JONES DAY

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COMMENTARY

Australian Court Stops Class Action from Obtaining US Courts' Assistance for Oral Depositions

Key Points

- By way of anti-suit injunctions against the applicant and a class member in class action proceedings, the Federal Court has restrained parties from making formal applications pursuant to 28 USC § 1782 to gather evidence through oral discovery in US District Courts.
- Parties to Australian proceedings should be wary of using foreign procedures to gather evidence without the Australian court's prior knowledge and consent, in particular where the court has a particular supervisory role (such as in class actions) that may be undermined by an application in a foreign jurisdiction.

Background

In *Jones v Treasury Wine Estates Limited* [2016] FCAFC 59, Justices Gilmour, Foster and Beach were required to rule on an interlocutory application in class action proceedings filed by the respondent, Treasury Wine Estates ("TWE"), seeking orders in the nature of anti-suit injunctions in relation to US proceedings against the applicant, Jones, and a member of the relevant class, Utah Retirement Systems ("URS").

The proceedings involved allegations of misleading or deceptive conduct and contraventions of the continuous disclosure provisions of the *Corporations Act 2001* (Cth), specifically TWE's alleged failure to disclose to the market that inventory levels of wine held by its US distributors were materially excessive, which in turn affected its profitability. To gather evidence, the applicant filed proceedings in the US District Court for the Southern District of New York, and URS filed proceedings in the US District Court for the Northern District of California seeking an order pursuant to 28 USC § 1782 of the US Code titled "*Assistance to foreign and international tribunals and to litigants before such tribunals*" for the obtaining of oral discovery (also referred to as a "deposition") from current and former senior executives of TWE.

28 USC § 1782 provides:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before

> formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court…. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

Specifically, URS sought orders for discovery by way of oral questions from Sandra LeDrew, the managing director of TWE's Americas Division, and Alejandro Escalante, the Vice President of Financial Planning & Analysis, Sales Division of TWE's Americas Division. Jones sought an order for discovery by way of oral questions from Stephen Brauer, a former manager of TWE's Americas Division. In response, the US District Court for the Northern District of California made orders pursuant to 28 USC § 1782 permitting the issue of subpoenas to Ms LeDrew and Mr Escalante for the taking of a deposition, and the US District Court for the Southern District of New York made an order for Mr Brauer to show cause why a similar order should not be made.

Jones and URS gave undertakings not to take further steps in or consequential upon the US proceedings until the determination of the application for an anti-suit injunction before the Federal Court of Australia.

The Judgment

Jurisdiction. In its judgment, the Court briefly commented on the nature of the jurisdiction for the grant of an anti-suit injunction as operating *in personam* to restrict a party from conducting proceedings in a foreign court. It has a basis both in the inherent power of the Court to protect its own processes once they have been set in motion (in this case through the commencement of class action proceedings by the applicant) and also in the equitable jurisdiction of the Court. TWE relied on both sources of power; however the Court concluded that it was sufficient to establish jurisdiction under the first ground.

Protection of the Federal Court's Processes. The Court considered in-depth the overarching purpose of the civil practice and procedure regime provided by the *Federal Court of Australia Act 1976* (Cth) ("FCA Act"), the *Federal Court Rules 2011* and Practice Note CM5: to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. The judges commented on how the legislation, in particular section 37M, emphasises the importance of judge-controlled litigation, and also suggests that ancillary proceedings "may not be conducive" to these aims except in rare cases.

Their Honours stated that while they theoretically have the power to order oral discovery of the kind which was being sought in the US proceedings by virtue of the provisions of the FCA Act, the present question did not require such an order to be made, and they considered that such a power would only be exercised in a "most exceptional case". Rather, the question was whether Jones's and URS's conduct in seeking to invoke the powers of a foreign court to obtain compulsory oral discovery, without the docket judge's knowledge or approval, was permissible. In particular, the fact that this was a class action was relevant, because case management of such proceedings has a particular significance given the Court's supervisory role. However, the fact that the proceedings were being case managed did not provide a basis in itself for restraining the parties from seeking orders under 28 USC § 1782.

The Court concluded that the applications in the US District Courts were made in order to obtain the benefit of procedures that would not usually be available in the Federal Court of Australia. While there may be circumstances where it would endorse an application by a party under 28 USC § 1782, in the present case the fact that the Jones's and URS's conduct in invoking the US proceedings without notice and without the Court's approval undermined the Court's case management and supervision of the class action. As such, the US proceedings were inconsistent with the overarching purpose of the

civil practice and procedure regime under which the Federal Court operates.

