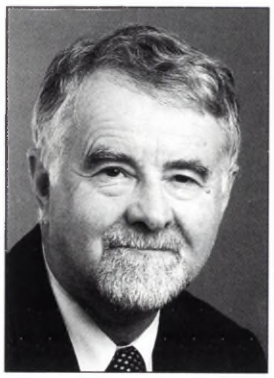
Ethical issues in Class Actions



Ian Dunn is the Chief Executive Officer of the Law Institute of Victoria.
PHONE 03 9607 9311

I am not certain that the ethical issues which arise in class actions are so sufficiently different from other ethical issues so as to be the exclusive focus of this paper. I have therefore decided that those who take on class actions may be better assisted if I divide this discussion into three parts.

I will first deal with some political pressures which have been exerted against Law Societies and which are, allegedly, driven by a perception that ethical standards are not being observed by those offering conditional fee agreements.

In the second part of the paper I will provide some "chapter and verse" from an analysis of various complaints which have been made to the Law Institute's Department of Professional Standards over the past five years and which are, in some way, connected with either class actions or conditional fee advertising (because I believe that the two areas are closely linked). And, finally, I will deal with what I perceive to be some ethical issues that may be regarded as unique to class action litigation.

Proposed Restrictions on Conditional Fee Advertising

In 1998, and entirely without previous warning or discussion, the Law Institute received a letter from the then

Attorney-General the Honourable Jan Wade MLA, advising that she had been informed that there were many complaints arising from conditional fee advertising. She enquired as to whether the Law Institute of Victoria had any view as to whether such advertising should be proscribed or restricted in some manner.

This caused some surprise. Contrary to the Attorney's understanding of the issue, the Professional Standards Department of the Institute which deals with complaints against solicitors had not experienced any rush or flood of complaints arising from conditional fee advertising. In fact the Department had received very few complaints indeed.

At this point one should pause to comment that the Attorney's concern appeared to be directed to the issues that arose out of the "offending" advertising. The firms that engage in this type of advertising include several of the largest plaintiff firms in Australia. The very nature of their practice being high volume, in litigation, and for large numbers of individuals many of whom have been affected or even traumatised by past injury, means that such firms will inevitably attract their share of complaints. The Law Institute receives about 2,500 complaints each year. It would, therefore, be absurd to claim that we were unaware of complaints against the firms that advertise in this manner. But it was a very different question when one came to determine whether the complaint arose out of or because of the advertisement or the inducement to the client, which the advertisement provided. After careful analysis of our files we could only locate two that could have been categorised as falling into this category.

You may therefore consider that it is not surprising that we responded to the Attorney-General stating that our records did not indicate that there was an upsurge in the number of complaints arising out of such advertising and that therefore we could not see any case for the introduction of restrictive legislation or rules. We invited the Attorney to supply further details.

No such details were supplied but later, and again to our considerable surprise, the Attorney advised that she had instructed that officers within her Department should conduct an inquiry into this subject with a view to the introduction of rules. Requests to the Department for details as to the identity of the "inquirer" met with no response and there the matter lay at the time of the election, which saw to the replacement of the Kennett government by the present government led by Mr Bracks.

One other matter should also be mentioned in the Victorian context. We were also considerably surprised to learn that *The Age*, in Melbourne, was proposing to run an article devoted to this subject following some remarks apparently made to the newspaper by the Legal Ombudsman in Victoria, Ms Kate Hamond. Ms Hamond's remarks were included in an article with the somewhat dramatic headline "No Win – No Fee – No Good". We were able, in a somewhat unsatisfactory manner, to slightly redress the balance in the narrative contained within *The Age* article. Whilst explaining that we had few complaints that could be said to relate to the advertising in question, we immediately asked the Legal Ombudsman for details. The then Law Institute of Victoria President, Mr Michael Gawler, continued to press the Legal Ombudsman and ultimately it appeared that she might have received two complaints that could be related to such advertising.

