MELBOURNE CITY INVESTMENTS PTY LTD (ACN 161 046 304) v TREASURY WINE ESTATES LTD (ACN 004 373 862)

FEDERAL COURT OF AUSTRALIA

FOSTER J

8 May 2015, 5 July 2016 — Sydney

[2016] FCA 787

Practice and procedure — Class actions — Abuse of process — Stay of proceedings — Application for permanent stay — (CTH) Federal Court Rules 2011 r 26.01(d).

The plaintiff, Melbourne City Investments Pty Ltd (MCI), was a company engaged in bringing representative proceedings against listed companies alleging breaches of continuous disclosure obligations. MCI was the representative plaintiff in such proceedings and Mr Elliott (the sole director, secretary and shareholder of MCI since its incorporation) would act as its solicitor and earn fees from doing so.

On 1 November 2012, the day it was incorporated, MCI purchased 140 ordinary shares from the defendant, Treasury Wine Estates Ltd (TWE) at $4.95 per share for a total cost of $693. Between November 2012 and May 2014, it purchased small parcels of shares in 157 ASX-listed corporations.

On 4 November 2013, MCI commenced proceedings against TWE in the Supreme Court of Victoria alleging TWE had contravened its continuous disclosure obligations and engaged in misleading or deceptive conduct (the first MCI proceeding).

Subsequently, the Victorian Court of Appeal made an order permanently staying the first MCI proceeding as an abuse of process, holding that the predominant purpose of MCI in bringing the first MCI proceeding was to enable Mr Elliott to earn fees as the solicitor on the record in that proceeding and that the purpose was an improper purpose: see *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585; 318 ALR 121; [2014] VSCA 351.

On the same day that the first MCI proceeding was permanently stayed, MCI commenced the present proceeding so as to keep its claims as the lead claimant in a representative action against TWE alive in the event that its application for special leave to appeal the decision of the Victorian Court of Appeal to the High Court of Australia was unsuccessful - which it ultimately was. In this proceeding (the present proceeding), Portfolio Law Pty Ltd, as opposed to Mr Elliott, were the solicitors on the record for MCI.

Held, permanently staying the proceedings as an abuse of process:

(i) As Mr Elliott was the sole director and shareholder of MCI, and because there was no evidence to suggest any other person had any say in its affairs, Mr Elliott's purpose in causing MCI to bring the present proceeding could also be attributed to MCI. It was incumbent on Mr Elliott to proffer an explanation for MCI's conduct. His failure to do so provided a basis for adverse inferences to be drawn against MCI: at [156].

(ii) MCI was created by Mr Elliott as a vehicle for bringing class actions against listed corporations, he caused MCI to make the share purchases in order to position itself as the lead plaintiff in class action proceedings: at [156].

(iii) It was more probable than not that Mr Elliott was concerned in the affairs of Portfolio Law in some fashion designed to bring him or MCI financial reward: at [156].

(iv) The causes of action pleaded in the present proceeding, and the question of its ultimate success, were immaterial to MCI's purpose in commencing it. The insignificant amount sought to be recovered by MCI for itself in the proceeding did not justify its commencement and maintenance: at [156].

(v) MCI did not institute nor was it maintaining the class action in order to obtain a remedy which the law provides either for itself as individual claimant or the members of the class which it purported to represent: at [157].

(vi) MCI did not have the capacity to fund the present proceeding itself, its claims were very weak if not hopeless and it commenced this proceeding as a "fallback" against the possibility that the first MCI proceeding would remain permanently stayed as an abuse of process: at [157].

(vii) It was therefore demonstrated that the present proceeding was brought for an illegitimate or collateral purpose, constituted an abuse of process and should be permanently stayed: at [158].

Application

This was an application by the defendant, Treasury Wine Estates Ltd, for orders permanently staying proceedings brought against it by the plaintiff, Melbourne City Investments Pty Ltd, on the basis that those proceedings constituted an abuse of process.

N J O'Bryan SC instructed by *Portfolio Law Pty Ltd* for the plaintiff (Melbourne City Investments Pty Ltd (ACN 161 046 304)).

A G Uren QC and *M C Garner* instructed by *Herbert Smith Freehills* for the defendant (Treasury Wine Estates Ltd (ACN 004 373 862))..

[1] **Foster J.** On 22 December 2014, in circumstances which I shall explain below, the plaintiff (**MCI**) commenced this proceeding in the Supreme Court of Victoria as a representative proceeding under Pt 4A of the Supreme Court Act 1986 (Vic) (the Supreme Court Act). The causes of action relied upon and the claims for relief made in this proceeding are identical to the causes of action relied upon and the claims for relief previously made by MCI in proceeding S CI 2013 5731 in the Supreme Court of Victoria between MCI, as plaintiff, and the present defendant (**TWE**), as defendant (**the first MCI proceeding**). The first MCI proceeding had been commenced on 4 November 2013. That proceeding was also a representative proceeding under Pt 4A of the Supreme Court Act.

[2] The only difference between the first MCI proceeding and this proceeding concerns the identity of the solicitor on the record for MCI. At the time when the first MCI proceeding was commenced and for some time thereafter, the solicitor on the record for MCI in that proceeding was Mark Edward Elliott who is an Australian legal practitioner. Mr Elliott has also been the sole director, the sole secretary and the sole shareholder of MCI at all times since its incorporation. In this proceeding, the solicitor on the record for MCI is, and always has been, Mr Anthony Zita of Portfolio Law Pty Ltd (**Portfolio Law**). There is no direct evidence before me which establishes that Mr Zita or Portfolio Law has made any agreement or arrangement with Mr Elliott in relation to the professional fees likely to be earned by Portfolio Law from representing MCI and the group in and in connection with this proceeding. On the face of things, Portfolio Law does not appear to have any connection with Mr Elliott other than as the solicitor for MCI in this proceeding and as the solicitor for MCI in other proceedings.

[3] Earlier on the same day as this proceeding was commenced (22 December 2014), the Victorian Court of Appeal made an order permanently staying the first MCI proceeding as an abuse of process (see *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585; 318 ALR 121; [2014] VSCA 351 (*TWE No 1*)).

[4] The Court of Appeal (by majority) held that the predominant purpose of MCI in bringing the first MCI proceeding was to enable Mr Elliott to earn fees as the solicitor on the record in that proceeding and that that purpose was an improper purpose.

[5] On 16 January 2015, MCI filed an application for Special Leave to Appeal to the High Court from the Court of Appeal's decision in *TWE No 1*. That application was dismissed with costs by the High Court on 15 May 2015.

[6] It is clear that this proceeding was instituted as a substitute or fallback proceeding designed to keep alive MCI's claims as the plaintiff and lead claimant in a representative action against TWE in order to protect itself against the possibility that the Court of Appeal's decision in *TWE No 1* was not overturned by the High Court. Before me, MCI did not cavil with this view of its conduct. MCI submitted that, if the High Court overturned the Court of Appeal's decision, it would not need to maintain this proceeding. It also argued that, if the High Court did not overturn the Court of Appeal's decision, it would press on with this proceeding.

[7] On 13 February 2015, TWE filed a Summons in this proceeding while it was still in the Supreme Court.

[8] By that Summons, TWE sought an order transferring this proceeding to this Court and an order staying this proceeding upon the limited discretionary basis that there was already on foot in this Court a representative proceeding (*Jones v TWE*, NSD 660 of 2014) (**the Jones proceeding**) brought against TWE on behalf of the same or substantially the same class in which substantially the same or similar claims as those made by MCI in this proceeding were being made. In the alternative, TWE sought an order that this proceeding not continue as a representative proceeding based upon the same limited ground. The Jones proceeding was commenced on 2 July 2014 which was after the date when the first MCI proceeding was commenced but before the date when this proceeding was commenced.

[9] On 3 March 2015, Justice Elliott, a judge of the Supreme Court, made an order transferring the whole of this proceeding to the New South Wales District Registry of this Court.

[10] As at 3 March 2015, the Supreme Court had not determined the remaining claims for relief made by TWE in its Summons filed on 13 February 2015. By agreement between the parties which was sanctioned by the Court, those residual claims have been left in abeyance pending the determination of the claims for relief made by TWE in an Interlocutory Application filed by it in this Court on 31 March 2015 (**TWE's Interlocutory Application**), to which I now turn.

[11] By that Interlocutory Application, TWE sought the following relief:

> 1. Pursuant to Rule 26.01(d) of the Federal Court Rules, alternatively pursuant to the inherent jurisdiction of the Court, that judgment be given against the Applicant, alternatively that this proceeding be permanently stayed, on the ground that it is an abuse of the process of the Court.
> 2. Alternatively, pursuant to section 33N or section 33ZF of the Federal Court of Australia Act 1976 (Cth), an order that the proceeding no longer continue as a group proceeding pursuant to Part IVA of the Federal Court of Australia Act.

3. Alternatively, pursuant to section 33ZF of the Federal Court of Australia Act, an order that the Applicant be restrained from continuing as the representative Applicant in this proceeding.
4. Alternatively to the order sought in paragraph 1 above:
   (a) pursuant to Rule 19.01 of the Federal Court Rules and/or section 1335 of the Corporations Act 2001 (Cth) and/or pursuant to the inherent jurisdiction of the Court, an order that the Applicant provide security to the Respondent for the costs of and incidental to this proceeding up to the stage of mediation, in the amount of $630,000, or such other amount as the Court determines to be appropriate, by payment of that amount into Court within 28 days of the making of this order, or in the event that the security has not been provided within that period, that the proceeding be stayed;
   (b) an order that the Respondent have liberty to apply for additional security for costs at any stage of the proceeding.
5. The Applicant pay the Respondent's costs of and incidental to this application.
6. Such further orders as the Court considers appropriate.

[12] In support of Order 1, TWE relied upon r 26.01(d) of the Federal Court Rules 2011 (FCR) and the inherent jurisdiction of the Court. It relied upon ss 33N and 33ZF of the Federal Court Act 1976 (Cth) (the FCA Act) as the sources of power for the Court to make Orders 2 and 3. Although Order 2 claimed by TWE in the Interlocutory Application filed by it in this proceeding seeks the same relief as Order 2 claimed by it in the Summons filed by it in the Supreme Court on 13 February 2015, the claim made in the Interlocutory Application filed in this Court is not limited to any particular ground or grounds whereas its claim for discretionary relief made in the Summons filed by it in the Supreme Court is based solely upon the circumstance that the Jones proceeding is on foot and that, in that proceeding, Mr Jones makes the same or substantially the same or similar claims as the claims made by MCI in this proceeding and does so on behalf of the same or a substantially overlapping class of group members. Order 4 raises an entirely separate matter for consideration (security for costs).

[13] By these Reasons for Judgment, I determine the claims for relief made by TWE in its Interlocutory Application.

Abuse of process

MCI's conduct

[14] MCI was incorporated on 1 November 2012 at the instigation of Mr Elliott.

[15] On the same day as it was incorporated, MCI purchased 140 ordinary fully paid shares in TWE at a cost of $4.95 per share. The total cost to MCI of the shares which it purchased at this time was therefore $693. MCI continues to hold that parcel of shares in TWE.

[16] In the period from November 2012 to 15 May 2014, MCI also purchased small parcels of shares in approximately 157 other publicly listed companies, the cost of most of those parcels of shares ranging between $600 and $900. The total amount outlaid in this fashion was of the order of $120,000.

[17] As mentioned at [1] above, MCI commenced the first MCI proceeding on 4 November 2013. In that proceeding, MCI claimed that TWE had contravened its continuous disclosure obligations under s 674(2) of the Corporations Act 2001 (Cth) (the Corporations Act) and that it had engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive in contravention of s 1041H of the Corporations Act by reason of TWE having failed to make timely disclosures to the Australian Securities Exchange (**ASX**) of certain price sensitive information and having made misleading announcements to the ASX. The core complaint made by MCI in the first MCI proceeding was that, throughout the period from 17 August 2012 to 15 July 2013, TWE concealed the true state of affairs concerning its US inventory which was, in truth, at excessive levels, slow-moving and, in some cases, obsolete. It makes the same allegations in this proceeding.

[18] In the first MCI proceeding, the group is defined as *"… all persons who acquired ordinary shares in* [TWE] *on or after 17 August 2012 and who were at the commencement of trading on 15 July 2013 holders of any of those shares"*. That definition of the group is the same definition of the group found in MCI's Statement of Claim filed in this proceeding.

[19] In the first MCI proceeding, MCI alleged that TWE's failure to disclose the true position concerning its US inventory and its publication of misleading and deceptive ASX releases on 17 August 2012 and on 28 February 2013 caused the market price for TWE ED securities prior to 15 July 2013 (when appropriate disclosures were made) to be substantially greater than the true value of those securities. MCI went on to plead that, as a result, MCI and the class members suffered loss and damage because they paid inflated prices for the TWE securities which they purchased in the period from 17 August 2012 to 15 July 2013. It makes the same allegations at pars 21 to 25 of its Statement of Claim filed in this proceeding.

[20] In both this proceeding and the first MCI proceeding, MCI's alleged loss is described as:

> … the difference between the prices at which the TWE ED securities were acquired by [MCI] and the Group Members and the prices that would have prevailed at the times of those acquisitions had the information about the US inventory matters been disclosed at those times …

[21] In the Jones proceeding, the definition of the group is, in substance, the same as the definition of the group in the first MCI proceeding and in this proceeding. Further, although the latest iteration of the Statement of Claim in the Jones proceeding (the Further Amended Statement of Claim filed on 22 December 2015) is a much longer document than either Statement of Claim filed in the two MCI proceedings, the essence of Mr Jones' complaints and the consequences of the contraventions alleged by him against TWE are, at core, substantially the same as are alleged by MCI in its proceedings. Mr Jones relies upon a larger number of contraventions and additional causes of action. Notwithstanding those differences, he also relies upon a market-based causation theory as providing the necessary causal link between the contravening conduct alleged against TWE and the loss and damage claimed. Mr Jones is represented by very experienced class action lawyers. He is also well supported by an experienced litigation funder, IMF Bentham Limited.

