

NOTICE OF FILING

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Details of Filing

Document Lodged: Reply - Form 34 - Rule 16.33
File Number: NSD576/2018
File Title: JAMES BONHAM AS TRUSTEE FOR AUCHAM SUPER FUND v
ILUKA RESOURCES LTD ABN 34 008 675 018
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 6/09/2018 3:19:17 PM AEST

Registrar

Important Information

As required by the Court's Rules, 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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Reply

No. NSD576 of 2018

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

James Bonham atf the Aucham Super Fund

Applicant

Iluka Resources Limited (ACN 008 675 018)

Respondent

The applicant joins issue on the Defence of the respondent (**ILU**) filed 3 August 2018, save to the extent that the Defence contains admissions.

In paragraphs A26 and 82 of the Defence, ILU pleads a limitation defence, to which the applicant replies as set out below. References in this document to **SOC** are to the applicant's original Statement of Claim filed 11 April 2018 and to **ASOC** are to the applicant's Amended Statement of Claim filed 8 June 2018.

1. The relevant limitation periods are:

- (a) ss 236(2) and 237(3) of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**) (applying to claims for damages / compensation pursuant to s 18 of the ACL);
- (b) ss 1041I(2), 1317K and 1325(4) of the *Corporations Act 2001* (Cth) (**Corporations Act**) (applying, respectively, to claims for damages / compensation pursuant to ss 1041E and 1041H, and 674 of the Corporations Act); and
- (c) ss 12GF(2) and 12GM(5) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) (applying, respectively, to claims for damages / compensation pursuant to ss 12GF(1) and 12GM(1) of the ASIC Act) (cf. ILU's Defence at para 82(b)(iii), which also refers to 12GNB(5) of the ASIC Act)

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but that sub-section applies in respect of applications by ASIC pursuant to s 12GNB(1)).

2. The limitation periods require that:
 - (a) an action be commenced within 6 years after the day on which the cause of action that relates to the conduct accrued (ACL, s 236(2));
 - (b) an application be made within 6 years after the day on which the cause of action that relates to the conduct accrued (ACL, s 237(3));
 - (c) an action be begun within 6 years after the day on which the cause of action arose (Corporations Act, s 1041I(2));
 - (d) proceedings be started no later than 6 years after the contravention (Corporations Act, s 1317K);
 - (e) an application be made within 6 years after the day on which the cause of action arose (Corporations Act, s 1325(4));
 - (f) an action be commenced within 6 years after the day on which the cause of action that relates to the conduct accrued (ASIC Act, s 12GF(2)); and
 - (g) an application be made within 6 years after the day on which the cause of action that relates to the conduct accrued (ASIC Act, s 12GM(2)).

3. The applicant complied with the above limitation periods in that he commenced or began an action, made an application and/or started proceedings by way of Originating Application and the SOC, each of which was filed on and dated 11 April 2018.

Particulars

The earliest alleged contraventions, being those formerly pleaded at paragraphs 37-39 and 43-62 of the SOC and now pleaded at paragraphs 37-39 and 43-58 of the ASOC, are alleged to have arisen on or after 12 April 2012, from which time group members who purchased ILU shares at the prevailing (inflated) market price suffered loss as a result of those contraventions. A cause of action accrued or arose from that date, on the basis of the *Potts v Miller* (1940) 64 CLR 282 loss scenario formerly pleaded at paragraphs 87 and 88(b) of the SOC and particularised at paragraph (i)(A) and/or (B) and now pleaded at paragraphs 79 and 80(b) of the ASOC and particularised at paragraph (i)(A) and/or (B). Six years after that date is 12 April 2018, being 1 day after the date of the applicant's Originating Application and SOC.

Alternatively, a cause of action accrued or arose from a later date, which was as late as on or shortly after 9 July 2012, on the basis of the *Dura Pharmaceuticals Inc. v Broudo*, 544 US 335 (2005) loss scenario formerly pleaded at paragraphs 87

and 88(b) of the SOC and particularised at paragraph (i)(C) and/or (D) and now pleaded at paragraphs 79 and 80(b) of the ASOC and particularised at paragraph (i)(C) and/or (D). Six years after that date is 9 July 2018, being 2 months and 27 days after the date of the applicant's Originating Application and SOC (and also, although not strictly relevant for reasons pleaded below, 1 month and 1 day after the ASOC).

4. The former SOC pleaded all causes of action and/or contraventions now pleaded in the ASOC (cf. Defence, para 82(f)).

Particulars

General

The applicant's claims under the former SOC and now under the ASOC are that on and from 12 April 2012 the market in ILU's shares was materially uninformed and/or misled, in contravention of statutory norms relating to continuous disclosure, false or misleading statements and/or misleading or deceptive conduct, in particular as to ILU's prospects as disclosed in the guidance given by ILU about its likely sales of Z/R/SR. That state of uninformedness and/or being misled continued after ILU's disclosures on 8 May 2012 and it was not until 9 July 2012 that a corrective disclosure was made (the period 12 April 2012 to 9 July 2012 being the **Relevant Period**). The applicant and group members suffered loss during the Relevant Period and further or in the alternative from the time of the corrective disclosure on 9 July 2012. These claims, in substance, were pressed in the SOC and continue to be pressed in the ASOC. The lay and expert evidence to be led by the applicant will be the same. So too the lay and any other evidence which group members might adduce for the idiosyncratic facts to be determined in their separate trials afterward.

