Article Information

Author: Lillian Rizio
Service: Class Actions, Dispute Resolution & Litigation, Litigation Funding
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Iluka Resources: lessons for shareholders in securities class actions

In the third decision delivered in a shareholder class action in Australia,[1] Iluka Resources Limited (Iluka) has succeeded in its defence of a securities class action which alleged that it had:

1. **engaged in misleading or deceptive conduct; and**
2. **breached its obligations under Australia's continuous disclosure regime**

for failing to inform its shareholders of its inability to achieve its forecast sales and to provide reliable sales forecasts for the 2012 calendar year.

Background

Iluka is a miner and global supplier of mineral sands products. Its products include zircon, rutile, and synthetic rutile. On 9 July 2012, Iluka significantly revised its sales guidance for these products, resulting in a 25% drop in its share price.

Shareholders alleged that Iluka's sales guidance leading up to its 9 July 2012 announcement was false and misleading,[2] misleading or deceptive[3] and breached continuous disclosure obligations[4]. Iluka was alleged not to have reasonable grounds for its sales guidance, and for not disclosing its true sale forecasts of zircon, rutile, and synthetic rutile, which were materially less than the sales guidance provided leading up to the 9 July 2012 announcement.

Justice Jagot of the Federal Court rejected both claims and the class action as a whole.

Were the representations made?

Before the claims were addressed, her Honour determined whether the representations alleged by the shareholders were made.

Iluka's sales guidance contained many disclaimers and caveats. Iluka further informed the market that its sales guidance was the best guidance it could provide at the time but was subject to all of the qualifications in its initial announcement in February, which included the following limitations:

1. given uncertain economic conditions globally; potential changes to supply and demand dynamics; and potential modification to the company's own plans, the statements are guidance about Iluka's expectations,
2. average outcomes over the next three years may vary significantly from the guidance,
3. the guidance is to assist sophisticated investors with modelling but should not be relied upon as a predictor of future performance,
4. the statements are not guarantees or predictions of future performance,
5. actual results may differ materially from the statements, and
6. Iluka shall not be liable for the correctness and/or accuracy of the information nor differences between the information provided and actual outcomes.

Importantly, any representation as to profitability was absent from the guidance, which only referred to Iluka's sales. This reinforced Justice Jagot's reasoning that the announcement was pitched at sophisticated investors for modelling purposes.

Her Honour held that the representations were not made by Iluka. Rather, finding that it was more likely than not that any ordinary and reasonable reader would have appreciated that the guidance was not a prediction or expectation, particularly considering Iluka's qualifying statements. In fact, the guidance was identifying that no such prediction or expectation could be provided.

Were the representations reasonable?

Had the alleged representations been made, her Honour would have held that Iluka had reasonable grounds for making them at all relevant times, pointing to Iluka's timely and reasonable revision of its guidance. The Court also noted that Iluka personnel were highly experienced in the markets, were careful and diligent, and communicated frankly regarding Iluka's forecasts. The fact that, with hindsight, Iluka was wrong about the timing or the fact of a rebound in demand did not establish that it lacked reasonable grounds for the alleged representations.

Interestingly, her Honour did reject Iluka's contention that whether a company's representations have reasonable grounds is based on whether Iluka applied a reasonable process, instead finding that the issue is ultimately one of substance, not merely process. While process is relevant, it is not a determinative factor. For entities, this conclusion significantly indicates that, in the context of a misleading sales guidance claim, they cannot simply point to their robust model and processes, but rather prove that the entity actually had a reasonable basis for providing the guidance.

Continuous disclosure

The claim for breach of continuous disclosure obligations similarly had to fail, as the alleged representations, had they been made, were made on reasonable grounds, and Iluka could not have been aware of the alleged contrary information that the sales guidance was no longer reliable.

Again, the Court did not accept a number of Iluka's submissions regarding continuous disclosure obligations, in particular that the requirements "only require an opinion to be disclosed if the opinion is actually held by the directors or if the opinion is held by someone else and should have become known to the directors." Her Honour's guidance on the matter rejected the obiter dicta in previous authorities,[**5**] instead concluding that "if an officer possesses information from which the officer ought reasonably have drawn a particular conclusion, the entity has become "aware" of the information", and would have contravened its continuous disclosure requirements. This observation, if endorsed, would make it easier for shareholders to succeed in continuous disclosure claims than if the narrower test suggested in previous authorities was applied.

Causation

Causation was also an issue, had the representations been made. Direct reliance failed, as it was found that the lead applicant did not rely on the alleged representations. Instead, the lead applicant had relied on information provided by an online stock information service. Market-based causation was pleaded but similarly failed. Interestingly however, the reasoning is silent on this point.[**6**]

Key takeaways

Iluka is an important addition to the limited suite of shareholder class actions that have proceeded to trial. Due to its rarity, there has been considerable dialogue since it was handed down.

To assume that this judgment condemns the future of shareholder class actions would be erroneous. This is reinforced by the recent successful appeal of *Crowley v Worley.[**7**] It is clear from the judgment that the Court is not purporting to reinterpret the application of the laws underpinning shareholder class actions. Instead, the judgment turned on its facts. This case failed due to the shareholders' submission on matters of law, not due to a change in the law itself. Thus, in future securities class actions, plaintiffs will carefully but surely distinguish their case from the Iluka decision.*

Further, the decision arguably contains favourable outlooks for shareholders seeking recourse from entities. One example is that, in the context of a misleading sales guidance claim, entities cannot simply point to their robust model and processes, but rather must prove that the entity actually had a reasonable basis for providing the guidance. Another example is her Honour's wider test for contravening continuous disclosure requirements that, if endorsed, will work to shareholders' benefit.

Ultimately, it is a mere technicality that the scoreboard is currently in favour of defendants. Plaintiff law firms and funders will find that the Iluka decision is not another nail in the coffin for shareholder class actions, but rather is a favourable outcome for investors, and provides important guidance toward conducting their case.

[1]Following *Crowley v Worley Limited [2020] FCA 1522 and TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747.

[2]In contravention of section 1041E of the *Corporations Act 2001* (Cth).
[3]In breach of section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth); and/or section 18 of the Australian Consumer Law (being Schedule 2 of the *Competition and Consumer Act 2010* (Cth)
[4]In breach of section 674 of the *Corporations Act 2001* (Cth) and ASX Listing Rule 3.1.
[5]*Grant-Taylor v Babcock & Brown Ltd (in liq)* (2015) 322 ALR 723; *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* (2019).
[6]See further: Nikki Stever and Madison Smith, 'Shareholder Class Actions In Australia: Uncertainty for the Future of Market-Based Causation', *Litigation Funding Journal* (Article, 7 April 2022) <>
[7]*Crowley v Worley Ltd* [2022] FCAFC 33.