

“The House Makes the Call”

The Federal Court of Australia Orders Override of Express Confidentiality Obligations in Crown Resorts Class Action

There are various controversies surrounding Crown Resorts Limited (Crown) at the moment. Whilst a recent Federal Court of Australia decision concerning Crown might not rank highly amongst those controversies, important implications arise from the decision for both Crown and other entities that regularly use confidentiality clauses in employment contracts and related agreements to protect commercial interests.

The Federal Court’s decision in *Zantran Pty Limited v Crown Resorts Limited* [2019] FCA 641 (*Zantran*) serves as a reminder of the court’s underlying statutory obligations to ensure the “just, inexpensive and efficient” resolution of disputes, as well as its supervisory and protective role played in the context of representative proceedings. Perhaps more importantly, it highlights how the court’s supervisory role in representative proceedings and certain public policy considerations may ultimately override the private commercial (and potentially sensitive) interests of companies that are the subject of such proceedings.

Relevantly, Crown has since appealed the decision delivered in *Zantran*. The Full Federal Court will now be given the opportunity to determine whether the court, in a case management context of class actions, is permitted to intervene in and override employment contracts. This note considers the decision in *Zantran*, the court’s reasoning and its potential consequential implications as we approach the Full Federal Court hearing scheduled for 29 August 2019.

Background

Zantran is a representative proceeding brought by Crown shareholders who purchased shares between 6 February 2015 and 16 October 2016.

The action commenced subsequent to a dramatic fall in Crown’s share price of 13.9% on 17 October 2016, after it was revealed that 19 employees of a Crown subsidiary were detained in the People’s Republic of China for alleged criminal conduct (Crown Employees). The alleged criminal conduct surrounded the undertaking of promotional activities by the Crown Employees directed at recruiting Chinese national “high roller” gamblers to play at Crown casinos in Melbourne, Perth and Macau. Ultimately, the Crown Employees were charged with criminal offences, pleaded guilty and were duly convicted in Baoshan District Court in Shanghai, China.

In *Zantran*, the lead plaintiff alleges that Crown was aware of the risk the Chinese government’s crackdown on the promotion of gambling to Chinese nationals posed to Crown’s recruitment activity and, more importantly, its revenue. It also alleges that, amongst other things, Crown failed to disclose this risk in breach of the continuous disclosure regime in the Corporations Act and otherwise engaged in misleading or deceptive conduct.

Interlocutory Issue

The Federal Court was required to determine whether *Zantran*’s legal representatives should be permitted to confer with the Crown Employees in order to obtain witness statements or outlines of evidence, and to obtain copies of documents connected with their criminal prosecution and conviction. In making its application for such access, *Zantran* sought orders that the Crown Employees be relieved of their contractual obligations of confidence owed to Crown.

Zantran submitted that the Crown Employees would likely be able to provide valuable information about the matters relevant to the representative proceeding. However, Crown opposed the application on the basis that the former Crown Employees should be held to their express contractual duties to maintain confidence and otherwise act accordingly. Crown submitted that [101]:

- The public interest in holding a contract void should be so significant that it transcends the resolution of the immediate civil dispute, and that such public interest does not exist in the present case
- If the provision of the relevant contract is not otherwise voidable or unenforceable on public policy grounds, procedural inconvenience is not a sufficient basis to warrant a release from the confidentiality obligation
- The rule that “there is no confidence as to the disclosure of iniquity” (that is, that one cannot be made the confidant of a crime or fraud) is inapplicable in circumstances where an express obligation of confidentiality is at issue
- Even if the iniquity rule applies, there is doubt as to whether allegations of misleading and deceptive conduct constitute an iniquity
- The Crown Employees’ express obligations of confidentiality do not impinge on the administration of justice

The primary question was whether refusal to make the orders, thereby allowing enforcement of the former Crown Employees’ obligations of confidence, would have an adverse effect on the administration of justice and the prosecution of the representative proceeding.

The Decision

Justice Murphy concluded that it was appropriate to make orders to relieve the former Crown Employees of their contractual confidentiality obligations for the limited purpose of allowing them to provide witness statements prior to trial, and to provide copies of documents produced by the prosecution or the court in China in connection with their criminal prosecutions and convictions.

In reaching this decision, Justice Murphy noted the court's role in weighing up any competing factors and determining whether the public interest is better served by enforcing, or not enforcing, the obligation of confidentiality. Ultimately, the court concluded that there was a public interest in the quick, cheap and efficient resolution of disputes and that it was satisfied that, in the circumstances, there would be a serious adverse effect on the administration of justice if the orders sought by Zantran were not made.

Justice Murphy placed significant weight on the "overarching purpose of civil practice and procedure" provisions provided in section 37M of the Federal Court Act 1976 (Cth) (Section 37M) and emphasised the requirement that the court **must** exercise its powers under the civil practice and procedure provisions in the way that best promotes the overarching purpose.

Although the competing public interest that exists in holding parties to their express contractual obligations was acknowledged by the court, his honour determined that this was outweighed by the public interest in the "just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible" [154]. This is especially so in the context of the matter at hand, given its status as an "open" representative proceeding whereby any findings would bind many more persons or entities than the lead plaintiff [145].

The fact that the provision of detailed evidence by the Crown Employees would potentially be highly probative and likely to assist the court in deciding whether Zantran could establish the allegations it made was considered by the court as a favourable factor in making the proposed orders.

Further, Justice Murphy noted that Crown did not argue that it would suffer any commercial disadvantage in the sense that trade secrets or confidential information beneficial to competitors would be released if the proposed orders were made [154]. Accordingly, his honour considered the benefits in making the proposed orders outweighed any detriment or prejudice caused by sanctioning a breach of express confidentiality agreements.

The court also refused to accept Crown's submission that Zantran's application lacked sufficient factual foundation given the lack of recent and compelling evidence to suggest that the Crown Employees would be of assistance and provide the evidence requested [124]. Justice Murphy concluded that there was evidence to suggest that several Crown Employees were willing to give evidence in the proceeding and assist the matter by providing relevant information [127].

Conclusion

The decision of the Federal Court, and, particularly, the reasoning of Justice Murphy, serves as a reminder of the underlying role that the court plays in the resolution of disputes. It is, no doubt, uncontroversial that there are significant public policy reasons in holding parties to their contractual obligations of confidence. However, in certain circumstances, these public policy reasons may be outweighed by the overarching purpose of the civil practice and procedure provisions enshrined in statute providing for the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

As demonstrated in the reasoning of the court, the underlying public policy considerations are amplified in the context of open class action disputes given the far-reaching implications such decisions have on group members to that action. In a class action context, it is clear that the court has a propensity to fully engage in its supervisory role and protect litigants and ensure the appropriate administration of justice, even if that is at the expense of private (contractual or other) rights.

Crown has appealed the decision delivered by Justice Murphy. On 29 August 2019, the Full Federal Court will determine whether the court, in a case management context of class actions, is permitted to intervene in and override employment contracts.

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