

# Litigation funds and coinciding interests

*Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*

By Ken Chan

The High Court's recent decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* is both an overdue vindication of litigation funding and a disappointing restriction on representative actions in the NSW Supreme Court.

## THE FACTS

Six years after the High Court declared tobacco licence fees unconstitutional, a financial services company, Firmstone & Feil, began seven representative proceedings in the NSW Supreme Court. The claims were on behalf of unnamed tobacco retailers, seeking reimbursement of the licence fees paid to wholesalers.

Firmstones created a procedure where retailers could opt in to litigation once it was underway. It would retain one-third of any award recovered and any costs orders in its favour.

Before filing any defences, the wholesalers sought to stay proceedings on 'jurisdictional' (that the proceedings were not within the jurisdiction of the Supreme Court) and

'discretionary' grounds (that they were an abuse of process). These issues went to the High Court.

## COMMONALITY OF ISSUES

For the proceedings to continue as representative proceedings before the Supreme Court, Fostif had to satisfy the requirements of the *Supreme Court Rules* (SCR).<sup>1</sup> The rules required all the represented retailers to have the 'same interest' in 'the proceedings'. The majority of the High Court construed this to mean that the retailers' interests had to coincide with the commencement of proceedings. The summons listed only the representative's (Fostif's) particular claim and not any claim for declaratory relief for the other retailers. Thus the retailers could not have had any interest in the success of the litigation at the time it commenced. Gleeson CJ and Kirby J felt that a broader construction was appropriate in light of *Carnie*.<sup>2</sup>

## LITIGATION FUNDING AND PUBLIC POLICY

Even if the proceedings fell within jurisdiction because they satisfied the SCR, the Supreme Court still had the discretion to stay them if they represented an abuse of process. The wholesalers claimed that the case was champertous, and that it should be stayed because Firmstones intended to profit from the litigation.

The High Court found that the present rules regulating lawyers' duties to the court were sufficient to guard against abuse, and since these were not breached, the case could not have been stayed.<sup>3</sup> Although it validated the litigation funding agreement in this case, the majority of the court<sup>4</sup> did not do so because of the increased access to justice afforded by litigation funding.<sup>5</sup> Kirby J, however, argued that access to justice was a crucial consideration.<sup>6</sup>

## CONSEQUENCE

As a result of the majority finding on the jurisdictional issue, the proceedings could not continue as a representative action. In light of the limitation period, over 2,000 tobacco retailers will be unable to reclaim licence fees. The Court's 'attitude of hostility to representative procedures'<sup>7</sup> and views on access to justice are sobering. However, this decision has given the green light to litigation funding and the practical access to justice that only financial aid can bring. ■

**Notes:** 1 *Supreme Court Rules* 1970, pt8, r13. Now replaced by *Uniform Civil Procedure Rules* 2005 (UCPR), r74. 2 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398. 3 At [93]. 4 Gummow, Hayne, Crennan, Callinan and Heydon JJ. 5 See, in particular, Callinan and Heydon JJ at [256]. 6 At [145]. 7 At [148] per Kirby J.

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PO Box 672, Elsternwick, VIC 3185  
Tel: 03 9576 7491 Fax: 03 9576 7493  
Email: susanw@smartchat.net.au

**Ken Chan** is a law student at Sydney University and a volunteer at the Lawyers Alliance. **PHONE** (02) 9258 7700

**EMAIL** Kenneth@lawyersalliance.com.au