

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S CI 2015 01318

MELBOURNE CITY INVESTMENTS PTY
LTD (ACN 161 046 304)

Plaintiff

v

MYER HOLDINGS LIMITED (ACN 119 085
602)

Defendant

<u>JUDGE:</u>	Sifris J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	28 & 29 September 2016
<u>DATE OF JUDGMENT:</u>	9 December 2016
<u>CASE MAY BE CITED AS:</u>	Melbourne City Investments Pty Ltd v Myer Holdings Limited (No 2)
<u>MEDIUM NEUTRAL CITATION:</u>	[2016] VSC 655

PRACTICE AND PROCEDURE – Permanent stay – Abuse of process – Group proceeding – Plaintiff company initiated proceeding – Proceeding commenced for predominant purpose of generating income for lead plaintiff and/or related party funder – Whether proper purpose – Whether proper use of processes of court – Permanent stay granted – *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585 applied.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr N. O'Bryan SC with Mr M. W. L. Symons	Portfolio Law
For the Defendant	Mr I. G. Waller QC with Mr P. Liondas	Clayton Utz

HIS HONOUR:

A INTRODUCTION

- 1 The plaintiff ("**MCI**") was incorporated on 1 November 2012.
- 2 At the time of its incorporation, Mark Elliott ("**Elliott**") was the sole shareholder of MCI. On 9 September 2015, BSL Litigation Partners Limited ("**BSLLP**"), a company associated with Elliott, became the sole shareholder of MCI.
- 3 Since incorporation, Elliott has been the sole director and secretary of MCI.
- 4 On 25 March 2015, MCI commenced this proceeding ("**Myer Proceeding**") against Myer Holdings Limited ("**Myer**").
- 5 The *Myer Proceeding* is brought on behalf of MCI and all persons who acquired ordinary shares in Myer on or after 11 September 2014 and who remained holders of any of those shares at the commencement of trading on 19 March 2015. Insofar as MCI is concerned, it purchased shares in Myer during the relevant period.
- 6 MCI alleges that a significant fall in Myer's share price on and after 19 March 2015 was caused by the disclosure of information that should have been disclosed on or prior to 11 September 2014 (**the "earnings forecast matter" information**).
- 7 MCI has commenced at least five group proceedings in the Supreme Court of Victoria in the last three years. All proceedings relate to alleged breaches of the continuous disclosure requirements of the *Corporations Act 2001* (Cth) ("**the Act**").
- 8 By summons dated 15 July 2015, Myer seeks an order that this proceeding be stayed as an abuse of process ("**Abuse Application**"). Myer contends that this proceeding has been commenced and is being maintained by MCI pursuant to, and in furtherance of, a business model by which it purchases shares in listed companies and then seeks to commence group proceedings against those listed companies for a predominant purpose other than vindicating its rights by judgment or settlement.

9 In support of the Abuse Application, Myer relies on an affidavit of Andrew Morrison sworn 15 July 2015 ("**Morrison Affidavit**") and a further affidavit of Andrew Morrison sworn 17 June 2016 ("**Second Morrison Affidavit**").

10 Myer contends that the proceeding is an abuse of process because:

(a) it has been commenced, and is being maintained, for an improper purpose;
and

(b) the circumstances in which the proceeding has been brought would otherwise bring the administration of justice into disrepute.

B RELEVANT BACKGROUND

B1 MCI's purchase of shares

11 On the day it was incorporated, MCI purchased 353 ordinary fully paid shares in Myer. MCI sold these shares on 17 February 2014. On 18 February 2014 MCI purchased 300 ordinary fully paid shares in Myer. On 11 November 2014 MCI sold these 300 shares. On 14 November 2014, MCI purchased 400 ordinary fully paid shares in Myer at a cost of \$1.78 per share ("**Relevant Shares**"). The total cost to MCI of the Relevant Shares was \$712, plus an amount of \$55 (apparently for brokerage).¹ MCI continues to hold the Relevant Shares. MCI's claim in the Myer Proceeding is brought in respect of this parcel of 400 shares. On 11 May 2015, MCI purchased a further 325 ordinary fully paid shares in Myer.²

12 On or about the day of its incorporation, MCI also purchased small parcels of shares in another 198 publicly listed companies, with each parcel costing between \$699.76 and \$752.50 (the majority of which were purchased for between \$740 and \$750).³

¹ Second Morrison Affidavit, Exhibit AM34 is a document entitled "Trading Transactions" and records MCI's share trading transactions between 1 November 2012 and 15 July 2015. This document was produced by MCI in response to a Notice to Produce ("**MCI Trading Transactions Summary**"); Second Morrison Affidavit at [9]. On any view, the highest possible amount of damages that MCI could recover in the Myer Proceeding would, it was submitted, be \$712 plus interest.

² All of these transactions are evident from the MCI Trading Transactions Summary, Second Morrison Affidavit [6]-[9]; and Exhibit AM34, 32.

³ Second Morrison Affidavit, Exhibit AM34, MCI Trading Transactions Summary.

These figures appear to include brokerage fees of approximately \$55 for each transaction. MCI's total share purchase on the date of its incorporation cost it approximately \$150,000.⁴

13 In the period from November 2012 to 15 July 2015, MCI purchased small parcels of shares in a further 28 publicly listed companies,⁵ at a further cost of approximately \$22,000.

14 Subsequent to its purchase of shares in these listed companies, MCI engaged in a pattern of selling and re-buying shares. From the MCI Trading Transactions Summary it is apparent that:

(a) between 17 and 18 February 2014, MCI sold its parcels of shares and then (the same day or the next day) re-acquired a similarly sized parcel of shares in over 100 of the companies in which it had acquired shares on 2 November 2012 (noting that it appears that MCI paid brokerage of around \$55 on each sale and acquisition of a parcel of shares);

(b) between 14 and 21 November 2014, MCI again sold, and then immediately re-acquired a similarly sized parcel of, shares in around 80 companies.

15 It can readily be inferred, it was submitted, that this pattern of share trading was undertaken so as to provide MCI with a platform for commencing representative proceedings alleging breaches of continuous disclosure obligations by listed companies.

16 It was submitted that these matters make plain what is in any case evident from MCI's purchase of nominal shares in 199 listed companies on or about the day of its incorporation and its subsequent commencement of multiple representative proceedings in respect of those shares: that MCI was established as a vehicle for bringing representative proceedings and has no interest in acquiring shares for the

⁴ 199 parcels of shares, at an average of about \$740 per parcel, comes to \$147,260.

⁵ Second Morrison Affidavit, Exhibit AM34, MCI Trading Transactions Summary.

purposes of trading and making a profit out of those shares in the normal course of trading.

- 17 These matters also give rise, it was submitted, to the inference that MCI bought shares in each listed company in the hope that they were overpriced, as a result of a breach of that company's continuous disclosure obligations.

B2 The TWE Proceeding⁶

- 18 The *TWE Proceeding* was commenced by MCI on 4 November 2013. Elliott was the solicitor for MCI.
- 19 On 23 July 2014 Ferguson J delivered judgment in respect of applications by Treasury Wine Estates Limited ("**TWE**") (and Leighton Holdings Limited ("**Leighton**") in a similar matter) to stay the *TWE Proceeding* and the *Leighton Proceeding* respectively as an abuse of process. While her Honour concluded that there was no abuse of process and therefore refused the application for a stay, she ruled that the proceedings ought not continue as group proceedings while MCI and Elliott acted in tandem as plaintiff and solicitor.⁷
- 20 TWE appealed Ferguson J's ruling on abuse of process. On 22 December 2014, the Court of Appeal granted leave to appeal, allowed the appeal, and ordered the proceeding against TWE be permanently stayed as an abuse of process.⁸ The basis of the abuse was a finding that the predominant purpose for commencing the proceeding was for Mr Elliott to earn legal fees.
- 21 On 16 January 2015, MCI filed an application for Special Leave to Appeal to the High Court from the Court of Appeal's decision.⁹ Special leave was refused with costs on 15 May 2015.

