IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S CI 2014 5296

STEVEN ELLIOT WILLIAMS — Plaintiff

v

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118) & Ors (according to Schedule) — Defendants

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| JUDGE: | EMERTON J |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 4 July 2017 |
| DATE OF JUDGMENT: | 28 August 2017 |
| CASE MAY BE CITED AS: | *Williams v AusNet Electricity Services Pty Ltd* |
| MEDIUM NEUTRAL CITATION: | [2017] VSC 474 |

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PRACTICE AND PROCEDURE — Application for approval of settlement of group proceeding — *Supreme Court Act 1986* Part 4A — Whether terms of settlement are fair and reasonable — Whether settlement distribution scheme is fair and reasonable — Whether amount for legal fees and disbursements reasonable — 'Mickleham bushfire class action' — Settlement approved but quantum of costs not approved.

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| APPEARANCES: | Counsel | Solicitors |
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| For the Plaintiff | Andrew Fraatz and Claire Nicholson | Maddens |
| For the Defendants | No appearance | |

HER HONOUR:

1 The plaintiff has applied pursuant to s 33V of the *Supreme Court Act 1986* (Vic) for approval of a proposed settlement of a group proceeding. He claims damages for himself and group members for losses suffered as a result of a bushfire which started on 9 February 2014 on the eastern side of the Mickleham Road Reserve between Mount Ridley Road and Bardwell Drive, Mickleham.

2 The day of the Mickleham fire was a day of total fire ban for the whole of Victoria. At noon, the automatic weather station at nearby Tullamarine Airport recorded that the temperature was 39.8 degrees Celsius, the wind was from the north-west at 50 kilometres per hour, gusting to almost 80 kilometres per hour, and the relative humidity was 6.83 per cent.

3 It is the plaintiff's case that the Mickleham bushfire started as a result of a large stem from a sugar gum tree ('Tree') failing and falling onto powerlines owned and operated by the first defendant, AusNet Electricity Services Pty Ltd ('AusNet'). The plaintiff alleges that AusNet was negligent, breached statutory duties and committed nuisance by failing to implement reasonable systems for the identification and removal of hazard trees in the vicinity of its overhead network.

4 The start of the fire was seen by a number of eye witnesses driving along Mickleham Road. These witnesses saw the stem of the Tree fall onto the powerlines and saw the fire start in the grass below almost immediately. The fire spread rapidly, and soon reached the urban fringe of Mickleham, where it destroyed a number of homes and damaged many others, including the plaintiff's home. During the afternoon, the wind swung around to the south-west, pushing the fire front to the north. The fire continued to burn for four days, and it ultimately burnt beyond Kilmore, some 42 kilometres to the north. In total, the Mickleham bushfire burnt 22,590 hectares within a perimeter of 221 kilometres, destroyed 17 houses, many more outbuildings, and kilometres of fencing.

5 Apart from AusNet, there are three other defendants to the proceeding: Hume City Council ('Hume'), which is the council for the municipal district that includes the

Mickleham Road Reserve on which the Tree stood; Active Tree Services ('ATS'), AusNet's vegetation management contractor in the relevant area; and Homewood Consulting Pty Ltd ('Homewood'), which was engaged by Hume to undertake and document a survey of trees in the municipality and which performed detailed inspections and assessments of the Tree for Hume in October 2007 and March 2012.

6 The plaintiff commenced this proceeding by writ, endorsed with a statement of claim, on 1 October 2014. AusNet was named as the sole defendant. On 8 December 2014, AusNet filed and served a Defence and Counterclaim, by which it joined Hume and ATS as defendants to the Counterclaim. By its defence, AusNet denies any liability to the plaintiff and group members, and further alleges that, if it is liable, the claims are apportionable claims pursuant to Part IVAA of the *Wrongs Act 1958* (Vic) and that Hume and ATS are concurrent wrongdoers. AusNet claims contribution from Hume, and contribution and/or indemnity from ATS pursuant to Part IV of the Wrongs Act and/or the terms of AusNet's contract with ATS.

7 On 15 January 2015, the plaintiff filed and served an amended writ endorsed with an amended statement of claim by which he joined Hume and ATS as defendants.

8 On 27 November 2015, Hume filed and served its defence and counterclaim, by which it joined Homewood as fourth defendant to the counterclaim. By its defence, Hume denies any liability to the plaintiff and to group members, and further alleges that, if it is liable, the claims are apportionable claims pursuant to Part IVAA of the *Wrongs Act* and that AusNet, ATS and Homewood are concurrent wrongdoers. It claims contribution from AusNet and ATS, and contribution and/or indemnity from Homewood pursuant to Part IV of the *Wrongs Act* and/or the terms of Hume's contract with Homewood.

9 On 23 December 2015, the plaintiff filed and served a further amended writ endorsed with a third amended statement of claim by which he joined Homewood as a defendant.

10 On 21 December 2016, the plaintiff filed a fifth amended statement of claim by which

he refined and updated the allegations to reflect, in particular, the expert evidence in the joint expert reports which had, by then, been filed. A sixth amended statement of claim is proposed to be filed pursuant to the approval orders. It makes only very minor amendments.

