FEDERAL COURT OF AUSTRALIA

Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited [2017] FCAFC 98

Appeal from:	*Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296
File number:	NSD 600 of 2017
Judge:	**JAGOT, YATES AND MURPHY JJ**
Date of judgment:	20 June 2017
Catchwords:	**PRACTICE AND PROCEDURE** – representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) – application by class member for leave to appeal interlocutory orders – power to make class closure order – exercise of discretion to make class closure order – whether opt out notice in representative proceeding was materially misleading – decisions not attended by sufficient doubt and substantial injustice would not result – leave to appeal refused
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 33A, s 33C, 33V, 33X, 33Y, 33ZC, s 33ZF
Cases cited:	*Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc* (1981) 148 CLR 170; [1981] HCA 39 *Blairgowrie Trading Ltd v Allco Finance Group Limited (Receivers & Managers appointed) (In Liq) (No 3)* [2017] FCA 330 *Bufalo v Official Trustee in Bankruptcy* [2011] FCAFC 111 *Camping Warehouse Australia Pty Ltd (formerly Mountain Buggy Australia Pty Ltd) v Downer EDI Ltd* [2015] VSC 122 *Cement Australia Pty Ltd v ACCC* (2010) 187 FCR 261; [2010] FCAFC 101 *Décor Corp v Dart Industries Inc* (1991) 33 FCR 397; [1991] FCA 844 *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 *Farey v National Australia Bank* [2014] FCA 1242 *Fernando v Ruddock* [2000] FCA 1151 *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21

House v R (1936) 55 CLR 499

HP Mercantile Pty Ltd v Plevey [2014] NSWCA 374

In re the Will of F.B. Gilbert (dec.) (1946) 46 SR (NSW) 318

Inabu Pty Ltd v Leighton Holdings Pty Ltd [2014] FCA 622

Jones v Treasury Wine Estates Limited (No 2) [2017] FCA 296

Kelly v Willmott Forests Ltd (in liquidation)(No 4) [2016] FCA 323

King v GIO Australia Holdings Limited [2001] FCA 270

Kirby v Centro Properties Limited (2008) 253 ALR 65; [2008] FCA 1505

Lenijamar Pty Ltd v AGC (Advances) Ltd (1990) 27 FCR 388; [1990] FCA 520

Matthews v SPI Electricity & SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 13) (2013) 39 VR 255; [2013] VSC 17

Melbourne City Investments Pty Ltd v Treasury Wines Estates Limited (2016) 243 FCR 474; [2016] FCA 787

Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2) [2017] FCA 449

Melbourne City Investments Pty Ltd v Treasury Wines Estates Limited (No 3) [2014] VSC 340

Mitic v OZ Minerals Pty Ltd (No 2) [2017] FCA 409

Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1; [2002] HCA 27

Newstart 123 Pty Ltd v Billabong International Ltd [2016] FCA 1194

Oswal v Burrup Fertilisers Pty Ltd (Receivers and Managers Appointed) [2011] FCAFC 117

P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2) [2010] FCA 176

Rawson Finances Pty Ltd v Deputy Commissioner of Taxation [2010] FCAFC 139

State of New South Wales v Kable (2013) 252 CLR 118; [2013] HCA 26

Thomas v Powercor Australia Ltd (Ruling No 1) [2010] VSC 489

Treasury Wines Estates Limited v Melbourne City Investments Pty Ltd (2014) 318 ALR 121; [2014] VSCA 351

Vuax v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 158

Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12

Winterford v Pfizer Pty Ltd [2012] FCA 1199

Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, *Report No 46* (Canberra, 1988)

Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Lawbook Co, 2012)

Date of hearing:	31 May 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	117
Counsel for the Applicant:	Mr N O'Bryan SC and Mr M Symons
Solicitor for the Applicant:	Portfolio Law
Counsel for the First Respondent:	Mr M Garner
Solicitor for the First Respondent:	Herbert Smith Freehills
Counsel for the Second Respondent:	Mr J Stoljar SC and Mr G Donnellan
Solicitor for the Second Respondent:	Maurice Blackburn Lawyers

ORDERS

NSD 600 of 2017

BETWEEN:	**MELBOURNE CITY INVESTMENTS PTY LTD** Applicant
AND:	**TREASURY WINE ESTATES LIMITED ACN 004 373 862** First Respondent
	BRIAN JONES Second Respondent
JUDGES:	**JAGOT, YATES AND MURPHY JJ**
DATE OF ORDER:	**20 JUNE 2017**

THE COURT ORDERS THAT:

1. The application for leave to appeal is dismissed.
2. The parties are to file short submissions on costs of no more than three pages, within 14 days, including submissions as to whether it is appropriate to order indemnity costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 In this proceeding the applicant, Melbourne City Investments Pty Ltd (**MCI**), seeks leave to appeal against interlocutory orders of a single judge of the Court in a shareholder class action brought by Mr Brian Jones against Treasury Wine Estates Limited (**TWE**) (the **Jones class action**). MCI is a class member in that proceeding and also the representative applicant in a competing shareholder class action against TWE in relation to the same or similar alleged wrongs. However, its class action has been permanently stayed by the Court as an abuse of process. MCI brings the application for leave to appeal as representing the class members in the Jones class action, and it names TWE and Mr Jones as the first and second respondents in the application.

2 MCI seeks leave to appeal in relation to interlocutory orders made by the primary judge:

(a) on 23 March 2017 requiring class members to register their claims pursuant to a class member registration protocol if they wish to participate in any subsequent settlement of the proceeding (the **class closure order**), and setting out the form of an opt out and claim registration notice (the **opt out notice**) to be given to class members (*Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296 (***Jones No 2***)); and

(b) on 5 April 2017 to dismiss MCI's application seeking that class members be sent a supplementary opt out and claim registration notice (the **supplementary opt out notice**).

3 For the reasons we explain, the application for leave to appeal must be refused. The decisions under challenge are not attended by sufficient doubt to warrant reconsideration by a Full Court. Even assuming them to be wrong, we can see no substantial injustice suffered by MCI and the class members.

STANDING

4 MCI's standing to bring the application for leave to appeal (and an earlier application for an extension of time in which to do so) is made pursuant to s 33ZC(6) of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), founded on it being a class member in the Jones class action. Section 33ZC relevantly provides:

Appeals to the Court

(1) The following appeals under Division 2 of Part III from a judgment of the Court in a representative proceeding may themselves be brought as representative proceedings:

(a) an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to issues common to the claims of group members;

(b) an appeal by a sub- group representative party on behalf of sub-group members in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members.

(2) The parties to an appeal referred to in paragraph (1)(a) are the representative party, as the representative of the group members, and the respondent.

(3) The parties to an appeal referred to in paragraph (1)(b) are the sub-group representative party, as the representative of the sub-group members, and the respondent.

…

(5) The parties to an appeal in respect of the determination of an issue that relates only to a claim of an individual group member are that group member and the respondent.

(6) If the representative party or the sub-group representative party does not bring an appeal within the time provided for instituting appeals, another member of the group or sub- group may, within a further 21 days, bring an appeal as representing the group members or sub- group members, as the case may be.

…

5 Section 33ZC(5) would have permitted MCI, as a class member in the Jones class action, to bring an appeal for determination of issues that related only to its individual claim, but it did not do so. It brought the application pursuant to s 33ZC(6) and purports to represent class members' interests in doing so.

6 It is not entirely clear that MCI's application for extension of time to appeal (which was earlier granted in this matter) or the application for leave to appeal fall within the definition of "representative proceeding" in s 33ZC(1). Section 33A provides that, unless the contrary intention appears, "representative proceeding" in Part IVA means a proceeding commenced under s 33C, and MCI's applications do not meet that description.

7 We note, however, that s 4 of the Act defines proceeding to include "an incidental proceeding in the course of, or in connection with a proceeding, and also includes an appeal." In *Fernando v Ruddock* [2000] FCA 1151 at [26] (Sackville, Katz and Kenny JJ) the Full Court said that "[i]t is perhaps arguable that the extended definition of "proceeding" produces the

result that an application for an extension of time for an appeal is itself a representative proceeding."

8 It is also arguable that s 33ZC indicates a contrary intention in relation to the meaning of "representative proceeding", such that it is not restricted to the meaning in s 33A. Section 33ZC(1) permits an appeal in a class action to be brought in a representative capacity by the representative party or a sub-group representative party. Section 33ZC(6) permits an appeal in a class action to be brought by a class member on a representative basis where the representative party or sub-group representative does not do so within the time limit allowed. We note that an appeal from an interlocutory decision and an application to appeal out of time may only be brought by leave of the Court.