⁶ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3)* [2014] VSC 340 ("**the TWE Proceeding**").

⁷ *Ibid* at [68].

⁸ *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585 ("**TWE Court of Appeal Decision**").

⁹ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2016] FCA 787 at [5].

B3 The Second TWE Proceeding

- 22 On the same day (22 December 2014), but after the Court of Appeal made its order permanently staying the *TWE Proceeding* as an abuse of process, MCI commenced a further proceeding against TWE in the Supreme Court of Victoria (“**Second TWE Proceeding**”).¹⁰ The causes of action relied upon and the claims for relief made in the *Second TWE Proceeding* were identical to those previously made in the *TWE Proceeding*.¹¹ The only difference between the *TWE Proceeding* and the *Second TWE Proceeding* was the identity of the solicitor on the record. In the *Second TWE Proceeding* Elliott had been replaced by Portfolio Law.¹²
- 23 On 3 March 2015, the *Second TWE Proceeding* was transferred to the Federal Court.¹³ This transfer was made because there was already a representative proceeding on foot in the Federal Court *Jones v TWE*¹⁴ (“**Jones Proceeding**”) brought against TWE on behalf of the same (or substantially the same) class, and in which substantially the same or similar claims as those made by MCI in the *Second TWE Proceeding* were being made.¹⁵
- 24 The *Jones Proceeding* was commenced on 2 July 2014, after the date of commencement of the *TWE Proceeding* (4 November 2013), but before the date when the *Second TWE Proceeding* was commenced (22 December 2014). Elliott and MCI were aware of the existence of the *Jones Proceeding* prior to the date when MCI commenced the *Second TWE Proceeding*.¹⁶
- 25 On 31 March 2015, TWE filed an application seeking, *inter alia*, an order that the *Second TWE Proceeding* be permanently stayed as an abuse of process.¹⁷
- 26 On 5 July 2016, Foster J delivered judgment permanently staying the *Second TWE*

¹⁰ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2016] FCA 787 at [3].

¹¹ *Ibid* at [1].

¹² *Ibid* at [2].

¹³ *Ibid* at [9].

¹⁴ NSD 660 of 2014.

¹⁵ *Ibid* at [8].

¹⁶ *Ibid* at [23].

¹⁷ *Ibid* at [10]-[11].

Proceeding. The basis of the abuse was a finding that the predominant purpose for commencing the proceeding was to generate income from the class action.

B4 The Leighton Proceeding¹⁸

27 The *Leighton Proceeding* was commenced by MCI on 4 October 2013. Elliott was the solicitor for MCI.

28 As noted in [19] , on 23 July 2014 Ferguson J delivered judgment in respect of applications by TWE and Leighton to stay the *TWE Proceeding* and the *Leighton Proceeding* as an abuse of process. Unlike TWE, Leighton did not appeal that decision.

29 Following TWE's successful appeal before the Court of Appeal, Leighton again sought an order that the *Leighton Proceeding* be permanently stayed on the ground that its commencement and maintenance was an abuse of process. On 14 April 2015, I ordered that the *Leighton Proceeding* be stayed until further order, holding that in the event that Special Leave to Appeal to the High Court in the *TWE Proceeding* was refused there would be a permanent stay of the *Leighton Proceeding*.¹⁹

30 MCI sought leave to appeal against my decision. On 7 September 2015, the Court of Appeal refused MCI leave to appeal in light of the failed special leave application and permanently stayed the *Leighton Proceeding*.²⁰

B5 The Worley Parsons Proceeding²¹

31 The *WorleyParsons Proceeding* was commenced by MCI on 18 December 2013. Elliott was the solicitor for MCI.

32 On 27 June 2014, Ferguson J delivered judgment in which her Honour found that MCI did not have standing to bring the proceeding.

¹⁸ *Melbourne City Investments Pty Ltd v Leighton Holdings Ltd* ("**the Leighton Proceeding**").

¹⁹ [2015] VSC 119.

²⁰ *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2015] VSCA 235.

²¹ *Melbourne City Investments Pty Ltd v WorleyParsons Limited*.

33 On 22 July 2014, MCI issued a summons seeking to have Joanne Walsh joined as a second plaintiff to the *WorleyParsons Proceeding*, although the application was subsequently abandoned.

34 On 8 September 2014, Ferguson J heard another application in which MCI sought leave to file a further amended statement of claim and WorleyParsons sought an order dismissing the proceeding. On 17 October 2014, Ferguson J delivered judgment in which her Honour refused MCI leave to file a further statement of claim and dismissed the *WorleyParsons Proceeding*.²²

B6 The UGL Proceeding²³

35 On 1 April 2015, MCI commenced a further securities class action against UGL (“**the UGL Proceeding**”) alleging contraventions of the continuous disclosure regime and misleading or deceptive conduct.

36 On 7 October 2015, Robson J delivered judgment on an application by UGL to strike out MCI’s statement of claim.²⁴

37 On 19 February 2016, UGL filed a summons seeking orders that the *UGL Proceeding* be permanently stayed as an abuse of process. That application has not yet been heard.

B7 The Walsh Proceeding²⁵

38 Following the hearing of the application on 8 September 2014 in the *WorleyParsons proceeding* (see [34] above), Ms Walsh commenced a separate group proceeding against WorleyParsons (“**Walsh Proceeding**”). Elliott was acting as Walsh’s solicitor in the *Walsh Proceeding*.

39 Prior to this proceeding being commenced, on 2 July 2014 MCI executed a deed of

²² *Melbourne City Investments Pty Ltd v WorleyParsons Limited (No 2)* (2014) 104 ACSR 15.

²³ *Melbourne City Investments Pty Ltd v UGL Limited*.

²⁴ [2015] VSC 540.

²⁵ *Walsh v WorleyParsons Limited*.

indemnity in favour of Ms Walsh.²⁶ Pursuant to the Deed Ms Walsh agreed to be named as plaintiff in proceedings commenced in the Supreme Court as a representative proceeding against WorleyParsons, and MCI agreed to indemnify, and keep indemnified, Ms Walsh against all costs and liabilities in connection with the proceeding.

40 On 28 November 2014, Elliott withdrew as Ms Walsh’s solicitor and Mr Stewart Peters was appointed to act as solicitor in place of Elliott.

41 On 18 February 2015, WorleyParsons filed an application seeking to have the *Walsh Proceeding* stayed as an abuse of process.

42 On 18 to 20 February 2015, WorleyParsons caused several subpoenas to be issued in support of its abuse of process application. On 15 April 2015, Almond J delivered judgment in relation to an application by Ms Walsh seeking to set the subpoenas aside.²⁷

43 No decision has yet been handed down in relation to WorleyParsons’ application seeking to have the *Walsh Proceeding* stayed as an abuse of process.

B8 The Banksia group Proceeding²⁸

44 On 24 December 2012, Laurence John Bolitho commenced a group proceeding against Banksia Securities Limited (“**Banksia**”) (and various other parties) (“**Banksia Proceeding**”). In the *Banksia Proceeding*, Bolitho alleges, *inter alia*, the non-disclosure of material matters in prospectuses issued by Banksia.

45 At the inception of the *Banksia Proceeding* Elliott acted as the solicitor for Bolitho. On the same day that the *Banksia Proceeding* was commenced (24 December 2012), Elliott and Bolitho entered into a deed of indemnity pursuant to which Elliott agreed to

²⁶ [2015] VSC 135 at [30], [37], [46]. A second Deed of Indemnity between MCI and Ms Walsh was signed by Ms Walsh on 21 January 2015 (Second Morrison Affidavit, Exhibit AM37). There is no evidence of MCI also signing this Deed of Indemnity. In any case, the terms of this second indemnity are, it was submitted, materially the same as those of the indemnity dated 2 July 2014.