[22] There is no doubt that the case sought to be made in the first MCI proceeding and in this proceeding is comprehensively captured by the case currently pleaded by Mr Jones in the Jones proceeding.

[23] It is clear from the judgment of Ferguson JA delivered on 12 December 2014 in the first MCI proceeding (*Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 7)* (unreported, Sup Ct, Vic, Ferguson JA, 12 December

2014)) that, by no later than 27 November 2014, Mr Elliott and thus MCI were aware of the existence of the Jones proceeding (see, in particular, her Honour's remarks at [11]). It is likely that Mr Elliott became aware of the Jones proceeding soon after it was commenced, that is, in early July 2014. I find, therefore, that Mr Elliott and MCI were aware of the existence of the Jones proceeding prior to the date when MCI commenced this proceeding (22 December 2014) and that they had probably been aware of the existence of the Jones proceeding for approximately five months before MCI commenced this proceeding. It is also likely that Mr Elliott and thus MCI knew that the Jones proceeding was on foot at the time when TWE sought leave to appeal from Ferguson J's refusal to stay the first MCI proceeding. MCI confined itself to opposing TWE's application for leave to appeal as its primary stratagem in the period from late July 2014 to 22 December 2014. As noted at [6] above, the present proceeding was only commenced as a fallback. MCI had determined to press the first MCI proceeding for so long as the Courts permitted it to do so while at the same time holding this proceeding in abeyance pending the High Court's decision. Senior Counsel for MCI conceded as much at the hearing of MCI's Special Leave Application in the High Court (see HCA Transcript 2/20–37).

[24] Even if it is established at trial that the price of the relevant securities that would have prevailed on the date when MCI acquired its 140 shares in TWE (1 November 2012) had the truth as to the US inventory been disclosed was $0, MCI's loss would be $693 plus interest. Further, as explained at [19] above, MCI does not contend that it directly relied upon TWE making appropriate, comprehensive and accurate disclosures as required by the Corporations Act or that it directly relied upon the various positive statements made by TWE which MCI pleads were misleading or deceptive. Rather, MCI relies upon a market-based causation theory as providing the necessary causal link between the alleged contraventions and the losses suffered by it and by the group members.

[25] On 6 November 2013, MCI commenced a representative proceeding in the Supreme Court of Victoria against Leighton Holdings Limited (**Leighton**). On 18 December 2013, it commenced a similar proceeding in the Supreme Court of Victoria against Worley Parsons Limited. On 25 March 2015, it commenced another similar proceeding in the same Court, on this occasion against Myer Holdings Limited. On 1 April 2015, MCI commenced yet another representative proceeding in the Supreme Court of Victoria, on this occasion against UGL Limited. MCI holds a small parcel of shares in each of the companies to which I have just referred. In each of these other proceedings, MCI has made similar claims to those which it had made against TWE in the first MCI proceeding and similar claims to those which it now makes against TWE in this proceeding.

Other matters

[26] The solicitors for TWE made enquiries and conducted searches in relation to Mr Zita and Portfolio Law. Those enquiries and searches proved the following facts and matters:

(a) Portfolio Law was registered on 29 August 2014. This was after the date when the principal judgment in *TWE No 1* was delivered by Ferguson J but before the Court of Appeal's judgment in that case. It was also soon after TWE filed an application for security for costs in the first MCI proceeding and soon after MCI applied for leave to appeal from the judgment of Ferguson J in *TWE No 1*.

(b) From 29 August 2014 up to the date of the hearing before me, the principal place of business of Portfolio Law was Level 3, 362 Little Collins Street, Melbourne.

(c) At all relevant times, the directors and shareholders of Portfolio Law have been Angela Romeo, Anthony Sica and Anthony Zita.

(d) Anthony Zita and Angela Romeo retain their connections with another law firm, John V Hayes & Co Pty Ltd Anthony Sica appears also to practise under the firm name Sica & Co.

(e) Neither Mr Zita nor Mr Sica has ever conducted a class action proceeding in Australia which can be found in the Case Base database. Nothing in the publicly available marketing material concerning their firms suggests that either of them has any expertise or experience in conducting a class action as solicitor on the record.

[27] By letter dated 26 March 2015 sent to Portfolio Law, TWE's solicitors sought information about Mr Elliott's role (if any) in connection with this proceeding and information about the involvement of a litigation funder (if any). That letter was ignored.

The judgment of Ferguson J in the first MCI proceeding

[28] On 21 March 2014, TWE filed an application in the Supreme Court of Victoria seeking an order that the first MCI proceeding be permanently stayed as an abuse of the process of the Court or, alternatively, an order that MCI be restrained from retaining Mr Elliott as its solicitor for so long as the proceeding continued as a class action. That Application was heard by Ferguson J (as her Honour then was) on 16 May 2014 and determined by her Honour on 23 July 2014 (*Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (No 3)* [2014] VSC 340). In support of its application that the first MCI proceeding constituted an abuse of process, TWE argued that the predominant purpose of MCI in bringing the proceeding was not to recover damages but rather was to provide a personal financial benefit to Mr Elliott by presenting him with the means to earn substantial fees as the solicitor on the record for the class in respect of which MCI was the lead plaintiff. At the same time, Leighton also sought a permanent stay of its proceeding. Her Honour dealt with both applications in her judgment.

[29] At [9]–[11] of her Honour's Reasons for Judgment, her Honour said:

> 9 In my opinion, it is probable that the reason for MCI's existence is to launch proceedings, such as the present proceedings, to enable its sole director and shareholder to earn legal fees from acting as the solicitor for MCI. This conclusion is based on:
>
> (a) the initial purchase of small parcels of shares in 20 companies on the day that the company was incorporated;
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> (b) the subsequent commencement of three group proceedings by MCI, with Mr Elliott acting as its solicitor; and
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> (c) the later purchase of similarly small parcels of shares in Treasury, Leighton and WorleyParsons and in another 145 publicly listed companies.
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> 10 Whilst Mr Elliott is acting on a 'no win, no fee' basis, it is common knowledge that most litigation settles before judgment and that this is treated as a 'win', such that the lawyers' fees are paid. So much is recognised by Mr Elliott on websites that have been established for each of the group proceedings. In the question and answer section, the following appears under

a heading 'IMPORTANT NOTE FROM MARK ELLIOTT, SOLICITOR FOR THE CLASS ACTION PLAINTIFF, MELBOURNE CITY INVESMENTS LIMITED [sic]':

> **Is the case likely to go all the way to Court or to settle earlier?**
>
> The overwhelming majority of cases that are issued in the Supreme Court of Victoria (and in every other court) do not go to trial or judgment, but settle earlier. I think this case is likely to settle before judgment as well. However there is the possibility that the case will go to a contested trial and to a judgment and I am preparing the case with the legal team on that assumption.
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> **What will your legal fees be and who will pay them?**
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> If we do not win the case I will not charge any fees and will pay out of my own resources the barristers, expert witnesses and others involved in the case, so there will be no responsibility for any member of the class to pay anything. If the case is successful, then the professional costs of the proceeding (solicitors' costs, barristers' fees and the costs of expert witnesses, etc.) will be recovered from the total amount which is recovered from the defendants by judgment or settlement. (The pages from the website were exhibited to affidavits filed in respect of the application.)

11 Leighton submitted that it can be inferred that MCI commenced the proceeding against it for the purpose of having Mr Elliott act as its solicitor so that he could earn fees. Again, it seems to me that this is the probable inference to be drawn in respect of both the Leighton and Treasury proceedings. The quantum of any damages claim being, as I have said, at best less than $700 in each, makes it unlikely that the proceedings were commenced for the purpose of recovering compensation. Another possible, but far less probable, inference would be that MCI is motivated by some general desire to assist shareholders to recover compensation from publicly listed companies which breach the law, or that MCI has some general desire to ensure that publicly listed companies comply with the law. Such inferences may have been likely if MCI had engaged independent solicitors. In circumstances, however, where Mr Elliott acts as the solicitor and has a significant financial interest in doing so, such inferences are less probable than the inference that I draw. They are certainly not inferences of equal probability to the inference that I draw. Again, the absence of evidence from Mr Elliott is something to be taken into account. It gives more comfort in drawing the inference that I do and leads to a conclusion that his evidence would not have helped MCI's case (*Jones v Dunkel* (1958) 101 CLR 298 at 308; [1959] ALR 367 (Kitto J), at 312 (Menzies J), at 321 (Windeyer J)).

[30] At [28]–[29], her Honour said:

28 The Defendants submitted that MCI is not assisted by reference to litigants with a genuine cause of action that they would wish to pursue in any event, because the position is quite different here. They submitted that the only inference open, given the quantum of MCI's claim, is that MCI would not wish to pursue the proceeding but for the improper purpose. They contended that MCI's submission to the contrary is untenable and that it is noteworthy that MCI has adduced no evidence to support it when it would have been a simple thing to do so. They also observed that, if the predominant purpose of the litigation were to enable Mr Elliott to earn legal fees, then that purpose is not a by-product of the litigation — it is the predominant purpose which is improper. They contended that the proper purpose of the litigant commencing litigation is an honest desire to recover the relief which is sought in the

> proceeding. So, they say, the fees charged by solicitors (whether they are acting for themselves or others) are a consequence of litigation; they are not the purpose of the litigation.
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> 29 As I have said above, I have formed the view that MCI commenced the proceeding for the purpose of generating legal fees for Mr Elliott. I agree with the Defendants that that purpose is not a purpose of earning legal fees as a desired by-product of the litigation. It is the predominant purpose [footnote removed].

[31] Notwithstanding the findings which her Honour made at [9], [11], [28] and [29] of her judgment, Ferguson J concluded that neither the first MCI proceeding nor the Leighton proceeding was an abuse of the process of the Court. However, her Honour also decided that Mr Elliott ought to be restrained from acting for MCI for so long as it remained the lead plaintiff in the first MCI proceeding and in the Leighton proceeding and that neither proceeding ought to be permitted to continue as a group proceeding for so long as MCI and Mr Elliott continued to act in tandem as plaintiff and solicitor.

[32] On 25 July 2014, after Ferguson J had delivered judgment but before orders were made in order to give effect to that judgment, MCI served a Notice of Change of Practitioner. By that Notice, Tan Partners then became MCI's solicitor on the record in the first MCI proceeding in place of Mr Elliott.

[33] On 31 July 2014, Ferguson J accepted certain undertakings the effect of which was to ensure that Mr Elliott took no further part as solicitor for MCI in the first MCI proceeding. In light of those undertakings, her Honour did not make any other substantive orders although it was implicit in the course which her Honour took that she had rejected TWE's claim for a permanent stay of the first MCI proceeding.

The appeal from the judgment of Ferguson J

[34] On 14 August 2014, TWE applied to the Court of Appeal for leave to appeal from the decision of Ferguson J not to stay the first MCI proceeding as an abuse of process. The Application for Leave was treated as the hearing of the Appeal.

[35] On 22 December 2014, the Court of Appeal by majority (Maxwell P and Nettle JA, as his Honour then was, Kyrou JA dissenting) allowed the Appeal and held that the first MCI proceeding should be permanently stayed upon the ground that it constituted an abuse of process.

[36] None of the findings of fact made by Ferguson J were challenged by MCI at the hearing in the Court of Appeal. It follows that the Court of Appeal proceeded upon the basis that the findings of fact made by her Honour at [9], [11], [28] and [29] were correct. By the time that the matter was heard by the Court of Appeal, Mr Elliott was no longer the solicitor on the record for MCI in the first MCI proceeding and had given to the Court the undertakings to which I have referred at [33] above. In the Court of Appeal, only Kyrou JA referred to these changed circumstances. At [74]–[75] in *TWE No 1*, his Honour said that he would not deal with MCI's submission that, even if the proceeding constituted an abuse of process at the time when it was commenced by reason of MCI's predominant purpose of Mr Elliott earning legal fees from acting as the solicitor on the record, once Mr Elliott ceased to be the solicitor on the record, the proceeding was no longer an abuse of process. His Honour did not find it necessary to deal with this submission because he concluded that MCI's predominant purpose was not improper in any event.

The Court of Appeal judgment in TWE No 1

[37] Maxwell P and Nettle JA commenced their joint judgment by saying:

> 1 This proceeding is one of a number of class actions brought by the respondent, Melbourne City Investments Pty Ltd (MCI) for the predominant purpose of enabling MCI's sole director and shareholder (Mr Elliott) to earn legal fees by acting as solicitor for MCI in the proceeding. As counsel for the applicant, Treasury Wine Estates Ltd (Treasury) described it in argument, each of the proceedings is "make work" for a solicitor.
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> 2 The principal question before the judge below was whether, because that is so, the proceeding should be stayed as an abuse of process. Her Honour concluded that there was no abuse of process and refused the application for a stay. At the same time, her Honour ruled that Mr Elliott ought to be restrained from acting for MCI while it was the lead plaintiff in the class actions.
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> 3 Kyrou JA, whose draft reasons we have had the advantage of reading, would refuse leave to appeal from that decision. For reasons which follow, we respectfully disagree. We would grant leave to appeal, allow the appeal and order that the action be stayed permanently.
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> **The findings below**
>
> 4 The relevant facts are set out in the judgment of Kyrou JA They are not in dispute. On the basis of those facts, her Honour was invited to draw, and did draw, the following inferences:
>
> (a) MCI was created by Mr Elliott as a vehicle for bringing representative proceedings against listed companies alleging breaches of continuous disclosure obligations;
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> (b) MCI would be the representative plaintiff in such proceedings; and
>
> (c) Mr Elliott would act as its solicitor, and would earn fees from doing so (*Melbourne City Investments Pty Ltd v Treasure Wine Estates Ltd (No 3)* [2014] VSC 340 at [7] and [8] (reasons)).