9 If the expression "representative proceeding" in s 33ZC(1) only means a proceeding commenced pursuant to s 33C it can be seen to exclude proceedings such as applications for leave to appeal and for leave to appeal out of time. That construction of s 33ZC(1) would seriously reduce the ability of representative parties, sub-group representatives and class members to bring appeals on a representative basis as it would mean that an appeal from an interlocutory decision or an appeal out of time could only be brought in a personal capacity, and not on behalf of class members. There is nothing in s 33ZC, or in Part IVA, to indicate a Parliamentary intention to so restrict the right to appeal in representative proceedings.

10 However, this issue was not argued before us and it is unnecessary to resolve it having regard to our conclusions in the proceeding. We will proceed on the assumption that s 33ZC permits MCI to bring the application for extension of time and the application for leave to appeal in a representative capacity.

THE EVIDENCE

11 The parties rely upon the following affidavits and their annexures:

(a) for MCI – affidavits of Mr Anthony Zita, a partner in the legal firm Portfolio Law, sworn 19 April 2017 and 11 May 2017;

(b) for TWE – an affidavit of Mr Peter Holloway, a partner in the legal firm Herbert Smith Freehills, affirmed 4 May 2017; and

(c) for Mr Jones – affidavits of Mr Ben Slade, a partner in the legal firm Maurice Blackburn, affirmed 10 May 2017 and 22 May 2017.

THE PROCEDURAL BACKGROUND

12 We have drawn the following account from judgments of this Court, judgments of the Supreme Court of Victoria, judgments of the Court of Appeal of the Supreme Court, and from affidavits filed on behalf of the parties to the application. Before us there was little or no contest as to the procedural background.

The First MCI class action

13 On 4 November 2013 MCI commenced an "open class" shareholder class action against TWE in the Supreme Court of Victoria (the **First MCI class action**), brought on its own behalf and on behalf of all persons who acquired TWE shares during the claim period.

14 The circumstances in which MCI came to be the representative plaintiff in that class action are unusual to say the least, and TWE applied to the Supreme Court for orders that the proceeding be permanently stayed as an abuse of process. In deciding that application Ferguson J (as her Honour then was) held that:

(a) since its incorporation on 1 November 2012, MCI's sole director and shareholder was a solicitor, Mr Mark Elliott;

(b) on the day of its incorporation, MCI purchased a small parcel of shares in three publicly listed companies, TWE, Leighton Holdings Limited and Worley Parsons Limited and also purchased small parcels of shares in another 17 publicly listed companies, each parcel costing about $700. In February 2014, MCI purchased further small parcels of shares in 145 other publicly listed companies, with each parcel costing between about $600 to $900;

(c) MCI subsequently commenced shareholder class actions against TWE, Leighton Holdings Limited and Worley Parsons Limited, with Mr Elliot acting as its solicitor; and

(d) MCI was created by Mr Elliott as a vehicle for bringing shareholder class actions against listed companies alleging breaches of continuous disclosure obligations, with MCI as the representative party, and with Mr Elliott acting as its solicitor and earning legal fees from doing so.

15 Her Honour held that the action was not an abuse of process and did not order that the proceeding be stayed, but considered that the matter should not continue as a representative proceeding with Mr Elliott as the solicitor while MCI remained the lead plaintiff: *Melbourne*

City Investments Pty Ltd v Treasury Wines Estates Limited (No 3) [2014] VSC 340 at [1]-[9] (Ferguson J).

16 On 14 August 2014, TWE sought leave to appeal the refusal of Ferguson J to stay the First MCI class action as an abuse of process. The Court of Appeal granted leave on 10 October 2014 and on 22 December 2014 it overturned the decision of Ferguson J. The Court held that the First MCI class action was an abuse of process because it had been commenced with the predominant purpose of earning legal fees for Mr Elliott, rather than such fees being an incident or by-product of the vindication of legal rights, and made orders to permanently stay the proceeding: *Treasury Wines Estates Limited v Melbourne City Investments Pty Ltd* (2014) 318 ALR 121; [2014] VSCA 351 at [22] (Maxwell P and Nettle JA, with Kyrou JA dissenting).

17 On 16 January 2015, MCI sought special leave to appeal to the High Court in relation to the orders of the Court of Appeal. On 15 May 2015, the High Court refused that application.

The Second MCI class action

18 On 22 December 2014, the same day that the Court of Appeal ordered a permanent stay of the First MCI class action, MCI commenced a second "open class" shareholder class action against TWE in the Supreme Court, making identical allegations on behalf of the same class members (the **Second MCI class action**). The only material difference was that a newly created legal firm, Portfolio Law, was MCI's solicitor on the record.

19 On 3 March 2015 the Second MCI class action was transferred to this Court. TWE again applied for an order that the proceeding be permanently stayed as an abuse of process. On 5 July 2016, the primary judge held that the proceeding was an abuse of process and made orders to permanently stay the case: *Melbourne City Investments Pty Ltd v Treasury Wines Estates Limited* (2016) 243 FCR 474; [2016] FCA 787. His Honour held (at [156]) that:

(a) MCI was created by Mr Elliott as a vehicle for bringing class actions against listed corporations alleging breaches of continuous disclosure obligations;

(b) Mr Elliott caused MCI to purchase small parcels of shares in 157 publicly listed corporations not because he was interested in investing in those corporations, but in order to enable MCI to position itself to move quickly to commence class actions against any one or more of those corporations, and to the extent possible to enable Mr Elliott himself to earn legal fees from the exercise;

(c) by positioning MCI in this way, Mr Elliott intended that MCI would be best placed to initiate class actions as the lead applicant when opportunities presented themselves, and would therefore be well-placed to negotiate with other relevant parties for its own financial benefit. Those parties would include class-action lawyers, litigation funders and the proposed defendants;

(d) the causes of action pleaded in the Second MCI class action and the question of ultimate success were immaterial to MCI's purpose in commencing the proceeding and MCI had no interest in recovering the insignificant amount of its alleged loss of about $700 when it launched the proceeding. Its purpose was to gain a financial benefit for itself which was likely to exceed such an amount to a very significant degree;

(e) given the reasons for MCI's purchases of shares it was very difficult, if not impossible, for Mr Elliott to contend in the Second MCI class action that MCI actually relied upon the various statements made by TWE to the ASX or that MCI relied upon the integrity of TWE in complying with its continuous disclosure obligations;

(f) following the decision of Ferguson J, MCI began efforts to disassociate Mr Elliott from the Second MCI class action;

(g) the insignificant amount sought to be recovered by MCI for itself in the proceeding did not, or any rational basis, justify the commencement or maintenance of the proceeding. The cost of litigating the issues raised and the risk of an adverse costs order would militate against pursuing the proceeding to judgment or settlement; and

(h) Portfolio Law was incorporated in late August 2014 and those who appear to stand behind that incorporated legal practice (including Mr Zita who has sworn affidavits in this application) had no experience in running class actions and had ongoing connections with other legal practices. In this regard, his Honour said (at [156(j)]):

> Although TWE did not establish by direct evidence that Mr Elliott was involved in the management of Portfolio Law or that he stood to gain financially from its operations, **I think that it is more probable than not that Mr Elliott is concerned in the affairs of Portfolio Law in some fashion designed to bring him or MCI financial reward**. No-one came forward to explain the circumstances in which Portfolio Law came to be incorporated nor did anyone explain why it was incorporated when it was. No-one came forward to deny that Mr Elliott was involved in the affairs of Portfolio Law. Evidence of these matters could easily have been brought forward but it was not.

(Emphasis added.)

20 His Honour held (at [157]-[158]:

> The Court should not permit MCI to institute and maintain this class action when, as I have found, it is not doing so 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. In addition, it plainly does not have the capacity to fund this proceeding itself and has not attempted to satisfy the Court that it has put in place secure litigation funding which will cover its own costs and the amount of any adverse costs order. MCI's claims are, at best, very weak if not hopeless. Its causation theory is problematic. MCI commenced this proceeding knowing that the Jones proceeding was on foot. It also commenced this proceeding with the intention of using it as a *"fallback*" or *"failsafe"* against the possibility that the first MCI proceeding would remain permanently stayed as an abuse of process.
>
> The purposes of MCI identified and discussed at [156]–[157] above demonstrate that this proceeding has been brought for an illegitimate or collateral purpose. For that reason, it constitutes an abuse of process and should be permanently stayed. It is also oppressive and vexatious *vis-à-vis* TWE and, if allowed to be maintained, will bring the administration of justice into disrepute. Nonetheless, I note that the claims made by MCI in this proceeding on its own account will be able to be litigated in due course in the Jones proceeding if MCI does not opt out of that proceeding. For this reason, the orders which I propose to make will not deny to MCI any legitimate remedy to which it may be entitled.

21 MCI did not seek leave to appeal the finding of abuse of process or the order to permanently stay the proceeding. Instead, on 11 July 2016, it filed an application to set aside or revoke the finding of abuse of process, seeking leave to reopen its case so as to tender further evidence which it said would establish that Mr Elliott was not concerned in any way in the affairs of Portfolio Law designed to bring him financial reward.