²⁷ *Walsh v WorleyParsons Limited* [2015] VSC 135.

²⁸ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582.

indemnify Bolitho against any costs or liabilities arising out of his role as plaintiff, including any adverse costs order (“**Banksia Indemnity Agreement**”).

46 On 13 March 2014, BSLLP entered into a litigation funding agreement with Bolitho (“**Banksia Funding Agreement**”).

47 The Banksia Funding Agreement provides, *inter alia*, that BSLLP is entitled to be paid from any “Resolution Sum” (being any money received or payment made to settle, compromise or resolve the claims brought by Bolitho) up to 30% of that Resolution Sum.²⁹ BSLLP subsequently entered into litigation funding agreements with the majority of debenture holders in Banksia. Those funding agreements were entered into following Elliott, in his role as solicitor for Bolitho, writing to all debenture holders (by posting various Questions and Answers on the website www.banksiaclassaction.com.au) asking them to enter into a funding agreement with BSLLP. In particular, the following message was posted on the website:

IMPORTANT NOTE FROM MARK ELLIOTT, SOUCITOR FOR THE CLASS ACTION PLAINTIFFS

These answers endeavour to answer the questions which have been most frequently asked of me by Banksia depositors (debenture holders). ...

Is there a litigation funder involved in the case and what will their fee be?

Mr Laurence Bolitho, in his capacity as representative plaintiff and following receipt of independent legal advice, has agreed to appoint [BSLLP] as the Banksia Class Action Funder and to enter into a Litigation Funding Agreement with [BSLLP] on mutually acceptable terms and conditions. A copy of the executed Funding Agreement has been posted on the Banksia Class Action website for your perusal. A Sample Litigation Funding Agreement on the same terms has been sent to all debenture holders. I am asking each group member of the Banksia Class Action to enter in to the same Funding Agreement with [BSLLP].

48 On 20 June 2014 the defendants in the *Banksia Proceeding* applied for orders restraining Elliott from continuing to act for Bolitho, given his association with BSLLP. On 26 November 2014, Ferguson JA delivered judgment in which her Honour found that Elliott ought be restrained from continuing to act for Bolitho.³⁰

²⁹ Banksia Funding Agreement, Clause 12.1.

³⁰ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582.

In arriving at that finding, Ferguson JA found that:

(a) a fair-minded, reasonably informed member of the public would form the view that Elliott, in his role as solicitor for Bolitho, may be influenced by the substantial interest of BSLLP in the outcome of the case;³¹

(b) a fair-minded, reasonably informed member of the public would conclude that if Elliott continued to act as solicitor for Bolitho, then this would affect the proper administration of justice, including the appearance of justice.³²

49 Bolitho has settled the claims made in the Banksia Proceedings against some of the defendants, subject to the approval of the Supreme Court. Of the \$5.2 million settlement sum:

(a) \$1.3 million is being paid to BSLLP;

(b) \$2.55 million is being retained for the payment of Bolitho's legal costs (which include the costs of Elliott in his role as Bolitho's previous solicitor in the proceeding).

50 Accordingly, of the settlement sum of \$5.2 million, only \$1.35 million (25%) is going to debenture holders, and they will each receive $\frac{1}{4}$ of a cent for each dollar of debentures that they hold.

B9 The Downer EDI Proceeding³³

51 On 27 March 2014, Camping Warehouse Australia Pty Ltd ("**Camping Warehouse**") commenced a securities class action against Downer EDI Limited ("**Downer EDI Proceeding**"), with Elliott acting as the solicitor for Camping Warehouse. At some point prior to 22 December 2015, Elliott Legal Pty Ltd became the solicitor on the record. Elliott Legal Pty Ltd is a company in which Elliott is a director and secretary,

³¹ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 at [52].

³² *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 at [67].

³³ *Camping Warehouse Australia Pty Ltd v Downer EDI Limited*.

and Decoland Holdings Pty Ltd (atf MEE Superannuation Fund)³⁴ (“**Decoland**”) (Elliott’s superannuation fund) is the sole shareholder.

- 52 The “Q&A” page on the website www.downerclassaction.com.au includes the following statement:

IMPORTANT NOTE FROM MARK ELLIOTT, ELLIOTT LEGAL PTY LTD, SOLICITORS FOR THE CLASS ACTION PLAINTIFF, CAMPING WAREHOUSE AUSTRALIA PTY LIMITED

These answers endeavour to answer the questions which have been most frequently asked of me by shareholders in Downer EDI Limited (Downer). ...

Will there be a litigation funder involved in the case and what will their fee be?

At present there is no litigation funder involved in this case. If the case becomes protracted or more complicated, it may be necessary to engage a litigation funder to ensure that the costs of barristers, expert witnesses and preparation of the case for trial can be paid. In the event that litigation funding for the case is procured, then the litigation funder will seek to be reimbursed the costs which it has incurred, plus an uplift factor for assuming the risk and expenses of funding the proceedings. Litigation funders generally receive a proportion of the total amount recovered from the defendants, which can be between 30% - 40% of the total amount recovered plus reimbursement of expenses. In the event it becomes necessary to engage a litigation funder, I will inform the members of the represented class about the terms and conditions upon which litigation funding will be offered.

- 53 On 18 June 2015, subsequent to the *Downer EDI Proceeding* being commenced, Camping Warehouse entered into a litigation funding agreement with BSLLP.
- 54 On 9 February 2016, Camping Warehouse and Downer EDI entered into a settlement agreement in relation to the *Downer EDI Proceeding*. The settlement agreement provided for the following to be paid out of the total settlement sum of \$8.25 million:

(a) \$825,000 to be paid to BSLLP;

(b) \$2.85 million to be paid for Camping Warehouse’s legal costs (which includes

³⁴ It can be noted, it was submitted, that “MEE” are the initials of Elliott (Mark Edward Elliott), and that Elliott wrote the initials “MEE” on documents produced by him pursuant to the subpoena issued by Myer (see Second Morrison Affidavit, Exhibits AM39 (covering letter), 31 and 32. It can therefore readily be inferred, it was submitted, that all shares in BSLLP are beneficially held for Elliott’s superannuation fund.

the costs of Elliott and Elliott Legal Pty Ltd);

- (c) further significant amounts to be paid to Elliott Legal Pty Ltd for “administering” the settlement fund (\$25,000 per calendar month until 31 December 2017).

55 Settlement of the proceeding on the terms set out in the settlement agreement was approved by Digby J on 3 May 2016.

B10 BSLLP - The litigation funder

56 BSLLP was incorporated on 20 January 2014.

57 At the date of the incorporation of BSLLP, and at all times since, Elliott was the secretary and one of the three directors.

58 Further, at all relevant times, Elliott, through his superannuation fund and another company controlled by him, was a major shareholder of BSLLP. This is evident from the following:

- (a) the register of members of BSLLP, which records that:

- (i) on the date of its incorporation, 20 January 2014, 500,000 shares were allotted to Ameo Investments Pty Ltd (“**Ameo Investments**”);

- (ii) on 3 February 2014, Ameo Investments transferred 450,000 shares to Decoland.

- (b) a company search for Ameo Investments shows that Elliott is the sole director and secretary of Ameo Investments, and Decoland is the sole shareholder;

- (c) a company search for Decoland shows that Elliott is a director (along with Pina Elliott), and Elliott and Pina Elliott are the only two shareholders.

59 As noted above, BSLLP has funded at least two proceedings with which Elliott has been connected: the *Banksia Proceeding* and the *Downer EDI Proceeding*. Pursuant to settlement agreements in those two proceedings BSLLP has been (or is to be) paid

\$2.125 million.

