevantly provides that where a statute stipulates a limitation period for instituting an action, a court may extend the time so prescribed or limited to such an extent and upon such terms as it thinks fit where it is satisfied that:

- “the facts material to the plaintiff's case were not ascertained by him until sometime within the 12 months before the expiration of the limitation period or occurring after the expiration of that period”;

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- “the action was instituted within 12 months of the ascertainment of those facts by the plaintiff”; and
- “in all the circumstances of the case, it [would be] just to grant the extension of [the limitation period]”.

The question of whether, in a class action context, s 44 of the *Limitation Act* may apply to the extension of the limitation period on the claims of class members turned on whether a class member:

- is a ‘plaintiff’ for the purpose of s 44 of the *Limitation Act*; and
- can, themselves, be considered to institute the relevant class action proceedings in satisfaction of the requirements of s 44.

Are class members plaintiffs and do they institute class action proceedings?

Section 44(b) of the *Limitation Act* specifies that time may be extended where a ‘plaintiff’ (who is defined as a person bringing an action and not a party to the action) ascertains new facts and institutes an ‘action’ (which is defined as including a proceeding in a court of competent jurisdiction) after the expiration of the relevant statutory limitation period. Justice Griffiths held that the *Limitation Act*’s definition of ‘plaintiff’ is broad enough to capture class members on whose behalf a class action proceeding is instituted and the definition of ‘action’ is sufficiently broad to encompass any form of legal proceeding, including a class action commenced in a court of competent jurisdiction.

In light of the language of and legislative intention behind the *Federal Court Act*, His Honour held that class members are properly regarded as plaintiffs (for the purpose of the *Limitation Act*) who are simply represented by the representative party in the conduct of a class action proceeding. Thus:

a group member in a Pt IVA proceeding, whether named individually or not, is a person on whose behalf the proceedings have been commenced by the representative party and is to be regarded as themselves having brought the proceedings. It is equally appropriate to describe a group member as having instituted an action within the terms of s 44(1) of the *Limitation Act*.

Furthermore, consistent with modern principles of statutory interpretation, the *Limitation Act* must be interpreted in the light of its beneficial purpose. Justice Griffiths concluded that class members must be understood to constitute plaintiffs, at least in the context of the *Limitation Act*. A contrary interpretation would lead to a ‘profoundly unlikely and scarcely intended result’. The statutory limitation period would not apply to class members but it would apply to the representative plaintiff. Section 44 was enacted at a time before the statutory class action regime but when “traditional (non-statutory) representative actions” were well-known and used. As such, His Honour inferred that the legislature at the time of s 44’s enactment was familiar with representative actions and intended, by adopting such broad definitions, to accommodate extensions of time in respect of both traditional and class action proceedings.

Therefore, His Honour was satisfied that the Court’s power not only extended to considering extending time on the representative party’s claim but on the claims of each of the class members as well. Each would have to satisfy the requirements of s 44 of the *Limitation Act* in order to remain a passive participant in the substantive proceedings.

General case management power – an alternative?

Sanda had contended, in the alternative, that even if the Court was not capable of determining whether to extend the limitation period in respect of class members under s 44 of the *Limitation Act*, it was capable of doing so under s 33ZF of the *Federal Court Act*. Section 33ZF provides the Court, in a class action proceeding, with a general power to make such orders as are necessary to ensure that justice is done. Having determined in favour of Sanda already,

Griffiths J found it unnecessary to make a determination concerning Sanda's alternative contention, but indicated in obiter dictum that the Court's general power to make orders for the just administration of proceedings did not extend to extending limitation periods in respect of class members in a class action. It appears that the Court will be unwilling to exercise its powers under s 33ZF to enable parties to circumvent the effect of limitation statutes.

Ramifications

A class member, at least as far as the *Limitation Act* is concerned, will be construed as a plaintiff in respect of a class action in which it is represented. The notion that class members are plaintiffs in their own right may have more widespread implications, although broader ramifications will depend on the context and legal framework governing the factual scenario.

While not likely to be relevant to *Sanda v PTTEP* (as each class member's claim arose from the same event), an

implication of treating class members as individual plaintiffs is the potential diminishment of the efficiency of a class action proceeding where many or all class members apply to the Court for an extension of time and the facts of each application must be determined individually.

Where a representative party seeks to commence Federal Court class action proceedings, but the limitation period has expired for some or all class members, the Court may have jurisdiction to consider whether time should be extended for those affected class members, although this will depend on the construction of the limitations legislation applicable to the action.

Although not definitively decided, it appears that the Federal Court's power to make orders to ensure the justice of a class action proceeding before it does not include the extension of statutory limitation periods. Extensions of time are to be dealt with according to the legislation imposing the limitation period.

