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COMMENTARY

Institutional Investors and Common Questions for Shareholder Class Actions in Australia

Key Points

- The Federal Court declined to make orders sought by the respondent for two institutional investors, who were amongst Newcrest's top 20 shareholders, to participate in the first stage of the trial dealing with common questions.
- The practice in Australian shareholder class actions of having a retail investor as the representative party and whose claim is determined as part of the resolution of common questions looks likely to continue.
- The Federal Court took a narrow view of its power to "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding".

Background

Earglow Pty Ltd, as trustees for Boorne Super Fund Account and the Boorne Holdings Family Trust, commenced a class action in the Federal Court of Australia against Newcrest Mining Ltd.

The class action alleged that in the period 13 August 2012 to 6 June 2013, Newcrest breached its continuous disclosure obligations under s 674 of the *Corporations Act* 2001 (Cth) (the "Act") and the prohibition on misleading and deceptive conduct in s 1041H of the Act in:

- Failing to disclose to the ASX certain material information known to Newcrest in relation to expected total gold production and expected capital expenditure; and
- Making statements that misled or deceived shareholders about profit forecasts and performance for the 2012 financial year.

Prior to the commencement of these proceedings, ASIC brought its own proceedings against Newcrest for contraventions of s 674(2) of the Act. Newcrest admitted the contravention and consented to the declarations made and pecuniary penalties imposed.

The common issues to be determined at the first stage of the trial included:

- Whether Newcrest made the representations and, if made, whether they were misleading or deceptive or likely to mislead or deceive;
- Whether the representations were continuing representations;

- Whether Newcrest had reasonable grounds for making the representations;
- Newcrest's knowledge, if any, of the material information throughout the class period;
- Whether any or all of the material information was generally available in the market; and
- Whether the material information was known to Newcrest and of a kind required to be disclosed during the class period.

Arguments for Institutional Investor Participation in the First Stage Trial

The respondent, relying on s 33ZF of the of the *Federal Court of Australia Act 1976* (Cth) ("FCA Act"), sought an order for two institutional investors, who were amongst Newcrest's top 20 shareholders and had signed litigation funding agreements with Comprehensive Legal Funding LLC, to partake in the first stage of the trial.

The respondent advanced the following submissions in support of the order:

- Evidence of institutional shareholders will have a significant impact in the determination of questions of reliance, causation and loss. Findings in the initial trial unique to the applicant's case will be unhelpful in assessing these questions in relation to the majority of the group members, who are made up of institutional investors and are likely to have employed a different methodology in making investment decisions.
- The applicant's individual claim alone will not adequately facilitate the adjudication of the issues and is not truly representative of Newcrest's investors. The applicant acquired only a very small number of Newcrest shares within a very limited temporal window, in circumstances where at least 80 percent of Newcrest's shareholder base was made up of institutional investors.
- There is no principle that the initial trial in a representative action must be confined to common issues.
- Recent case law demonstrates that group members, particularly those who have signed litigation funding agreements, are not entitled to remain passive.

Federal Court Declines to Make Orders

Justice Beach declined to exercise his powers under s 33ZF of the FCA Act for the following reasons:

Interpretation of s 33ZF. Section 33ZF provides that:

> (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

Justice Beach made the following observations concerning s 33ZF. Firstly, it was accepted that PtIVA does not provide an entitlement that group members may remain passive. Secondly, while s 33ZF is a wide power, it must nonetheless satisfy the requisite statutory test, namely that the exercise of power is "appropriate or necessary, to ensure that justice is done in the proceedings". Thirdly, the statutory test under s 33ZF will not be satisfied solely on the basis that the orders sought will assist or contribute to an efficient resolution. Fourthly, courts should be cautious in accelerating individual claims outside the contemplation of s 33Q and s 33R. Finally, s 37M of the FCA Act, which requires the court to interpret and apply the civil practice procedure provisions in a way that promotes the overarching purposes, cannot be used to give broader meaning or scope to s 33ZF.

Examples of Active Participation. Newcrest advanced the following case law examples of instances where individual group members' claims have been adjudicated at the first stage trial (*see Johnson Tiles Ltd v Esso Australia Pty Ltd & Abir* (No 3) [2001] VSC 372; *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* 253 FLR 240; *Mathews v SPI Electricity Pty Ltd (Ruling No 5)* (2012) 35 VR 615; *Rowe v AusNet Electricity Services (formerly SPI Electricity Pty Ltd)* (S CI 2012 04538)). Justice Beach distinguished these examples from the present case, emphasising that unlike the cases advanced, the applicant has not acquiesced to the procedure put forward by Newcrest and had instead pursued a different forensic strategy. Furthermore, Justice Beach determined that cases presented were not analogous as they involved significant

differences between individual group members in terms of liability, as group members were distinguished from one another on the basis of the different legal duties owed.