60 Further, various matters support, it was submitted, the inference that BSLLP was established to fund the *Banksia Proceeding* and other proceedings in which Elliott was involved. For example, an article appearing in *The Australian* newspaper on 26 April 2014 reports public statements made by Elliott as follows:

On 13 March he wrote to Banksia debenture holders informing them that he had been personally funding disbursement for the previous 18 months.

This arrangement, however, cannot continue, so Elliott has raised \$2 million from investors to form a litigation funder that would take on the Banksia case and others, if the need arose.

61 Elliott has not denied making these statements.

B11 MCI's financial position

62 As at the date of its incorporation (and also as at the date of commencement of the *Myer Proceeding*), MCI had a paid up share capital of \$200,000.

63 MCI's costs in acquiring shares to commence securities class actions, and in relation to proceedings other than the *Myer Proceeding*, were substantial. In this regard it was submitted that the following matters were relevant.

64 *First*, MCI spent around \$150,000 of its paid up share capital of \$200,000 on purchasing shares on or about the day of its incorporation.

65 *Secondly*, in 2013 MCI commenced the *TWE Proceeding* and the *Leighton Proceeding*. MCI retained Senior and Junior Counsel to prepare its statement of claim in both proceedings. It is apparent that MCI amended its statement of claim in each proceeding on numerous occasions. As noted above, TWE and Leighton applied to have the *TWE Proceeding* and the *Leighton Proceeding* permanently stayed as an abuse of process. The following contested hearings took place in relation to these issues:

(a) a hearing before Ferguson J on 16 May 2014;

(b) an appeal hearing in the Court of Appeal on 10 October 2014;

(c) a hearing before me on 16 March 2015;

(d) an application for Special Leave to Appeal to the High Court being heard on 15 May 2015;

(e) an appeal hearing in the Court of Appeal on 25 August 2015.

66 MCI, TWE and Leighton were each represented by Senior and Junior Counsel at each of the hearings. MCI was ordered to pay, at least:

(a) TWE's costs of the *TWE Proceeding*, which included the hearing on 16 May 2014 before Ferguson J, the hearing in the Court of Appeal on 10 October 2014, and all other costs in the proceeding;

(b) TWE's costs of the application for special leave to the High Court.

(c) Leighton's costs relating to a contested hearing on 18 December 2013.

67 It can also be inferred, it was submitted, that MCI was ordered to pay Leighton's costs of the *Leighton Proceeding* following that proceeding being permanently stayed.

68 Myer does not know the quantum of the costs payable pursuant to each of these orders. However, it can readily be inferred, it was submitted, that the amounts payable by MCI were significant, and would have run into (at least) several hundred thousand dollars.

69 Thirdly, MCI's own costs of maintaining each of the *TWE Proceeding*, the *Leighton Proceeding*, and the *WorleyParsons Proceeding*, each of which was commenced prior to the *Myer Proceeding*, was likely, it was submitted, to run into millions of dollars (for each proceeding).

70 The likely amount that MCI would spend on each proceeding can readily be inferred from the amount of legal costs incurred by the Plaintiff in the *Downer EDI Proceeding*. In the *Downer EDI Proceeding* the solicitor on the record was Elliott (and then Elliott Legal Pty Ltd), and Senior and Junior Counsel were the same counsel retained by

MCI in each of the *TWE Proceeding*, the *Leighton Proceeding*, the *WorleyParsons Proceeding* and the *UGL Proceeding*. The settlement agreement in the *Downer EDI Proceeding* reveals that the plaintiff's costs and disbursements were \$2.85 million (noting that the matter was settled shortly after the trial commenced). Those costs provide, it was submitted, a reasonable guide as to the likely costs to be incurred by MCI in each of the securities class actions it has commenced.³⁵

71 *Fourthly*, it was also likely in each instance that the respective defendants would incur costs of *at least* that magnitude (i.e. \$2.85 million), and that security for costs would be sought.

72 It was submitted that two points can be made having regard to the foregoing. The *first* is that on any view it is obvious, and would always have been obvious to MCI, that it did not have sufficient funds to conduct the *Myer Proceeding* (or any of the other proceedings it commenced).³⁶ When that fact is considered alongside various other matters, the clear inference is that MCI always knew and intended that it would obtain litigation funding and that that funding would be provided by BSLLP.

73 The *second* point is that it is evident that MCI has incurred, and will continue to incur, substantial costs in relation to a range of proceedings, such costs substantially, it was submitted, outweigh the likely compensation that may be recovered by MCI in each of those proceedings.

C THIS PROCEEDING

74 MCI commenced this proceeding against Myer on 25 March 2015.

75 The Q&A page on the Myer class action website (www.myerclassaction.com.au)

³⁵ The retainer letter between MCI and Portfolio Law in relation to the Myer Proceeding estimates that Portfolio Law's fees and disbursements may be in the range of \$75,000 to \$100,000 (Second Morrison Affidavit, Exhibit AM7). The estimate for fees payable to Counsel and experts was estimated as \$10,000 to \$30,000 (Second Morrison Affidavit, Exhibit AM7). It was submitted that on no view can this represent a *bona fide* or realistic estimate of likely costs and disbursements.

³⁶ The fact that MCI's paid up share capital was increased in September 2015 to \$600,000 is, it was submitted, immaterial. Plainly MCI's resources continued to be inadequate. There is no evidence, it was submitted, of MCI having access to any other source of funds.

contains a statement, apparently authored by Elliott for the information of group members, in response to the theoretical question “*What will I get if we win?*” He says (emphasis added):

If the case is successful (whether by court judgment or settlement), there will be an amount of money to be paid by Myer. It is not possible at this stage to estimate how much the amount of money may be. In due course, when the likely amount is better known, I will provide further information about what amount might ultimately be recovered. I expect that the amount recovered (less the costs of running the case **and any fee payable to a litigation funder**) will be shared pro-rata between all the members of the Myer class. In other words, all members of the class will likely receive the same number of cents in every dollar they have lost by reason of the wrongdoing alleged against Myer.

- 76 The Q&A page also contains a statement, responding to the question “*Will there be a litigation funder involved in the case and what will their fee be?*”, as follows:

At present there is no litigation funder involved in this case. If the case becomes protracted or more complicated, it may be necessary to engage a litigation funder to ensure that the costs of barristers, expert witnesses and preparation of the case for trial can be paid. In the event that litigation funding for the case is procured, then the litigation funder will seek to be reimbursed the costs which it has incurred, plus an uplift factor for assuming the risk and expense of funding the proceedings. Litigation funders generally receive a proportion of the total amount recovered from the defendants, which can be between 30% - 40% of the total amount recovered plus reimbursement of expenses. In the event that it becomes necessary to engage a litigation funder, I will inform the members of the represented class about the terms and conditions upon which litigation funding will be offered.

- 77 It can be noted that this latter statement was in the same terms as the statement made by Elliott on the website for the *Downer EDI Proceeding* (in which the plaintiff subsequently entered into a funding agreement with BSLLP).

- 78 On 9 February 2016, MCI published an advertisement in the *Australian Financial Review* entitled “*Wanted – Myer Shareholders: Melbourne City Investments P/L v Myer Holdings Ltd*”. Having referenced this proceeding, the advertisement stated that:

MCI wants to make contact with all Myer shareholders who are included in the group proceeding that it has already commenced against Myer.

If you acquired shares in Myer on or after 1 September 2014 and still held those shares on 19 March 2015 please contact MCI at: **infor@myerdassaction.com.au** to discuss your participation in the class action in further detail.

79 It was submitted that an obvious reason (and the only one identified in the evidence)
for publishing such an advertisement is to make contact with potential group
members for the purpose of encouraging them to enter into funding agreements in
respect of the conduct of this proceeding.

D SUBMISSIONS – MYER

80 Myer invited the Court to make a number of factual findings.³⁷ It was submitted
that the suggested findings were not only open on the evidence, but indeed
compelling. The suggested findings are set out in paragraphs [81]-[97] below.

