

Notice of appeal

No. of 20

Federal Court of Australia
District Registry: New South Wales
Division: General

On appeal from the Federal Court

Larry Crowley

Appellant

Worley Limited (ACN 096 090 158)

Respondent

To the Respondent

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Federal Court of Australia, Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000

Date:

.....
Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Larry Crowley, Appellant
Prepared by (name of person/lawyer) Craig Allsopp
Law firm (if applicable) Shine Lawyers
Tel (02) 8754 7270 Tel (02) 8754 7270
Email callsopp@shine.com.au
Address for service Level 6, 299 Elizabeth Street, Sydney NSW 2000
(include state and postcode)

The Appellant appeals from the whole of the judgment of the Federal Court given on 19 December 2023 at Sydney in proceedings NSD 1292 of 2015.

Grounds of appeal

1. In circumstances where the primary judge (correctly) found that the Respondent had, engaged in misleading or deceptive conduct and breached its continuous disclosure obligations in making its FY14 guidance, and had (correctly) accepted market based causation, the primary judge erred in failing to find that the Respondent's conduct caused some loss or damage to the Appellant.
2. The primary judge erred in finding that counterfactual earnings guidance by the Respondent in the amount of \$317m Net Profit After Tax (NPAT) would have been reasonably based and would have satisfied the parameters of a P50 budget.
3. The primary judge erred in failing to:
 - a. accept that counterfactual earnings guidance of \$260m-\$300M NPAT (being the primary counterfactual), alternatively \$284m NPAT or \$289m NPAT (being the alternative counterfactuals), on and from 14 August 2013 or, in the alternative, on and from 27 September 2013, was appropriate for the quantification of loss or damage;
 - b. do the best the primary judge could on the available evidence, by quantifying the Appellant's loss or damage based on the calculations prepared by the Appellant's expert, Mr Torchio.
4. In the alternative to Grounds 2 to 3, the primary judge erred in finding that, on counterfactual earnings guidance for FY14 of NPAT of \$317 million, the Appellant had failed to prove that the Respondent's contravening conduct caused the Appellant loss or damage and by failing to quantify the Appellant's loss or damage in accordance with the calculations prepared by the Appellant's expert, Mr Torchio.

Orders sought

1. The appeal be allowed.
2. The orders made on 19 December 2023 be set aside.
3. Questions 1 to 15 in the Joint List of Issues for Determination be answered as set out in Annexure A to this Notice of Appeal.
4. The Respondent pay the Appellant's costs.

Appellant's address

The Appellant's address for service is:

Place: Level 6, 299 Elizabeth Street, Sydney NSW 2000

Email: craig.allsopp@acalawyers.com.au

The Appellant's address is 17 The Promenade, Port Macquarie NSW 2444.

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 7 February 2024



Signed by Craig Allsopp
Lawyer for the Appellant

Annexure A**Joint List of Issues for Determination (Annotated)****I. Misleading or deceptive conduct case**

- 1 Was the FY2014 Guidance Representation a representation as to future matters and, if so, in what respects?

Answer: Yes, to the extent only that it conveyed the representation that the Respondent (**WOR**) expected to achieve NPAT in excess of \$322 million in FY14.

- 2 At any time throughout the period from 14 August 2013 to 19 November 2013 (**Relevant Period**), alternatively in the period from 9 October 2013, 10 October 2013 or 15 October 2013 to the end of the Relevant Period:

2.1 in so far as the FY2014 Guidance Representation was a representation as to present matters, was it misleading or deceptive, or likely to mislead or deceive; and

2.2 in so far as the FY2014 Guidance Representation was a representation as to future matters, was it made without a reasonable basis?

Answer: Yes in relation to both questions, at all times throughout the Relevant Period.

- 3 By making the FY2014 Guidance Representation, did WOR engage in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of any of the pleaded statutes (**Misleading or Deceptive Conduct**) during all or any part of the Relevant Period (and if so, when) (**FY2014 Guidance Representation Contravention**)?

Answer: Yes, during all of the Relevant Period

- 4 By making the FY2014 Earnings Guidance Statement, did WOR engage in Misleading or Deceptive Conduct during all or any part of the Relevant Period (and if so, when) (**FY2014 Guidance Statement Contravention**)?

Answer: Yes, during all of the Relevant Period.

II. Continuous disclosure case

- 5 At any time during the Relevant Period, was it the fact that WOR did not have a reasonable basis for making the FY2014 Earnings Guidance Statement (**FY2014 Guidance Material Information**)?

