

SUPREME COURT OF QUEENSLAND

CITATION: *Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd* [2020]
QSC 20

PARTIES: **MALLONLAND PTY LTD ACN 051 136 291 (AS
TRUSTEE FOR THE ANDREW JENNER FAMILY
TRUST)**
(First Plaintiff)

AND

**ME & JL NITSCHKE PTY LTD ACN 074 520 228 (AS
TRUSTEE FOR THE NITSCHKE FAMILY TRUST)**
(Second Plaintiff)

v

ADVANTA SEEDS PTY LTD ACN 010 933 061
(Defendant)

FILE NO/S: BS No 4103 of 2017

DIVISION: Trial Division

PROCEEDING: Application filed on 5 February 2020

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 28 February 2020

DELIVERED AT: Brisbane

HEARING DATE: Written submissions provided

JUDGE: Jackson J

ORDER: **The order of the Court is that:**

1. The application that the plaintiffs identify which group members other than the plaintiffs have signed litigation funding agreements and produce redacted copies of each such agreement is dismissed.

2. Costs reserved.

CATCHWORDS: PROCEDURE– CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS– REPRESENTATIVE PARTY OR PROCEEDINGS– OTHER CASES AND MATTERS– where the defendant applied for an order that the plaintiffs identify group members other than the plaintiffs who have signed litigation funding agreements and that the plaintiffs produce redacted copies of each agreement–where the defendant submits they should be disclosed and produced as

the proceeding will involve the determination of common questions applicable to all group members— where the plaintiffs submit that disclosure would provide a tactical advantage to the defendant— where the court ordered that the application be dismissed.

Civil Proceedings Act 2011 (Qld), s 3, s 103A, s 103B, s 103M, s 103N, s 103ZB
Practice Direction 2 of 2017
Uniform Civil Procedure Rules 1999 (Qld), r 9, r 22

BMW Australia Ltd v Brewster (2019) HCA 45
P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No. 2) [2010] FCA 176
Pharm-a-care Laboratories Pty Ltd v Commonwealth of Australia [2009] FCA 1203
Thomas v Powercor Australia Ltd [2010] VSC 489

COUNSEL: D Campbell QC and B Hall for the plaintiffs
R Douglas QC for the defendant

SOLICITORS: Creevey Russell Lawyers for the plaintiffs
Clifford Gouldson Lawyers for the defendant

Jackson J:

- [1] This is an application for an order that the plaintiffs write to the defendant identifying which group members other than the plaintiffs have signed litigation funding agreements and that the plaintiffs produce redacted copies of each such agreement.
- [2] The proceeding is what is commonly known as a class action, brought as a representative proceeding under Part 13A of the *Civil Proceedings Act* 2011 (Qld) (“CPA”), and Chapter 3, Part 1, Division 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) (“UCPR”) and subject to Practice Direction 2 of 2017 (“Practice Direction”).
- [3] Paragraph 8.2 of the Practice Direction provides that at or prior to the initial case conference each party is expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party.
- [4] The proceeding is constituted under the UCPR as a proceeding started by claim. There are three parties being the plaintiffs and the defendant. A proceeding must be started by claim, unless the rules require or permit it to be started by application.¹ A

¹ *Uniform Civil Procedure Rules* 1999 (Qld), r 9.

claim must be in the approved form; that is, it must be brought by a plaintiff or plaintiffs against a defendant or defendants and must attach a statement of claim.² By r 77B, a representative proceeding in the form of a class action must be started by claim in the approved form. That is to say, it must be brought by a plaintiff or plaintiffs against a defendant or defendants who are the parties to the proceeding.

- [5] Under the CPA, that Act applies to civil proceedings in the Supreme Court³ and a proceeding under Part 13A of that Act may be started by one or more persons on behalf of some or all of the persons who have claims as identified in s 103B(1).⁴ Such a proceeding is brought against a defendant and the parties to it are the plaintiff or plaintiffs and the defendant or defendants.
- [6] Critically, for present purposes, other provisions of Part 13A affect the rights of a person identified in those provisions as a “group member”. Section 103A defines a “group member” for that part to mean a member of a group of persons on whose behalf a representative proceeding has been started. It also defines the person who starts a representative proceeding under that part as a “representative party”.
- [7] Accordingly, the legislation distinguishes between a party who is a representative party, who is a plaintiff, and a person represented, who is not a party, and who is identified as a group member.
- [8] Paragraph 4.1 of the Practice Direction provides that words and expressions in the Practice Direction have the meanings given to them in s 103A of the CPA. Paragraph 4.2 provides that subject to Part 13A of the CPA, the UCPR apply to representative proceedings under that part.
- [9] It follows, in my view, that the provision in paragraph 8.2 of the Practice Direction that each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order is a provision directed to the relevant party or parties, namely the plaintiffs in the present proceeding.
- [10] However, the litigation funding agreements which the defendant seeks to have disclosed and produced by the plaintiffs are not the litigation funding agreements between the plaintiffs and the litigation funder. They have been disclosed already. What the defendant applies for is any litigation funding agreement between other group members and the litigation funder.
- [11] In my view, it is not clear that paragraph 8.2 applies to those agreements, even if they were in the possession or power of the plaintiffs, a matter about which there is no evidence.
- [12] It is not apparently in dispute that the plaintiffs’ solicitors possess copies of some litigation funding agreements made between group members and the litigation funder.