81 *First*, Elliott’s purpose in causing MCI to commence, and continue to prosecute, this
proceeding should be attributed to MCI. Elliott is the sole director of MCI, and there
is no evidence to suggest that any other person has any say in the affairs of MCI.

82 *Secondly*, on the date of its incorporation, 1 November 2012, MCI purchased small
parcels of shares in 199 publicly listed companies. Between November 2012 and July
2015, MCI purchased further small parcels of shares in other publicly listed
companies and engaged in a pattern of selling and re-buying its existing small
parcels of shares.

83 *Thirdly*, MCI did not make these purchases and engage in its pattern of selling and
buying shares because it was interested in investing in each of the corporations in
which shares were purchased, either as a long-term investor or as a trader.

84 *Fourthly*, MCI has subsequently commenced Supreme Court proceedings against five
of the publicly listed companies in which it acquired shares. Each of those
proceedings involved materially similar allegations namely, *inter alia*, breaches of
continuous disclosure obligations.

85 *Fifthly*, it is readily to be inferred from these matters, and has been found in previous
cases, that MCI was created as a vehicle for bringing class actions against listed

³⁷ Outline of Submissions of the defendant dated 25 July 2016, [123]-[139] contain 15 suggested findings of fact.

corporations alleging, *inter alia*, breaches of continuous disclosure obligations by those corporations. It can also readily be inferred that MCI made share purchases in order to position itself to move quickly to commence class actions as the lead plaintiff against one or more of the corporations in which it purchased shares.

86 *Sixthly*, 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 the proceeding. As Derham AsJ observed in the *Myer Subpoena Decision*: “The prospective compensation likely to be awarded if MCI is successful is so small that there must be some other benefit to MCI or Elliott”.³⁸ Similarly, the quantum of MCI’s potential claims in other representative proceedings that it has commenced are no more than a few hundred dollars and does not rationally justify the commencement of these proceedings.

87 *Seventhly*, in commencing representative proceedings with Elliott as the solicitor, MCI had the predominant purpose of using the proceedings to generate fees for Elliott. So much has been found in previous cases. A consistent finding is amply justified by the factual material adduced in this Abuse Application.

88 *Eighthly*, MCI does not have, and has never had any reasonable prospect of having, sufficient funds to be able to conduct the proceeding without the involvement of a litigation funder.³⁹

89 *Ninthly*, Elliott and/or MCI have committed to incurring substantial expenditure in cases where MCI is not the lead plaintiff. For example, in cases where the relevant proceeding has not been brought with MCI as the lead plaintiff, Elliott and/or MCI have indemnified the plaintiff and Elliott has stated that he will pay the lawyers and experts in the case on behalf of MCI out of his own resources.⁴⁰

³⁸ *Myer Subpoena Decision* [2016] VSC 239 at [66].

³⁹ As Derham AsJ observed in the *Myer Subpoena Decision* [2016] VSC 239 at [134]: “It remains a mystery how MCI is to fund proceedings commenced having regard to the other calls on its capital”.

⁴⁰ E.g. in the Downer EDI Proceeding (Exhibit AM55, page 549: “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...”). In the Banksia Proceeding Elliott indemnified Bolitho.

- 90 *Tenthly*, BSLLP has funded at least two cases in which Elliott is involved: the *Banksia Proceeding* and the *Downer EDI Proceeding*. Elliott has made, and stands to make, substantial money from those cases, both through his involvement as a solicitor, and through the involvement of his litigation funder (BSLLP).
- 91 *Eleventhly*, in public statements Elliott has noted that:
- (a) BSLLP may take on cases other than the *Banksia Proceeding*;
 - (b) there may be a need for a litigation funder in the *Myer Proceeding*.
- 92 *Twelfthly*, the model that has been followed in at least two other group proceedings in which Elliott has been the driving force has been to commence the proceeding without a funder in place, subsequently have the lead plaintiff (and other group members) sign a funding agreement, and to then have a substantial proportion of the settlement proceeds paid to BSLLP.
- 93 *Thirteenthly*, in the context of the *Myer Proceeding*, MCI published an advertisement in the *Australian Financial Review*. It can be inferred that the purpose of this advertisement was to have potential group members make contact with MCI for the purpose of encouraging them to enter into funding agreements.
- 94 *Fourteenthly*, by reason of all or some of the preceding five matters, it can be inferred that MCI and Elliott commenced the *Myer Proceeding* intending to put in place arrangements by which Elliott would secure a financial return. In particular, the basis for inferring the existence of such a purpose is:
- (a) it is, and has always been, the case that MCI will need to seek funding for the current proceeding at some stage. It should be inferred that Elliott has always known and intended that such funding would be sought;
 - (b) Elliott has arranged in other cases for his funding vehicle to enter into funding arrangements with the lead plaintiff and other group members;
 - (c) the party from which such funding will be sought is BSLLP or some other

funding vehicle through which Elliott seeks to make a profit.

95 This is consistent with the comments of Derham As J in the *Myer Subpoena Decision*, where his Honour described the following argument put by Myer as “compelling”:⁴¹

MCI’s financial capacity is relevant to the issue of whether MCI has or intends to enter into some form of funding arrangement, because:

- (a) if MCI does not have sufficient funds to run this proceeding, then there is a clear basis for an inference that it has, or will, seek funding for the proceeding; and
- (b) if MCI has sought, or intends to seek, funding from an entity connected to Mr Elliott, then this supports the inference of an improper collateral purpose.

96 *Fifteenthly*, MCI has shown a determination to bring and pursue group proceedings in circumstances where an existing group proceeding is already on foot, where that existing proceeding includes MCI (and all other members of the group in the proceeding subsequently commenced by MCI) as group members, and where the allegations in each proceeding are materially the same.

97 By reference to these suggested facts and matters, Myer submitted that –

- (a) MCI’s purpose (or, its predominant purpose) is not altruistic. It has not acquired shares for the purpose of championing, at its own cost and risk, the rights of shareholders who have suffered losses;
- (b) MCI’s predominant purpose in commencing and maintaining the *Myer Proceeding* is not to vindicate any rights of MCI or group members;
- (c) MCI’s predominant purpose is to enrich Elliott in ways unconnected with the vindication of MCI’s rights or the rights of group members:
 - (iii) either in some way that has not been disclosed; or

⁴¹ *Melbourne City Investments Pty Ltd v Myer Holdings Limited* [2016] VSC 239 at [75]-[76]. As his Honour also noted (at [100]), “there is a strong inference that funding is, or soon will be, needed”, and “it is on the cards that Mr Elliott would seek contracts or arrangements that will benefit him or those with whom he is connected in some way.”

(iv) by putting in place BSLLP and seeking to have that funder paid a significant proportion of any amount recovered in the proceeding.⁴²

98 As previously noted, this conclusion, it was submitted, was not only open, but compelling particularly in light of the cross-examination of Elliott.

99 In the circumstances of this case, the objective facts set out in these submissions and the two affidavits of Morrison, there is, it was submitted, an abundance of material from which the Court can, and should, infer that the predominant purpose of MCI in commencing and maintaining the *Myer Proceeding* is not to vindicate its rights or those of group members, but rather is to enrich Elliott and/or companies associated with him. To the extent that there was, belatedly,⁴³ an attempt by Elliott to suggest that his motives in establishing and maintaining MCI and his business model are entirely altruistic, it was submitted that evidence is not conclusive and should not be preferred to, or accepted in the face of, the probabilities and inferences that arise from the objective evidence as to what he (and his companies) said and did at earlier times.

100 Accordingly, it was submitted by reference to the *TWE Court of Appeal Decision* that as the Court's process was engaged for an illegitimate or collateral purpose, the proceeding was an abuse of process and should be stayed permanently.