Additionally, their Honours emphasised that "what is vital is that this Court's proceedings and its pre-trial processes are solely subject to supervision by this Court, particularly where one is dealing with a class action which invokes the Court's supervisory role".[1] In any situation where an order for a deposition under 28 USC § 1782 is made, it would therefore necessarily need to be obtained with notice to the other party, and with the Court's prior knowledge and approval. The circumstances in which approval might be granted would be exceptional, and their Honours considered that it was "neither necessary nor helpful" to contemplate what scenarios might warrant such endorsement in the present judgment.

Therefore, their Honours ordered that Jones and URS:

1. Be restrained from taking any further step in furtherance of, or in connection with, the US proceedings; and
2. Be restrained from taking, or causing to be taken, or participating in the taking of any oral deposition of the TWE executives who were the subject of the applications under 28 USC § 1782.

Issues Raised

Scope of the Decision. It is uncertain how far the implications of this case will reach with respect to the rationale for the Court's judgment, for two reasons:

First, their Honours commented that while the Court does not, in general, exercise any control over the manner in which a party lawfully obtains the evidence which it will need to support its case, this does not give a party the right to circumvent the Court's control and supervision of the proceedings before it. However, it is unclear as to what specific actions by a party will constitute circumvention. It may be that a distinction can be made between formal processes in foreign jurisdictions where an order is sought from a foreign court, such as the present situation, and informal means of gathering evidence, which would potentially fall outside the Court's jurisdiction to intervene in the evidence-gathering process.

Secondly, their Honours did not discuss the relevance of the fact that the subject of the 28 USC § 1782 applications was a subsidiary of a party to the proceedings (TWE). There is a question of whether the Court would be willing to restrain a party from making foreign applications to gather evidence from independent third parties, which again turns on the scope of the decision. It is likely that the rationale of retaining the Federal Court as the sole supervisor of the proceedings would again serve as justification for restraining a party from gathering evidence from third parties under the foreign procedure. Moreover, the Federal Court has recently affirmed the position that documents in the possession of a subsidiary are not in the "control" of its parent for the purposes of discovery,[2] which demonstrates that even where it could not itself compel the officers of the subsidiary to provide evidence it will still restrain a 28 USC § 1782 application, because such an application would still fall outside the Court's management of the case.

Use of Depositions in Australia. Their Honours stated that the Federal Court has, theoretically, the power under the FCA Act to order oral discovery of the US kind due to the broad nature of sections 23, 33ZF and 37P. However, such a power would be exercised only in "an exceptional case". This is a softening of previous judicial positions where it was said that in the Federal Court, "compulsory oral discovery is not available against either parties or non-parties".[3]

The Court also stated that it is unlikely that section 46 of the FCA Act could be used for oral discovery, notwithstanding its apparent width. Section 46 was specifically amended to allow the evidence on commission procedure that it embodies to be employed in relation to discovery. The Court's view may have been the result of a focus on the purpose behind the amendment, which was to give effect to recommendations made by the Australian Law Reform Commission to permit "pre-trial oral examination about discovery".[4] Section 46 was meant to facilitate the locating of documents and resolution of discovery disputes.[5] Oral discovery aimed at obtaining information relevant to the dispute the subject of proceedings is a broader purpose. However, the text of section 46 does not reflect the more limited purpose.

Implications

This case has demonstrated that parties to proceedings in an Australian court should be wary of making formal applications for discovery to a foreign court without the prior knowledge and consent of the Australian court, regardless of whether the discovery is of a kind that is available under the Australian court's procedures. In particular, it highlights the Federal Court's reluctance to allow actions by parties that are inconsistent with the overarching purpose of the FCA Act, especially where the Court has a particular role in the management of the case (as in class actions). At the very least, if a party wishes to gather evidence using a procedure outside those prescribed by the FCA Act (or equivalent state legislation for state matters), it should make the Australian court aware of this fact and seek supporting orders.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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Endnotes

1 *Jones v Treasury Wine Estates Limited* [2016] FCAFC 59 at [48].

2 *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi SRL (No 11)* [2015] FCA 876.

3 *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 4]* (1996) 64 FCR 61 at 67; *Martin v Tasmania Development Resources* [1999] FCA 71 at [1].

4 Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Court, Report 115* (2011), Recommendations 10-1 and 10-2.

5 Law Council of Australia / Federal Court of Australia, *Case Management Handbook* (2014) 108-109.