² *Uniform Civil Procedure Rules 1999 (Qld)*, r 22.

³ *Civil Proceedings Act 2011 (Qld)*, s 3.

⁴ *Civil Proceedings Act 2011 (Qld)*, s 103A and s 103B.

- [13] The order sought by the defendant was not opposed by the plaintiffs on the ground that they do not have the relevant documents in their possession or power. Still, that may not be a matter that should be assumed and any order that might otherwise be made should, in my view, be limited to the litigation funding agreements that are within the plaintiffs' possession or power as the group members are neither parties to the proceeding, nor were they represented on this application.
- [14] Even if paragraph 8.2 of the Practice Direction may properly be construed to apply to litigation funding agreements that are made between the litigation funder and group members that are in the possession or power of the plaintiffs, a question remains whether an order should be made that they be produced by way of disclosure under that paragraph.
- [15] The defendant submits that they should be disclosed and produced because the proceeding will involve the determination of common questions applicable to all group members.
- [16] The plaintiffs' claims are for damages in tort or under a statutory cause of action for loss or damage alleged to have been suffered as a result of planting sorghum seed supplied by the defendant for use in the commercial growing of sorghum for particular purposes. The plaintiffs are two separate growers. Each has a separate claim for loss or damage said to have been caused by the common issues of law and fact as to liability as between the plaintiffs and group members on the one hand and the defendants on the other. The statement of claim alleges, in addition to the plaintiffs' claims for loss or damage, the claims for loss or damage of five other selected growers among the group members.
- [17] However, none of the group members apart from the plaintiffs is a party to the proceeding. By reason of s 103ZB of the CPA, none of them is liable for the costs of the proceeding, other than under s 103M or s 103N, which deal with directions the court may give to decide the remaining issues when the issues common to all group members will not finally decide the claims of all group members. No directions of that kind have yet been made, although it may be necessary to do so in the future.
- [18] The defendant submits that to identify those of the group members who have signed litigation funding agreements is not information which might reasonably be expected to confer a tactical advantage on it. The defendant submits that *BMW Australia Ltd v Brewster*⁵ is relevant because although it decided that common fund orders are not authorised by statutory provisions that operate in the same way as Part 13A, yet fund equalisation orders may be made so as to take account of those group members who have signed litigation funding agreements and those who have not. In *BMW*, a fund equalisation order was described thus:

“A funding equalisation order provides for deductions from the “amounts payable to unfunded [group] members [from their entitlement on settlement or judgment] of amounts equivalent to the funding commission that would otherwise have been payable by them had they entered into a funding agreement” with the funder. Such amounts are then “distributed pro rata across all [group] members, so that both funded and unfunded [group] members ...

⁵ [2019] HCA 45.

receive the same proportion of their settlement or judgment". Unfunded group members pay no commission to the funder, but such an order achieves equality of treatment between group members because unfunded group members do not receive any more than funded group members. A funding equalisation order is limited to redistributing actual costs incurred⁶

- [19] The defendant submits that the order sought on this application is a course to be encouraged because it may assist in the settlement of the overall proceeding. Exactly how that may do so is not articulated.
- [20] The plaintiffs resist the order on the ground that disclosure of all existing litigation funding agreements entered into by group members with the litigation funder would advantage the defendant and enable it to exploit tactically the various divisions between group members who have entered into litigation funding agreements on the one hand and those who have not on the other hand for the purpose of settlement. Again, exactly how that may be done is not articulated.
- [21] Neither of the parties referred to any prior cases dealing with disclosure of group members' litigation funding agreements. In some cases, where the class is closed, it is known that all group members of a particular class will have entered into the litigation funding agreement made between a plaintiff or plaintiffs and the litigation funder. In those cases the present question will not arise. But that is not this case.
- [22] Earlier cases have considered applications for discovery or disclosure from group members including litigation funding agreements. They include *Pharm-a-care Laboratories Pty Ltd v Commonwealth of Australia*,⁷ *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No. 2)*,⁸ and *Thomas v Powercor Australia Ltd*.⁹
- [23] It is unnecessary to discuss the cases at any length. Part of the relevant decisions in those cases concerned the powers of the relevant courts, in a class action context, to make orders for non-party discovery or production of documents under particular rules of court. I pass those questions by in order to decide this case.
- [24] Of more relevance is that in each of those cases, the court considered whether the purpose for which the discovery or production of the litigation funding agreements was sought warranted making the order. In the present case, there is no context of that kind. The only identified purpose is the possibility that identification and production would assist in settlement. Because I am not able to understand clearly why that would be so, in my view, the order sought should not be made.

⁶ [2019] HCA 45, [134].

⁷ [2009] FCA 1203.

⁸ [2010] FCA 176.

⁹ [2010] VSC 489.