Specific

ILU identifies specific paragraphs of the ASOC, defined as the "Materially Amended Paragraphs", at paragraph 82 of its Defence. As to each of those specific paragraphs, the applicant says the following:

- (i) **Paragraphs 7A, 7B, 7D and 7E** of the ASOC allege who ILU's directors, Leadership Team and officers were from February 2012 and at all relevant times during and until the end of the Relevant Period. None of these paragraphs raise a new cause of action or alleged contravention by ILU. They are alleged material facts of existing causes of action. Further, the applicant pleaded in the SOC (former para 5) that information known or which ought reasonably to have been known by an officer of ILU is information of which ILU was "aware" at the relevant time. In that regard paragraphs 7A, 7B, 7D and 7E of the ASOC merely provide greater detail about the alleged officers of ILU at relevant times.
- (ii) **Paragraph 22(b)** of the ASOC pleads that as at 12 April 2012 ILU was aware "that generally consumer confidence and economic conditions were subdued and that an expected 'pick-up' in the zircon market in Q1 had not materialised". The former paragraph 22(b) of the SOC was that as at 12 April 2012 ILU was aware "that generally consumer confidence and economic conditions were subdued". ILU accordingly may be taken to object to the further words "and that an expected 'pick-up' in the zircon


market in Q1 had not materialised". Those exact words appeared in former particular (iii) to paragraph 22(b) of the SOC. They were raised in the SOC.

- (iii) Even if they were not, however, the facts pleaded in paragraph 22 of the ASOC are to be understood as forming the basis of the continuous disclosure breach in respect of the "April Material Information" pleaded in paragraph 24 of the ASOC. This was pleaded in the SOC. In particular, the information pleaded in paragraph 24(a) of the ASOC was formerly raised by paragraph 24(a),(b) of the SOC; the information pleaded in paragraph 24(b) of the ASOC was formerly raised by paragraphs 16-19, 22(l), 23(a),(c) and 24(a),(b) of the SOC; the information pleaded in paragraph 24(b) of the ASOC was formerly raised by paragraphs 16-19, 22(l), 23(a),(c) and 24(a),(b) of the SOC; and the information pleaded in paragraph 24(d) of the ASOC was formerly raised by paragraph 24(c) of the SOC.
- (iv) **Paragraph 22(c)** of the ASOC pleads that ILU's actual sales figures for the first quarter of 2012 for zircon, rutile and synthetic rutile, and in particular the actual sales figures for zircon, had been significantly lower than ILU had budgeted. Former paragraph 22(c) of the SOC pleaded that "demand for zircon had been significantly lower than ILU had budgeted for during 1Q 2012". All that the ASOC has added in the pleading is that the relevant demand which was lower was for zircon, rutile and synthetic rutile, not just zircon. However, the particulars to former paragraph 22(c) of the SOC included details of rutile and synthetic rutile in addition to zircon. There has been no – at least no substantive – addition to the former pleading; rather a clarification. In any event, paragraph 22 of the ASOC should be understood in the context identified in Particular sub-paragraph (iii) above.
- (v) **Paragraph 22(i1)** of the ASOC pleads that ILU's budget for 2012 had not been amended to address the matters pleaded in paragraphs 22(f)-(i) of the ASOC. The question of the status of ILU's budget was raised in former paragraph 22(c) and the particulars to former paragraphs 22(e) and (j) of the SOC. In any event, paragraph 22 of the ASOC should be understood in the context identified in Particular sub-paragraph (iii) above.
- (vi) **Paragraph 24** of the ASOC is addressed in Particular sub-paragraph (iii) above.
- (vii) **Paragraphs 27 and 28** of the ASOC are in the same terms as former paragraphs 27 and 28 of the SOC.
- (viii) **Paragraph 30** was pleaded in the SOC. In particular, the information pleaded in paragraph 30(a) of the ASOC was formerly raised by paragraph 30(a),(b) of the SOC; the information pleaded in paragraph 30(b) of the ASOC was formerly raised by paragraph 30(b) of the SOC; the information pleaded in paragraph 30(c) of the ASOC was formerly raised by paragraph 30(b) of the SOC; and the information pleaded in paragraph 30(d) of the ASOC was formerly raised by paragraph 30(c) of the SOC.
- (ix) **Paragraphs 40, 41 and 45** of the ASOC are in the same terms (at least in substance) as former paragraphs 40, 41 and 45 of the SOC.

5. Accordingly:

- (a) the time of commencement of the ASOC is irrelevant for the purpose of the relevant limitation periods (cf. Defence, para 82(d)-(e)); and
- (b) the applicant does not bring any claim, cause of action or contravention outside an applicable limitation period (cf. Defence, para 82(g)).

Dated: 6 September 2018



Signed by Craig Allsopp
Solicitor for the Applicant


This pleading was prepared by Caspar Conde and settled by Guy Donnellan, both of counsel.

Certificate of lawyer

I, Craig Allsopp, certify to the Court that, in relation to the reply filed on behalf of the applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading;
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Dated: 6 September 2018



Signed by Craig Allsopp
Lawyer for the Applicant