101 Myer submitted further that in the circumstances, permitting the matter to proceed would bring the administration of justice into disrepute. This was, it was submitted,

⁴² Myer referred to the remarks of Derham AsJ in the Myer Subpoena Judgment [2016] VSC 239 at [67], "the financial position of MCI is, on the face of the material presented by Myer, insufficient to fund this proceeding, let alone all the others that presently have no litigation funder. The statements attributed to Mr Elliot[t] and MCI regarding the future use of litigation funders, and the relationship between Mr Elliot[t] and BSL, points to that company being the intended beneficiary of any success in the proceeding".

⁴³ Reference was made to the affidavit of Mark Edward Elliott sworn 19 July 2016. The affidavit is "belated", it was submitted, both in terms of its service 18 days after the date for the service of any evidence by MCI in relation to the Abuse Application, and also in terms of this being the first proceeding in which Mr Elliott has claimed, a substantial period of time after he remained silent in numerous proceedings in which submissions were put (and findings made) that his purpose in commencing securities class actions through MCI was to enrich himself, that in fact his only purpose is an altruistic one. For example, such findings were made in the TWE Proceeding, and were not challenged on appeal.

a further ground of abuse that justified a permanent stay.

E SUBMISSIONS – MCI

102 MCI submitted that, the onus being on Myer, it had not established by admissible evidence, that MCI had as its predominant purpose in commencing this proceeding the generation of income pursuant to its business model and not the legitimate purpose of the vindication of its rights. In fact, the evidence of Elliott established, it was submitted, that the predominant purpose was indeed to provide a platform for meritorious class actions.

103 The gravamen of MCI’s submission was that it was effectively in no different a position to other funders. Reference was made to the recent cases approving funding arrangements.

104 Further, it was submitted that this case differed to the previous proceedings, particularly the *Second TWE Proceeding*, because unlike those cases Elliott gave direct evidence of his (and consequently MCI’s) intention, as noted above.

105 It was submitted that although MCI’s motive was or may be to generate income, it did intend to provide a platform for the vindication of its rights and the rights of others with, if necessary, funding, the rewards of which would be carefully scrutinised or supervised by the Court. It was submitted that this is precisely what was permitted on a proper analysis of *Williams v Spautz*⁴⁴ in light of developments in the funding of class actions. Such analysis, it was submitted, would also be instructive as to the caution with which courts should proceed when asked to stay otherwise meritorious claims.

F ANALYSIS

F1 Applicable legal principles

106 It is unnecessary to engage in any comprehensive or detailed review of the

⁴⁴ (1992) 174 CLR 509.

authorities. The Court of Appeal decisions in *TWE Proceeding* and the *Leighton Proceeding* are relevant, sufficiently clear and are, of course, binding on this Court. Further, the decision of Foster J in the *Second TWE Proceeding* is highly instructive and persuasive as it deals with the generation of income as the predominant purpose, as opposed to generation of legal fees, and is otherwise on all fours with this case.⁴⁵

The TWE Court of Appeal Decision

107 The Court of Appeal in the *TWE Court of Appeal Decision* recently considered the relevant principles.

108 Before Ferguson J (as her Honour then was) at first instance, TWE argued that the predominant purpose of MCI in bringing the proceeding against TWE was not to recover damages, but rather to provide a personal financial benefit to 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.

109 Ferguson J noted the following factual matters, none of which were in dispute:⁴⁶

- (a) MCI was incorporated on 1 November 2012, with Elliott as its sole director and shareholder;
- (b) on the day of its incorporation, MCI purchased small parcels of shares in 20 publicly listed companies, with each parcel costing a little under \$700;
- (c) in February 2014, MCI purchased small parcels of shares in another 145 publicly listed companies, together with further small parcels of shares in TWE, Leighton and WorleyParsons Limited, with each parcel costing between \$600 and \$900;

⁴⁵ Save of course that Elliott did not give evidence and Foster J appears to have in effect drawn adverse inferences in this regard.

⁴⁶ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3)* [2014] VSC 340 at [1], [2] and [6].

- (d) towards the end of 2013, MCI commenced separate group proceedings against TWE, Leighton and WorleyParsons, with Elliott being the solicitor for MCI in each of the proceedings;
- (e) putting it at its highest, the most that MCI could gain by way of compensation if it were successful would be less than \$700 in each of these proceedings.

110 Ferguson J drew the following inferences from these facts:⁴⁷

- (a) MCI was created by Elliott as a vehicle for bringing representative proceedings against listed companies alleging breaches of continuous disclosure obligations;
- (b) MCI would be the representative plaintiff in such proceedings; and
- (c) Elliott would act as its solicitor, with Elliott earning fees from doing so.

111 Her Honour then went on to say:⁴⁸

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;
- (b) the subsequent commencement of three group proceedings by MCI, with Mr Elliott acting as its solicitor; and
- (c) the later purchase of similarly small parcels of shares in Treasury, Leighton and WorleyParsons and in another 145 publicly listed companies.

...

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

⁴⁷ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3)* [2014] VSC 340 at [7]-[8].

⁴⁸ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3)* [2014] VSC 340 at [9], [11] and [29].

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. ...

29 ... 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.

112 Notwithstanding these findings, Ferguson J concluded that the *TWE Proceeding*⁴⁹ was not an abuse of the process of the Court.

113 TWE succeeded on appeal in contending that the *TWE Proceeding* constituted an abuse of process. The relevant judgment was given by Maxwell P and Nettle JA (as his Honour then was). There was no challenge on appeal to any of the findings set out in paragraphs 109 and 110 above.

114 The critical reasoning of Maxwell P and Nettle JA is set out in the *TWE Court of Appeal Decision* at [9]-[14] in the following terms:

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*)).

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

⁴⁹ And the Leighton Proceeding.

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 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.
- 14 It seems to us that this is a clear example of an abuse of process. The processes of the Court do not exist – and are not to be used – merely to enable income to be generated for solicitors. On the contrary, they exist to enable legal rights and immunities to be asserted and defended. In the common form of class action, that is the sole purpose of the proceedings. The members of the class wish to vindicate their rights. The fact that success will result in the solicitors’ fees being paid does not affect the propriety of the proceeding.

115 Using the words of Mason CJ, Dawson, Toohey and McHugh JJ in *Williams v Spautz*, Maxwell P and Nettle JA noted that it was not part of MCI’s purpose to receive “a result for which the law provides in the event that the proceedings terminate in [its] favour”.⁵⁰

116 At [22], Maxwell P and Nettle JA concluded as follows:

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.⁵¹ 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.

⁵⁰ *TWE Court of Appeal Decision* at [18].

⁵¹ *Williams* (1992) 174 CLR 509, 520.

117 As noted, MCI sought Special Leave to Appeal to the High Court in relation to the
TWE Court of Appeal Decision. That application was refused with costs. The
transcript of argument before the High Court, and comments made by each of
Hayne J and Keane J, provide support for the submissions made by Myer on this
application.⁵² In particular, the following may be noted.

118 *First*, Senior Counsel for MCI submitted that the *TWE Court of Appeal Decision* was
contrary to the High Court decision in *Williams v Spautz*. In response to that (and
other submissions made on behalf of MCI), leave was refused and the Court noted
that it was not persuaded that an appeal would enjoy sufficient prospects of success.

119 *Secondly*, Keane J noted that, “The purpose of judicial power is to quell controversies.
Surely, it is an abuse of the judicial power to generate controversies for the profit
that can be made from doing so.”⁵³

120 *Thirdly*, Hayne J described as “unthinkable” the proposition that it could be
legitimate for a solicitor to procure a client to commence proceedings for the
predominant purpose of generating fees for the solicitor.⁵⁴ To like effect, Keane J
observed that none of the authorities referred to ever had it in mind that such
conduct could be legitimate.⁵⁵

The Leighton Court of Appeal Decision

121 As previously noted, the issue of abuse of process came before the Court of Appeal
in the Leighton Proceeding.⁵⁶

122 MCI argued on appeal that the decision of the Court of Appeal in the *TWE Court of
Appeal Decision* was wrong and should be overturned or not followed.⁵⁷

⁵² Although, it was accepted that the refusal of Special Leave to Appeal did not create a binding
precedent.