22 On 1 May 2017 (after the interlocutory orders which are the subject of the present application were made), the primary judge refused to allow MCI to reopen its case and dismissed its application to set aside the finding of abuse of process. The permanent stay therefore remained in place: see *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2)* [2017] FCA 449.

23 On 15 May 2017, MCI filed an application for extension of time and for leave to appeal from the judgment and orders of the primary judge on 5 July 2016 and for leave to appeal from the judgment and orders of 1 May 2017. That application has not yet been listed for hearing.

24 Since its commencement in December 2014 the Second MCI class action has either been stalled in a dispute as to whether it constituted an abuse of process or permanently stayed by

order of the Court. The evidence is that no substantive steps have been taken to advance the case to trial.

The Jones class action

25 On 2 July 2014, while the First MCI class action was still on foot but mired in the dispute in the Supreme Court, Mr Jones commenced the Jones shareholder class action in this Court. Mr Jones made similar allegations against TWE to those in the MCI proceeding on behalf of a "closed class" of persons who had acquired shares in TWE in the claim period and who had entered into a litigation funding agreement with Bentham IMF Ltd (**IMF**). Mr Jones later "opened" the class definition by amendment, and the proceeding now covers the same class members as the Second MCI class action.

The interlocutory dispute regarding the opt out notice

26 On 5 July 2016, both the Jones class action and the Second MCI class action were listed before the primary judge, the Jones class action for case management and the Second MCI class action for judgment in the abuse of process application. Counsel appeared for MCI at the hearing. In the Jones class action, his Honour made orders for the parties to file submissions in relation to the proposed opt out notice and listed the dispute for a case management hearing on 9 August 2016. On that date, the primary judge heard submissions by Mr Jones and TWE, amongst other things, as to the appropriate class closure order and the form of the opt out notice.

27 We set these matters out because Mr Zita's evidence in the present application is to the effect that MCI did not know about the hearing on 9 August 2016. We do not accept that. The evidence shows that MCI was on notice of that hearing and as a class member in the Jones class action it was open to MCI to seek leave to appear and make submissions in relation to the form of the opt out notice. That is the course it later took in relation to the supplementary opt out notice.

28 On 23 March 2017, the primary judge made orders for class members to be sent an opt out notice informing them of their right to opt out of the Jones class action by 4.00 pm on 26 May 2017 (the **Class Deadline**), and that if they wished to share in any settlement of the action they were required to register their claim by that deadline.

29 The dispute before the primary judge in relation to the opt out notice concerned three issues:

(a) the manner of distribution of the opt out notice to class members (*Jones No 2* at [18]-[30]);

(b) the information required to be provided by class members in a class member registration process (*Jones No 2* at [31]-[36]); and

(c) the appropriate class closure and related orders (and therefore the form of the opt out notice) (*Jones No 2* at [37]-[62]).

Only the last of these issues is relevant to the present application.

The class closure and related orders

30 Before the primary judge it was common ground that in order to facilitate settlement it was necessary to identify the class members interested in participating in a settlement and that a class member registration process was therefore appropriate. It was also common ground that the Court should make a class closure order to preclude class members who neither opt out nor register in that process from sharing in the proceeds of any settlement.

31 However, TWE sought orders that would close the class for all purposes such that, even if settlement was not achieved, class members who neither opted out nor registered were precluded from sharing in the fruits of any favourable judgment that was later given. Mr Jones opposed such orders and argued that the Court had no power to extinguish the rights of class members in that regard, and that as a matter of discretion the Court should not do so.

32 We will deal with the primary judge's consideration of this issue later. For the present, it suffices to note that his Honour made a class closure order which provides that class members who neither opt out nor register are precluded from sharing in any settlement outcome but, in the event settlement is not achieved, their rights to share in a subsequent judgment are expressly preserved. Order 15 of the orders of 23 March 2017 provides:

> Pursuant to s 33ZF of the Act, any group member who does not opt out and who is not a Registered Group Member:
>
> (a) Remain a group member for all purposes, including for the purpose of being bound by any judgment in this proceeding and being entitled to participate in any award of damages by the Court if this proceeding does not settle; but
>
> (b) Subject to any further order of the Court, will not be entitled to receive a distribution from any settlement of this proceeding.

The supplementary opt out notice

33 On 28 March 2017, MCI's solicitor, Mr Zita, wrote to the solicitors for Mr Jones and TWE stating that the 23 March 2017 orders regarding the opt out notice had recently come to his attention, and that the opt out notice was misleading and not in the interests of class members.

34 On 31 March 2017, MCI filed an interlocutory application in the Jones class action seeking orders that:

(a) a supplementary opt out and claim registration notice, in the form attached to the application, be given to class members in the Jones class action; and

(b) Order 15 of the orders of 23 March 2017 be varied to provide as follows:

> Pursuant to s 33ZF of the Act, Order 15 of the orders made on 23 March 2017 be varied so that any group member who does not opt out and who is not a Registered Group Member:
>
> (a) remains a group member for all purposes, including for the purpose of being bound by any judgment in this proceeding and being entitled to participate in any award of damages by the Court if this proceeding does not settle;
>
> (b) will not be entitled to receive a distribution from any settlement of this proceeding subject to:
>
> (i) any further order of the Court; and
>
> (ii) **the preservation of all rights which that group member has in their capacity as a group member of the proceeding brought by Melbourne City Investments Pty Ltd against the defendant (NSD216/2015).**
>
> (Emphasis added.)

35 On 5 April 2017, the primary judge heard and dismissed that application. His Honour did not publish reasons.

36 As we have said, on 1 May 2017 the primary judge handed down the decision refusing MCI's application to re-open the finding that the Second MCI class action constituted an abuse of process. The permanent stay of that proceeding therefore remained.

37 On 26 May 2017, the Class Deadline for class members to opt out or register in the Jones class action passed.

RELEVANT PRINCIPLES

38 The primary considerations in determining whether to grant leave to appeal from the decision of a single judge of the Court are well-established. Before leave may be granted the applicant must usually show that:

(a) in all the circumstances the decision to be appealed is attended with sufficient doubt to warrant its reconsideration on appeal; and

(b) supposing the decision to be wrong, substantial injustice would result if leave were refused: see *Décor Corp v Dart Industries Inc* (1991) 33 FCR 397; [1991] FCA 844 at 398-399 (Sheppard, Burchett and Heerey JJ).

The sufficiency of the doubt in respect of the decision to be appealed and the question of substantial injustice bear upon each other so that the degree of doubt which is sufficient in one case may be different from that required in another. The considerations are cumulative such that leave ought not to be granted unless each limb is made out: *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2010] FCAFC 139 at [5] (Ryan, Stone and Jagot JJ).

39 The decisions to be appealed involved the exercise of a discretion. MCI must therefore show an error in the exercise of the discretion of the type described in *House v R* (1936) 55 CLR 499 at 504-505 (Dixon, Evatt and McTiernan JJ) (***House v King***). In that case, the plurality explained that it is not enough that the appellate court be persuaded that it would or might have made a different decision than the primary judge, the applicant must show that the primary judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him or her, mistook the facts, or did not take into account some material consideration. Where the basis for the decision is not disclosed (as with the primary judge's decision of 5 April 2017) the plurality explained (at 505) that:

> …if upon the facts [the decision] is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

40 In the present case, both decisions to be appealed involved the exercise of discretion concerning matters of practice and procedure rather than substantive rights. While the class closure order precludes class members who neither opt out nor register from sharing in any

settlement outcome, it does not determine class members' substantive rights. Class members could opt out of the proceeding and thereby:

(a) not be affected by any orders made in the Jones class action; and

(b) preserve their right to bring their own separate legal proceedings, if they wished to do so. Any such proceedings could be brought either individually, or collectively in another class action.

Alternatively, class members could preserve their right to share in a settlement of the Jones class action by registering in that proceeding. If settlement was not achieved they were entitled to share in the fruits of any subsequent judgment, whether they registered or not.

41 It is well-established that appellate courts should exercise particular caution in reviewing decisions pertaining to practice and procedure: see *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [34] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ). In *Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc* (1981) 148 CLR 170; [1981] HCA 39 at [9] 177 Gibbs CJ, Aickin, Wilson and Brennan JJ cited with approval the statement of Sir Frederick Jordon in *In re the Will of F.B. Gilbert (dec.)* (1946) 46 SR (NSW) 318 at 323 where his Honour said:

> …there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice…

The Full Court has often referred to the importance of keeping a short leash on appeals relating to questions of practice or procedure: see, for example, *Cement Australia Pty Ltd v ACCC* (2010) 187 FCR 261; [2010] FCAFC 101 at [72] (Keane CJ, Gilmour and Logan JJ); *Bufalo v Official Trustee in Bankruptcy* [2011] FCAFC 111 at [35], (Mansfield, Besanko and Flick JJ).