Finally, to complete the Victorian picture, a year ago we received a letter from an officer within the Department of the Attorney-General again raising the issue. We provided the same response. Subsequent discussions with the Attorney-General appeared to indicate that he had been personally unaware of the letter that had been forwarded by an officer within his Department. It appears that the officer had become aware of developments in New South Wales and had exercised initiative in enquiring as to the position of the professional association in Victoria. I conclude this aspect by suggesting that it is unlikely that there will be any proscription or restriction in the light of the current information in Victoria

New South Wales readers will, of course, be aware that a very different situation now applies in New South Wales. I have not seen all of the details that led to the introduction of the New South Wales legislation so it is probably unwise to comment. But one obvious point should be made. Unless it can be demonstrated that there is an obvious public benefit in introducing restrictions or even prohibitions as to certain forms of advertising, the New South Wales legislation is clearly anti-competitive and should, one would have thought, invoke the ire of the National Competition Council (NCC). That Council has a vital (and much underrated) role, having to advise whether ▶

various State Governments and their instrumentalities have adopted competition policy and are therefore eligible for the compensation payable by the Commonwealth Government to the States. The National Competition Council has gone to extraordinary length to highlight concerns about what could be described as absolutely trivial issues, certainly when compared with a ban on advertising by a firm which is prepared to handle legal work in a certain manner. For example, rules which previously prevailed within some states which prevented law firms from advertising fees have attracted not only the wrath of the National Competition Council but also, previously, the Trade Practices Commission. One should have thought that both the NCC and the Australian Competition and Consumer Commission (ACCC) should be considering the present New South Wales legislation. In the case of the NCC the New South Wales entitlement to "competition compensation" should be considered. In the case of the ACCC one would expect that the legislation proscribing such advertising should, of itself, be under attack.

Complaints that have Arisen in Class Action Work

Again, I am pleased to say that a present analysis of the files held by the Institute would indicate that there are very few complaints that have arisen from class action work. I doubt whether much wisdom may be derived from these limited examples, but as they may be of interest some detail should be supplied.

In one complaint a member of a class who was one of the "lead plaintiffs" complained after he saw reference to his name in publicity about the class action in the newspaper. He complained the he had not consented to the issuing of proceedings and believed that he should have been notified before the writ was issued. His complaints were met by production of the documentation that had been afforded to him and copies of which he had signed. Specifically, the fact that he was to be one of the lead plaintiffs had been spelled out. Whilst there had been no documented advice to him as to the date upon which proceedings were to be issued, it was felt that any reasonable person would have apprehended that the proceedings were about to be issued.

Something can be learnt from this case. In retrospect we have no doubt that the solicitors would now feel that they should have taken the additional step of advising at least the lead plaintiffs of the fact that the writ would be issued at a certain time and that it was conceivable that it might attract some publicity.

Another client complained that after seeking advice from a firm and joining a class action, in subsequent discussions with another legal practitioner he learnt that in the particular circumstances of his own case his prospects of success individually would have been overwhelming. He had become aware that by reason of his joinder in the class action the rights that he would have enjoyed had he brought the action separately were lost. He believed that any ultimate compromise of the action would be unlikely to reflect the strength of his own position had he sued separately. He believed that he should have been alerted to these matters before agreeing to take part in the class action.

This complaint was ultimately dismissed because on a careful reading of all of the material that had been supplied to him it was considered that he had been well informed as to his position. He had, specifically, been invited to seek separate advice and had apparently chosen not to do so at that stage.

But this matter does demonstrate a point to which reference will be made in due course. A careful analysis must be made of the particular rights of each client. A further illustration of this point may be useful.

Approximately 20 years ago, long before taking up my present position at the Law Institute I was involved in one of the original class actions in Victoria. It involved claims arising out of very serious fires at a town a small distance from Melbourne. The precipitating cause of the fires appeared to have been the collapse of an electricity pole in very high winds on a hot day. A fire had immediately developed on the property upon which the pole had fallen and the farming property concerned had been burnt out. Thereafter a number of other properties were also enveloped by fire and ultimately some 85 property owners joined in the action. But it was not absolutely clear that the fire had spread from the first property to the others. On the day in question there had been a number of fires throughout Victoria – it was at least arguable that the original fire had been confined to the property upon which it had broken out and that the other properties had been affected by fires that had arisen separately. On balance it was considered that the link could be established. But on any view, the position of the landowner where the pole had fallen was much stronger than the "downstream plaintiffs".