⁵³ T4:129-133.

⁵⁴ T7:240-245.

⁵⁵ T7:234-240.

⁵⁶ *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2015] VSCA 235.

⁵⁷ *Leighton Court of Appeal Decision* [2015] VSCA 235 at [8] (appeal ground 8), [14].

123 The Court of Appeal (in a joint judgment of Tate and Beach JJA and Robson AJA) noted that the Court was bound to follow the *TWE Court of Appeal Decision* unless they determined that it was “plainly wrong”.⁵⁸ The Court of Appeal held that not only was the *TWE Court of Appeal Decision* not plainly wrong, but that in fact they saw “no error in the conclusion of the majority that the proceeding was brought for an improper purpose, to use them as a means of generating income for Mr Elliott rather than to recover compensation.”⁵⁹

124 Their Honours then went on to say:

It is one thing to commence a proceeding for the purpose of obtaining substantive relief, and in the knowledge that if one is successful then costs will likely follow the event. It is another to have commenced a proceeding for the predominant purpose of simply generating income for a legal practitioner in circumstances where the value of any loss meant that it was unlikely that the proceeding had been commenced for the purpose of recovering compensation. We agree with the majority in *Treasury Wine* that commencing a proceeding, in the circumstances we have described, for the predominant purpose of generating income for a legal practitioner, was and is an abuse of process.⁶⁰

The Second TWE Proceeding

125 In the more recent decision of the *Second TWE Proceeding*⁶¹, Foster J conducted a thorough review of the relevant authorities in relation to abuse of process, including in particular *Williams v Spautz* and the *TWE Court of Appeal Decision*. Relevantly, and consistently with the statement of principle of the Court of Appeal in the *TWE Court of Appeal Decision*, Foster J found that the following proposition could be stated having regard to the High Court decisions in *Williams v Spautz*⁶², *Varawa v Howard Smith Co Ltd*⁶³, and *Dowling v Colonial Mutual Life Assurance Society Ltd*⁶⁴:

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 524; and *Spautz* at 526-527). It is the use of the proceeding

⁵⁸ *Leighton Court of Appeal Decision* [2015] VSCA 235 at [39].

⁵⁹ *Leighton Court of Appeal Decision* [2015] VSCA 235 at [45].

⁶⁰ *Leighton Court of Appeal Decision* [2015] VSCA 235 at [45].

⁶¹ [2016] FCA 787.

⁶² (1992) 174 CLR 509.

⁶³ (1911) 13 CLR 35.

⁶⁴ (1915) 20 CLR 509.

which must be examined and which may constitute an abuse of process (*Spautz* at 527-528). 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 532-533). 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 532-533). The pursuit of a legal remedy is not converted into an abuse of process merely by an unworthy or ulterior motive (*Spautz* at 533-534).⁶⁵

126 As noted by Foster J, the purpose which legal proceedings are designed to serve are the protection or vindication of particular rights or immunities. Legal proceedings are not designed to enable a funder or some other party connected with the plaintiff to be enriched by reason of the proceeding. Accordingly, and consistently with the analysis of the Court of Appeal and Foster J, if the use to which a proceeding is put is other than the protection or vindication of rights or immunities, then the proceeding is an abuse of process.

F2 Decision

127 The critical issue is, therefore, the use to which the proceeding is put.⁶⁶ If the predominant purpose is the generation of legal fees or other income, or obtaining a collateral advantage from the proceeding, and not simply any advantage that might flow from the proceeding brought to vindicate legal rights, the proceeding will be an abuse of process,⁶⁷ because proceedings are not designed to generate income unrelated to proper compensation or damages and the like.

128 Why then has MCI commenced this proceeding? If the predominant purpose is to generate income for Elliott and/or his associates it is an abuse of the process. If however, the income, such as it may be, simply flows from the vindication of legal rights, being the predominant purpose of the proceeding, it is not an abuse of the process.

⁶⁵ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2016] FCA 787 at [147(d)].

⁶⁶ *TWE Court of Appeal Decision* (2014) 45 VR 585, at [12] and authorities cited.

⁶⁷ *Ibid*, at [11].

- 129 In my opinion the Court's process has been engaged for an illegitimate or collateral purpose and accordingly the proceeding is an abuse of process.
- 130 The predominant purpose of this proceeding is to generate, not legal fees, but income or revenue for interests associated with Elliott. The recovery of mere hundreds of dollars – although a vindication of rights – is entirely incidental and merely the pathway to the desired result. But for the desired result or predominant purpose this proceeding would not have commenced. So much is effectively admitted. Like the generation of legal fees, the generation of income is not a legitimate predominant purpose.
- 131 In my opinion, this case is on all fours with the *TWE Court of Appeal Decision*. Any distinction is without any legal difference or significance. Whether the income generated represents fees for its solicitor or income or profit for those behind and inextricably connected to the litigation the result is the same. The predominant purpose – whether it be fees or otherwise – is to use the proceeding to generate a profit. Or put another way, the predominant purpose is not to vindicate rights, notwithstanding that this may be a pre-condition to the relevant income generation. To this extent the case differs from the usual funded class action cases. There the predominant purpose is to vindicate legal rights.
- 132 The evidence establishing the predominant purpose of the proceeding, namely the generation of income (apart from damages or compensation) for those entities associated with Elliott, is indeed compelling as submitted. Most of the fifteen facts and matters referred to by Myer in its written submission⁶⁸, drawn largely from the findings of Foster J in the *Second TWE Proceeding*, provide the necessary evidential foundation. This foundation was not shaken by the evidence of Elliott. In fact the contrary is the case. Elliott's evidence confirmed the predominant purpose.⁶⁹

⁶⁸ Based on the admissible evidence filed by Myer in this proceeding.

⁶⁹ As noted above, Foster J effectively drew an adverse inference from the failure of Elliott to give evidence as to 'his' predominant purpose. In this case Elliott did give evidence but it does not assist the position of MCI.

- 133 Notwithstanding Elliott's repeated and rehearsed statements in evidence, that MCI is seeking to provide a platform for the vindication of legal rights (the intention) and what follows or may follow in terms of income generation is no more or less than that which is usual, permitted and supervised by the Court under the relevant provisions (the motive), the evidence taken as a whole points the other way.
- 134 Of the 15 suggested factual findings ([81]-[97] above), MCI effectively does not dispute, or take serious issue with items 1, 2, 3, 4, 5, 9, 10, 11.
- 135 In relation to the sixth matter ([86] above) MCI contends that in addition to any damages or compensation, MCI may be awarded additional compensation for acting in a representative capacity as the lead plaintiff. Reference was made to s 33ZF of the *Supreme Court Act*. Indeed, this is the point. But for this additional compensation, or other compensation through funding arrangements, MCI would not have commenced this proceeding.
- 136 In relation to the seventh matter ([87] above) MCI contends that as this case is not concerned with any abuse relating to legal fees, the suggested consistent finding is irrelevant and no inference is available. However, although the case does not relate to legal fees, it relates to the generation of other income which makes it, in context, indistinguishable from the other cases.
- 137 In relation to the eighth matter ([88] above) MCI contends that it does have and has always had sufficient funds available to fund the proceeding and that it has never engaged a litigation funder in any class action proceeding in which it is a plaintiff. Further it contends that there is no evidence that it intends to do so in this case. In my opinion the evidence points the other way. It is inconceivable that if the matter proceeded to trial MCI would not require some form of funding. It would require substantial funding and on the evidence BSLLP will be the likely funder.
- 138 In relation to the twelfth matter ([92] above) MCI contends that the suggested 'substantial proportion of the settlement proceeds paid to BSLLP' is no more than 10% and much less than the market rate for litigation funders. This does not

however convert the predominant purpose into a legitimate one.