42 A party who seeks leave to appeal in relation to an exercise of discretion on a matter of practice and procedure, as in the present case, faces a "formidable task" and has a "heavy burden": *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388; [1990] FCA 520 at 393 (Wilcox and Gummow JJ); *Oswal v Burrup Fertilisers Pty Ltd (Receivers and Managers Appointed)* [2011] FCAFC 117 at [8] and [11] (Mansfield and Foster JJ).

THE APPLICATION FOR LEAVE TO APPEAL

MCI's case

43 The application for leave to appeal alleges the following grounds:

1 On the grounds set out in paragraphs 3 to 7 below, the decisions of the Honourable Justice Foster are attended by sufficient doubt to warrant the decisions being reconsidered by the Full Court.

2 Group members are likely to suffer substantial injustice if leave is refused because:

(a) the class closure orders made in this proceeding (the **Jones proceeding**) adversely affect their rights to receive compensation from TWE in their capacity as group members in the Applicant's proceeding;

(b) group members must make an important decision concerning their rights in respect of both the Jones proceeding and the Applicant's proceeding in circumstances where the information given to them is insufficient and is liable to mislead them in respect of that decision;

with the effect that group members' interests may be prejudiced by a lack of information and by class closure orders which do not account for the existence of the Applicant's proceeding, which is an alternative open class group proceeding brought on behalf of the same group members.

3 The closure of the Jones proceeding class effected by the judgment and orders of 23 March 2017, and affirmed by the order made on 5 April 2017 dismissing the Applicant's application, is contrary to the interests of justice and an error of law because it affects group members' rights in respect of each of:

(i) this proceeding; and

(ii) the group proceeding brought by the Applicant against Treasury Wine Estates Limited (NSD216/20158),

by denying group members who do not register pursuant to the orders made on 23 March 2017 any opportunity to receive any compensation in the Jones proceeding or in the Applicant's proceeding, such that the class closure order is inconsistent with s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth).

4 The order dismissing the Applicant's application made on 5 April 2017 is inconsistent with s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) and an error of law because the failure to order amendment to paragraph 15 of the orders made on 23 March 2017 concerning the consequences of neither opting out of, nor registering to participate in the Jones proceeding on group members' rights is contrary to the interests of justice because group members' rights to participate in the Applicant's proceeding are adversely affected if they neither opt-out of, nor register to participate in, the Jones proceeding.

5 The judgment and orders of 23 March 2017, and as affirmed by the order dismissing the Applicant's application made on 5 April 2017 with the effect

that no supplementary notice to group members has been ordered, are inconsistent with s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) on the basis that the form of opt-out notice ordered by the Court is contrary to the interests of justice because it does not provide group members with any information whatsoever concerning the likely costs of legal representation and litigation funding in this proceeding which are expected to be borne in whole or in part by group members, where such information is highly relevant to individual group members' decisions as to whether to opt out of the Jones proceeding.

6 The judgment and orders of 23 March 2017, and as affirmed by the order dismissing the Applicant's application made on 5 April 2017 with the effect that no supplementary notice to group members has been ordered, are inconsistent with s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) because the form of opt-out notice ordered by the Court is contrary to the interests of justice in that it states that the Jones proceeding "is a preferable vehicle for litigating the core claims made against TWE", despite the fact that the Court has not heard any evidence or submissions on that question, which statement is liable to mislead group members.

7 The judgment and orders of 23 March 2017, and as affirmed by the order dismissing the Applicant's application made on 5 April 2017 with the effect that no supplementary notice to group members has been ordered, are inconsistent with s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) on the basis that the form of opt-out notice ordered by the Court and the refusal to order any supplementary notice is contrary to the interests of justice because it does not provide group members with information concerning the Applicant's proceeding, including the likely costs of legal representation and litigation funding in the Applicant's proceeding despite such information being relevant to individual group members' decision making as to whether to opt-out of the Jones proceeding.

Withdrawal of the contention that the Court lacked power to make the class closure order and/or that it was wrong to make such a class closure order at that stage

44 In its written submissions, MCI contended that the Court had no power to make a class closure order in the terms that it did, at least not at that stage of the proceeding. It contended that there were two errors of law in the decisions proposed to be appealed.

45 MCI contended, as the first alleged error of law, that the requirement for class members to register their claim in order to continue to participate in the class action, prior to settlement or judgment and before the terms and consequences of settlement are known, operated to improperly exclude class members. It submitted that when the terms and consequences of a settlement are known to class members and represents the best offer they think they are likely to receive, they will be more likely to register their claim in any class member registration process, and less likely to register before settlement or judgment because they would be binding themselves to an unknown outcome. It contended that orders requiring class

members to register prior to settlement or judgment are inherently unfair and contrary to the opt out rationale underpinning the Part IVA regime.

46 MCI contended, as the second alleged error of law, that the primary judge improperly exercised the power under s 33ZF to make a class closure order. It said that it would be a rare case in which a class closure order is made at the early stage of the present case, and reiterated the contention that (because class members were less likely to register prior to settlement) the class closure order favoured TWE's interests in addressing the claims of the minimum possible number of class members, contrary to the interests of justice and s 33ZF.

47 However, in oral submissions Senior Counsel for MCI moved away from that position and conceded that:

(a) the Court has power pursuant to s 33ZF of the Act to make the class closure order in the terms that it did; and

(b) it was appropriate for the primary judge to make the class closure order at that stage of the proceeding.

48 That concession was appropriate. As we later explain, it is plain that the primary judge had power to make the class closure order that his Honour did, and it was clearly appropriate for his Honour to make such orders at that stage of the Jones class action.

The contention that the opt out notice was materially misleading

49 Before us MCI accepted that the critical issue in the application is whether the opt out notice sent to class members was materially misleading. It accepted that if the opt out notice was not materially misleading then the grounds of the application fall away, including that there could be no requirement to send class members the supplementary opt out notice.

50 MCI contended that the opt out notice was misleading in that it:

(a) affected the rights of class members vis-à-vis TWE, including their rights arising under the Second MCI class action, if they neither opted out nor registered to participate in the Jones class action without properly explaining the nature of those rights;

(b) represented that the Jones class action is a preferable vehicle to the Second MCI class action for class members to litigate their claims against TWE, without explaining the basis for that assertion or articulating any contrary view;

(c) failed to inform class members of information which was relevant to their decision as to whether to opt out of or register to participate in the Jones class action; and

(d) conveyed the "coercive threat" that if class members did not register in the Jones class action, they would not be permitted to participate in the distribution of any damages award or settlement outcome.

51 MCI said that it sought variation of the class closure order so as to preserve the rights of class members to participate in the Second MCI class action for those class members who neither opt out nor register in the Jones class action, and that it sought orders for the supplementary opt out notice so as to correct the (allegedly) misleading impression conveyed by the opt out notice.

52 There are two main issues in the application:

(a) *first*, whether the opt out notice was materially misleading in the impression it conveyed in relation to the Second MCI class action, including by representing that the Jones class action was the preferable vehicle for class members to vindicate their claims against TWE, that the existence of the Second MCI class action was irrelevant, and that if class members opted out of the Jones class action they would be on their own (**MCI's first argument**); and

(b) *second*, whether the opt out notice was materially misleading because it represented that, if settlement was not achieved, class members who neither opted out nor registered were not entitled to share in the fruits of any subsequent judgment, contrary to the express terms of the class closure order (**MCI's second argument**).

The terms of the opt out notice

53 The opt out notice is headed "Opt Out and Claim Registration Notice". MCI argued that the heading represented that the notice related to any claim against TWE which class members may have.

54 Under the heading "What is this Notice?" the notice stated:

> If you purchased shares in TWE between 17 August 2012 and 14 July 2013 (inclusive), you should read this notice carefully **as it may affect your ability to participate in the class action**.
>
> If there is anything in this notice that you do not understand, you should seek legal advice.
>
> (Emphasis added.)

MCI relied on the emphasised passage and argued that it represented that the interests of class members in the Jones class action could be brought to an end if they did not take one of the steps outlined in the notice.

55 Next, the notice stated:

> **Key points to be aware of**
>
> 1. If you wish to register to obtain compensation from any settlement of this proceeding you must:
>
> (a) Have already retained Mr Jones' solicitors, Maurice Blackburn, to act for you in writing and/or signed a funding agreement with IMF Bentham Limited (**IMF**) in relation to this proceeding; or
>
> (b) Before 4.00 pm on 26 May 2017 complete and submit the online TWE Class Member Registration Form accessible at the domain hosted by IMF www.tweclassaction.com.au.
>
> 2. If you do not wish to be involved in the class action, before 4.00 pm on 26 May 2017, you must complete and submit an opt out notice in the form available on the Maurice Blackburn website.
>
> 3. If you wish to challenge the orders of the Federal Court, before 4.00 pm on 26 May 2017, you must write to Maurice Blackburn stating the reasons for your challenge.
>
> 4. If you have not already retained Maurice Blackburn and/or signed a funding agreement with IMF and you do nothing, your rights (if any) may be determined without your participation.