Representation of the Group. Justice Beach rejected Newcrest's submission that, as a noninstitutional investor, the applicant and its claim were not representative of the group. Firstly, when examining the number of different shareholders rather than the percentage of shareholdings, the vast majority of the shareholders within the group were not institutional investors. Secondly, it is common in Australian shareholder class actions to have a retail investor as the representative party, whose individual claim is determined at the first stage. Finally, given the variations in size, client base and investment parameters, identifying and adjudicating the case of just two institutional investors would not be entirely representative of the group.

Relevance of Evidence. Despite accepting that evidence of the role and behaviour of institutional investors will generally be relevant in determining the common issues, Justice Beach held that such evidence was not therefore automatically "necessary". Justice Beach held that questions of evidence and forensic strategy are matters to be determined by the applicant and that s 33ZF does not exist as a coercive power to compel the applicant to file evidence that may be necessary to support its claim.

Impediments, Costs or Delay. Justice Beach accepted that the orders sought would not give rise to significant practical impediments nor cause excessive costs or delay. Notwithstanding this position, Justice Beach concluded that the class action regime in the FCA Act did not command such an intrusive role and was of the opinion that the circumstances did not justify "stretching modern case management to such an extent as to endorse some Continental idea of in effect coercing a party to file evidence of a particular type against its wishes".[1]

Ramifications

Section 33ZF has been recognised as conferring a wide power on the court in representative proceedings. In *McMullin v ICI Australia Operations Pty Ltd*, Wilcox J interpreted the provision as follows:[2]

> Section 33ZF appears in Div 6 of Pt IVA which is headed "Miscellaneous". It bears the marginal note "General power of Court to make orders". These two features support the conclusion, that would in any event arise from its wording, that s 33ZF(l) was intended to confer on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding.

Similarly, in *Courtney v Medtel Pty Ltd*, Sackville J acknowledged the breadth of the power, stating that:

> There are good reasons to give s33ZF a generous interpretation. The section is couched in broad terms. Moreover, the Court is given power to act on its own motion. The language, which is described in the Explanatory Memorandum as "wide", doubtless reflects the drafter's perception that the new statutory procedure for representative proceedings was likely to throw up novel problems that would require close supervision by the Court.[3]

Justice Beach appears to have adopted a much stricter interpretation of s 33ZF. Although accepting that "appropriate" is a lower threshold than "necessary", his Honour then raised the threshold by placing emphasis on the need "to *ensure*" that justice is done. Further, a finding that steps may be "merely convenient or useful *per se*" is not sufficient for the power to be exercised.[4] This is not to say that following the earlier decisions would have necessarily resulted in the orders being granted. Section 33ZF provides the court with a discretion that it still could have chosen not to exercise in favour of the orders sought.

The outcome reached by Justice Beach is consistent with two factually similar cases where the court declined to invoke its power under s 33ZF. In *Kirby v Centro Properties Limited*, the respondents sought an order that the claims of at least one institutional/trustee group member be heard in the initial trial. The respondents advanced similar submissions to those put forth by Newcrest. In rejecting the application, Justice Middleton held that it was unlikely that the order would assist in the determination of causation as an institutional investor "will have its own peculiarities in relation to reliance and other claims".[5] In *National Australia Bank Ltd v Pathway Investments*,

the trial judge dismissed the respondent's application for an order identifying the 20 largest shareholders and requiring them to give discovery. The Court of Appeal dismissed the respondent's appeal on the basis that although the documents and particulars sought may have been relevant to the common issues, it was within the primary judge's power to determine that the submissions advanced by the respondents were not sufficient to justify exercising its discretion.[6]

Lawyer Contacts

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Endnotes

1 *Earglow Pty Ltd v Newcrest Mining Ltd* [2015] FCA 328 at [132].

2 *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4.

3 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [48].

4 *Earglow Pty Ltd v Newcrest Mining Ltd* [2015] FCA 328 at [33].

5 *Kirby v Centro Properties Limited* (Federal Court of Australia, Proceeding No VID 366 of 2008) (transcript of proceeding dated 13 April 2011) at 28.

6 *National Australia Bank Ltd v Pathway Investments* (2012) 265 FLR 247.