We determined that that client should be very carefully advised of his position. Whilst, by joining the class action, sums which might be required of him for disbursements would be reduced and whilst undoubtedly his position would be better protected in the event that the action was lost, it was likely that by entering in the class proceedings, his ultimate position would not be as satisfactory as would be the case if he sued separately. The client nevertheless elected to stay in the class action which, as it turned out, was well settled with the defendant paying 85 per cent of damages to all plaintiffs. I am sure that this man effectively gave up part of his damages but at least he was well acquainted with the issues.

Another complaint (and we have experienced it on several occasions in relation to conditional fee cases, as well as in class action litigation) relates to an

alleged failure to advise the complainant about the fact that if the complainant decides to change solicitors, the costs which have been incurred to date will be payable by the complainant. Complainants appear to believe that in the spirit of the agreement which they have reached with their first solicitor, the liability for any costs and disbursements (even when the client is leaving the solicitor with whom the arrangements have been made) should only come into effect upon the successful conclusion of the litigation.

I have heard anecdotally that in other States similar complaints have also been received and that in some cases it has been felt that clients have been misled. I can only report that in the Victorian cases, once we have called upon the solicitor for production of the relevant agreement, in each case the written agreement has demonstrated that the clients' complaint is unfounded. In discussions with our complaints solicitors we have agreed that it would be preferable, however, if this was a matter which was mentioned orally, at the first opportunity.

Anecdotally we have heard suggestions that clients are not being advised of potential costs obligations to the other party in the event that their action is lost, or that some are being asked to reimburse the solicitor for disbursements when they haven't been told that that will be the case. Again, I can only say that in the files that have come to our attention, the clients have been adequately advised about both of these issues.

Additional Ethical Obligations in Class Action Litigation

Against this background, what is it that the solicitor acting in class actions should be contemplating in order that there may be no doubt that the solicitor fulfils his or her ethical obligations to the client?

Plainly, an appropriate initial assessment and specific advice to the client are essential requirements at the commencement of the engagement. I believe that it is critical that the solicitor should carefully analyse whether the client's interests are common to the other intended class members. Sometimes it will be helpful for the solicitor to be able to identify one or more plaintiffs whose actions are overwhelmingly strong. But it must be clearly recognised that in certain circumstances their position may be so different from those of the other prospective clients that it would be unfair for them to be encouraged to take part in the class action. A referral to another solicitor for independent advice may well be called for. In making these comments I am not referring to the almost inevitable possibility that the quantum of various claims will be different. That fact alone will not warrant consideration of separate representation for the strongest claimants.

Costs

Although the issue of costs being charged by solicitors after a successful outcome has not, as yet, been the subject of a complaint to the Institute, it is ▶

plain that as is inevitable with most legal work, the issue of costs may give rise to considerable dispute.

Any practitioner proposing to enter into an arrangement with a client who, it is proposed, will become a group member in a class action, must pay careful heed to the remarks of Merkel J in *Johnson Tiles Pty Ltd v Esso Australia Ltd and Another*[1](the Esso case). In that case His Honour ruled that the jurisdiction of the Federal Court extended to approval or supervision over fee arrangements entered into in relation to proceedings in the court. What was at stake was a conditional fee agreement upon which the plaintiffs' solicitors proposed to rely. It had several features including:

- A liability on the part of the group member for individual costs of disbursements;
- No general liability for fees or disbursements unless the claim for compensation was successful;
- An obligation on the part of the group member to remain a client of the solicitors until the claim was finalised. In the event that the group member elected to terminate the retainer earlier, or the group member failed to comply with obligations under the agreement, then the group member became liable (immediately) for the individual fees and a portion of group fees incurred as at the date of termination;
- In the event that the claim was successful, the solicitors would be entitled to charge a premium of 25 per cent on the individual fees and group fees, including disbursements;
- There was no provision in the conditional fee agreement requiring the agreement to be approved by the court;
- The liability of group members would not be limited to taxed costs as between solicitor and client.

The 25 per cent "uplift" is provided for in s 98 of the *Legal Practice Act* (Victoria) and His Honour held that the provisions of the *Legal Practice Act* were, indeed, applicable to the action in the Federal Court.