56 MCI argued that this section merely informed class members that they may register in the Jones class action (paragraph 1), and if they did not wish to be involved in the action they may opt out (paragraph 2). It argued that paragraph 4 represented that if class members did nothing (i.e. neither opted out nor registered) their rights may be brought to an end. It said this was misleading because it did not inform class members that if they did nothing the class closure order meant that they were still entitled to share in any subsequent judgment.

57 The notice then stated:

> **What is a class action?**
>
> A class action is an action brought by one person (plaintiff) on his or her own behalf and on behalf of a group of people (class members) against another person (defendant), where the plaintiff and the class members have similar claims against the defendant.
>
> Class members are bound by any judgment or settlement in the class action, unless they have opted out of the proceeding. This means that:
>
> 1. If the class action is successful, class members may be eligible for a share of

any settlement monies or Court-awarded damages;

2. If the class action is unsuccessful, class members are bound by that result; and

3. Regardless of the outcome of the class action, class members will not be able to pursue their claims against the defendant in separate legal proceedings unless they have opted out.

The plaintiff does not need to seek the consent of class members to commence a class action on behalf of those persons. **However, class members can cease to be class members by opting out of the class action. Unless you opt out, you will be bound by the outcome of the class action.** An explanation of how class members may opt out of this proceeding is set out below.

(Emphasis added.)

58 MCI sought to rely on the fact that this section of the notice did not differentiate between settlement or judgment, and did not mention that, if settlement was not achieved, the class closure order meant that class members who neither opted out nor registered retained their entitlement to share in any judgment.

59 Relevantly, the notice then set out a brief summary of the Jones class action, and said the following about the Second MCI class action:

Another class action against TWE has been filed by Melbourne City Investments Pty Ltd (**MCI**) as lead plaintiff. That proceeding was brought on behalf of the same or substantially the same class of persons as the [Jones] class action and includes the same or similar claims to those made in the [Jones] class action. **On 5 July 2016 the Federal Court of Australia found that MCI had brought its class action for an illegitimate or collateral purpose and, on that basis, found that it was an abuse of process and should be permanently stayed. The Court stated in its reasons that the [Jones] class action, in which Maurice Blackburn act as solicitors, is a preferable vehicle for litigating the core claims made against TWE**. The decision is available at: [website address]. **MCI has applied to the Court to set aside its decision. That application has been heard but has not yet been determined.**

(Emphasis added.)

60 MCI argued that this paragraph was materially misleading because it represented to class members in the Jones class action that the Second MCI class action was irrelevant to their decision whether to register or opt out. Notwithstanding that the Second MCI class action had been permanently stayed as an abuse of process since 5 July 2016, MCI contended that it continued to be relevant at that time. MCI also sought to rely on the fact that, on 15 May 2017, it filed an application for extension of time and for leave to appeal against the decision of 5 July 2016 that its proceeding was an abuse of process and the decision of 1 May 2017 to refuse to reopen that case.

61 MCI argued that by stating that the Jones class action "is a preferable vehicle for litigating the core claims made against TWE" the opt out notice represented that there had been (to use MCI's expression) a "beauty parade" between the competing class actions and that the primary judge had heard and determined an application as to whether the Jones or the MCI class action was the most meritorious and should go forward.

62 It is inappropriate to use the expression "beauty parade" and we do not adopt it. We understand it as a reference to a process in which a judge chooses between competing class actions on the basis of judicially determined criteria: see *Kirby v Centro Properties Limited* (2008) 253 ALR 65; [2008] FCA 1505 at [32] (Finkelstein J) and the carriage motion in Canadian class action procedure described by Professor Morabito in "Clashing Classes Down Under - Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives" (2012) 27 *Connecticut Journal of International Law* 205, 241-244.

63 Importantly, the opt out notice then stated:

> **What class members must do**
>
> If you have already signed a retainer with Maurice Blackburn and/or a funding agreement with IMF in relation to this class action, you are deemed to have already registered. Notwithstanding this, you must contact Maurice Blackburn or IMF in order to provide certain information concerning your dealings in TWE shares.
>
> If you are a class member in the [Jones class action], and have not retained Maurice Blackburn and/or signed a funding agreement with IMF, you must select one of the following options by 26 May 2017.
>
> ***Option 1 - Register your interest in receiving compensation***
>
> If you wish to make a claim for any loss you may have suffered as a result of TWE's alleged conduct, you must complete the online TWE Class Member Registration Form available on the TWE class action website, accessible at [website address].
>
> Registration Forms must be completed online before 4.00 pm on 26 May 2017. Registration Forms completed after this time will not be accepted and you will be treated as having not responded to this notice (see Option 4 below).
>
> ***Option 2 - Opt out and cease to be a class member***
>
> If you do not wish to remain a class member in the [Jones] class action, you must opt out of the proceeding by completing the opt out notice that is available on the Maurice Blackburn website at [website address]. If you opt out of the [Jones] class action you will:
>
> 1. Not be affected by any orders made in the [Jones] class action;
> 2. Not be permitted to participate in the distribution of any damages award or settlement outcome; and
> 3. Be entitled to commence separate legal proceedings against TWE in relation

> to the matters the subject of the [Jones] class action on your own behalf if you so wish.
>
> Completed opt out notices must be submitted to the New South Wales District Registry of the Federal Court of Australia at Level 17, Law Courts Building, Queens Square, Sydney NSW 2000 on or before 4.00 pm on 26 May 2017. Opt out notices received after this time will not be accepted and you will be treated as having not responded to this notice (see Option 4 below).
>
> ***Option 3 - Apply to the Federal Court to vary orders regarding opt out and registration protocol***
>
> If you wish to challenge the orders made by the Federal Court in relation to either Option 1 or Option 2 above, you must send a written notice to Maurice Blackburn setting out the challenge you will make and the reasons for that challenge. You will be required to attend the Federal Court in Sydney at a later date in order to have your challenge heard and decided by the Court.
>
> Any notice challenging the Federal Court orders must be delivered to Maurice Blackburn before 4.00 pm on 26 May 2017. Any such notice received after this time will not have any effect.
>
> ***Option 4 - Not respond to this Notice***
>
> If you do nothing, i.e. you do not act in accordance with Options 1, 2 or 3 above, you will remain a class member in the [Jones] class action and be bound by any judgment or settlement agreement in the proceeding. However if there is a settlement, you will not be entitled to make a claim for part of that settlement.
>
> In other words, if you do nothing, you will lose your right to share in the proceeds of any settlement with TWE in relation to the matters the subject of the allegations made against TWE in the [Jones] class action.
>
> If Mr Jones and TWE reach an in-principle settlement of the [Jones] class action, Mr Jones will seek orders that are commonly sought in relation to the settlement of class actions. The effect of these will be that all group members as defined in the [Jones] class action will be bound by the settlement of that proceeding and will be prohibited from bringing a further claim against TWE in relation to the same issues as are raised in the TWE class action. If these orders are granted, this will mean that group members in the [Jones] class action will not be permitted to continue claims under the MCI proceeding described above. **This will only ever be relevant if MCI succeeds in setting aside the orders of the Court staying the MCI proceeding and the permanent stay is lifted**.
>
> (Emphasis added.)

64 MCI argued that:

(a) Option 1 informed class members that if they wished to make a claim for any loss they had suffered as a result of TWE's alleged conduct they were required to register their claim. It said this was misleading because the notice did not inform class members that, if they neither opt out nor register, they were nevertheless entitled pursuant to the class closure order to share in any judgment against TWE;

(b) Option 2 informed class members that if they opted out they would not be entitled to participate in any settlement or judgment. MCI said this suggested that the notice as a whole concerned the entitlement of class members to compensation through both settlement and judgment;

(c) Option 4 informed class members that if they did nothing (i.e. neither opted out nor registered) they would be bound by any judgment or settlement. It also informed class members that if they did nothing they would lose their right to share in any settlement. MCI said this conveyed a misleading impression because the notice made no reference to the fact that, if class members did nothing, they retained their right to share in any judgment; and

(d) the last paragraph (regarding the orders Mr Jones was likely to seek at the settlement approval hearing) misleadingly represented that the Second MCI class action was presently irrelevant to class members and, unless MCI could set aside the permanent stay, class members would be on their own.

65 The notice then stated:

> **Will you be liable for legal costs?**
>
> You will not become liable for legal costs simply by remaining as a class member for the determination of common questions or by registering your interest in receiving compensation.
>
> If the [Jones) class action is unsuccessful, IMF will pay Mr Jones' costs and satisfy any order against Mr Jones to pay TWE's costs.