[38] At [5] in *TWE No 1*, Maxwell P and Nettle JA observed that Ferguson J had noted (at [11] of her judgment) that, given that the quantum of MCI's damages claim was less than $700, it was unlikely that the first MCI proceeding had been commenced for the purpose of recovering compensation. Their Honours then continued to refer to the judgment of Ferguson J. At [6], their Honours quoted [29] in the judgment of Ferguson J and said that, on appeal, there was no challenge to any of these findings. At [8], their Honours said that, notwithstanding the earlier findings which her Honour had made, Ferguson J had found that MCI's immediate purpose in commencing the proceedings had been to obtain pecuniary relief and that success in that endeavour would naturally have led to an award of costs.

[39] At [9]–[13] in *TWE No 1*, their Honours said:

> **Consideration**
>
> 9 As the law stands, the only legitimate purpose for bringing a proceeding is to vindicate legal rights or immunities by judgment or settlement. Consequently, unless the predominant purpose of bringing a proceeding is a legitimate purpose, the proceeding is an abuse of process and is liable to be stayed (*Williams v Spautz* (1992) 174 CLR 509 at 533 and 543; 107 ALR 635 at 652 and 660 (*Williams*)).
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> 10 The question for determination, therefore, is whether MCI's purpose of "generating legal fees for Mr Elliott" is a legitimate purpose. Plainly enough, generating legal fees does not constitute a purpose of vindicating legal rights or immunities. Obtaining payment of legal costs is but a corollary, or an incident, or a by-product, of the successful vindication of rights.

11 It is necessary, then, to examine the notion of "collateral advantage". The authorities distinguish between two types of case. On the one hand, a proceeding will not be regarded as an abuse of process by reason only that it is brought for the purpose of taking collateral advantage of any judgment or settlement in vindication of legal rights or immunities which might be obtained in the proceeding. On the other hand, if a proceeding is brought for the predominant purpose of obtaining collateral advantage from the existence of the proceeding as such, as opposed to collateral advantage flowing from any judgment or settlement in vindication of legal rights or immunities which might be obtained in the proceeding, it will be an abuse of process and liable to be stayed (*Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 489–90; [1977] 2 All ER 566 at 574–5 (*Goldsmith*) per Lord Denning MR; *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134; 163 ALR 744; [1999] FCA 773 at [63]–[64] (*Flower*)).

12 In our view, the proceeding by MCI against Treasury falls into the second of these categories. What distinguishes the two categories is the use to which the proceeding is put (*Williams* at CLR 527, 530 and 531; ALR 647, 649 and 650; *Maxwell-Smith v S & E Hall Pty Ltd* (2014) 86 NSWLR 481; 308 ALR 149; [2014] NSWCA 146 at [41]; *Paradise Grove Pty Ltd v Stubberfield* [2001] QCA 117). In the present case, MCI is using the cause of action to create an income-generating vehicle for its solicitor. It has no interest in vindicating its rights, or obtaining a remedy, as such.

13 The nature of the cause of action — as a claim based on an alleged breach of disclosure requirements — is immaterial to MCI's purpose. Its sole purpose has only ever been to create for itself — in this case, by acquiring a small parcel of shares — a cause of action of sufficient merit to induce the defendant company to pay Mr Elliott's fees.

[40] The statement of principle set out at [9] was supported by references to *Williams v Spautz* (1992) 174 CLR 509; 107 ALR 635 (*Spautz*) at CLR 533; ALR 652 and at CLR 543; ALR 659–60.

[41] At [14], their Honours held that the case before the Court was a clear example of an abuse of process. They said that the processes of the Court do not exist (and are not to be used) merely to enable income to be generated by solicitors. They held that the processes of the Court exist in order to enable legal rights or immunities to be asserted and defended.

[42] At [15]–[18], their Honours referred to *Spautz* at CLR 526–7; ALR 646–7 and emphasised the point that the critical distinction between a proceeding which is an abuse of process and one which is not lies in the use to which the relevant proceeding is put. In the case of MCI in the first MCI proceeding, MCI had no wish, and no need, to prosecute its claims against TWE to conclusion. The question of ultimate success after a trial was immaterial to MCI's purpose. It had no interest in recovering the paltry sum of $700. Using the words of Mason CJ, Dawson, Toohey and McHugh JJ in *Spautz*, it was no part of MCI's purpose to receive *"a result for which the law provides in the event that the proceedings terminate in* [its] *favour"* (at [18]).

[43] At [19], their Honours said:

> That conclusion is unaffected by the fact that, in order to generate maximum fee income for Mr Elliott, the cause of action had to be strong enough to create the risk for the defendant company that it might be liable to pay costs. All that was needed to make this "vehicle" suitable for the purpose of generating costs was that any claim issued on behalf of MCI be sufficiently arguable to encourage the defendant to negotiate a settlement and pay MCI's costs.

[44] At [20], their Honours held that an appropriate analogy was *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134; 163 ALR 744; [1999] FCA 773. In that case, the plaintiff had no interest in securing the remedy sought. Rather, its purpose was to delay. The proceeding had been commenced for that purpose.

[45] Maxwell P and Nettle JA ultimately held that MCI had instituted the first MCI proceeding not in order to vindicate the right to compensation which it asserted in that proceeding but rather in order to produce legal fees for its solicitor (Mr Elliott).

[46] At [22], their Honours expressed their conclusion in the following terms:

> Ultimately, the policy considerations which inform the law relating to abuse of process are twofold: to ensure that the processes of the court are used fairly, and to maintain public confidence in the ability of the court to function in that way (*Williams* at CLR 520; ALR 641). In this case, there is a palpable unfairness in a defendant being brought to court for the predominant purpose of enriching the plaintiff's solicitor, and the community's confidence would undoubtedly be shaken if that were held to be a legitimate purpose for bringing proceedings.

[47] Having accepted as a fact that MCI had been created by Mr Elliott as a vehicle for bringing representative proceedings against listed companies alleging breaches of continuous disclosure obligations and that the first MCI proceeding had been instituted by MCI for the predominant purpose of enabling Mr Elliott to earn legal fees by acting as the solicitor for MCI in that proceeding, the majority went on to hold that that predominant purpose was improper and that the proceeding was an abuse of process and liable to be permanently stayed. They held that the predominant purpose of generating legal fees for Mr Elliott was a purpose intended to obtain a collateral advantage from the mere existence of the proceeding as such, and thus improper, as distinct from a collateral advantage flowing from any judgment or settlement in vindication of legal rights or immunities which might be obtained in the proceeding, which was a legitimate purpose. Thus, the critical matter upon which the Court's reasoning was founded was the finding of fact that the predominant purpose of MCI in instituting the first MCI proceeding was to enable Mr Elliott to earn legal fees by acting as the solicitor for MCI in that proceeding.

[48] Kyrou JA dissented.

[49] At [57] in *TWE No 1*, his Honour said:

> The question of whether the purpose of bringing a proceeding is improper must be assessed in the context of statements in the authorities that the legitimate purpose for bringing a proceeding is the protection or vindication of particular legal rights or immunities (*Williams* at CLR 532; ALR 651; *White Industries (Qld) Pty Ltd v Flower & Hart* (unreported, FCA, Goldberg J, 14 July 1998) at 102 (*White Industries*); *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134; 163 ALR 744; [1999] FCA 773 at [63] and [64] (*Flower*)).

[50] His Honour then referred to and discussed the decision of the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366; [2013] All ER 8 (*Crawford Adjusters*). In that case, Lord Wilson JSC approved a statement by Isaacs J in *Varawa v Howard Smith & Co Ltd* (1911) 13 CLR 35 (*Varawa*) that a purpose is improper if it is *"entirely outside the* **ambit** [emphasis added] *of the legal claim on which the court is asked to adjudicate"* (*Varawa* at 91). At [149] in *Crawford Adjusters*, Lord Sumption JSC described an improper purpose as a *"purpose of obtaining* *some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought”*.

[51] At [59]–[63] in *TWE No 1*, Kyrou JA said:

> 59 There is a distinction between bringing proceedings to a successful conclusion, so as to take advantage of an entitlement or benefit which the law gives the litigant in that event, and bringing proceedings when the purpose is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers (*Williams* at CLR 526–7; ALR 647; *Klement v Randles* [2010] VSCA 336 at [32]).
>
> 60 Where a proceeding is instituted for the purpose of vindicating a right but with the aim of settling the claim before trial, the proceeding is not an abuse of process (*Williams* at CLR 533 and 543; ALR 652 and 660; *White Industries* at 102; *Flower at* [63]). In *Crawford Adjusters*, Lord Wilson JSC rejected the proposition that the bringing of a proceeding in the hope of settling it rather than securing a judgment is improper. His Lordship said (at [64]):
>
>> [64] But the settlement of an action is often reached on terms which, had it proceeded, the court could not have ordered; and not infrequently claimants reasonably initiate actions in the hope that some such settlement might eventuate. In *Goldsmith v Sperrings Ltd*… Bridge LJ neatly allowed for this possibility in suggesting … that
>>
>> “when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance.” (*Crawford Adjusters* at [64] (citations omitted)).
>
> 61 In *Williams*, the plurality referred to *Goldsmith v Sperrings Ltd* ([1977] 1 WLR 478; [1977] 2 All ER 566 (*Goldsmith*)) and agreed with the doubt expressed by Bridge LJ as to whether an abuse of process would exist where a litigant with a genuine cause of action which the litigant intends to pursue has an ulterior purpose in view as a desired by-product of the litigation (*Williams* at CLR 522; ALR 643)
>
> 62 The onus of satisfying the court that there is an abuse of process lies on the party alleging it. The onus is a heavy one and the power to grant a permanent stay is one to be exercised only in the most exceptional circumstances (*Williams* at CLR 529; ALR 649).
>
> 63 If a proceeding is an abuse of process, there is no discretion to refuse a stay (*Batistatos* at [7]).

[52] At [65], his Honour said:

> In my opinion, the judge correctly applied the principles summarised at [53]–[63] above. Fundamentally, this is because an order for costs is at the discretion of the court and such an order ordinarily follows from pursuing litigation to a successful conclusion rather than being independent of, or collateral to, such success (The court’s power to award costs is set out in ss 33ZD and 33ZJ of the Act).

[53] At [67]–[68], his Honour went on to say:

> 67 MCI could not achieve its predominant purpose of earning fees for Mr Elliott unless it pursues this proceeding to a successful conclusion and obtains an order for costs from the court or negotiates a favourable settlement which is approved by the court. The outcome of the proceeding, the nature and scope of any costs order, and the question of whether a settlement should be approved are matters to be determined by the court in accordance with well-established legal principles. A costs order cannot be pursued by MCI separately from the substantive relief sought in the proceeding. Likewise,

> there would have to be very good reasons for the court to approve a settlement which merely involves payment of MCI's costs. In other words, the legal process contains robust safeguards against abuse.
>
> 68 It follows that the judge's analysis as set out at [41] above is correct. Her Honour's reference to immediate and ultimate purposes simply sought to explain that, while the substantive relief sought in the proceeding was a means to an ultimate end, both the means and the ultimate end were standard and legitimate components of any litigation. Similar language was used by the plurality in *Williams* (*Williams* at CLR 526–7; ALR 647). Given that costs cannot be awarded without a court order and such an order is usually not made unless a plaintiff is successful in obtaining substantive relief, there is nothing improper about a party commencing a proceeding which has legal merit for the purpose of obtaining such relief and such an order, even if the predominant purpose is to obtain such an order. This is because that predominant purpose cannot be achieved without the court being satisfied that it is appropriate to award costs.

[54] At [77], his Honour concluded that the decision of Ferguson J to refuse to grant a permanent stay of MCI's case was neither wrong nor attended by sufficient doubt to warrant the grant of leave to appeal. Therefore, his Honour would have refused leave to appeal.

MCI's application for special leave to appeal to the High Court

[55] As I have already mentioned (at [5] above), MCI's Application for Special Leave to Appeal to the High Court was heard and determined by that Court (Hayne and Keane JJ) on 15 May 2015. This was after I had reserved my decision upon the present applications. At HCA Transcript 10, Hayne J said:

> The issues which the applicant seeks to agitate in this Court have been rendered substantially academic by the applicant's decision to institute a second proceeding. In any event we are not persuaded that an appeal to this Court would enjoy sufficient prospects of success to warrant a grant of special leave. Special leave to appeal is refused with costs.

[56] The Court did not call upon Counsel for TWE before dismissing MCI's Application for Special Leave to Appeal.

[57] In argument before the High Court, Senior Counsel for MCI submitted that:

(a) It was not the law in Australia that the only legitimate purpose for bringing a proceeding is to vindicate legal rights or immunities by judgment or settlement as Maxwell P and Nettle JA stated in the first sentence of [9] in *TWE No 1* of their Honours' judgment;

(b) It is not the law in Australia that, if a proceeding is brought for the predominant purpose of obtaining collateral advantage from the existence of the proceeding as such, as opposed to collateral advantage flowing from any judgment or settlement in vindication of legal rights or immunities which might be obtained in the proceeding, it will be an abuse of process and liable to be stayed (as to which see the last sentence of [11] in *TWE No 1* in the majority judgment);

(c) While it must be accepted that the first MCI proceeding was instituted for the purpose of generating fees for Mr Elliott, that purpose was not an improper purpose and the institution of the first MCI proceeding for that purpose was not an abuse of process because costs would only be payable by TWE if it agreed to pay costs as part of a settlement or if the

Court made an order to that effect consequent upon success by MCI in its claims for substantive relief; and

(d) Because the first MCI proceeding was a representative proceeding under Pt 4A of the Supreme Court Act, there was never any possibility of Mr Elliott recovering anything whether by way of judgment or settlement or in respect of legal costs without the sanction and approval of the Court.

