NOTICE OF FILING

Details of Filing

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Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 124
Rule 36.24

Notice of contention

No. NSD 115 of 2024

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 Appellant

The Respondent contends that the answer to questions 13 and 15 as recorded in paragraph 1 of the orders of the Federal Court made on 19 December 2023 at Sydney in proceeding NSD 1292 of 2015 should be affirmed on grounds other than those relied on by the Court.

Grounds relied on

1. In circumstances where the learned primary judge was bound (consistently with the principles in *Harvard Nominees v Tiller (No 4)* (2022) 403 ALR 498; [2022] FCA 105) to apply the ruling in *Crowley v WorleyParsons Limited (No 2)* [2019] FCA 1535 with the effect that the representativeness of sell-side analysts as a proxy for the views of buyers and sellers in the market was a matter to be separately proven by the Appellant:

    a. the learned primary judge ought to have held that the Appellant had not established that the opinions of sell-side analysts were a proxy for the buyers and sellers in the market for WOR shares;

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b. alternatively to 1a, the learned primary judge ought to have held the opinions of sell-side analysts were not a proxy for the buyers and sellers in the market for WOR shares;

with the consequence, as a result of either 1a or 1b above, that the learned primary judge ought further to have held that:

c. the calculation of the portion of the excess return attributable to different counterfactual assumptions could not be undertaken by commencing with the prior "consensus" as at 19 November 2013 of $352 million and subtracting it from "analyst consensus" after the 20 November 2013, as at 29 November 2013;

d. the Appellant had failed to prove that the FY2014 Guidance Material Information caused buyers and sellers in the market to inflate the trading price of WOR shares above the price which a properly informed market would have set.

2. The learned primary judge erred in determining that, in a securities class action, market-based causation is a valid means of proving the necessary causal connection between alleged contravening conduct and the claimed losses of a purchaser of shares (RJ, [170]-[174]).

3. In the alternative to ground 2, the learned primary judge:

a. erred in determining (at RJ, [175]) that WOR misunderstood the first of the three elements set out in paragraph [1662] of *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* (2019) 293 FCR 29; [2019] FCA 1747 (***Myer***);

b. ought to have held that:

i. paragraph [1662(a)] of *Myer* required that the Appellant adduce proof on the balance of probabilities that WOR's disclosure failures caused the actions of intermediaries, namely buyers and sellers, to inflate the trading price above that which a properly-informed market would have set;

ii. the issue was one which required the application of specialised knowledge (per *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305);

iii. there was no proof, including for the reasons set out in ground 1 above, capable of supporting such a conclusion); and/or

iv. the Appellant did not prove, nor seek to prove, that:

1. the market for WOR shares was fundamentally efficient;

2. buyers and sellers in the market for WOR shares traded on the integrity of the price of WOR shares;

v. by reason of the foregoing matters, the Appellant could not invoke market-based causation as a form of indirect active causation.

4. In the alternative, the learned primary judge erred in determining (at RJ, [257]) that:

a. he could infer (in the absence of expert evidence) that a counterfactual disclosure of $284 million would have caused an adverse effect on WOR's share price;

b. whilst "market price and true value are not necessarily the same" market price in an informationally efficient market was a 'good enough proxy' for true value for the purpose of quantifying loss.

5. Further or alternatively the learned primary judge:

a. erred in finding (at RJ, [255]) that a reasonable counterfactual NPAT for FY14 was $317 million because his Honour failed to have proper regard for and give appropriate weight to some or all of the following:

i. in relation to the "first round management adjustments" (other than the adjustments made in relation to the MENAI and ASCH Regions in the amount of $6.6 million) in the amount of $24.446 million in operational EBIT (or $17.36 million NPAT applying the formula of 71% adopted by the learned primary judge in RJ, [253]), his Honour erred in failing to take into account or give appropriate weight to the following undisturbed findings of the learned primary judge in the initial trial, which he was bound to accept on remitter:

1. Between 29 and 31 May 2013, Mr Bradie (WOR's Group Managing Director of Operations) conducted a round of calls to discuss the detailed location budgets with each region: PJ, [198];

2. Mr Bradie's review calls might have identified adjustments for specific locations but the regions were left to find the adjustments across all locations within their purview: PJ, [203];

3. Senior management did not "Demand" adjustments to operational EBIT and adjustments were not "imposed" by senior management: PJ, [324]; and

4. Locations were not "pushed too hard" in any single location or more generally: PJ, [329].

b. in relation to the "second round management adjustments" (other than the adjustments made in relation to the MENAI and ASCH Regions in the amount of $6.7 million) in the amount of $7.4 million in operational EBIT (or $5.254 million NPAT applying the formula of 71% adopted by the learned primary judge in RJ [253]), his Honour erred in failing to take into account or give appropriate weight to the following undisturbed findings of the learned primary judge in the initial trial, which he was bound to accept on remitter:

i. Mr Wood (CEO of WOR) considered that the draft FY14 Budget as at 31 May 2013 was "unacceptable and unrealistic as it sought to justify increase in operational EBIT of 1% with an increase in functional costs of 17%": PJ, [215];

ii. The challenge set by Mr Wood (including in relation to the "second round management adjustments") was an attack on overhead structures: PJ, [226]; and

iii. The "second round adjustments" were not a product of "finding ways to pump up the numbers": PJ, [232], [334]-[335];

c. in relation to the amount of $23.4 million NPAT in overhead reduction made as part of the Management Adjustments (**Overheads Adjustment**), the learned primary judge erred in failing to take into account or give appropriate weight to:

i. his finding at RJ, [250]-[252] that the Overheads Adjustment was not shown to lack reasonable grounds and his finding at RJ, [251] and RJ, [252] that the Overheads Adjustment satisfied the parameters of a P50 budget;

ii. the learned primary judge in the initial trial's finding at PJ, [340] that WOR did not lack a reasonable basis for the Overheads Adjustment (which the learned primary judge correctly found he was bound by on the remitter); and

iii. that the Appellant did not submit that the Overhead Adjustments were unreasonable as recorded in RJ, [250] and PJ, [336];

d. ought to have held that a reasonable counterfactual NPAT for FY14 was $352.1 million, as was contained in the FY14 Budget, alternatively an amount between $322.1 million and $352.1 million.

Date: 28 February 2024

Signed by Jason Betts
Lawyer for the Respondent