66 MCI again contended that the reference to "compensation" suggested that the notice related to any recovery in the Jones class action, whether by settlement or judgment.

67 Finally, the notice stated:

> **Other matters**
>
> If the [Jones] class action resolves by way of a judgment in favour of Mr Jones or by way of a negotiated settlement arrangement, then:
>
> 1. …
>
> 2. If any compensation becomes payable to you as a result of any order, judgment or settlement in the [Jones] class action, the Court may order that some of the compensation be used to pay a portion of the legal costs incurred by Mr Jones in running the [Jones] class action. Mr Jones may also seek an order that part of any compensation becomes payable to class members who have not signed a funding agreement with IMF is paid to IMF in return for IMF funding the action. Alternatively Mr Jones may apply for orders that

> class members receive the same rate of return in the [Jones] class action, whether or not they have signed a funding agreement with IMF.

68 MCI complained that the notice only contained this general statement about the legal costs and litigation funding fees which would be charged in the Jones class action, and gave no detail about the likely quantum of such charges or the proportion it would constitute of class members' recoveries. It said that the Second MCI class action was a viable alternative proceeding, that the legal fees and litigation funding charges in that case would be lower, and that the notice should have so informed class members.

69 MCI also submitted that the opt out notice conveyed the misleading impression that there was no possibility of recovery through the Second MCI class action and that if class members wanted to recover any monies from TWE in respect of the alleged wrongdoing they had to register in the Jones class action.

CONSIDERATION

Class closure orders generally

70 Given MCI abandoned its contentions that the primary judge lacked power to make the class closure order and/or erred in exercising the power at that stage of the Jones class action, it is unnecessary to deal with those arguments. However, those contentions raise important issues in relation to class action procedure, which TWE and Mr Jones addressed in their written submissions. In circumstances where there has been some divergence in judicial practice in this regard it is appropriate to set out our views.

71 In *Jones No 2* (at [58]-[59]) the primary judge expressed doubt that the Court has power to make an order, before the initial trial of a Part IVA proceeding, to extinguish a class member's rights to share in the fruits of a subsequent judgment unless the class member took steps to register in the proceeding. However, his Honour did not rule on that question and instead addressed the issue as an exercise of discretion. His Honour said (at [61]-[62]):

> In my judgment, even if the Court has the requisite power, it should not exercise it at the present time in order to make the additional class closure order and associated preclusion order sought by TWE. There is no reason to make such orders now. In my view, the appropriate time to consider making orders of this type is after judgment is delivered in respect of the issues to be determined at the initial trial and perhaps even after other questions have been decided. Not now.
>
> My reasons are:
>
> (1) Such an order is neither appropriate nor necessary at the present time in order to ensure that justice is done. Any potential conflicts of interest can be

> managed if and when they arise. Not making such an order now has no bearing upon the position of registered and unregistered group members in relation to settlement. There is no discrimination between those two subgroups as a result of the wider class closure and preclusion orders not being made now.
>
> (2) The so-called unfairness visited upon TWE by not making the orders proposed by it is speculative and, in any event, irrelevant. To the contrary, the making of the orders sought by TWE would provide a real forensic advantage to TWE which could then approach settlement negotiations and the initial trial knowing that its exposure was limited to those group members who had registered their claim within time.
>
> (3) While it may be obviously both sensible and practical to make a class closure order and preclusion order at some time in the future in the event that the case does not settle, as I see matters at the moment, the most appropriate time to consider doing so is after judgment is delivered in relation to the initial trial and, most probably, before any hearings concerning individual cases and relief are commenced. It is by no means certain that, even then, a class closure order and preclusion order should be made.
>
> (4) There is no good reason to shut out unregistered group members now if the case does not settle and goes to trial and is ultimately determined by the Court. Those group members who do not opt out as part of the opt out process addressed by these Reasons should retain all of their rights at least until judgment on liability.

We respectfully agree with his Honour's remarks in relation to the exercise of discretion in this context.

72 The Commonwealth Parliament, in implementing a core recommendation of the Australian Law Reform Commission in its report *Grouped Proceedings in the Federal Court*, *Report No 46* (Canberra, 1988) at [127], expressed a legislative intention to adopt an opt out rather than an opt in procedure: Second Reading Speech, *Federal Court of Australia Amendment Bill 1991* (Cth), House of Representatives Parliamentary Debates, Hansard, 14 November 1991 p 3,175. It must be accepted that the requirement for class members to take active steps to "register" in order to share in a settlement of a class action undercuts to some extent the opt out rationale underpinning the Part IVA regime. In *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [40] (Gaudron, Gummow and Hayne JJ) their Honours said:

> Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring.

73 Class proceedings are intended to require little or no active involvement by class members and class members participate principally for the limited purpose of taking the benefit or suffering the burden of the findings made on the common questions: *P Dawson Nominees Pty*

Ltd v Brookfield Multiplex Ltd (No 2) [2010] FCA 176 at [16] (***P Dawson No 2***) (Finkelstein J). As J Forrest J said in *Thomas v Powercor Australia Ltd (Ruling No 1)* [2010] VSC 489 (***Thomas v Powercor No 1***) at [30], "one of the consequences of the opt out model, as was clearly intended by the legislature, is the ability of group members to "sit back" and watch the proceeding unfold". There must be a good reason to exercise the discretion to make a class closure order which may operate to deny the benefits of a settlement to class members who do not opt out and who do not take the active step of registering: *P Dawson No 2* at [17].

74 Having said this, if a class closure order operates to facilitate the desirable end of settlement, it may be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding and therefore appropriate under s 33ZF of the Act. The courts have accepted on numerous occasions that, in order to facilitate settlement, it is appropriate to make orders to require class members to come forward and register in order to indicate a willingness to participate in a future settlement, and to make orders that class members be bound into the settlement but barred from sharing in its proceeds unless they register: see for example, *Matthews v SPI Electricity & SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 13)* (2013) 39 VR 255; [2013] VSC 17 at [22]-[80] (***Matthews v SPI No 13***) (J Forrest J) and the authorities there referred to; *Farey v National Australia Bank* [2014] FCA 1242 at [11]-[16] (Jacobson J); *Inabu Pty Ltd v Leighton Holdings Pty Ltd* [2014] FCA 622 at [17]-[22] (Jacobson J); *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 at [67]-[68] (Beach J). An important aspect of the utility of a class proceeding is that they may achieve finality not only for class members but also for the respondent.

75 The rationale behind such class closure orders is that a requirement for class members to register their claims will facilitate settlement, because it allows both sides to have a better understanding of the total quantum of class members' claims, permits the settlement amount to be capped by reference to the number of class members, and assists in achieving finality (to the extent the Part IVA regime permits): see Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Lawbook Co, 2012) at [14.410]. A class closure order that precludes class members, who neither opt out nor register, from sharing in a subsequent settlement may facilitate settlement, and therefore be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.

76 However, we share the views expressed by the primary judge in relation to a class closure order that also precludes class members from sharing in a subsequent judgment. In our view

the Court should be cautious before making a class closure order that, in the event settlement is not achieved, operates to lock class members out of their entitlement to make a claim and share in a judgment. That is, the facilitation of settlement is a good reason for a class closure order but, if settlement is not achieved, an order to shut out class members who do not respond to an arbitrary deadline is not.

77 Caution should also be exercised in relation to the stage at which a class closure order is made. In our view, the Court should usually not exercise the discretion to make a class closure order based merely on a respondent's assertion that it is unwilling to discuss settlement unless such an order is made. It is a common if not inevitable feature of opt out class actions that the defendant will be faced with uncertainty regarding the quantum of class members' claims: *P Dawson No 2* at [31]; *Thomas v Powercor No 1* at [37]-[38].

78 We respectfully agree with the approach taken by Bromberg J in *Winterford v Pfizer Pty Ltd* [2012] FCA 1199 at [9] where his Honour declined to make a class closure order in circumstances where the pleadings were not closed, common questions had not been settled, opt out notices had not been sent out, no settlement discussions had been undertaken, and no settlement discussions were proposed unless the Court made a class closure order. As his Honour said, to make a class closure order at that stage "would turn on its head the very nature of the opt-out model chosen by the legislature." See also *Camping Warehouse Australia Pty Ltd (formerly Mountain Buggy Australia Pty Ltd) v Downer EDI Ltd* [2015] VSC 122 at [16] (Sifris J).

79 Whether it is appropriate to order class closure is a question of balance and judicial intuition. The Court must take into account the interests of the class as a whole in requiring class members to take steps to facilitate settlement, and consider the surrounding circumstances including the point the case has reached, the attitude of the parties, and the complexity and likely duration of the case: see *Matthews v SPI No 13* at [75]-[79]. This will often involve striking a balance between the conflicting interests of class members.

