Judgment Summary
Supreme Court of Victoria

23 July 2014

Melbourne City Investments PTY LTD
v
Treasury Wine Estates Limited

and

Melbourne City Investments PTY LTD
v
Leighton Holdings Limited

Justice Ferguson

This summary is necessarily incomplete. It is not to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons is that contained in the Court's published Reasons for Judgment: Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No3) [2014] VSC 340.

Today the Supreme Court has ruled that a solicitor who is the lead plaintiff for a company that has launched several securities class actions be restrained from having dual roles in some of the proceedings. The Court also ruled that those proceedings ought not continue as group proceedings while the company and solicitor are acting in tandem as plaintiff and solicitor.

Melbourne City Investments Pty Ltd is a Victorian investment company managed and controlled by Mark Elliott, a Melbourne-based solicitor. He has been the sole director and shareholder since the company was incorporated in late 2012. Towards the end of 2013, MCI commenced separate legal proceedings against three publicly listed companies — Treasury Wine Estates Limited, Leighton Holdings Limited and WorleyParsons Limited - alleging breaches of disclosure obligations and misleading or deceptive conduct. Mr Elliott is the solicitor for MCI in each of the proceedings.

MCI holds shares in the three companies, acquiring each for a little less than $700. In the proceedings against Treasury and Leighton, the loss claimed is the difference between the prices at which MCI acquired its shares and the prices that would have prevailed had each company made what is alleged to be proper disclosure. Putting it at its highest, then, the most that MCI could gain by way of compensation if it were to be successful would be less than $700 in each of those proceedings.

Treasury and Leighton sought orders to effectively bring the proceedings against them to a halt, at least for the time being, contending that the proceedings were brought by MCI to generate legal fees for Mr Elliott, and that each is an abuse of process and should be stayed. Alternatively, they sought to restrain Mr Elliott from acting for MCI in the proceedings whilst MCI is the lead plaintiff. They also

sought orders that the proceedings not continue as group proceedings whilst MCI is the lead plaintiff and Mr Elliott remains as its solicitor.

The Court said that it was probable that the reason for MCI's existence to launch proceedings was to enable its sole director and shareholder to earn legal fees from acting for MCI and that that was MCI's predominant purpose in suing.
The Court concluded that although Mr Elliott is acting on a 'no win, no fee' basis, it is common knowledge that most litigation settles before judgment and that this is treated as a 'win', such that the lawyers' fees are paid. So much is recognised by Mr Elliott on websites that have been established for each of the legal proceedings, the Court noted. But despite this, the proceedings were found not to be an abuse of process because a successful party is usually entitled to its legal costs. MCI did not sue to achieve something that could not be ordered by the Court. The Court also said that the proceedings were no more oppressive than any other proceeding simply because they are brought by a plaintiff who has engaged its sole director and shareholder as its lawyer. Nor have the proceedings brought the administration of justice or the legal profession into disrepute. The conduct of the solicitor was another matter, however.

The defendants contended there was a real possibility that Mr Elliott's interests might be different from those of group members. An early settlement, for instance, may be in MCI's best interests to avoid the need to spend further time and money on the claim, and to recover Mr Elliott's legal fees from the settlement sum. If MCI were to be successful in the proceedings, the quantum payable would be small compared to the likely amount of Mr Elliott's legal fees. Treasury argued that a scenario in which Mr Elliott and MCI may be prepared to accept a settlement offer that was sufficient to meet his professional fees — but which would provide little or no net return to MCI or other group members — could readily be envisaged. While such a settlement would require Court approval, the Court would be placed in an invidious position having regard to the personal interest that Mr Elliott would have in obtaining the Court's approval of any settlement. In light of the suggested potential position of conflict that Mr Elliott may find himself in, it was submitted that, at the very least, Mr Elliott should be restrained from continuing to act as the legal practitioner for MCI for so long as MCI is the representative plaintiff. The defendants contended that a fair-minded, reasonably informed and independent observer would expect this, in the interests of the protection of the integrity of the judicial process and the administration of justice.

The Court agreed that an independent observer would conclude that Mr Elliott was the decision-maker in the conduct of the proceedings, both from the point of view of what is in MCI's commercial interests as plaintiff and also as its solicitor. In this regard, the observer would reasonably conclude that Mr Elliott, through MCI, is in the business of purchasing small shareholdings in listed companies with the objective of subsequently commencing group proceedings against some of them for alleged breaches of their continuous disclosure obligations. Moreover, the observer would reasonably conclude that MCI's

(and Mr Elliott's) business model was likely to depend upon the outcome of the proceedings against the defendants and WorleyParsons. In addition, 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, independent and impartial advice taking into account not only the interests of MCI and its potential exposure to an adverse costs order, but also the interests of group members. The group members do not have control over the action, yet unless they opt out, they are bound by judgment in the group proceedings. The Court ruled that while Mr Elliott may be very confident that the claim MCI brings is a good one and will succeed, such that he does not consider the risk of adverse costs orders being made against MCI as very high, litigation is often uncertain and these proceedings are no different from others in that regard. If justice is to be seen to be done, the observer would expect that MCI would be represented by a person without the vested interests that Mr Elliott has in the proceedings.
Overall, then, the observer would conclude that the proper administration of justice requires that Mr Elliott be prevented from acting for MCI whilst the proceedings remain as group proceedings with MCI as the representative plaintiff.

The Court ruled that MCI could quite readily continue on as the plaintiff (with other solicitors acting for it) and the issues raised in the proceedings could be determined in the usual way; it was not persuaded that MCI could not adequately represent the interests of group members, if it had independent advice. Although there might be issues associated with MCI as the lead plaintiff while Mr Elliott is its solicitor, those issues could be better addressed in other ways, the Court ruled. The Court concluded that unless Mr Elliott ceases to act for MCI in the proceedings or MCI is replaced as the representative plaintiff, Mr Elliott should be restrained from acting as the solicitor for MCI and the proceedings should not be permitted to continue as group proceedings. Such orders have been deemed necessary to ensure the due administration of justice takes place and to protect the integrity of the judicial process. It is part of ensuring that justice is not only done, but is manifestly and undoubtedly seen to be done.