[58] These arguments did not find favour with the Court.

[59] At the commencement of the hearing of MCI's Special Leave Application, Hayne J observed that the issue sought to be raised by MCI had been rendered *"moot"* or *"effectively academic"* by the institution of this proceeding. That thinking was ultimately reflected in the brief reasons given by the Court for not granting special leave (as to which, see [55] above).

TWE's contentions in this Court

[60] TWE filed a Written Submission dated 27 April 2015 in support of its ultimate proposition that this proceeding should be dismissed or permanently stayed on the ground that it is an abuse of process. It also supplemented those submissions with oral submissions made at the hearing before me.

[61] In broad terms, TWE submitted that this proceeding is an abuse of process because:

(a) It has been brought for an illegitimate or collateral purpose;

(b) To allow it to remain on foot would be unjustifiably oppressive to TWE; and/or

(c) To allow it to remain on foot would bring the administration of justice into disrepute.

[62] These three bases were identified by the High Court in *PNJ v R* (2009) 252 ALR 612; [2009] HCA 6 (*PNJ*) at [3] as well-established available alternative bases for the Court's finding that a particular proceeding constitutes an abuse of process.

Improper purpose

Issue estoppel

[63] In support of its abuse of process arguments, TWE claimed that MCI was estopped from asserting anything to the contrary of the following findings of fact and law, all of which were said to have been necessarily established as the legal foundation or justification of the Court of Appeal's conclusion that the first MCI proceeding was an abuse of process, including:

(a) The statement of legal principle made by the majority at [9] in *TWE No 1* to the effect that:

> … the only legitimate purpose for bringing a proceeding is to vindicate legal rights or immunities by judgment or settlement.

(b) The second statement of principle made by the majority at [9] in *TWE No 1* to the effect that:

> … unless the predominant purpose for bringing a proceeding is a legitimate purpose, the proceeding is an abuse of process and is liable to be stayed.

(c) The finding of fact to the effect that, in the first MCI proceeding, MCI was using that proceeding to create an income-generating vehicle for its solicitor, Mr Elliott. MCI's purpose in suing was not to vindicate the

right to compensation asserted by it in the first MCI proceeding but rather to produce legal fees for Mr Elliott in his capacity as its solicitor.
(d) The finding of fact that the nature of the pleaded cause of action was immaterial to MCI's purpose.
(e) The finding of fact that the question of ultimate success was also immaterial to MCI's purpose. MCI had no interest in recovering the relatively *de minimis* sum of $700.
(f) The finding of mixed fact and law that, by commencing the first MCI proceeding for the predominant purpose of enriching its solicitor, and not for the purpose of vindicating legal rights or immunities by judgment or settlement, MCI had abused the processes of the Court.

[64] TWE contended that each of the issues or matters to which I have referred at [63] above constituted an issue estoppel against MCI. In support of that proposition, TWE relied upon the statements of principle made by Dixon J (as his Honour then was) in *Blair & Perpetual Trustee Co Ltd v Curran (Adams' Will)* (1939) 62 CLR 464 at 531–2; (1941) 47 ALR (CN) 365b, by Barwick CJ in *Ramsay v Pigram* (1968) 118 CLR 271 at 276; [1968] ALR 419; and by the High Court in *Kuligowski v Metrobus* (2004) 220 CLR 363; 208 ALR 1; [2004] HCA 34 (*Kuligowski*) at [21] and [40].

[65] TWE submitted that there are three requirements for the creation of an issue estoppel, namely:
(a) The same question must necessarily have been decided in the first matter;
(b) The judicial determination which is said to create the relevant estoppel must have been final, conclusive and *"on the merits"*; and
(c) The parties to the judicial determination or their privies must be the same persons as the parties to the proceedings in which the estoppel is raised or their privies,

all of which were satisfied in the present case.

[66] TWE also contended that an issue estoppel can arise in respect of either a factual determination or a legal determination made in a prior judicial decision between the same parties or their privies.

[67] TWE argued that the requirement that the earlier decision be final and conclusive may be satisfied even though, technically speaking, the earlier decision may have been interlocutory in form. TWE went on to submit that, in the present case, the decision of the Court of Appeal in *TWE No 1* to the effect that the first MCI proceeding was an abuse of process was plainly a decision which was final and *"on the merits"* because the decision established certain facts as proved or not in dispute, set out the relevant principles of law and expressed a conclusion with regard to the effect of applying those principles to the factual situation concerned (*DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar and thirteen other ships* [1985] 1 WLR 490 at 499; [1985] All ER 104*(The Sennar (No 2))* per Lord Brandon). For all intents and purposes, given that MCI's appeal rights from the Court of Appeal's decision in the first MCI proceeding have now been exhausted, the Court of Appeal's decision has finally determined the claims for relief made by MCI in the first MCI proceeding by staying that proceeding permanently.

[68] TWE also submitted that, even if, contrary to its submissions, no issue estoppel has arisen in the present case because the decision of the Court of Appeal was not final and conclusive in the relevant sense, it can still be relied upon as finally determining various issues as between MCI and TWE within the meaning of the principles discussed by Edmonds J in *Windsor v Sydney Medical Service Co-operative Ltd (No 2)* [2009] FCA 704 (*Windsor*) at [29]. TWE emphasised the findings of fact and law set out at [5], [6], [9], [10], [12], [13], [14], [18] and [20] of the judgment of the majority in *TWE No 1*, the effect of which is summarised at [63] above.

[69] The first group of submissions made by TWE in support of the proposition that the Court should conclude that this proceeding has not been brought by MCI for the predominant purpose of vindicating legal rights or immunities by judgment or settlement and has therefore been brought for an illegitimate purpose focussed on the matters in respect of which TWE contended that MCI was estopped (as to which see [63] above). In respect of these matters, TWE submitted that it was not necessary for it to establish MCI's actual predominant purpose in bringing this proceeding and that it was sufficient if TWE established that, whatever MCI's predominant purpose might be, it was not to vindicate legal rights or immunities. TWE emphasised the fact that the cause of action and relief claimed in each of the two MCI proceedings brought against it were identical.

[70] TWE placed particular reliance upon the findings of fact made by Ferguson J and accepted by the Court of Appeal that the nature of the pleaded cause of action in the first MCI proceeding was immaterial to MCI's purpose and that the question of ultimate success in that proceeding was also immaterial to MCI's purpose. In addition, TWE relied upon the finding that MCI had no interest in recovering the paltry sum of $700 in the first MCI proceeding.

[71] Alternatively, TWE submitted that, if it were open to MCI to explain why the particular findings accepted by the Court of Appeal and relied upon by TWE had no application in the present case, it had chosen not to do so. In those circumstances, so it was submitted, the Court should infer that the circumstances which led to the relevant findings were still in play.

Other arguments (improper purpose)

[72] Next, it was submitted by TWE that I should follow the decision of the Court of Appeal in *TWE No 1* as a matter of precedent. TWE submitted that I should apply the relevant principles of law explained by the majority in the Court of Appeal and also apply the reasoning of the majority in order to arrive at the same conclusion as that to which that Court came in *TWE No 1*.

[73] TWE then moved on to make a series of submissions to the effect that, even if MCI was not estopped from acting inconsistently with the findings set out at [63] above, I should nonetheless infer from the evidence before me that MCI's predominant purpose in bringing this proceeding was not to vindicate legal rights or immunities by judgment or settlement but to benefit Mr Elliott financially other than by way of an award of damages to MCI. In support of this submission, TWE relied upon the following matters:

(a) The paltry return to MCI itself by way of damages or settlement did not, on any rational basis, justify the commencement or maintenance of the present proceeding. The costs of litigating the issues raised in the present proceeding and the risk of an adverse costs order would plainly militate against pursuing this proceeding to judgment or settlement;

(b) If MCI is unsuccessful in the present proceeding, it will not be able to meet any order for costs and will ultimately be placed into liquidation;

(c) The material placed on MCI's website by Mr Elliott in respect of the first MCI proceeding makes clear that, in the event that MCI is not successful in either proceeding, Mr Elliott will pay the lawyers and experts involved in the case on behalf of MCI out of his own resources;

(d) The legal fees to be earned by the solicitor for MCI in the present proceeding are likely to be very substantial. It is inherently improbable that Mr Elliott intends to permit all of those legal fees to be earned by Portfolio Law given that that firm has had no experience in class action litigation. The Court should infer that Mr Elliott will derive some benefit from the conduct of the present proceeding; and

(e) MCI's business model or scheme is to acquire small parcels of shares in listed companies so as to be in a position to launch legal proceedings by way of shareholder class actions against such companies at a later time notwithstanding that the damages likely to be claimed by MCI in any such proceeding are *de minimis* and could not on any rational basis justify the costs or the risk of an adverse costs exposure associated with the bringing of such proceedings. It is unlikely that this business model has been abandoned as a result of the Court of Appeal's decision in *TWE No 1*. The likelihood is that it has been adapted. It must be remembered that MCI is maintaining several other proceedings against other defendants alleging substantially the same contraventions of the law as are alleged in this proceeding.

[74] TWE submitted that the Court should draw an adverse inference against MCI for the reasons explained at [73] above and also because MCI has failed to adduce evidence as to its actual purpose in bringing the present proceeding. MCI has effectively hidden from scrutiny any material that might be used to cast light upon its actual predominant purpose in commencing this proceeding. The Court should infer that Mr Elliott is deriving some financial benefit from this proceeding other than solely in his capacity as the shareholder and controller of MCI. Why else would a corporation in the hands of a rational human being take expensive and risky proceedings in order to recover a few dollars?

[75] TWE then submitted that, if it were necessary for it affirmatively to establish MCI's predominant purpose in bringing this proceeding (which it submitted it was not obliged to do) then it urged the Court to draw the inference that MCI's predominant purpose was to enable Mr Elliott to obtain a payment, remuneration or other financial benefit as a consequence of the bringing of the proceeding or the conduct or outcome of the proceeding. That benefit did not necessarily need to take the form of legal fees as the solicitor on the record for MCI but could be obtained by other means and through other arrangements. TWE submitted that, in all of the circumstances established before me, the logical inference is that Mr Elliott is deriving some other undisclosed collateral benefit from this proceeding notwithstanding that he is no longer MCI's solicitor on the record. I pause to note that Mr Elliott was never MCI's solicitor on the record in this proceeding.

[76] TWE then submitted that the failure by Mr Elliott to lead any evidence as to MCI's purpose coupled with the other facts and matters proven constitutes a sufficient basis for the necessary inferences to be drawn.

Unjustifiable oppression

[77] TWE submitted that it is well established under Australian law that *prima facie* it is vexatious and oppressive (and therefore an abuse of process) for a second or subsequent action to be commenced in a court in Australia if an action between the same parties is already pending with respect to the same subject matter in an Australian court. It submitted that, although the first MCI proceeding has now been stayed, it is still on foot and thus engages the relevant principles.

Bringing the administration of justice into disrepute

[78] TWE argued that the predominant purpose of MCI in bringing the present proceeding is still to benefit Mr Elliott financially by some undisclosed method other than by the recovery of damages in circumstances where the predominant purpose is kept secret from the Court and from TWE.

[79] It must be an abuse of process, so TWE submitted, for MCI to have commenced this proceeding whilstever the first MCI proceeding remains on foot.

[80] In support of this argument, TWE also argued that the commencement of the present proceeding is just a device to circumvent the effect of the Court of Appeal's decision in *TWE No 1*.

MCI's contentions

Improper purpose

[81] In relation to issue estoppel, MCI relied upon the statement of principle approved by the High Court in *Kuligowski* at [40]. It then submitted that one of the requirements for issue estoppel is that the precise matter at issue must already have been necessarily and directly decided by the relevant tribunal in the earlier decision and that the issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case.

[82] MCI submitted that, in the present case, the precise matter in question (namely whether MCI has committed an abuse of process on several different bases) was not directly decided by the Court of Appeal in the first MCI proceeding. It argued that the facts in the present proceeding are fundamentally different from those in the first MCI proceeding because Mr Elliott has never been the solicitor on the record for MCI in this proceeding. The vice in the first MCI proceeding was that MCI had brought that proceeding for the predominant purpose of allowing Mr Elliott to earn substantial fees as its solicitor. That circumstance has never been in play in relation to this proceeding. That which is precluded by the Court of Appeal's decision in *TWE No 1* is the institution of any fresh proceeding by MCI the predominant purpose for which is to enable Mr Elliott to earn fees having regard to the principles of law articulated and applied by the majority judgment in *TWE No 1*.

[83] MCI then submitted that this Court should not follow the reasoning of the majority of the Court of Appeal in any event.

[84] It was submitted on behalf of MCI that the decision of the majority in the Court of Appeal in *TWE No 1* was plainly wrong, that it created a new and indeterminate category of abuse of process in Australian law and that it contradicted the *ratio decidendi* of the High Court in *Spautz*. It was contended on behalf of MCI that, under existing Australian law, as stated in *Spautz*, collateral abuse of process occurs only if the purpose of the proceeding is not to pursue it to its conclusion but rather to use it to obtain an outcome that is not within the scope of any remedy that the proceeding permits, whether by judgment, settlement or otherwise. It was submitted on behalf of MCI that, if the end sought by the plaintiff (ie the purpose of the proceeding) is within the scope of any remedy or outcome which the proceeding allows, there is no abuse of process. In making this latter submission, Senior Counsel for MCI emphasised that there is a difference between motive and purpose and that MCI's motive for commencing the present proceeding is irrelevant. MCI contended that the majority in the Court of Appeal erred when they explained the relevant principles at [9] in *TWE No 1* because their explanation was founded upon the proposition that there can only be one legitimate purpose for commencing a proceeding. The true position is that there may be more than one legitimate purpose. The true principle is that the party alleging abuse of process must establish that the predominant purpose of the plaintiff for instituting the proceeding was not to pursue the litigation but to use it for a collateral end not within the potential range of remedies that could reasonably relate to an action of that nature.