Answer: Yes, at all times throughout the Relevant Period.

- 6 If the answer to question 5 is “yes”, was WOR “aware” within the meaning of ASX Listing Rule 19.12 of the FY2014 Guidance Material Information at any time during the Relevant Period (and if so, when)?

Answer: Yes, at all times throughout the Relevant Period.

- 7 Between 14 August 2013 and immediately before WOR’s announcement to the ASX on 20 November 2013 (**20 November 2013 Announcement**), was it a fact that the consensus expectation of professional analysts covering the ASX and ordinary shares in WOR (**WOR Securities**), that WOR would deliver between \$354 and \$368 million in NPAT for FY2014 (**FY2014 Earnings Expectation**)?

Answer: No.

- 8 If the answer to question 7 above is ‘yes’, by 14 August 2013, was WOR aware of the FY2014 Earnings Expectation?

Answer: Does not arise.

- 9 At any time during the Relevant Period, was it the fact that WOR’s FY2014 earnings were likely to fall materially short of the FY2014 Earnings Expectation (**FY2014 Consensus Forecast Material Information**)?

Answer: Does not arise.

- 10 If the answer to question 9 is “yes”, was WOR “aware” within the meaning of ASX Listing Rule 19.12 of the FY2014 Consensus Forecast Material Information at any time during the Relevant Period (and if so, when)?

Answer: Does not arise.

- 11 Did WOR at any time prior to 20 November 2013 become obliged pursuant to Listing Rule 3.1 to tell the ASX of the FY2014 Guidance Material Information and/or the FY2014 Consensus Forecast Material Information?

Answer:

- (a) in relation to the FY2014 Guidance Material Information: Yes; and
 (b) in relation to the FY2014 Consensus Forecast Material Information: No.

- 12 Did WOR contravene section 674(2) of the *Corporations Act* by not informing the ASX of:

12.1 the FY2014 Guidance Material Information on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013 (**FY2014 Guidance Material Information Contravention**); and/or

12.2 the FY2014 Consensus Forecast Material Information on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013 (**FY2014 Consensus Forecast Material Information Contravention**)?

Answer:

- (a) as to question 12.1: Yes; and
 (b) as to question 12.2: No.

III. Causation, loss and damage

- 13 During the Relevant Period, did the Contraventions (or any of them) cause the market price for WOR Securities to be substantially greater than:

13.1 their true value; and/or

13.2 the market price that would have prevailed but for the Contraventions (or any of them),

and if so, by how much?

Answer: ~~No, in relation to both questions 13.1 and 13.2. The question as to how much does not arise.~~ Yes, by 24.28%, or in the alternative, by 21.16%, or in the alternative, by 19.60%, or in the alternative, by 10.87%

- 14 In the decision to acquire an interest in WOR Securities did the Applicant rely directly on the FY2014 Guidance Representation or the FY2014 Earnings Guidance Statement and its repetition on 9, 10 and 15 October 2013?

Answer: Yes, in relation to the FY2014 Guidance Representation and the FY2014 Earnings Guidance Statement, but not in relation to its repetition on 9, 10 and 15 October 2013.

- 15 Has the Applicant suffered loss and damage in relation to his interest in WOR Securities by and resulting from his reliance on the Contraventions?

Answer: ~~No.~~ Yes, in the amount of \$2,432, or in the alternative, \$2,120, or in the alternative, \$1,963, or in the alternative, by \$1,089.

Definitions:

“Contraventions” mean the:

- (a) FY2014 Guidance Representation Contravention (as defined in question 3);
- (b) FY2014 Guidance Statement Contravention (as defined in question 4);
- (c) FY2014 Guidance Material Information Contravention (as defined in question 12.1);
and/or
- (d) FY2014 Consensus Forecast Material Information Contravention (as defined in question 12.2);

“FY2014 Guidance Representation” has the same meaning as defined in paragraph 51 of the Fourth Further Amended Statement of Claim. It means, individually and together, a representation made by WOR that:

- (a) It expected to achieve NPAT in excess of \$322 million in the financial year ended 30 June 2014; and
- (b) It had reasonable grounds to expect that it would achieve NPAT in excess of \$322 million in the financial year ending 30 June 2014.

“FY2014 Earnings Guidance Statement” has the same meaning as defined in paragraph 12(b) of the Fourth Further Amended Statement of Claim. It means the following statement made by WOR on 14 August 2013: *“While recognizing the uncertainties in world markets, we expect our geographic and sector diversification to provide a solid foundation to deliver increased earnings in FY2014”.*