JONES DAY

COMMENTARY

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Eshelby's Principle: A Lawyer's Fine Point That Can Be Overcome

IN SHORT

Background: In Western Australia, a procedural rule called the "Eshelby principle" prevents the pursuit of causes of action grounded upon events arising only after the commencement of litigation. Other jurisdictions have taken steps to address the issues arising from the application of the principle.

Issue: Is a party able to overcome Eshelby's principle and the restriction to claims for events arising after pleadings have been filed?

Answer: Yes, provided that the fresh cause of action is brought within the limitation period.

The operation of Eshelby's principle was recently reviewed by the Supreme Court of Western Australia by Justice Kenneth Martin in two decisions. These cases provide a practical solution for proceedings in Western Australia, which are restricted by a principle that no longer operates in other Australian jurisdictions.

The first of these decisions, *Mineralogy Pty Ltd v Sino Iron Pty Lt [No 16]* [2017] WASC 340 concerned a claim by Mineralogy Pty Ltd against Sino Iron Pty Ltd and Korean Steel Pty Ltd for liquidated royalty amounts due and payable pursuant to two written contracts. During trial an issue arose as to the procedural rules that should be applied to the case as the matter had been transferred from the Supreme Court of New South Wales under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) ("NSW Cross-vesting Act").

The differences in the potential procedural rules that could be applied carried a potential impact towards the scope of the causes of action that could be determined at trial. If the procedural rules of the Supreme Court of NSW applied—being the *Civil Procedure Act 2005* (NSW) ("NSW Rules")—then the Supreme Court of WA could resolve all the pleaded causes of action that were raised under Mineralogy's pleading. These causes of action included Mineralogy's claim for payments allegedly falling due to it at dates arising after the commencement of the action in NSW.

The so-called 'Eshelby principle' prevents the pursuit of causes of action grounded upon events arising only after the commencement of litigation.

At trial, Sino Iron and Korean Steel argued that Mineralogy could not pursue any claims seeking payment for amounts which fell due after the litigation had been commenced, an argument which arose from the Court of Appeal of WA's observations in *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 2]* [2017] WASCA 76.

This inability to pursue causes of action for debt and damages that only accrued after a commencement of an action emerges from Samuel JA's determinations in *Baldry v Jackson* [1976] 2 NSWLR 415, 417, which refer to the legal principle established by *Eshelby v Federated European Bank Ltd* [1932] 1 KB 423. The so-called 'Eshelby principle' prevents the pursuit of causes of action grounded upon events arising only after the commencement of litigation.

In *Mineralogy*, Martin J held that the Eshelby principle still applies with undiminished force in Western Australia, and it continues to have adverse procedural repercussions for many plaintiff litigants. The problems caused by the Eshelby principle have been addressed by reform in New South Wales effected under s 64(3) of the NSW Rules.

The question for Martin J was whether s 64(3) of the NSW Rules applied in the circumstances where the court was effectively exercising some aspects of the cross-vested jurisdiction of the Supreme Court of NSW. His Honour held that the procedural rules of the Supreme Court of NSW should apply, via s 11(1)(c) of the *WA Cross-vesting Act*, accordingly, s 64(3) of the NSW Rules would apply in relation to the pleaded causes of action.

Importantly, his Honour noted that although the effect of the Eshelby principle has not been ameliorated by any reforming legislation in Western Australia, Mineralogy theoretically held an alternative relief pathway to the same outcome as if it had been concluded that s 64(3) of the NSW Rules did not apply. Mineralogy could have, without leave being required, issued a further generally endorsed writ and sought under an endorsement of claim all amounts that fell due after proceedings had been commenced. If such a writ were filed it would then be open to Mineralogy to apply to the court for all pleadings and discovery

in the new action to be waived and for that new action to be consolidated with the present action.

In the circumstances, Martin J indicated a clear view that the interests of justice and the overall ends of sensible case management would strongly support the making of consolidation of action orders along those lines. This option however, would only be open to a party where there was no limitation on the commencement of this new action.

Following the trial, an application was made by Mineralogy against all the defendants, to consolidate the original action with Mineralogy's subsequent action, which was issued on 28 November 2017. In *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 17]* [2018] WASC 8, his Honour made orders for the consolidation of both of Mineralogy's actions. Justice Martin noted that it was appropriate to do so as a matter of justice and sensible case management, as well as there being no identifiable forensic prejudice whatsoever to the defendants by the consolidation orders being issued. His Honour noted that the problem of Eshelby's principle was "only a lawyer's fine point" and that it was capable of being procedurally ameliorated even in Western Australia.

TWO KEY TAKEAWAYS

1. Justice Martin noted that although the effect of Eshelby’s principle has not been improved by any reforming legislation in Western Australia, the plaintiff could have, without leave being required, issued a further generally endorsed writ and sought under an endorsement of claim all amounts that fell due after proceedings had been commenced.
2. The Justice stated that the problem of Eshelby's principle was "only a lawyer's fine point," capable of being procedurally ameliorated even in Western Australia.

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