[85] Senior Counsel for MCI then developed these submissions by reference to the High Court's judgment in *Spautz*. He also submitted that there was no evidence before me from which the Court could conclude that Mr Elliott was deriving any collateral benefit from this proceeding.

[86] MCI argued that there were three errors in the reasoning which led the majority in the Court of Appeal in *TWE No 1* to conclude that MCI's sole purpose in commencing the first MCI proceeding was to create for itself a cause of action of sufficient merit to induce TWE to pay Mr Elliott's fees.

[87] First, MCI submitted that, if the Court of Appeal's conclusion as to MCI's purpose was correct, that purpose could only be achieved if the case had merit and was successful.

[88] Second, MCI submitted that the mere acquisition of a small parcel of shares in TWE did not, of itself, provide a necessary cause of action to MCI.

[89] Third, MCI argued that the Court of Appeal erred when it concluded that MCI had no wish, and no need, to prosecute its claims against TWE to their conclusion. MCI argued that the fact that Mr Elliott had publicly expressed the view that the first MCI proceeding might settle before judgment did not make either the cause of action or the question of ultimate success immaterial. The conclusion reached by the majority failed to pay due regard to the fact that no settlement of a class action in the Supreme Court of Victoria can occur without the sanction of that Court. In addition, the majority's reasoning ignored the fact that the law has long recognised that cases may be settled on terms which are different from, or go well beyond, the orders that could reasonably be made by a court in a judgment.

[90] The proper outcome in the first MCI proceeding should have been that which was ordered by Ferguson J and approved by Kyrou JA, namely, restraining Mr Elliott but finding no abuse of process.

Unjustifiable oppression

[91] MCI took issue with TWE's submissions in support of its unjustifiable oppression argument. Contrary to the submissions of TWE, MCI submitted that, once the first MCI proceeding was permanently stayed, that proceeding was brought to an end. It then submitted that there is no abuse of process where a new proceeding is commenced following the termination of prior proceedings (as to which see *Thirteenth Corp Pty Ltd v State* (2006) 232 ALR 491; [2006] FCA 979 per Jessup J). MCI also submitted that there was a fundamental contradiction between the position adopted by TWE for the purpose of its issue estoppel arguments (viz that the first MCI proceeding has been finally determined) and the position adopted for the purpose of its unjustifiable oppression argument (viz that the first MCI proceeding is still on foot).

Bringing administration of justice into disrepute

[92] MCI met this argument advanced by TWE by submitting that nothing of substance was added to TWE's submissions by the arguments advanced by it under this heading. MCI submitted that, under this heading, TWE merely repeated the same points made by it in support of its arguments based upon issue estoppel and collateral abuse of process.

Orders 2 and 3

[93] The only specific submission made by TWE in support of Orders 2 and 3 claimed in its Interlocutory Application filed in this Court was made in par 60 of its Written Submissions. In that paragraph, TWE said:

> The Court may consider that these alternative orders can be made, instead of an order for a permanent stay or dismissal, although this is only put as a possible but not preferred result.

[94] No specific submissions in support of these orders were made orally by TWE.

[95] Notwithstanding that no submission was specifically directed by TWE to these claims for relief, I took TWE to be relying upon all of the submissions which it made in support of its abuse of process claim as justifying the making of one or other of these orders.

[96] MCI too did not address specific submissions to TWE's claims for orders in the terms of Orders 2 and 3.

Discussion and decision (abuse of process)

[97] The High Court has said on more than one occasion that it is not possible to describe exhaustively what will constitute an abuse of process (*Batistatos v Roads and Traffic Authority of New South Wales (No S530/2005)* (2006) 226 CLR 256; 85 ALR 1 at 11; 227 ALR 425; 45 MVR 288; [2006] HCA 27 (*Batistatos*) at [9]–[15] per Gleeson CJ, Gummow, Hayne and Crennan JJ and the cases cited in those paragraphs; *PNJ* at [3] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[98] In *Ridgeway v R* (1995) 184 CLR 19 at 74–5; 129 ALR 41 at 83 (*Ridgeway*), Gaudron J observed that the courts have resisted laying down hard and fast rules as to what constitutes an abuse of process. Her Honour continued (at CLR 75; ALR 83):

> Abuse of process cannot be restricted to "defined and closed categories" (*Hamilton v Oades* (1989) 166 CLR 486 at 502; 15 ACLR 123 at 131–2, citing *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639; 71 ALR 457 at 475–6 and *Tringali v Stewardson Stubbs & Collett Pty Ltd* (1966) 66 SR (NSW) 335 at 340, 344. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25–6, 47–8, 74; 87 ALR 577 at 578, 594, 613–14; *Walton v Gardiner* (1993) 177 CLR 378 at 393–5; 112 ALR 289 at 298–9; *Rogers v R* 181 CLR 251 at 254–5, 285–6; 123 ALR 417 at 419, 443; (1994) 68 ALJR 688 at 689, 706) because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case (See *Dietrich v R* (1992) 177 CLR 292 at 328–9, 364; 109 ALR 385 at 410, 437–8). That is

not to say that the concept of "abuse of process" is at large or, indeed, without meaning. As already indicated, it extends to proceedings that are instituted for an improper purpose (As to what constitutes improper purpose, see *Williams v Spautz* (1992) 174 CLR 509 at 526–30, 532–7, 553–6; 107 ALR 635 at 646-50, 651-5; 667-70; see also at CLR 543–51; ALR 659–67) and it is clear that it extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" (*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247; 79 ALR 9 at 46) or "productive of serious and unjustified trouble and harassment" (*Hamilton v Oades* (1989) 166 CLR 486 at 502; 85 ALR 1 at 11; 15 ACLR 123 at 131–2).

[99] In *Ridgeway*, at CLR 46; ALR 60, Brennan J affirmed the views which he had expressed in *Jago v District Court (NSW)* (1989) 168 CLR 23; 87 ALR 577 (*Jago*) at CLR 47–8; ALR 594 where his Honour explained that:

> An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve.

[100] In the same case, at CLR 60; ALR 71, Toohey J said that:

> The concept of abuse of process is not a precise one. Nor can it be; it gives effect to a concern on the part of courts that may arise in a variety of circumstances. But at the heart of the concept lies the legitimate power of the courts to stay prosecutions brought in exercise of the prerogative of the Crown. In *Connelly v Director of Public Prosecutions* ([1964] AC 1254 at 1354; [1964] 2 All ER 401 at 440) Lord Devlin addressed the fundamental issue in this way:
>
> > "Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."
>
> That passage asserts the power of the courts to act; it does not, and does not purport to, identify the scope of the power.
>
> Generally, abuse of process derives from a concern that judicial process be not invoked for an improper purpose (the issue in *Williams v Spautz*) and that the process be not abused in a way that interferes with the conduct of a fair trial (the issue in *Jago v District Court (NSW)* and *Walton v Gardiner*). There are distinct aspects of abuse of process in that proceedings may be stayed if it appears that they have been brought for an improper purpose even though there is no reason to doubt that the accused will receive a fair trial. Equally, an accused may not receive a fair trial, by reason of delay for instance, though there is no improper purpose in bringing the proceedings. But the power of a superior court to stay its proceedings on grounds of abuse of process is not confined to those situations (*Walton v Gardiner* (1993) 177 CLR 378 at 395; 112 ALR 289 at 300).

[101] At CLR 61; ALR 72, his Honour observed that a finding of abuse of process does not necessarily lead to a stay of proceedings and that there may be other ways of remedying the abuse.

[102] In *PNJ* at [3], the Court said:

> It is not possible to describe exhaustively what will constitute an abuse of process (*Batistatos v Roads and Traffic Authority of New South Wales (No S530/2005)* (2006) 226 CLR 256; 27 ALR 425; 45 MVR 288; [2006] HCA 27 at [9]–[15] (*Batistatos*) per Gleeson CJ, Gummow, Hayne and Crennan JJ). It may be accepted, however, that many cases of abuse of process will exhibit at least one of three characteristics (*Rogers v R* (1994) 181 CLR 251 at 286; 123 ALR 417 at 443–4 per McHugh J. See also *Batistatos*

at [15] per Gleeson CJ, Gummow, Hayne and Crennan JJ):

(a) the invoking of a court's processes for an illegitimate or collateral purpose;
(b) the use of the court's procedures would be unjustifiably oppressive to a party; or
(c) the use of the court's procedures would bring the administration of justice into disrepute.

[103] Although *PNJ* was a criminal proceeding, the remarks made by the Court were not limited to criminal proceedings but were intended to apply to both civil and criminal proceedings. This much is made clear from the references to *Batistatos* in the footnotes referred to in [3] of *PNJ*, *Batistatos* itself being a civil case and some of the cases discussed in the passages from *Batistatos* which are referred to in the footnotes to [3] of *PNJ* also being civil cases. This is consistent with observations made by the Court in *Batistatos* at [8] and by the majority in *Moti v R* (2011) 245 CLR 456; 283 ALR 393; [2011] HCA 50 at [11].

[104] In argument before me in the present case, both parties drew heavily upon the High Court judgment in *Spautz*.

[105] In *Spautz*, Dr Spautz, who was a Senior Lecturer in the Department of Commerce at the University of Newcastle, commenced an action against that university for wrongful dismissal. Dr Spautz had been dismissed for misconduct constituted by his campaign against another academic who had been appointed as the Chair of Commerce at the same university. Dr Spautz believed that he (Spautz) should have been appointed to that position.

[106] Subsequently, Dr Spautz laid criminal informations against various officers of the university alleging a number of offences including criminal conspiracy to defame and conspiracy to injure him without justification and by illegal means. On the application of some of those persons for declarations that particular prosecutions were an abuse of process, the primary judge found that Dr Spautz's predominant purpose in instituting and maintaining the criminal proceedings was to exert pressure upon the university to reinstate him and/or to agree to a favourable settlement of his wrongful dismissal case. In light of those findings, the primary judge made declarations as sought by the persons against whom the informations had been laid and stayed the prosecutions permanently.

[107] On appeal, the New South Wales Court of Appeal overturned the primary judge's decision. It did so by majority. The leading majority judgment in that Court was delivered by Priestley JA who considered that the governing principle was that supervising courts should restrict use of their power to control abuses of process in relation to criminal proceedings to those cases in which the exercise of the power is the only way of ensuring that an accused person is not deprived of a fair trial by reason of such abuse. His Honour concluded that, on the materials before the Court, the persons against whom the informations had been laid would not have been deprived of a fair trial. The Court of Appeal rejected a challenge to the primary judge's central findings concerning Dr Spautz's predominant purpose which I have extracted at [109] and [111] below.

[108] Dr Spautz's opponents then appealed to the High Court. By majority, that Court allowed the appeal. Four judgments were delivered. The first was the judgment of the plurality (Mason CJ, Dawson, Toohey and McHugh JJ). Each of Brennan J (as his Honour then was), Deane J and Gaudron J delivered a separate judgment. Both Deane J and Gaudron J dissented in the result.

[109] At CLR 516; ALR 638, the plurality recorded the primary judge's critical finding in the following terms:

The trial judge's findings of fact and the conclusions reached by the Court of Appeal

After examining in detail the conduct of Dr. Spautz during his self-proclaimed campaign for justice, Smart J. made this finding of fact:

> "The predominant purpose of Dr. Spautz in instituting *and maintaining* the criminal proceedings, the subject of the present applications, against Profs. Gibbs and Williams and Mr. Morris was to exert pressure upon the University of Newcastle to reinstate him and/or to agree to a favourable settlement of his wrongful dismissal case." (Emphasis added.)

As Priestley J.A. noted in the Court of Appeal, there was ample material before the trial judge from which he could draw that conclusion.

[110] The primary judge also found that Dr Spautz had other purposes in instituting the various criminal proceedings and that most of those purposes were also improper.

[111] At CLR 517; ALR 639, the plurality explained the ultimate conclusion of the primary judge in the following terms:

The trial judge expressed his understanding of the concept of abuse of process, which was based on the formulation by Hunt J. in *Spautz v Williams* ([1983] 2 NSWLR, at 539), in these terms:

> "The essence of an abuse of process action is that the proceedings complained of were instituted and/or maintained for a purpose other than that for which they were properly designed or exist, or to achieve for the person instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process. The focus in such a suit is on the purpose for which the proceedings exist, and on the dominant purpose of the person charged with abuse of process in instituting them."

His Honour then concluded that the fundamental purposes of a criminal defamation prosecution are to punish the defamer and to protect the community and that the dominant purpose of the prosecutor must be to bring the offender to justice. As the respondent's predominant purpose in bringing the prosecutions, namely, to secure his reinstatement, was improper and ulterior, the trial judge declared each of the relevant proceedings an abuse of process and ordered them stayed permanently.

[112] At CLR 518; ALR 640, the plurality said that it is well established that Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process. In support of that proposition, their Honours cited *Clyne v Bar Association (NSW)* (1960) 104 CLR 186 at 201; [1960] ALR 574; *Barton v R* (1980) 147 CLR 75 at 96, 107 and 116; 32 ALR 449 at 459–60, 468 and 475 and*Jago*. The jurisdiction extends to both civil and criminal proceedings.