But His Honour was concerned about the fact that the members of the group were incurring this liability notwithstanding that it had not previously been explained to them in advertising which informed them of their right to opt out of the representative proceeding. It might be thought that if such warning had been given in the advertising (whilst recognising that it would be difficult to draft the warning in appropriate form in an advertisement) His Honour might well have found it to be unobjectionable.

The decision of Merkel J was based upon the relevant provisions of the *Federal Court Act*. "One reasons why the opt out notice required to be given under s 33X must be approved by the court under s 33Y is to ensure that group members are given such information as is appropriate and necessary to enable them to make an informed decision whether to opt out of the proceeding. In the usual course group members are entitled to have the group proceeding conducted by the representative party on their behalf without being liable for legal costs merely because they are a group member. However, if it is proposed that group members are to become liable for the legal costs and disbursements incurred by the solicitors acting for the representative party, without the prior approval or supervision of the court in respect of those costs, then it seems to me that, to enable an informed decision whether to opt out, the opt out notice should adequately inform the group members of that prospective liability."

One other comment made by His Honour should cause concern to practitioners who must make absolutely certain that their clients are aware of conditions which will apply in the event of a termination of the retainer. Merkel J said, "early termination of a retainer can result in a substantial costs liability that is quite inconsistent with the "no win – no fee" representation made to group members".

One further note about Justice Merkel's judgement is worth mentioning. His Honour does specifically suggest that the position might be different where specific group members have actually agreed to join together commencing and pursuing a representative proceeding. "In (those) circumstances where the group members are actively involved in and contributing to the conduct of the proceeding the court is less likely to be concerned with or involved in approval or supervision of a fee agreement between the solicitors acting for the representative parties and the group members. The nature and extent of the court's involvement and concern with a fee agreement would depend upon the particular facts and circumstances of each case".

I do not think, therefore, Esso should be interpreted to mean that an agreement providing for uplift in fees will always be improper in representative proceedings. Overwhelmingly, Esso stands for the proposition that absolute notification to clients of any "additional" fee obligations will be absolutely critical.

Conclusion

A common feature of all of the matters which I have mentioned is the need for full and candid information to be furnished by solicitors to their clients. To this extent the position is, perhaps, no different from any other field of legal activity.

But it must be acknowledged that representative proceedings are to the layman, complex indeed. Properly explained, most clients will view them as a boon to the consumers of legal services because they make litigation possible for those who could not possibly undertake it otherwise.

Provisions that require a class action client to remain with a solicitor until the completion of the litigation, failing which the client will sustain significant

penalties, are not (when properly analysed) inconsistent with the normal relationship between solicitor and client. After all, if the client had individually retained the solicitor for an action in the client's name alone such a provision would apply, and the solicitor would retain a lien until payment of costs and disbursements. But the mere fact that such a clause may **appear** to be inconsistent with a conditional fee arrangement, as demonstrated in the comments of Merkel J, means that this, above all, must be drawn to the attention of the client.

The obligation to provide a full and candid explanation of the client's position extends also to consideration as to whether this client's particular circumstance would warrant advice that he or she should take separate action with a greater prospect of a result that approximates to the client's strength in the litigation.

And, finally, the obligation for candour and a full explanation must extend also to clear warnings to the client that the client will not have the rights enjoyed by individual parties to exercise a determination as to whether to settle or to proceed. The client must be alerted to the fact that in return for all of the benefits which are to be derived from participation in the class action, his or her right to determine the course to be followed will be severely, and perhaps totally, compromised.

In establishing whether the requirements, in relation to any particular subject, have been met, could there be any better test than "what if I was the client"? If the solicitor considers what information he or she would require before entering into such proceeding, and takes into consideration that that test should be applied bearing in mind that the client will, normally, have no informed knowledge as to the matters upon which the advice is being tendered, then in the unfortunate event that a complaint is later made, the practitioner is most likely to be held to have fulfilled his or her obligations. PL

Footnote:

[1] *Johnson Tiles Pty Ltd v Esso Australia Ltd. Federal Court of Australia* [1999] FCA 1363