



Australian Shareholder Class Action Held to be an Abuse of Process

Key Points

- Treasury Wine Estates Limited (“TWE”) was the subject of shareholder class actions in both the Supreme Court of Victoria and the Federal Court of Australia. In the Supreme Court of Victoria class action, the Court exercised its inherent jurisdiction to restrain a legal practitioner from acting for the lead plaintiff because there was a serious risk of a conflict of interest. The Court of Appeal subsequently ordered that the entire proceeding be permanently stayed on the basis that it constituted an abuse of process.
- The plaintiff in the Supreme Court class action then commenced a further class action in Victoria, but with a different lawyer, that was then transferred to the Federal Court of Australia. In *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2016] FCA 787, the Federal Court held that the proceeding should be stayed as an abuse of process, on the basis that it was brought for the predominant purpose of securing a financial benefit (other than by an award of damages) rather than the vindication of legal rights.

Background

In *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3)* [2014] VSC 340 (“MCI decision”), the lead plaintiff (“MCI”) purchased a small parcel of shares in both Treasury Wine Estates Limited and Leighton Holdings Limited and commenced separate group proceedings against both companies. In each proceeding, the solicitor for the lead plaintiff, Mr Mark Elliott, was sole director and shareholder of the lead plaintiff. Each defendant sought orders (alternatively) that: (i) the proceeding be stayed as an abuse of process; (ii) Mr Elliott be restrained from acting as solicitor for the lead plaintiff; or (iii) the proceeding not continue as a group proceeding while Mr Elliott remained solicitor for the lead plaintiff, pursuant to sections 33N or 33ZF of the *Supreme Court Act 1986 (Vic)*.

The Court held that the relevant test for determining whether it should exercise its inherent jurisdiction to restrain a legal practitioner is: “whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a lawyer should be prevented from acting, in the

interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice”.

The Court found that, on the present facts, the fair-minded observer would have concluded that Mr Elliott, through MCI, was in the business of purchasing shares in listed companies in order to commence group proceedings for alleged breaches of continuous disclosure obligations. Further, the Court held that the observer would “consider that Mr Elliott is compromised in his role as a solicitor such that there would be a real risk that he could not give detached [and] independent ... advice taking into account not only the interests of MCI ... but also the interests of group members” (at [50]). Thus, the Court made orders restraining Mr Elliott from acting for the lead plaintiff.¹

The MCI decision was appealed by TWE, and the Court of Appeal upheld the appeal and ordered that the proceeding be permanently stayed as an abuse of process (“COA decision”).² In doing so, Maxwell P and Nettle JA accepted the unchallenged findings of Ferguson J, concluding that the reason for MCI’s existence was to commence proceedings to enable the lead plaintiff’s solicitor (Mr Elliott) to earn legal fees (under “no win, no fee” arrangements). The Court held that it was clear the present litigation had been commenced for the predominant purpose of generating legal fees for Mr Elliott, rather than to vindicate the legal rights of class members. This purpose was found to be an improper one. Relevant to this finding was evidence showing that the quantum of damages for the claim against TWE would have amounted to less than \$700.

Federal Court Proceeding

On 22 December 2014, the same day the COA decision was handed down, MCI commenced further proceedings in the Supreme Court of Victoria, relying upon identical causes of action and seeking the same relief as sought in the MCI decision, except with Portfolio Law acting as solicitor on the record. The Court described this as a “fallback proceeding”, designed to keep MCI’s claims on foot if its High Court Special Leave Application from the COA decision was unsuccessful (which it was). These proceedings were then transferred to the Federal Court of Australia by a judge of the Supreme Court of Victoria.

It was also the case that a separate shareholder class action had been commenced against TWE by Mr Brian Jones on 2 July 2014 (“Jones proceeding”).³

By way of interlocutory application, TWE sought a number of orders in the alternative, including:

- That the proceeding be stayed as an abuse of process pursuant to the Court’s inherent jurisdiction;
- That judgment be given against MCI under r 26.01(d) of the *Federal Court Rules 2011* (Cth) on the basis that the proceeding was an abuse of process;
- That the Applicant be restrained from continuing as the representative applicant in the proceeding under s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (“FCA”); or
- That the proceeding no longer continue as a group proceeding, under s 33N of the FCA.

Abuse of Process

TWE’s primary contention was that the proceeding was an abuse of process on the basis that: (i) it was brought for an illegitimate or collateral purpose; (ii) to permit it to remain on foot would be unjustifiably oppressive to TWE; and/or (iii) to allow it to continue would bring the administration of justice into disrepute.