139 In relation to the thirteenth matter ([93] above) MCI contends that the suggested inference is not the most logical one and that there is no evidence as to the purpose of the advertisement. It was submitted that the rational inference was ‘to ascertain the number and value of the shareholder class members’ and to ensure that, if necessary, a substitute plaintiff can be found. In my view this is not a matter of sufficient relevance.

140 In relation to the fourteenth matter ([94] above) MCI contends that the only financial return is following a successful outcome of the proceedings by judgment or settlement and consequently there can be no abuse presumably because of the court’s involvement either way. The fact that there may be limited or even extensive court supervision does not alter the predominant purpose. It does or may do no more than control the extent of the collateral benefit.

141 In relation to the fifteenth matter ([96] above) MCI contends that the proposition is factually wrong. Nothing turns on this.

142 Elliott conceded, fairly and appropriately, that reward was the motive⁷⁰ and was to be achieved, if there was a favourable result by settlement or judgment, by application under s 33ZF of the *Supreme Court Act* (reimbursing a representative plaintiff) and if applicable a percentage to be taken by the (related party) funder.⁷¹

143 He also gave evidence that the predominant purpose is to provide a platform, for meritorious class actions to be conducted.⁷²

144 When I suggested that he would not provide the platform unless there was a reward he later responded ‘if I don’t get it a couple of times, I’ll stop doing it, that’s for sure’.⁷³ He then gave evidence as follows; ‘this is not unlike venture capital, the risks

⁷⁰ T30.2.

⁷¹ T30.9.

⁷² T39.24.

⁷³ T40.6.

are significant but so are the rewards and it's up to the judge to determine if they are commensurate'.⁷⁴

145 When the predominant purpose of the proceeding was again put to him directly Elliott disagreed and repeated that 'it was to provide a platform for a meritorious class action'.⁷⁵ A little earlier he said; 'when I vindicate my rights I would be seeking compensation for having done so, yes beyond the damages that I would have obviously received having vindicated my rights'.⁷⁶ Elliott then agreed that the damages would be limited to 'hundreds of dollars'⁷⁷ and the potential costs 'on both sides in excess of \$1 million'.⁷⁸ Finally he said in effect that he would not 'do it for \$178'⁷⁹.

146 It was submitted that when assessing the evidence of Elliott as to purpose, Elliott's evidence was not conclusive and that the Court was entitled to scrutinise and carefully assess such evidence and have regard to what Elliott "... said and did, and from any inference that might be drawn from what was said and done (including the commencing and maintenance of the proceeding) in the circumstances of the case".⁸⁰

147 In my opinion the evidence does not assist MCI. Acting as sole plaintiff, MCI would clearly not have commenced this proceeding. Acting as a representative plaintiff it has only commenced this proceeding so that it (or its associates) may be rewarded in the manner identified. Absent such reward it would not have provided 'the platform'. It is this hope and expectation of reward that is the predominant purpose. There is a direct relationship between the platform and the reward. No reward, no platform. This is the business model. Although this is what most funders do, the critical difference is that in the case of such funders the reward follows the legitimate

⁷⁴ T40.10.

⁷⁵ T44.6 - T44.13.

⁷⁶ T43.28.

⁷⁷ T44.2.

⁷⁸ T44.4.

⁷⁹ T44.5.

⁸⁰ *Williams v Spautz* (1992) 174 CLR 509, at [532]. Reference was also made to *Warriewood Valley Pty Ltd v FC of T* 93 ATC 4653 at [4662].

vindication of rights which is the predominant purpose of the litigation. In this case, the vindication of rights is incidental to or purely a pre-condition to the reward.

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

149 In my opinion the critical matters that inform the predominant purpose are the matters referred to by Myer above and by Foster J in the *Second TWE Proceeding* at [156].

150 In my opinion these facts and matters, open on the evidence, together with the oral evidence of Elliott as referred to above, are sufficient to permit the drawing of the necessary inferences (as referred to and submitted by Myer at [97] above) in relation to the predominant purpose, despite the forceful attack by Mr O'Bryan SC (who appeared with Mr Symons for MCI) as to the adequacy and admissibility of such evidence.

151 The first attack was the *Browne v Dunn*⁸¹ point. It was submitted, by reference to a table, that numerous matters of importance were not put to Elliott and could not be relied on. In response Mr Waller QC (who appeared with Mr Liondas for Myer) submitted that the critical issue of improper purpose and matters relating to the predominant purpose of the acquisition were squarely put. It was submitted that other relevant matters were either agreed, responded to by Elliott in his affidavit or embraced sufficiently by the cross-examination.

152 I agree. In my opinion there is no unfairness associated with the operation of the rule in *Browne v Dunn*. Elliott was fully aware of the nature of the case and the matters and evidence that he needed to address and that Myer would rely on. In his affidavit and submissions prepared on his behalf and on his instructions, including

⁸¹ (1893) 6 R 67.

relevant and proper admissions, the relevant critical issues were dealt with as indeed they were in cross-examination. There was, in my view, sufficient 'puttage' given the circumstances and context of this application.⁸²

153 The second attack comprised numerous objections to Morrison's affidavits. It is not necessary to deal with these objections. There is ample admissible relevant evidence, including admissions, that establishes the evidential foundation for the various findings and inevitable and permitted inferences.

154 The third attack related to the submission that MCI would require funding and the business model and evidence was such that the related party funder would provide funding and obtain a substantial financial benefit. It is sufficient to say that if the matter proceeds to trial MCI will require substantial funds. Whatever the source of funding, the expectation, based on the evidence, would be that the funder (probably BSLLP) would receive or seek or expect to receive an appropriate and not insubstantial benefit.

155 MCI made much of advances in the law in relation to the funding of class actions. Extensive reference was made to *Fostif*⁸³, both in the New South Wales Court of Appeal and the High Court, and to other cases. However, none of those cases dealt with the abuse of process type argument with which we are here concerned. In those cases the predominant purpose of the litigation was not challenged. Its legitimacy, namely the vindication of rights, was assumed. Rather, the issue or the suggested abuse related to the funding arrangements involving external third party funders. The funding of class actions (on commercial terms that involve consideration of risks and rewards) has come a long way and is even encouraged as a vital access to justice issue. However, whatever commercial outcomes flow from the product of the litigation — and although to some extent supervised they may be considerable — they are underpinned by parties (usually named plaintiffs unrelated

⁸² See *Curwen & Ors v Vanbreck Pty Ltd* (2009) 26 VR 335 at [21].

⁸³ *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 and *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd & Ors* (2005) 63 NSWLR 203.

to the funder) who have the predominant purpose of vindicating their rights. The fact that the funder may provide the means to do this, albeit for substantial reward, does not detract from the legitimacy of the fundamental or predominant purpose. It is what flows from it. As identified, this case and this funding model is different. It is this model as exemplified by the specific features of this case, as identified,⁸⁴ that the law will not permit.

156 Although it is not necessary to deal with this issue in any detail, it must also follow in my opinion that permitting the case to proceed will bring the administration of justice into disrepute.

G DISPOSITION

157 Accordingly, for the reasons given I propose to grant a stay of the proceeding. I will hear from the parties as to an appropriate form of order and costs.

⁸⁴ This case is concerned with MCI acting as lead plaintiff in the circumstances referred to, and no more. Although cases where MCI is not the lead plaintiff (and there is an unrelated lead plaintiff) have been referred to as part of the evidence, it is not intended by this judgment to deal with the legitimacy or legality of such arrangements.