HIGH COURT OF AUSTRALIA

12 March 2025

BOGAN & ANOR v THE ESTATE OF PETER JOHN SMEDLEY (DECEASED) & ORS
[2025] HCA 7

Today, the High Court held that the making of a group costs order ("GCO") by the Supreme Court of Victoria in a group proceeding commenced under Pt 4A of the *Supreme Court Act 1986* (Vic) is relevant to the Court's consideration of the exercise of the power conferred on it by s 1337H(2) of the *Corporations Act 2001* (Cth) ("the Corporations Act"). The fact that the Supreme Court of Victoria had made a GCO in the group proceeding weighs decisively against transfer of the proceeding to the Supreme Court of New South Wales. This is because the GCO could not operate after such a transfer, giving rise to a considerable risk that the proceeding would not be able to continue.

Section 33ZDA of the Supreme Court Act creates an exception to the prohibition in Victoria against the charging by a law practice of a contingency fee, being an amount of legal costs calculated as a proportion of the amount ultimately recovered by a client in a proceeding. Section 33ZDA empowers the Supreme Court of Victoria to make a GCO in a group proceeding commenced under Pt 4A of the Supreme Court Act. Section 1337H(2) of the Corporations Act relevantly provides that "if it appears to a transferor court that, having regard to the interests of justice, it is more appropriate" for the proceeding to be determined by another court that has jurisdiction in the matters for determination in the proceeding, "the transferor court may transfer the relevant proceeding ... to that other court". Section 1337P(2) of the Corporations Act relevantly provides that if "a proceeding is transferred ... to a court ... from another court ... the transferee court must deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court."

The Arrium class action is a group proceeding that was commenced in the Supreme Court of Victoria. The plaintiffs bring the proceeding on their own behalf and on behalf of members of a group of those who or which acquired an interest in fully paid ordinary shares of Arrium Ltd during the relevant period. The plaintiffs applied by summons for a GCO ("the GCO application"). By summons, the fifth defendant, who had been retained to audit Arrium's financial accounts in the relevant period, applied for a transfer of the Arrium class action to the Supreme Court of New South Wales ("the transfer application"). The primary judge ordered that the transfer application be determined after the GCO application. Another judge determined the GCO application and ordered that the legal costs payable to the law practice representing the plaintiffs and the group members be 40% of the amount of any award or settlement that may be recovered in the Arrium class action. The primary judge then reserved the following questions for the consideration of the Court of Appeal of the Supreme Court of Victoria: (1) Is the fact that the Supreme Court of Victoria has made a GCO under s 33ZDA of the Supreme Court Act relevant to the exercise of discretion under s 1337H(2) of the Corporations Act; (2) If the proceedings are transferred to the Supreme Court of New South Wales: (a) will the GCO remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court; (b) if the GCO will remain in force, does the Supreme Court of New South Wales have power to vary or revoke the GCO; (3) Should the proceedings be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the Corporations Act? The Court of Appeal concluded that the questions reserved should be answered: (1) Yes; (2)(a) No; (2)(b) Does not arise; and (3) No. On the application of the fifth defendant, the High Court ordered that the whole of the cause pending in the Court of Appeal be removed into the High Court.

The High Court held that on the proper construction of s 1337P(2) of the Corporations Act, the provision would not operate to give legal force to the GCO were the Arrium class action transferred to the Supreme Court of New South Wales. By majority, the Court held that in the mandatory consideration of the interests

of justice for the purpose of s 1337H(2) of the Corporations Act, the consideration that the GCO would have force and effect if the Arrium class action remained in the Supreme Court of Victoria, but not if it were transferred to the Supreme Court of New South Wales, weighed decisively against transfer being in the interests of justice. This was because of the considerable risk that the Arrium class action would not be able to continue in the absence of the GCO with the result that the plaintiffs' and group members' claims would have to be abandoned. Accordingly, the Court answered the questions reserved as follows: (1) Yes; (2)(a) No; (2)(b) Does not arise; and (3) No.