[113] At CLR 521–2; ALR 642–3, the plurality discussed the power to prevent an abuse of process when the conduct on the part of the claimant in instituting and maintaining the relevant proceeding constitutes oppression. At CLR 522; ALR 642, after referring to *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478; [1977] 2 All ER 566 (*Goldsmith*), their Honours said that the Court would prevent an abuse of process where, though the process might appear to be entirely proper and correct, it was used for an improper purpose. The particular example with which the plurality dealt at this point in their judgment concerned the case in which the plaintiff does not wish to pursue his or her cause of action to a conclusion because he or she intends to use the proceeding for a collateral and improper purpose.

[114] At CLR 522–6; ALR 643–6, the plurality discussed the relationship between the inherent jurisdiction to prevent an abuse of process and the tort of collateral abuse of process.

[115] At CLR 524; ALR 645, the plurality cited with apparent approval the following passage from the judgment of Isaacs J in *Varawa* (at 91):

> In the sense requisite to sustain an action, the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose.

[116] At CLR 524–5; ALR 645, the plurality also quoted with apparent approval the statement of principle made by Isaacs J in *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509 at 521–2; 21 ALR 425 (*Dowling*) where his Honour said:

> If the object sought to be effected by the process is within the lawful scope of the process, it is a *use* of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the fraud may be an answer; if, however, the object sought to be effected by means of the process is outside the lawful scope of the process, and is fraudulent, then — both circumstances concurring — it is a case of *abuse* of that process, and the Court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse. *Grainger v Hill* laid down the distinction.

[117] Their Honours then moved on to refer to *R v Henderson* [1898] AC 720 at 731 (*Henderson*). Having done so, their Honours observed that the existence of an unworthy or reprehensible motive for bringing the action was not enough and that it must appear that the *purpose* sought to be effected by the litigant in bringing the proceeding was not within its scope and was improper.

[118] At CLR 526–7; ALR 646–7, the plurality said:

> *The boundaries of abuse of process*
>
> The observations of the Privy Council in *R v Henderson* ([1898] AC, at 731) and those of Isaacs J. in *Dowling* ((1915) 20 CLR at 521–2, 21 ALR 425), to which we referred earlier, represent an attempt to achieve a formulation which keeps the concept of abuse of process within reasonable bounds. To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.
>
> Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.
>
> It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed (*Re Majory*, [1955] Ch 600 at 623–4) or some collateral advantage beyond what the law offers (*Goldsmith v Sperrings Ltd*, [1977] 1 WLR at 498–9; [1977] 2 All ER at 581–2; see also *Varawa* (1911) 13 CLR at 91). So, in *Dowling* ((1915) 20

CLR at 524), Isaacs J. pointed out that "if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process". However, because the Society wished to use the process for the very purpose for which it was designed, there was no abuse of process.

[119] At CLR 527–8; ALR 647, their Honours stressed that it is the *use* of the proceeding which must be examined and which may constitute an abuse of process. They also held that neither the authorities in England nor those in Australia require that there be an improper act as an essential ingredient of the concept of abuse of process.

[120] At CLR 528; ALR 648, the plurality said:

> In his dissenting judgment in *Goldsmith v Sperrings Ltd*, Lord Denning M.R. was of the view that to issue a writ for an improper purpose constitutes without more an abuse of process ([1977] 1 WLR at 489–90; [1977] 2 All ER at 581–2). His Lordship appears to have regarded the cases on the tort of collateral abuse of process, including *Grainger v Hill*, as supporting this proposition. In this respect, Lord Denning may well have been incorrect. However, his Lordship was right in treating the comments of Lord Evershed M.R., when he delivered the judgment of the Court of Appeal in *Re Majory*, as supporting the proposition. There, Lord Evershed referred ([1955] Ch at 623–4) to a general rule "that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused". In our view, that is a correct statement of the principle.

[121] At CLR 529; ALR 648–9, the plurality held that it was sufficient that the predominant purpose for the institution and maintenance of the proceeding is an improper purpose in order to found an entitlement to restrain or terminate the proceeding as an abuse of process. The improper purpose need not be the sole purpose for the institution or maintenance of the proceeding. The plurality also held that it was well established that the onus of satisfying the Court that there is an abuse of process lies upon the party alleging it. They said that the onus was *"a heavy one"* and that the power to grant a permanent stay is one to be exercised only in the most exceptional circumstances.

[122] At CLR 530–1; ALR 650, the plurality expressed their ultimate conclusion allowing the appeal in the following terms:

> *Conclusion*
>
> Although the primary judge did not express his findings in terms that the use of the proceedings was for an improper purpose, the findings are so expressed as to make it clear that Dr Spautz threatened to use the proceedings for an improper purpose and that his commencement and maintenance of the proceedings were, in pursuance of that purpose, undertaken predominantly to that end. There was therefore a relevant use of the proceedings for an improper purpose.

[123] Justice Brennan commenced his Reasons for Judgment with the following (at CLR 531; ALR 650):

> The jurisdiction of a court to prevent an abuse of its process and the power of a court to mould its procedures to ensure a fair trial are distinct aspects of curial authority (*Barton v R* (1980) 147 CLR 75 at 95–6; *Jago v District Court (NSW)* (1989) 168 CLR 23; 87 ALR 577). In *Jago v District Court (NSW)*, this Court considered the power of

a court to eliminate or diminish the prejudice created by an unjustifiable delay in bringing an accused person to trial and the manner in which that power should be exercised. That case was concerned with the court's procedures to ensure a fair trial. In this case, the other aspect of curial authority falls for consideration.

As I said in *Jago* (at CLR 47–8; ALR 594):

> "An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve … Although it is not possible to state exhaustively all the categories of abuse of process, it will generally be found in the use of criminal process inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct or the exoneration of the accused from liability to punishment for the conduct alleged against him. When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose."

[124] His Honour then briefly described the criminal proceedings which Dr Spautz had instituted.

[125] Then, at CLR 532–3; ALR 651–2, his Honour said:

… To establish that the proceedings in the Local Court are an abuse of process which the Supreme Court of New South Wales ought to stay (In exercise of its supervisory jurisdiction: see s 23 of the Supreme Court Act 1970 (NSW) and *Herron v McGregor* (1986) 6 NSWLR 246 at 251), it is necessary to show that the purpose of those respective proceedings — seen as part of an entire criminal process — is not a purpose which they are designed to serve, that is, not a legitimate purpose. But what is meant by purpose when used in reference to a "proceeding"?

Purpose, when used in reference to a transaction, has two elements: the first, a result which the transaction is capable of producing; the second, the result which the person or persons who engage in or control the transaction intend it to produce. Or, to express the concept in different terms, the purpose of a transaction is the result which it is capable of producing and is intended to produce (See the reference to intention in *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 370, 381; 39 ALR 521 at 530, 539). When the transaction is the commencement or maintenance of a legal proceeding, its purpose is to be ascertained by reference to the intention of the party who commences or maintains it (hereafter "the plaintiff"). The intention of the plaintiff can be proved by what the plaintiff said and did, and from any inference that might be drawn from what was said or done (including the commencing and maintaining of the proceeding) in the circumstances of the case. The testimony of the plaintiff, though admissible to prove intention, is not conclusive.

The purposes which legal proceedings are designed to serve are the protection or vindication of particular legal rights or immunities, the maintenance or affection of particular legal relationships, and the imposition or enforcement of particular legal penalties, liabilities and obligations. The means by which these purposes are achieved in a proceeding consist in the verdict which might be returned or the order which might be made in the proceeding, in the consequences that flow naturally from a verdict that might be returned or from an order that might be made (for example, the vindication of a plaintiff's reputation flowing from a verdict in a civil action for defamation) and in compromise of the claims made in the proceeding. The achievement of any of the purposes mentioned by any of the means mentioned is within the scope of the remedy for which a proceeding is designed. But a proceeding may be intended to produce and may be capable of producing results that are not within the scope of the remedy.

The possibility of producing results that are not within the scope of the remedy arises from the variety of situations and interests that can be affected by the commencement or maintenance of a proceeding and, in particular, by the burdens, the delay and the publicity of litigation. Where a plaintiff commences or maintains a proceeding with the

> intention of obtaining a result falling outside the scope of the remedy, a question can arise as to whether the purpose of the proceeding is legitimate or not.
>
> In the early formulation of the test of an abuse of process, emphasis was placed on the scope of the process to determine the legitimacy of the purpose of a proceeding …

[126] After referring to *Grainger v Hill* (1838) 132 ER 769; [1938] EngR 365, Brennan J noted that the criterion adopted by the Court for abuse of process was the character of the result which the plaintiff intended to achieve and that character was to be ascertained by comparing the object which the plaintiff intended to achieve with the scope of the process by which he intended to achieve it.

[127] At CLR 533–4 CLR 652–3, his Honour then discussed *Dowling* and *Henderson*. At CLR 534; ALR 653, his Honour held that the pursuit of a legitimate remedy is not converted to an abuse of process by an unworthy and ulterior motive. His Honour then said (at CLR 534–6; ALR 653–4):

> These cases show that a plaintiff's intention to achieve a result must be distinguished from his motive for commencing or maintaining a proceeding, though the distinction may be elusive. In *Bayne v Blake* ((1908) 6 CLR 382 at 403; 14 ALR 426), O'Connor J. cited with approval a statement by Holroyd J. in a Victorian case (*Re Morrissey* (1899) 24 VLR 776 at 778; 5 ALR 129):
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>> "'I think that if the object of an act is legal, and there is no wrongful intention in it, but the intention is to do something also legal, founded upon that act — it is perfectly immaterial what the ulterior motive of the party may be — what it may be that prompts him to do the legal act.'"
>
> That principle was held to be applicable to an act done in exercise of a legal right arising under a contract or other instrument in *Chapman v Honig* ([1963] 2 QB 502 at 520; [1963] All ER 513 at 520) in which Pearson L.J. said:
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>> "I cannot think of any case in which such an act might be invalidated by proof that it was prompted by some vindictive or other wrong motive. Motive is disregarded as irrelevant."
>
> In a given case, a distinction may have to be drawn between the purpose of the proceeding and the motive of the plaintiff in commencing or maintaining it (*XCO Pty Ltd v Federal Commissioner of Taxation* (1971) 124 CLR 343 at 350–1). That distinction depends on a disparity between the plaintiff's intention and the plaintiff's motives. Intention relates to the result which the plaintiff desires to obtain by commencing or maintaining the proceeding; motive relates to all the considerations which move that party to commence or maintain the proceeding. The desired result is no doubt an element of the moving considerations, but it does not exhaust those considerations.
>
> In a case where a plaintiff intends to obtain relief within the scope of the remedy available in a proceeding, there is no abuse of process whatever the plaintiff's motives may be. Isaacs J. said in *Dowling* ((1915) 20 CLR at 521–2):
>
>> "If the object sought to be effected by the process is within the lawful scope of the process, it is a *use* of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the fraud may be an answer; if, however, the object sought to be effected by means of the process is outside the lawful scope of the process, and is fraudulent, then — both circumstances concurring — it is a case of *abuse* of that process, and the Court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse."

For the reasons given by the majority judgment in this case, his Honour's reference to fraud should be understood as importing a purpose outside the scope of the remedy and improper.

There is no impropriety of purpose (whatever may be said of motive) when a plaintiff commences or maintains a proceeding desiring to obtain a result within the scope of the remedy, even though the plaintiff has an ulterior purpose — or motive — which will be fulfilled in consequence of obtaining the legal remedy which the proceeding is intended to produce. To amount to an abuse of process, the commencement or maintenance of the proceeding must be for a purpose which does not include — at least to any substantial extent — the obtaining of relief within the scope of the remedy. As Isaacs J. said in *Varawa v Howard Smith & Co Ltd*. ((1911) 13 CLR 35 at 91):

> "the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose."

Putting to one side, then, the cases where the plaintiff intends to obtain relief within the scope of the remedy, the problematic cases arise when the plaintiff's purpose is to obtain some benefit, to impose some obligation or to affect some relationship otherwise than by verdict, by order or by compromise of the particular claims made in the proceeding …

[128] At CLR 536–7; ALR 655, his Honour discussed the English decisions of In *Re Majory* [1955] Ch 600 at 623–4 and *Goldsmith*. After doing so, his Honour said (at 537):

… I would formulate the test in this way: if there be a reasonable relationship between the result intended by the plaintiff and the scope of the remedy available in the proceeding, there is no abuse of process. If there be mixed purposes — some legitimate, some collateral — I would restate his Lordship's test that "but for his ulterior purpose, [the plaintiff] would not have commenced proceedings at all". So expressed, the test casts on the other party an onus of proving what the plaintiff would not have done if he had not formed the intention of obtaining a collateral advantage. That onus may be impossible to discharge. If that onus were discharged, the other party would establish that the plaintiff had not commenced or maintained the proceeding for any substantial legitimate purpose. The gravamen of the test, I apprehend, is that the plaintiff did not commence or maintain the proceeding for any substantial legitimate purpose. I would state the test in that way. Substantiality is a matter of degree, ascertained by reference to the intention attributed to the plaintiff in all the circumstances of the case. At the end of the day, the court must determine, by reference to the intention attributed to the plaintiff, not merely whether the collateral purpose of the proceeding outweighs any legitimate purpose but whether the plaintiff entertained any substantial intention that the proceeding should achieve a legitimate purpose.

For these reasons, I would hold that an abuse of process occurs when the only substantial intention of a plaintiff is to obtain an advantage or other benefit, to impose a burden or to create a situation that is not reasonably related to a verdict that might be returned or an order that might be made in the proceeding.

[129] His Honour then moved to discuss the application of the relevant principles to the case before the Court. In concluding, his Honour found that the appeal should be allowed and the trial judge's orders restored.

[130] Justice Deane took a different view of the relevant law from the views expressed by the plurality and Brennan J.

