

FEDERAL COURT STAYS A SECOND CLASS ACTION AGAINST TWE AS BEING AN ABUSE OF PROCESS

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Legal Briefings - By **Peter Holloway**

On 5 July 2016 Foster J of the Federal Court ordered that a second shareholder class action commenced by Melbourne City Investments Pty Ltd (**MCI**) against Treasury Wine Estates Limited (**TWE**) be permanently stayed as an abuse of process of the Court.¹

This decision follows an earlier decision by the Victorian Court of Appeal on 22 December 2014² to stay another shareholder class action commenced by MCI against TWE in November 2013, on the basis of that proceeding being an abuse of process. The majority Court of Appeal decision (Maxwell P and Nettle JA, with Kyrou JA dissenting) was based on findings made by the first instance Judge (Ferguson J) that the reason for MCI's existence was to launch proceedings to enable its sole shareholder and director, Mr Elliott, to earn legal fees from acting as the solicitor for MCI in legal proceedings, including the claim against TWE.

Ferguson J had concluded that on its incorporation MCI purchased small parcels of shares in 20 publicly listed companies, and later purchased similarly small parcels of shares in another 147 publicly listed companies, including TWE, and subsequently commenced 3 group proceedings with Mr Elliott acting as its solicitor. The judge also found that as the quantum of any damages likely to be recovered by MCI in its claim against TWE was at best less than \$700, it was unlikely that the proceedings were commenced for the purpose of recovering compensation.

Despite these findings, Ferguson J did not rule that the initial proceeding against TWE was an abuse of process.

TWE applied to the Court of Appeal for leave to appeal the decision of Ferguson J not to stay the first MCI proceeding as an abuse of process. None of the findings of fact made by the Judge at first instance were challenged by MCI in the appeal. On 22 December 2014 the Court of Appeal allowed TWE's appeal and held that the first MCI proceeding should be permanently stayed on the ground that it constituted an abuse of process.

The majority of the Court of Appeal found that MCI was using the cause of action to create an income-generating vehicle for its solicitor, TWE having no interest in vindicating its rights or in obtaining a remedy. The majority found that the sole purpose of MCI had only ever been to create for itself a cause of action of sufficient merit to induce TWE to pay Mr Elliott's fees and that this constituted a clear example of an abuse of process - commenting that the processes of the Court do not exist, and are not to be used, merely to enable income to be generated for solicitors, but rather they exist to enable legal rights and immunities to be asserted and defended.

Within hours of the decision of the Court of Appeal, MCI filed and served a fresh Supreme Court Writ and Statement of Claim against TWE, making allegations essentially the same as those made in the first (stayed) proceeding, but with MCI being represented by a different law firm.

MCI also sought special leave to appeal the decision of the Court of Appeal, but special leave was refused in May 2015.

The second MCI proceeding against TWE was transferred to the Federal Court, where another shareholder class action against TWE (an IMF-funded claim prosecuted by Maurice Blackburn on behalf of the lead applicant) was pending.

In the Federal Court, TWE challenged the second MCI proceeding, alleging that MCI was estopped from bringing a second proceeding by reason of the determinations made by the Court of Appeal in the first proceeding, and, moreover, that the second MCI proceeding ought be stayed as an abuse of process because it too had not been brought for the proper predominant purpose of vindicating MCI's legal rights, but for an improper purpose of Mr Elliott receiving some financial benefit in or resulting from the proceeding in the event that MCI was ultimately to be successful.

Mr Elliott did not lead evidence in the Federal Court challenge about the purpose of MCI commencing either the original or the second proceeding against TWE. TWE argued that this led to a *Jones v Dunkel* inference against MCI.

In reaching his decision delivered on 5 July 2016, Justice Foster found that:

1. Mr Elliott's purpose in causing MCI to bring the proceeding could be attributed to MCI as its purpose for bringing the proceeding, because Mr Elliott was the sole director and sole

shareholder of MCI and because there was no evidence to suggest that any other person had any say in the affairs of MCI;

2. in the circumstances, it was incumbent upon Mr Elliott to proffer an explanation for MCI's conduct in evidence given to the Court, in particular to explain his purpose in bringing the proceeding, and that his failure to do so provided a basis for the Courts to draw adverse inferences against MCI;
3. Mr Elliott did not cause MCI to make purchases of small parcels of shares in more than 150 listed corporations because he was interested in investing in each of the corporations either as a long term investor or as a trader, but created MCI as a vehicle for bringing class actions against listed corporations alleging, amongst other things, breaches of continuous disclosure obligations by those corporations;
4. Mr Elliott caused MCI to make the share purchases in order to enable MCI to position itself to commence a class action as the lead plaintiff against any one or more of the corporations in which the shares were purchased and, to the extent possible, to enable Mr Elliott himself to earn legal fees from the exercise;
5. given the reasons as found for MCI's purchases of shares, it was very difficult if not impossible for Mr Elliott to contend in the claim against TWE that MCI actually relied upon the various positive statements made by TWE to the ASX said to constitute contraventions of the *Corporations Act* or that MCI actually relied upon the integrity of the share market;
6. furthermore, it would be very difficult for MCI to persuade the Court at a final hearing that, in the circumstances as found, it should be able to rely upon market-based causation theory to establish an indirect basis for reliance by it on the alleged contraventions committed by TWE;
7. Mr Elliott and MCI almost certainly did not rely upon anything TWE said or failed to say or do when MCI purchased the shares in TWE in November 2012; and
8. the insignificant amount sought to be recovered by MCI in the proceeding did not, on any rational basis, justify the commencement and maintenance of the proceeding.

Ultimately, the Judge said that the Court should not permit MCI to institute and maintain the class action when, as the Court had found, it was doing so not in order to obtain a remedy which the law provided either for itself as an individual claimant or for the members of the class which it purported to represent. The Judge said that MCI plainly did not have the capacity to fund a proceeding itself and had not attempted to satisfy the Court that it had put in place litigation funding which would cover its own costs and the amount of any adverse costs order. He also said that MCI's claims were, at best, very weak if not hopeless, and observed that the proceeding had been commenced with the intention of using it as a 'fall back' or 'failsafe' against the possibility that the first MCI proceeding would remain permanently stayed as an abuse of process.

These matters were said by the Judge to demonstrate that the proceeding had been brought for an illegitimate and collateral purpose and that it constituted an abuse of process and should be permanently stayed. The Judge also said that it was oppressive and vexatious to TWE and, if it was allowed to continue, would bring the administration of justice into disrepute.

ENDNOTES

1. [2016] FCA 787. Herbert Smith Freehills is representing TWE in the defence of the shareholder class actions against it, including the MCI claims.
2. [2014] VSCA 351.

MORE INFORMATION

For further information concerning this issues canvassed in this article contact [Peter Holloway](#) or [Alan Mitchell](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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