80 There was no merit in MCI's written submission (since withdrawn) that the class closure order in the present case was made at too early a stage. There were numerous factors relevant to the primary judge's exercise of discretion which militated in favour of making the class closure order. Amongst other things, the order was made in circumstances where the trial of the case was imminent and the parties had agreed to mediate within three months, the proceeding was at a stage where the parties were in a position to realistically assess the

prospects of victory or defeat, the lawyers for the applicant were experienced in class action litigation and able to assess whether class closure was in the interests of class members, and both parties considered that a class closure order should be made in order to facilitate settlement.

Are the decisions attended by sufficient doubt to warrant reconsideration?

MCI's first argument

81 In our view, MCI's contention that the opt out notice conveyed a misleading impression in the information it provided in relation to the Second MCI class action, including by stating that the Jones class action was "a preferable vehicle", is without merit. We do not consider the opt out notice to be misleading in this regard, and we can see no requirement for class members to be sent the supplementary opt out notice. MCI did not persuade us that the primary judge made any error in the exercise of the discretion of the type referred to in *House v King*.

82 *First*, we do not accept MCI's contention that the statement that the Jones class action is "a preferable vehicle for litigating the core claims made against TWE" represented to class members that the Court chose the Jones class action ahead of the Second MCI class action after hearing and deciding an application regarding which of the competing class actions should go forward. That contention relies upon imputing to class members some knowledge of judicial practice and procedure in relation to competing class actions. The opt out notice was directed to a broad class of shareholders, not to lawyers, and we would not impute such knowledge to the ordinary or reasonable class member.

83 *Second*, in our view the opt out notice accurately reflected the status of the Second MCI class action. The notice stated that:

(a) the Court "found that MCI had brought its class action for an illegitimate or collateral purpose and, on that basis, found that it was an abuse of process and should be permanently stayed";

(b) "[t]he Court stated in its reasons that the [Jones] Class Action… is a preferable vehicle for litigating the core claims made against TWE"; and

(c) "MCI has applied to the Court to set aside its decision. That application has been heard but has not yet been determined".

Each of those statements is correct.

84 The rationale underpinning MCI's contention appeared to be that the decision to permanently stay its class action as an abuse of process was plainly erroneous and likely to be overturned on appeal. It is inappropriate to express any opinion in that regard when there is an application on foot seeking an extension of time and leave to appeal in relation to that decision. It suffices to note that the Court made an order to permanently stay the Second MCI class action as an abuse of process more than 12 months ago, and that such an order is valid unless set aside, even when made in excess of jurisdiction: see *State of New South Wales v Kable* (2013) 252 CLR 118; [2013] HCA 26 at [32]. The stay order is valid and should be presumed to be correct.

85 *Third*, treating the order to permanently stay the Second MCI class action as valid, there is nothing misleading about the statement that the Court said in its reasons that the Jones class action is a preferable vehicle for class members. MCI commenced the Second MCI class action on 22 December 2014. From its commencement that action has been either mired in a dispute as to whether or not it constituted an abuse of process, or it has been permanently stayed. There has been no substantive progress towards a hearing of the action.

86 That stands in contrast to the Jones class action. In that action, the defence was filed in October 2014, TWE has provided substantial discovery, Mr Jones has filed his lay and expert evidence, TWE has filed its lay evidence and is shortly to file its expert evidence, the opt out and class member registration process was completed on 26 May 2017, the Court has referred the proceeding to mediation, and the trial is set to commence on 28 August 2017 on an estimate of six weeks.

87 At the time the primary judge made the decisions under challenge, the Second MCI class action could only become a viable alternative vehicle for class members to vindicate their rights if MCI was able to set aside the stay. On the best view for MCI, that outcome was uncertain. At the relevant time, there was a substantial risk for class members that, if they decided to opt out of the Jones class action and the Second MCI class action remained stayed, they might be left without a class action within which to advance their claims. Even if MCI is eventually successful in lifting the stay, the Jones class action is likely to be decided years ahead of the Second MCI class action. There can be no real question that the primary judge was correct in holding that the Jones class action was a preferable vehicle.

88 Nor do we accept the contention that it was necessary for the opt out notice to further explain the basis for the statement that the Jones class action is a "preferable vehicle", or because it

did not articulate MCI's contrary view in that regard. The principal purpose of a notice under ss 33X or 33Y of the Act is to ensure that class members can make informed decisions concerning their rights. Clarity and simplicity are essential if an opt out notice is to have its intended effect: *King v GIO Australia Holdings Limited* [2001] FCA 270 at [14]-[16] (Sackville, Hely and Stone JJ). The statements in the opt out notice were accurate and class members may have been confused if the notice provided further information about the stayed Second MCI class action or if the notice ventilated MCI's arguments to the contrary.

89 *Fourth*, there is little force in MCI's contention that the opt out notice should have informed class members that they would incur lower legal fees and litigation funding charges if they opted out of the Jones class action and made their claims through the Second MCI class action. Putting to one side the question as to the correctness of MCI's assertions in this regard, there was no requirement for the notice to inform class members of the possible or likely level of costs and charges in a class action which had been permanently stayed. Nor is an opt out notice the appropriate place to ventilate a dispute about the level of such costs and charges. Doing so would be likely to confuse class members.

90 It is also important to note that the Court has a supervisory or protective role in relation to legal costs proposed to be charged to class members (see *Kelly v Willmott Forests Ltd (in liquidation)(No 4)* [2016] FCA 323 at [11], [333] and [346] (Murphy J), and in relation to litigation funding charges (*Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 at [133]-[134], [157] (Murphy J); *Blairgowrie Trading Ltd v Allco Finance Group Limited (Receivers & Managers appointed) (In Liq) (No 3)* [2017] FCA 330 at [101] (Beach J); and *Mitic v OZ Minerals Pty Ltd (No 2)* [2017] FCA 409 at [26]-[31] (Middleton J)). If the legal fees and litigation funding commission proposed to be charged to class members in the Jones class action are excessive or unreasonable, then the Court can deal with that in any settlement approval application.

91 *Fifth*, because the opt out notice was not misleading in respect of the Second MCI class action, there was no error in the primary judge's refusal to allow the supplementary opt out notice. But, even if (contrary to our view) the opt out notice required some clarification, the supplementary opt out notice was itself misleading (or least likely to mislead) and could not be approved. The supplementary opt out notice:

(a) represented to class members that if they opted out of the Jones class action they would get the benefit of (asserted) lower legal fees and litigation funding charges in

the Second MCI class action when, in fact, there was no such benefit unless the permanent stay was lifted;

(b) stated that "[i]f you wish to preserve your right to participate in the MCI proceeding, you should opt out of the Jones proceeding" but did not inform class members that the Second MCI class action was permanently stayed. That was misleading because the "right to participate" in the MCI class action was illusory unless the permanent stay was lifted; and

(c) did not disclose the substantial risk class members faced if they opted out of the Jones class action and the permanent stay on the Second MCI class action was not lifted. If that occurred class members may have been left without an alternative class action within which to advance their claims.

MCI's second argument

92 It is common ground that the class closure order provides that class members who did nothing in response to the opt out notice (i.e. neither opted out nor registered) are entitled to share in the fruits of any subsequent judgment, if settlement is not achieved. MCI argued that the opt out notice misleadingly failed to inform class members of this and they suffered a "coercive threat" forcing them to register in the Jones class action or they would not be permitted to share in the distribution of any compensation, whether by settlement or by judgment.

Should MCI be permitted to raise a new argument

93 In our view, this is a new argument. MCI first advanced it in oral submissions before us, in circumstances where:

(a) MCI had notice of the hearing on 9 August 2016 in relation to the form of the opt out notice and it did not seek leave to appear at that hearing to run this argument;

(b) MCI did not raise this asserted deficiency in the opt out notice in its interlocutory application of 3 April 2017 which sought orders for the supplementary opt out notice. The proposed supplementary notice relevantly stated:

> **Discussion of options presented in Opt Out and Claim Registration Notice**
>
> ***Option 1 - Register your interest in receiving compensation***
>
> If you register your interest in receiving compensation in the Jones proceeding and you do not opt out of the Jones proceeding, unless an order of

> the Court is made under the *Federal Court of Australia Act*, you may not be entitled to participate in any judgment or settlement of the MCI proceeding.
>
> ***Option 2 - Opt out and cease to be a class member***
>
> If you wish to preserve your right to participate in the MCI proceeding, you should opt out of the Jones proceeding. You may opt out of the Jones proceeding by completing the "Opt out notice" which accompanies this Supplementary Notice.
>
> …
>
> ***Option 4 – Not respond to the Opt Out and Claim Registration Notice***
>
> If you do not respond to the Opt Out and Claim Registration Notice, unless an order of the Court is made under the *Federal Court of Australia Act*, and in addition to not being entitled to participate in any settlement of the Jones proceeding, you may not be entitled to participate in any judgment or settlement of the MCI proceeding.
>
> (Emphasis in original.)