[131] Justice Gaudron, on the other hand, agreed with the explanation of the relevant principles given by the plurality. At CLR 552–4; ALR 667–9, her Honour said:

> It is convenient to adopt the expression "improper purpose" to describe the kind of purpose that must be established before proceedings or some step in proceedings can be characterized, by reason of the purpose involved, as an abuse of process. And, on that basis, I can at once state my agreement with Mason C.J., Dawson, Toohey and McHugh JJ. that an improper purpose is sufficient, without an improper act, to justify a stay. That, of course, says nothing as to the tort of collateral abuse of process which, I am inclined to think, requires some act amounting to a misuse or attempted or threatened misuse of the process involved. And I agree with their Honours that a stay may be granted on the basis of improper purpose even though there are reasonable grounds for the proceedings or for the taking of the particular step concerned. However, I differ from their Honours in that, in my view, something over and above what is involved in this case is necessary before a purpose can be identified as improper.
>
> The kind of purpose that will indicate that proceedings should be stayed as an abuse of process is the same kind that marks out the tort of collateral abuse of process, they being different remedies deriving from the same law and based on those principles which protect the courts and their processes (*Re Majory* [1955] 1 Ch 600 at 623–4). The tort was recognized by this Court in *Varawa v Howard Smith & Co Ltd.* ((1911) 13 CLR 35. For earlier discussion see *Bayne v Blake* (1908) 6 CLR 382 at 401; *Bayne v Blake* (1909) 9 CLR 347 at 358–9; 15 ALR 486) and in *Dowling v Colonial Mutual Life Assurance Society Ltd* ((1915) 20 CLR 509; 21 ALR 425). However, in neither of those cases was the tort established. The tort was made out in *QIW Retailers Ltd v Felview Pty Ltd* ([1989] 2 Qd R 245). And in *Hanrahan v Ainsworth* ((1990) 22 NSWLR 73) it was held that there was sufficient evidence to be left to a jury. These appear to be the only reported cases in this country in which a plaintiff has succeeded on the tort or on some aspect of it. The same pattern can be observed in other jurisdictions, there being few successful claims since *Grainger v Hill* ((1938) 132 ER 769; (1838) 4 Bing NC 212)), the case in which the tort was established. Successful claims were made in *Gilding v Eyre* ((1861) 10 CBNS 592; 142 ER 584) in the United Kingdom, in *Guilford Industries Ltd v Hankinson Management Services Ltd.* ((1973) 40 DLR (3d) 398) in Canada and in *Dishaw v Wadleigh* ((1897) 44 N.Y.S. 207) in the United States of America. The list is not exhaustive.
>
> The cases in this area speak in terms that are not entirely explicit. The terms used include "[a purpose] foreign to the scope of the process" (*Varawa v Howard Smith & Co Ltd* (1911) 13 CLR 35 at 55, per Griffith CJ. See also, at 70, per O'Connor J.), "an object not within the scope of the process" (*Parton v Hill* (1864) 10 LT (NS) 414 at 415), "some collateral advantage … [other than] the purpose for which such proceedings are … designed" (*Re Majory* [1955] 1 Ch 600 at 623–4), or a "collateral advantage … beyond what the law offers" (*Goldsmith v Sperrings Ltd*., [1977] 1 WLR 478 at 498–9; [1977] 2 All ER 566 at 582). These expressions can be traced to *Grainger v Hill* where the expressions used included "an object not within the scope of the process" ((1838) 4 Bing (NC) at 221, per Tindal CJ [132 ER at 773]) and "an ulterior purpose" (ibid., at 224, per Bosanquet J. [ER at 774]. See also *Varawa v Howard Smith & Co Ltd* (1911) 13 CLR at 91, per Isaacs J). The terms leave it to be discovered from the facts of the cases in which abuse has been established (or potentially established) what it is that makes a purpose "foreign" or "ulterior".
>
> I have already stated my agreement with the conclusion of Mason C.J., Dawson, Toohey and McHugh JJ. that an improper act is not essential. However, it should be noted that many, if not all, of the cases in this area and in which it has been held that there was an abuse of process have involved some positive act. That is not surprising: many cases are cases in tort where damage is essential, and it is difficult to conceive of damage occurring in this area without some act or threat; and, at least ordinarily, improper purpose is discoverable only because of some act done in furtherance of the

purpose. Notwithstanding my view that improper purpose is sufficient to justify a stay, it is necessary to have regard to the cases involving an improper act for, otherwise, very little useful guidance is to be had.

The cases in which abuse of process has been established have usually involved an act described in terms such as "extortion" (*Gilding v Eyre* (1861) 10 CB (NS) at 605 [142 ER at 590]. See also *Guilford Industries* (1974) 40 DLR (3d) at 405, where the act was described as obtaining "a settlement by means of legal 'blackmail'"), "coercing" (*Dishaw v Wadleigh* (1897) 44 NYS at 210) or "bring[ing] pressure to bear … to force [a result]" (*QIW Retailers Ltd v Felview*, [1989] 2 Qd R at 258). These terms signify a claim or demand made without right and without claim of right. And without going to the detail of the cases in which those expressions were used, it is fair to say that, save in the case of *Gilding v Eyre*, what was demanded was unrelated to the right, interest or wrong asserted in the proceedings which were held to constitute an abuse of process or, in the case of ancilliary proceedings, the right, interest or wrong asserted by the particular process involved.

[132] In *Walton v Gardiner* (1993) 177 CLR 378; 112 ALR 289, complaints which had been made against three medical practitioners were referred to the Medical Tribunal constituted under the Medical Practitioners Act 1938 (NSW). The complaints alleged misconduct in the treatment of patients at Chelmsford Private Hospital in Sydney. The complaints were accompanied by wider allegations of the inappropriateness of the kind of treatment being given at Chelmsford, including the use of deep sleep therapy in conjunction with electro-convulsive therapy. In 1986, on the application of two of the doctors in question, the Court of Appeal (NSW) granted a stay of the proceedings before the Tribunal as against those practitioners. The basis for the stay was that there had been a prolonged delay in dealing with the alleged misconduct after the relevant facts had become known. The Medical Tribunal itself stayed proceedings against the third practitioner. A subsequent Royal Commission reported adversely on the conduct of all three practitioners. In 1991, fresh complaints were made against them which, though not the same as the earlier complaints, arose out of the same pattern of professional conduct as had given rise to the earlier complaints and raised issues which substantially overlapped those that would have arisen under the earlier complaints. The Court of Appeal (NSW) stayed the new complaints on the ground that they were so unfairly and unjustly oppressive as to constitute an abuse of process.

[133] The High Court, by majority, held that the proceedings had been properly stayed.

[134] The majority (Mason CJ, Deane and Dawson JJ) recounted the history of the disciplinary proceedings against Dr Gardiner and the other two doctors at CLR 382–92; ALR 290–7 and then discussed the grounds that had been advanced in support of the stay granted by the Court of Appeal.

[135] At CLR 392; ALR 297–8, their Honours referred to the essence of the judgments in the Court of Appeal. They noted that Gleeson CJ and Kirby P considered that the Court of Appeal has power to make an order staying proceedings if it is satisfied that the continuation of the proceedings would be *"so unfairly and unjustifiably oppressive"* as to constitute an abuse of process. Mahoney JA considered that the question for the Court of Appeal was whether, in all the circumstances, the continuation of the proceedings before the Tribunal would involve unacceptable injustice or unfairness. The majority judges in the High Court observed that, in their view, the test propounded by Mahoney JA was, in substance, the same as that which had been propounded by Gleeson CJ and Kirby P. The majority in the High Court expressly approved the approach adopted by the Court of Appeal.

[136] At CLR 392–3; ALR 298–9, the majority said:

> The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail (See, e.g., *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 at 220–1; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128–30; [1965] ALR 636). Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them (See, generally, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; 97 ALR 124). Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings (See, e.g., *Reichel v Magrath* (1889) 14 App Cas 665 at 668; *Connelly v Director of Public Prosecutions,* [1964] AC 1254 at 1361–2; [1964] 2 All ER 401). The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in *Hunter v Chief Constable of West Midlands* ([1982] AC 529 at 536; [1981] 3 All ER 727 at 729) as "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".

[137] The majority then referred to *Jago* and said that at least three of the five members of the Court who decided that case had specifically rejected the narrower view that a court's power to protect itself from an abuse of process in criminal proceedings is limited to traditional notions of abuse of process. At CLR 393–5; ALR 299–300, the majority said:

> His Honour quoted, with approval, the following remarks of Richardson J. of the New Zealand Court of Appeal in *Moevao v Department of Labour* ([1980] 1 NZLR 464 at 481):
>
> > "public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."
>
> Deane J. expressed a similar view in his judgment in *Jago* at CLR 58; ALR 602):
>
> > "The power of a court to stay proceedings in a case of unreasonable delay is not confined to the case where the effect of the delay is that any subsequent trial must necessarily be an unfair one. Circumstances can arise in which such delay produces a situation in which any continuation of the proceedings would, of itself, be so

> unfairly and unjustifiably oppressive that it would constitute an abuse of the court's process. Multiple prosecutions arising out of the one set of events but separated by many years or a renewed charge brought years after the dismissal of earlier proceedings for want of prosecution could, in a case where the relevant material had been available to the prosecution from the outset and depending on the particular facts, provide examples. Where such circumstances exist, the power of a court to prevent abuse of its process extends to the making of an order that proceedings be permanently stayed."
>
> In her judgment in *Jago* (ibid, at CLR 74; ALR 613), Gaudron J. stressed that the power of a court "to control its own process and proceedings is such that its exercise is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands." Her Honour added the comment (ibid, at CLR 74; ALR 614) "that, at least in civil proceedings, the power to grant a permanent stay should be seen as a power which is exercisable if the administration of justice so demands, and not one the exercise of which depends on any nice distinction between notions of unfairness or injustice, on the one hand, and abuse of process, on the other hand". Subsequently in her judgment (ibid, at CLR 77; ALR 616–6), her Honour made clear that, subject to some refinements which she identified, that comment was also appropriate to be adopted in relation to criminal proceedings.
>
> It should be mentioned that there was considerable discussion in the course of argument about the effect of some comments in the judgment of the majority of the Court in *Williams* at CLR 519–20; ALR 640–1. When those comments are properly understood in context, however, there is nothing in them which supports the proposition that a permanent stay of proceedings can only be ordered on the ground of either improper purpose or no possibility of a fair hearing. Indeed, careful examination of them discloses that they lend some support to a denial of that proposition (ibid, at 520, see, in particular, the approving reference to the judgment of Richardson J. in *Moevao v Department of Labour,* [1980] 1 NZLR 464 at 482).

[138] Justice Brennan was of the opinion that the Court of Appeal's supervisory jurisdiction under s 23 of the Supreme Court Act 1970 (NSW) is confined to ensuring that the relevant tribunal acts within its jurisdiction and power, that its jurisdiction has not been invoked for an impermissible purpose and that the way in which it exercises its jurisdiction is not oppressive so as to prevent the proceeding before it from being fairly tried.

[139] At CLR 416; ALR 316, his Honour said:

> The traditional view with respect to the scope of abuse of process has been described as "narrower" than the scope of abuse of process endorsed by some of the judgments in *Jago* (at CLR 27–30, 58, 74; ALR 579–81, 602, 613–4). I adopt the narrower view not only because it is traditional but because it denies to judges and to other repositories of jurisdiction conferred for the public benefit (that being the character of the jurisdiction conferred on the Tribunal by Pt 3A of the Act) any discretion to refuse to do justice according to law. It is the very absence of that discretion which maintains the rule of law and the authority of courts and of judicial tribunals to administer the law.

[140] His Honour held that the stay order granted by the Court of Appeal was erroneous in principle.

[141] At CLR 420; ALR 319–20, Toohey J indicated general agreement with the reasons of Brennan J. At CLR 421; ALR 320;, his Honour emphasised that *Walton v Gardiner* was not a case where the basis of the alleged abuse of process was improper purpose.

[142] In *Rogers v R* (1994) 181 CLR 251; 123 ALR 417 (*Rogers*), the High Court again dealt with the question of abuse of process in the criminal context.

[143] At CLR 255; ALR 419, Mason CJ said:

> I agree with the reasons given by Deane and Gaudron JJ. for concluding that the prosecution's tender of the records of interview constituted a direct challenge to the 1989 determination and was therefore an abuse of process. The concept of abuse of process is not confined to cases in which the purpose of the moving party is to achieve some foreign or ulterior object, in that it is not that party's genuine purpose to obtain the relief sought in the second proceedings. The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories (*Hunter v Chief Constable,* [1982] AC at 536; [1981] 3 All ER at 729, per Lord Diplock). Likewise, it would be a mistake to treat the discussion in judgments of particular circumstances as necessarily confining the concept of abuse of process.

[144] The Chief Justice adverted to the majority judgment in *Walton v Gardiner* at CLR 393 and 395; ALR 298–9 and 300 in order to emphasise the proposition that the power of a superior court to grant a permanent stay of proceedings was not limited to cases where the proceeding was brought for an improper purpose or where there was no possibility of a fair hearing.