In support of the “illegitimate or collateral purpose” ground, TWE made a number of alternative claims. First, it argued that there was an issue estoppel in respect of the COA decision, such that MCI was estopped from asserting anything contrary to the findings of law and fact made in that case. Second, TWE argued that the Federal Court should follow the COA decision as a matter of precedent. Finally, it asserted that even if no issue estoppels arose, the Court should infer that the predominant purpose of the proceeding was to entitle Mr Elliott to derive a collateral financial benefit (other than by the recovery of damages). This, they argued, was in line with MCI’s business model and supported by the findings in both the MCI decision and COA decision.

In response to TWE’s claims, MCI asserted that no issue estoppel arose because the facts in the two cases were fundamentally different (Mr Elliott having never been the solicitor on the record in the present case). Further, it implored the Court not to follow the COA decision on the basis that it was

plainly wrong and argued that there was no evidence before the Court from which to conclude that Mr Elliott was obtaining any collateral financial benefit from the proceeding.

The Court's Findings

Justice Foster observed that it is within the inherent jurisdiction of every superior court to prevent abuse of its processes and that, while the categories are not closed, they usually fall into one of the established classes raised by TWE. An improper purpose is one that uses a court proceeding to obtain some advantage for which the proceeding is not designed, thus leading to the court's processes being "utilised as instruments of injustice or unfairness". Hence the court must focus on the use of the proceeding in determining whether it constitutes an abuse of process.

In assessing TWE's contention that MCI had invoked the court's processes for an illegitimate purpose, the Court held that, practically speaking, MCI's purpose in bringing the proceeding was the same as Mr Elliott's purpose in causing MCI to do so (as Mr Elliott was sole shareholder and director of MCI). Further, as MCI had proffered no alternative explanation for bringing the proceeding, the Court was entitled to draw adverse inferences in respect of this issue. Relying on the findings of fact from the MCI decision, Justice Foster noted that MCI was created by Mr Elliott as a vehicle for bringing class actions against listed companies. In order that MCI could act as lead plaintiff, Mr Elliott caused it to purchase small parcels of shares in companies and then commence proceedings, with Mr Elliott expecting to earn substantial legal fees as the solicitor on record. His Honour agreed with the MCI decision that MCI had no interest in recovering the \$700 in damages it allegedly suffered.

Justice Foster also found that, based on the reasons for MCI purchasing the shares in TWE as explained above, it was almost certain that neither Mr Elliott nor MCI acted in reliance upon anything TWE said (or failed to say) when MCI purchased the shares, or actually relied upon the integrity of the share market, including adherence by TWE to its statutory obligations to make accurate ongoing material disclosures from time to time. Further, it would be very difficult for MCI to persuade the Court that it should be able to rely upon a

market-based causation theory to establish an indirect basis for reliance by it on the alleged contraventions committed by TWE.

In relation to the present case, the Court found that it was more probable than not that Mr Elliott was concerned in the affairs of the solicitor on the record (Portfolio Law) in a way designed to provide him or MCI a financial reward. In the absence of evidence to the contrary from MCI, the Court was entitled to make such an inference.

A further factor relevant to the abuse of process claim was the existence of the Jones proceeding, which Foster J concluded MCI must have known about at the time it commenced the present proceeding. The group members in the Jones proceeding overlapped with those in MCI's Federal Court proceeding and involved largely similar claims to the present proceeding.

The Court also found that MCI had not commenced the proceedings "in order to obtain a remedy which the law provides either for itself as an individual claimant or for the members of the class which it purports to represent".

Decision

For all of the above reasons, the Court held that the proceeding was brought for an illegitimate or collateral purpose. It further held that the proceeding would operate oppressively and vexatiously in respect of TWE (because of the existence of the Jones proceeding) and would bring the administration of justice into disrepute if allowed to continue.

Although it was not necessary for the Court to consider the issue of estoppel, Foster J noted that while the COA decision did have the requisite quality of finality and the parties were bound by the statements of principle arising from that case, the findings relating to the abuse of process in the COA decision were limited to that factual context (and did not extend to the present proceeding). Therefore no issue estoppel arose in this case.

In ordering that the proceeding be permanently stayed as an abuse of process, Foster J also ordered that MCI pay TWE's costs of the application.

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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Claire Goulding, an associate in the Sydney Office, assisted in the preparation of this Commentary.

Endnotes

- 1 See Jones Day *Commentary*, “Australian Lawyers with Financial Interest in Litigation Funder Restrained from Acting in Class Action” (January 2015).
- 2 *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 351. See Jones Day *White Paper*, “Class Actions in Australia: 2014 in Review” (January 2015).
- 3 *Brian Jones v Treasury Wines Estates Limited* ACN 004 373 862, NSD 660 of 2014, Federal Court of Australia, New South Wales Registry.