Class Actions Update – Another Setback for MCI

***Melbourne City Investments Pty Ltd v Myer Holdings Limited* [2016] VSC 655**

15 DECEMBER 2016

JUDGMENT

In delivering judgment in *Melbourne City Investments Pty Ltd* v *Myer Holdings Limited*[1], the Supreme Court of Victoria has found that a class action pursued by MCI against Myer was *"for an illegitimate or collateral purpose"*[2] and was, therefore, an abuse of process. His Honour Justice Sifris concluded that "*permitting the case to proceed to trial will bring the administration of justice into disrepute*"[3].

The decision in *Myer* continues a line of successful 'abuse of process' applications against MCI[4] and represents another blow to the business model pursued by MCI and its principal, Mark Elliott.

In *Myer,* MCI commenced group proceedings against Myer as lead plaintiff in respect of a shareholding purchased at an aggregate cost of $712. Consistent with other group proceedings commenced by MCI, it was alleged that Myer breached its continuous disclosure obligations and engaged in misleading or deceptive conduct in not informing the market about certain matters relevant to its share price.

Myer sought to have the proceeding dismissed as an abuse of process on the basis that its primary purpose was not to vindicate the rights of the group identified in the proceedings (being certain Myer shareholders who had acquired shares in a relevant period) but, rather for the improper purpose of generating income for Mr Elliott by way of a likely litigation funding arrangement.

Sifris J agreed with Myer's submissions. He observed that:

> *"…the purpose which legal proceedings are designed to serve are the protection or vindication of particular rights or immunities. Legal proceedings are not designed to enable a funder or some other party connected with the plaintiff to be enriched by reason of the proceeding. Accordingly…if the use to which a proceeding is put is other than the protection or vindication of rights or immunities, then the proceeding is an abuse of process"*[5].

Sifris J found that, on the evidence presented, it was inconceivable that if the matter proceeded to trial MCI would not require substantial funds, and whatever the source of that funding, the reasonable expectation would be that the funder, most likely an entity beneficially owned and controlled by Mr Elliott, would receive (or at least expect to receive) an appropriate and not insubstantial benefit.

In supporting his conclusions, Sifris J made the following observations:

> *"Acting as sole plaintiff, MCI would clearly not have commenced this proceeding. Acting as a representative plaintiff it has only commenced this proceeding so that it (or its associates) may be rewarded in the manner identified. Absent such reward it would not have provided 'the platform' [for the legal rights of other Myer shareholders to be vindicated]. It is this hope and expectation of reward that is the predominant purpose. There is a direct relationship between the platform and the reward. No reward, no platform. This is the business model. Although this*

[1] [2016] VSC 655
[2] Ibid at [129]
[3] Ibid at [155]
[4] *Treasury Wine Estates Ltd* v *Melbourne City Investments Pty Ltd* (2014) 45 VR 585; *Melbourne City Investments Pty Ltd* v *Treasury Wine Estates Limited* [2016] FCA 787; *Melbourne City Investments Pty Ltd* v *Leighton Holdings Ltd* [2014] VSC 7
[5] *Melbourne City Investments Pty Ltd* v *Myer Holdings Limited* [2016] VSC 655 at [126]

is what most funders do, the critical difference is that in the case of such funders the reward follows the legitimate vindication of rights which is the predominant purpose of the litigation. In this case, the vindication of rights is incidental to or purely a pre-condition to the reward…

At best for Elliott and MCI, if they are indeed providing a service or platform for meritorious claims, they are doing so within a business model that is predominantly concerned with generating income, the vindication of rights being incidental or a by-product, albeit an important one".

IMPLICATIONS

The decision is consistent with recent authority involving MCI and an important one for defendants (and their insurers) to group proceedings.

However, the significance of the decision should not be overstated in terms of its application to litigation funded class actions more generally. Sifris J in *Myer* sought to differentiate Mr Elliott's business model from litigation funding more broadly, expressly acknowledging that litigation funding plays an important role in the access to justice. In this context, his Honour made the following observations:

"The funding of class actions (on commercial terms that involve consideration of risk and rewards) has come a long way and is even encouraged as a vital access to justice issue. However, whatever commercial outcomes flow from the product of the litigation – and although to some extent supervised they may be considerable – they are underpinned by parties (usually plaintiffs unrelated to the funder) who has the predominant purpose of vindicating their rights. The fact that the funder may provide the means to do this, albeit for substantial reward, does not detract from the legitimacy of the fundamental or predominant purpose. It is what flows from it. As identified, this case and the funding model is different. It is this model as exemplified by the specific features of this case…that the law will not permit"[6].

The Court's decision was handed down on 12 December 2016. It remains to be seen whether MCI appeals against the judgment.

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[6] Ibid at [155]