[145] After referring to *Walton v Gardiner*, the Chief Justice said (at CLR 256; ALR 420):

> … there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute. This led the majority in *Walton v Gardiner* to state that the question whether criminal proceedings should be permanently stayed was to be determined by a weighing process involving a balancing of a variety of considerations ((1993) 177 CLR at 395–6; ALR 300). Those considerations, which reflect the two aspects of abuse of process outlined above, include (ibid., at CLR 396; ALR 300):
>
> > "the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."
>
> In the present case, a weighing of these considerations inevitably compels the conclusion that a stay should be ordered. …

[146] Justice McHugh commenced his discussion of abuse of process at CLR 286; ALR 443–4. There, and at CLR 287; ALR 443–4, his Honour said:

> Inherent in every court of justice is the power to prevent its procedures being abused (*Hunter v Chief Constable of West Midlands* [1982] AC 529 at 536; [1981] 3 All ER 727 at 729). Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute. Many, perhaps the majority of, cases of abuse of procedure arise from the institution of proceedings. But any procedural step in the course of proceedings that have been properly instituted is capable of being an abuse of the court's process. In *Walton v Gardiner* ((1993) 177 CLR 378 at 393; 112 ALR 289 at 298–9) (*Walton v Gardiner*), Mason CJ, Deane and Dawson JJ. said that the jurisdiction to stay proceedings that are an abuse of process "extends to all those cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness". Their Honours gave three examples of such an abuse of process. *Walton v Gardiner* at CLR 393; ALR 298–9). One of them is the case where an estoppel cannot be established but the proceedings are unjustifiably oppressive because it is sought to litigate an issue which has already been disposed of by earlier proceedings (See, e.g.,

Reichel v Magrath (1889) 14 App Cas 665 at 668; *Connelly v Director of Public Prosecutions,* [1964] AC 1254 at 1361–2). *Reichel v Magrath* ((1889) 14 App Cas 665) is the paradigm example of such a case.

[147] The following propositions may be distilled from the above discussion of *Spautz*, *Walton v Gardiner*, *Rogers*, *Ridgeway*, *Batistatos* and *PNJ*:

(a) Every superior court has an inherent power to prevent its procedures from being abused (*Hunter v Chief Constable of West Midlands* [1982] AC 529 at 536; 1981 3 All ER 727 at 729; *Spautz* at CLR 518; ALR 439–40 and the cases there cited; and *Rogers* at CLR 287; ALR 444).

(b) The categories of abuse of process are not closed (*Batistatos* at [9]–[15]; *PNJ* at [3]; and *Ridgeway* at CLR 75; ALR 83). The concept is not at large or without meaning. Notions of justice and injustice must reflect contemporary values if the courts and the administration of justice are to continue to enjoy the confidence of the public (*Ridgeway* at CLR 75; ALR 83).

(c) Abuses of procedure usually fall into one of the following three broad categories:

  (i) The court’s procedures are invoked for an illegitimate or improper purpose;

  (ii) The use of the court’s procedures is unjustifiably oppressive to one of the parties or vexatious; or

  (iii) The use of the court’s procedures in the manner contemplated would bring the administration of justice into disrepute.

  (*Rogers* at CLR 287; ALR 444; *PNJ* at [3]).

(d) An improper purpose is a purpose to use a proceeding as a means of obtaining some advantage for which that proceeding is not designed (*Varawa* at 91; *Dowling* at CLR 524; and *Spautz* at CLR 526–7; ALR 646–7). It is the use of the proceeding which must be examined and which may constitute an abuse of process (*Spautz* at 527–8; ALR 647–8). It is not necessary that, in addition to the improper purpose, the abuser must have committed an improper act. In this context, the purpose of the plaintiff is the result which the institution of the relevant proceeding is capable of producing and the result which it is intended to produce (*Spautz* at CLR 532–3; ALR 651–2). The purposes which legal proceedings are designed to serve are the protection or vindication of particular rights or immunities, the maintenance or affection of particular legal relationships and the imposition of particular legal penalties, liabilities and obligations (*Spautz* at 532–3). The pursuit of a legal remedy is not converted into an abuse of process merely by an unworthy or ulterior motive (*Spautz* at CLR 533–4; ALR 652–3).

(e) An abuse of process occurs when the processes and procedures of the court are utilised as instruments of injustice or unfairness. For example, a proceeding will constitute an abuse of process if it can be clearly seen to be foredoomed to fail (*Walton v Gardiner* at CLR 392–3; ALR 297–8). Other examples of unjustifiably oppressive and vexatious proceedings are: where the proceeding seeks to litigate anew a case which has already been finally disposed of by earlier proceedings even though no *res judicata* or issue estoppel can be established; where unreasonable delay on the part of the plaintiff has made it extremely difficult for the defendant to marshal and bring forward evidence in her defence; and where the legitimate public interest in having those who commit offences brought to justice promptly is not served by reason of delay.

(f) The onus of proving an abuse in any given case rests upon the party alleging abuse. That onus is a heavy one (*Spautz* at CLR 529; ALR 648–9).

[148] In their textbook *Class Actions in Australia* (2^{nd} ed, Thomson Reuters, 2012) at pp 7–8 [1.170], the learned authors (Messrs Grave, Adams and Betts) summarise the views expressed by the Australian Law Reform Commission (**ALRC**) in its report, *Grouped Proceedings in the Federal Court*, Report No 46 (1988). At [2] of the Report, the ALRC said:

> Allowing proceedings to be brought on behalf of a group or class of persons can ensure that persons who have a cause of action arising from multiple wrong-doing are not prevented or discouraged from having that claim determined by a court as a result of lack of resources, cost barriers or ignorance of legal rights. In addition, the grouping of many claims into one proceeding may be a more efficient way of determining the issues which are common to those claims than separate proceedings would be.

[149] The ALRC considered that the class actions procedure had a number of advantages. These are set out by the learned authors at p 7 in their textbook in the following terms:

- Reducing the cost of court proceedings to the individual;
- Enhancing access by the individual to legal remedy;
- Promoting efficiency in the use of court resources;
- Ensuring consistency in the determination of common issues; and
- Making the law more enforceable and effective.

[150] Overall, the ALRC considered the class action procedure to provide a desirable mechanism for the expeditious, fair and cost effective determination of claims with common features made by a large number of persons. The procedure is regarded as particularly useful when each individual claim is for a relatively small amount of money.

[151] It is now also well accepted that the lawyers who represent the lead claimant in a class action owe a fiduciary duty to the members of the class in that proceeding, even where those lawyers have not been retained by some members of the class (*King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480; 191 ALR 697; [2002] FCA 872 at [24]–[27] per Moore J).

[152] This Court has developed special procedures for dealing with class actions. Integral to those procedures is effective case management in which the Court retains a keen ongoing interest.

[153] TWE's abuse of process application must be considered in the class action context which I have briefly described at [148]–[152] above.

[154] As already noted, TWE relies upon all three of the broad categories of abuse of process identified by the High Court in *PNJ* at [3].

[155] The main focus of TWE's submissions was on the first category of abuse, namely, the invoking of the Court's processes for an illegitimate or collateral purpose.

[156] In order to address TWE's arguments in support of their broad contention that the present proceeding has been brought for an illegitimate or collateral purpose, I make the following findings:

(a) Mr Elliott's purpose in causing MCI to bring this proceeding may be safely attributed to MCI as its purpose for bringing this proceeding. This is because Mr Elliott is the sole director and sole shareholder of MCI and because there is no evidence to suggest that any other person has any say in the affairs of MCI.

(b) Mr Elliott did not give evidence before me. Thus, there is no direct evidence from Mr Elliott explaining his purpose in causing MCI to behave as it has done in bringing this proceeding. However, for reasons which I will outline below, I consider that, in the circumstances of this case, it was incumbent upon Mr Elliott to proffer an explanation for MCI's conduct in evidence given to the Court. In particular, in my view, he was obliged to explain his purpose in bringing this proceeding. In all of the circumstances, his failure to do so provides a basis for the Court to draw certain adverse inferences against MCI.

(c) In the period between November 2012 and May 2014, Mr Elliott caused MCI to purchase a small parcel of shares in each of 157 corporations listed on the ASX. Mr Elliott did not cause MCI to make those purchases because he was interested in investing in each of the corporations in which shares were purchased either as a long-term investor or as a trader.

(d) As found by Ferguson J in *TWE No 1*, MCI was created by Mr Elliott as a vehicle for bringing class actions against listed corporations alleging (*inter alia*) breaches of continuous disclosure obligations by those corporations.

(e) Mr Elliott caused MCI to make the share purchases which it made in order to enable MCI to position itself to move quickly to commence a class action as the lead plaintiff against any one or more of the corporations in which the shares were purchased and, to the extent possible, to enable Mr Elliott himself to earn legal fees from the exercise. By positioning MCI in this way, Mr Elliott intended that MCI would be best placed to initiate class actions as the lead claimant in the event that opportunities to do so presented themselves in the future. MCI would then be well-placed to negotiate with other relevant parties in relation to such actions for its own financial benefit. These parties would include class action lawyers, litigation funders and, of course, the proposed defendants themselves.

(f) The causes of action pleaded in this proceeding are immaterial to MCI's purpose in commencing it. The question of ultimate success is also immaterial to MCI's purpose. As found by Ferguson J in *TWE No 1*, MCI had no interest in recovering the insignificant amount of $700 when it launched this proceeding. Its purpose was to gain a financial benefit for itself which was likely to exceed that amount to a very significant degree. MCI's purpose is not altruistic. It has not positioned itself in the manner which I have described in order to champion at its own cost and risk shareholders who have suffered losses at the hands of defaulting corporations.

(g) These findings are broadly in line with the findings made by Ferguson J and the Court of Appeal in the first MCI proceeding although the focus of the Court in that proceeding was on Mr Elliott's role as the solicitor for MCI.

(h) Given the reasons for MCI's purchases of shares which I have found, it is very difficult, if not impossible, for Mr Elliott to contend in the present proceeding that MCI actually relied upon the various positive statements made by TWE to the ASX said to constitute contraventions of the Corporations Act or that MCI actually relied upon the integrity of the share market including adherence by TWE to its statutory obligations to make accurate ongoing material disclosures from time to time. Furthermore, it would be very difficult for MCI to persuade the Court at a final hearing that, in the circumstances to which I have referred, it should be able to rely upon market-based causation theory to establish an indirect basis for reliance by it on the alleged contraventions committed by TWE. In blunt terms, Mr Elliott and MCI almost certainly did not rely upon anything TWE said or failed to say or do when it purchased the 140 ordinary fully paid shares in TWE which it purchased on 1 November 2012. This was the very first parcel of shares acquired by MCI. That circumstance is suggestive of the possibility that Mr Elliott may, by 1 November 2012, already have formed the view that there may be grounds for MCI to mount a class action against TWE alleging contraventions of the type now incorporated in the Statement of Claim filed by MCI in this proceeding.

(i) MCI's efforts to dissociate Mr Elliott from the present proceeding began immediately after Ferguson J gave judgment in *TWE No 1*. Very soon after that judgment was delivered, MCI took steps to replace Mr Elliott as the solicitor on the record in the first MCI proceeding with Tan and Partners.

(j) In late August 2014, Portfolio Law was incorporated. Those who appear to stand behind that incorporated legal practice have no experience in running class actions and have ongoing connections with other practices. Neither Mr Zita nor Mr Sica gave evidence before me. 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.

(k) The insignificant amount sought to be recovered for itself by MCI in the present proceeding does not, on any rational basis, justify the commencement and maintenance of this proceeding. The costs of litigating the issues raised and the risk of an adverse costs order clearly militate against pursuing this proceeding to judgment or settlement. There is no evidence that MCI is being funded by an established litigation funder nor is there any evidence which would otherwise support the proposition that MCI has the capacity both to maintain the present proceeding and meet any adverse costs order.

[157] 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.

[158] 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.

[159] In light of the findings which I have made and the conclusions which I have reached, I have not found it necessary to consider in detail whether the decisions of Ferguson J and the Court of Appeal in the Supreme Court gave rise to the estoppels by way of issue estoppel for which TWE contended. However, in deference to the parties' submissions, I will briefly state my conclusions in relation to the arguments based upon issue estoppel.

[160] First, I am of the view that the Court of Appeal's decision has the necessary quality of being final and on the merits for the purposes of considering the arguments based upon issue estoppel. While that decision may technically be interlocutory, it has the legal and practical effect of terminating the first MCI proceeding.

[161] Second, I think that the statements of legal principle extracted by me at [63(a)] and [63(b)] above do bind both MCI and TWE in the present proceeding. I pause to observe that, in my view, in any event, those statements of principle correctly state the law.

[162] Third, I am of the opinion that both MCI and TWE are bound by the findings to which reference is made in subpars (c) to (f) of [63] above. However those findings have to be viewed in the context in which they were made. In particular, they have to be viewed against the ultimate conclusion expressed by the Court of Appeal that the vice in MCI's conduct in instituting the first MCI proceeding was that it did so in order to provide a means for Mr Elliott to earn legal fees from that proceeding. The particular findings to which I have referred can only have relevance to the present proceeding if they can be viewed as extending beyond the context in which they were made in the first MCI proceeding. I do not think that they can be so viewed.

Other matters

[163] Given that I propose to stay this proceeding permanently, I do not think that it is necessary to deal with TWE's claim that MCI should post security for its costs of this proceeding. Nor, in the circumstances, will it be necessary in due course for me to deal with the residual claims made by TWE in its Summons filed in the Supreme Court on 13 February 2015. At the appropriate time, I propose to dismiss that Summons upon the basis that there be no orders as to the costs thereof.

[164] However, before leaving these topics I should record that, in my opinion, there is considerable force in the proposition which underpins the remaining claims in TWE's 13 February 2015 Summons, namely, that the Jones proceeding is a preferable vehicle for litigating the core claims made by MCI in the first MCI proceeding and in this proceeding.

[165] As to remedy, I think that a permanent stay is the appropriate remedy rather than dismissal or either of the other orders sought by TWE in its Interlocutory Application. I have concluded that the whole proceeding is an abuse not merely the class action aspect of it.

[166] Finally, there is no reason why costs should not follow the event. For this reason, I propose to order MCI to pay TWE's costs of the application with which I am presently dealing.

[167] There will be orders accordingly.

Orders

1. This proceeding be permanently stayed as an abuse of the process of the Court.
2. The plaintiff pay the defendant's costs of and incidental to the Interlocutory Application filed by the defendant in this proceeding on 31 March 2015.

J D SANTILLI
SOLICITOR