Nothing in the supplementary opt out notice informed class members that, if they neither opted out nor registered in the Jones class action, and settlement was not achieved, they remained entitled to share in any judgment in that case;

(c) MCI did not raise this argument before the primary judge in the 5 April 2017 hearing concerning the supplementary opt out notice;

(d) the application for leave to appeal does not allege that the opt out notice was misleading in this way; and

(e) in written submissions this contention was not advanced, or at least not clearly.

94 Senior Counsel for MCI did not seek leave to raise this new argument and instead contended that it fell within the "coercive threat" contention (outlined at [50](d) above). We do not accept that it does.

95 TWE argued that the Court should decline to consider this new argument. It relied on *HP Mercantile Pty Ltd v Plevey* [2014] NSWCA 374, in which Meagher and Barrett JJA said (at [16]):

> Whilst the argument the applicant seeks to make on appeal raises questions as to the construction of rules 42.21(1) and s 1335(1), the present case is not an appropriate vehicle in which to consider those questions in circumstances where they were not fully debated before the primary judge and are not the subject of any reasons for judgment.

96 TWE's contention is not without force. However, it is settled that where it is expedient and in the interests of justice an appellate court may allow a point to be raised for the first time on

appeal. In *Water Board v Moustakas* (1988) 180 CLR 491; [1988] HCA 12 at 497 Mason CJ, Wilson, Brennan and Dawson JJ observed:

> More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied: see *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; *Coulton v Holcombe* (1986) 162 CLR 1 at 7–8; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319.

97 It is also relevant to understand whether there is some real prejudice to the respondent in permitting a fresh argument to be agitated: *Vuax v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158 at [48] (Kiefel, Weinberg and Stone JJ). Neither TWE nor Mr Jones submitted they would be prejudiced if the new argument as to the disconformity between the class closure order and the form of the opt out notice was agitated. Nor did they contend that the argument could have been met by calling evidence before the primary judge. The issue is just a question of construction of the opt out notice.

98 In the circumstances, we would allow MCI to advance this argument. but as we explain below nothing turns on it.

TWE's contentions

99 TWE contended that when the opt out notice is read as a whole it is not misleading, and it accused MCI of "cherry picking" those parts of the notice which support its contention. It pointed to Options 1 to 4 in the notice (set out at [63] above) and argued that:

(a) while Option 1 did not distinguish between the rights of class members to participate in a judgment as compared to a settlement, that distinction is made in Options 2 and 4;

(b) Option 2 informed class members that if they opted out they would "not be permitted to participate in the distribution of any damages award or settlement outcome", which is correct;

(c) Option 4 informed class members that if they did nothing (i.e. neither opted out nor registered):

> …you will remain a class member in the [Jones] class action and be bound by any judgment or settlement agreement in the proceeding. However if there is a settlement, you will not be entitled to make a claim for part of that settlement.

> In other words, if you do nothing, you will lose your right to share in the proceeds of any settlement with TWE…

100 TWE said that Option 2 correctly informed class members that if they opted out they would lose the their rights to share in both a settlement and a judgment, and that Option 4 informed them that if they neither opted out nor registered they would lose their rights to share in a settlement. TWE argued that, reading the notice as a whole, class members would understand that if settlement was not achieved they would retain their rights to share in any judgment.

101 We do not accept TWE's contentions. In our view, the few sentences in the opt out notice which touch on the entitlement of class members, who neither opt out nor register, to share in any subsequent judgment are unclear. Option 4 stated that class members who did nothing would lose their rights to share in the proceeds of a settlement but it did not say that they would retain their entitlement to share in a judgment in the event settlement was not achieved. In our view, the opt out notice did not clearly set out the effect of the class closure order.

102 We proceed on the basis that ordinary and reasonable class members may have understood the opt out notice as conveying that, if they neither opted out nor registered, they would be precluded from sharing in any subsequent judgment (not just precluded in relation to settlement) when, in fact, the orders only precluded them from participating in a settlement, not judgment.

Would substantial injustice result if leave were refused

103 On the assumption that the opt out notice conveyed the incorrect impression that, if class members neither opted out nor registered, they would be precluded not only from sharing in any settlement but also from sharing in any judgment, we cannot see how class members would suffer any, let alone material, prejudice. This is because, insofar as any class member might have been misled, the only difference between the potentially misleading impression formed and the true position was to the benefit of class members (that is, the assumed unknown additional right to share in the proceeds of any judgment).

104 The opt out notice presented class members with the options of registering to participate in any settlement of the Jones class action, opting out of that class action (which would preserve their right to bring separate proceedings), objecting to the class closure regime (which no class member other than MCI has done), or doing nothing (and thereby losing their right to

claim a share in any settlement that might be achieved or, assuming any class member was misled, also losing their right to claim in any judgment). We do not consider that class members thereby suffered a "coercive threat" if by that anything more is meant than that some members of the class might have understood that, if they did not register, they would not be permitted to participate in the distribution of any judgment and settlement outcome.

105 The purpose of the opt out notice was to inform class members of two main matters.

106 *First*, the notice informed class members of their right to opt out of the Jones class action if they wished to do so, in which case they would not be affected by any orders made in that action and would not be permitted to share the proceeds of any settlement or judgment. That information was correct.

107 The notice also informed class members that if they opted out they were permitted to bring their own separate legal proceedings against TWE. That information was also correct. Any such proceedings could be commenced by class members individually, or they could bring their individual claims through another class action, or in a resurrected Second MCI class action if the permanent stay is ever lifted.

108 There is no "coercive threat" in this. Class members were clearly informed of this option and any member who preferred the Second MCI class action could have chosen it.

109 *Second*, the notice informed class members that if they wished to share in any settlement in the Jones class action it was necessary for them to register their claim. Although it was not made clear in the notice, the effect of the class closure order was that, provided class members did not opt out, they were able to share in any judgment, whether they registered or not.

110 There appear to be two relevant categories of class member in this regard.

111 The first category is class members who did not wish to opt out (i.e. they wished to be bound by any order in the proceeding and did not wish to bring separate legal proceedings against TWE), and who were interested in sharing in any fair or reasonable settlement that is able to be achieved; it must be a fair settlement or it will not be approved by the Court pursuant to s 33V. Such class members would have registered their claim in the Jones class action. If it is assumed that they were misled by the opt out notice to understand that, if settlement was not able to be achieved, their right to share in any subsequent judgment also depended upon their registration, they will have lost nothing. They would have registered in the Jones class action

anyway, and they suffered no detriment; as noted, the difference between the assumed position of a misled class member and the true position was merely the added benefit of being able to share in the judgment

112 The second category is class members who did not wish to opt out but who were not interested in sharing in any fair settlement that is able to be achieved. Putting to one side our concern that this does not appear to be a rational view, such class members would not have registered their claim in the Jones class action. If it is assumed that they were misled by the opt out notice to understand that, if settlement was not able to be achieved, they were not entitled to share in any judgment because they did not register, they too will have lost nothing. Pursuant to the class closure order, they are entitled to share in any judgment and they have suffered no detriment; again, the difference between the assumed position of a misled class member and the true position was merely the added benefit of being able to share in the judgment

113 It necessarily follows from this that there can be no injustice, let alone substantial injustice, as a result of the lack of clarity of the opt out notice in respect of the preservation of the right to share in the judgment, such as to warrant the grant of leave to appeal.

114 *Third*, even if (contrary to our view) it is assumed that class members were misled by the information about the Second MCI class action, they did not suffer any substantial injustice as a result. If they chose to register in the Jones class action because they were misled into believing it to be a "preferable vehicle", they will be class members in a class action, conducted by lawyers experienced in class action litigation which is approaching mediation, and if mediation fails to achieve a settlement it is shortly fixed for hearing. It is somewhat circular but worth noting that, by registering, they will have given up the "opportunity" to bring their claim within the MCI class action which has been permanently stayed as an abuse of process, with no certainty that the stay will ever be lifted. Even if the stay is eventually lifted there has been little or no substantive progress in the action and it is unlikely to be settled or heard for some significant time.

115 In all the circumstances the application for leave to appeal must be refused.

COSTS

116 We consider costs should follow the event and, subject to the submissions of the parties, we propose to order that MCI pay the costs of TWE and Mr Jones. However, in circumstances

where MCI has brought two class actions against TWE, both of which have been found to be an abuse of process, it has been unsuccessful in a number of interlocutory applications in those actions, and it brought this application for leave to appeal notwithstanding a substantial lack of merit, a question arises as to whether MCI ought to pay costs on an indemnity basis.

117 The parties are directed to file short submissions on costs of no more than three pages, within 14 days, including submissions as to whether it is appropriate to order indemnity costs.

I certify that the preceding one hundred and seventeen (117) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot, Justice Yates and Justice Murphy.

Associate:

Dated: 20 June 2017