11 The plaintiff alleges that the Mickleham bushfire was caused by breaches by each defendant of duties owed to the plaintiff and group members. He claims that, had any one of the defendants discharged their duties in connection with the Tree, it would have been pruned or removed prior to 9 February 2014 so that it could not have fallen onto the powerlines to start the Mickleham fire.

12 In particular, the plaintiff alleges that:

(a) AusNet was negligent, breached statutory duties and committed a nuisance by failing to implement reasonable systems for the identification and removal of hazard trees in the vicinity of its overhead network;

(b) Hume was negligent in failing to carry out structural pruning and weight reduction works on the Tree, which Homewood recommended following an inspection of the Tree in October 2007;

(c) ATS was negligent in failing to engage competent employees and failing to identify the Tree as a hazard and remove or prune it;

(d) Homewood negligently failed to assess properly the risk posed by the Tree and failed to recommend the necessary works to avoid or mitigate that risk.

13 The group membership in this proceeding is defined by way of an 'open class', being are all of those who suffered:

(a) personal injury;

(b) loss or damage to property; and/or

(c) pure economic loss

as a result of the Mickleham bushfire.

14 On 8 April 2015, the Court made orders closing the class of group members by:

(a) setting 22 May 2015 as the date by which any group member (or group member's insurer) may opt out of the proceeding;

(b) requiring that by 22 May 2015, any group member who wished to claim compensation for personal injury, property loss or damage or economic loss which was uninsured or not fully insured in any settlement of property or economic loss claims in the proceeding, register with the plaintiff's solicitors, Maddens;

(c) requiring that by 22 May 2015, any insurer that wished to claim compensation in respect of any indemnity provided to a client of the insurer in respect of property loss or damage or economic loss caused by the Mickleham bushfire register with Maddens; and

(d) approving the form and mode of advertising of notices to group members and group members' insurers, notifying them of the proceeding, their right to opt out of the proceeding and the requirement to register should they wish to participate in any settlement of the proceeding.

('Class Closure Orders')

15 372 group members registered with Maddens pursuant to the Class Closure Orders. Four group members filed opt-out notices.

16 On or about 20 February 2017, the parties agreed upon terms for the settlement of the proceeding. Those terms are recorded in a Deed of Settlement executed on that day ('Deed'). The Deed provides for the defendants to pay the sum of $16 million ('Settlement Sum') in settlement of the claims of the plaintiff and group members, with no admission of liability and inclusive of costs. AusNet is to contribute $5 million; Hume is to contribute $6 million; and Homewood is to contribute $5 million

to the Settlement Sum.

17 The proposed settlement is governed by the Deed and by a document that sets out a mechanism for the distribution of the Settlement Sum to group members known as the 'Settlement Distribution Scheme' ('Scheme').

18 On 31 March 2017, the Court made orders requiring group members to be notified of the settlement. The orders required a notice ('Notice of Settlement') and information sheet to be published in State and local newspapers, and to be sent via email and standard post to registered group members, as well as uploaded to the websites of the plaintiff's solicitors and the Supreme Court of Victoria. Among other things, the orders made on 31 March 2017 also provided for any group member or insurer who wished to oppose the proposed settlement to deliver to Maddens a notice of objection by 19 May 2017. Notices of objection were to be provided to the Court by 5 June 2017.

19 The Notice of Settlement sent to group members duly informed them of their right to object and advised that an objector should be ready to come to Court to argue their objection. The Notice advised that any objections would be heard by the Court on 4 July 2017.

20 In the event, four objections were received. Two of them were related and simply involved separating the claims of a husband and wife who had separated. Another objection was not particularised and was not pursued. The fourth objection concerned legal costs. I deal with this objection below.

**The approval process**

21 Pursuant to s 33V of the *Supreme Court Act 1986* (Vic), a group proceeding may not be settled or discontinued without the approval of the Court. If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into Court.

22 The plaintiff seeks an order pursuant to s 33V(2) for the Settlement Sum to be

distributed in accordance with the Scheme. He relies on the following evidence:

(a) confidential affidavit of Brendan Francis Pendergast sworn 24 March 2017 with exhibits BFP-1 to BFP-8;

(b) second confidential affidavit of Brendan Francis Pendergast sworn 9 June 2017 with confidential exhibit BFP-1;

(c) confidential affidavit of Graeme Peter Arnold sworn 13 June 2017 with confidential exhibit GPA-1;

(d) compliance affidavit of Brendan Francis Pendergast sworn 9 June 2017;

(e) further affidavits of Brendan Francis Pendergast sworn on 3 and 4 July 2017 relating to persons under a disability and notices of objection, respectively.

23 Of particular importance to the Court's consideration is the Confidential Opinion of Counsel exhibited to the second confidential Pendergast affidavit and the report on legal costs exhibited to the confidential affidavit of Graeme Peter Arnold ('Arnold Costs Report').

24 The Confidential Opinion, along with the Arnold Costs Report, are confidential exhibits to affidavits filed in the proceeding. The Court has made orders preserving the confidentiality of the 9 June affidavit made by Mr Pendergast, along with a further affidavit concerning persons under a disability made on 3 July 2017. Confidentiality has been preserved because the relevant documents contain material which exposes the frank views of the plaintiff's legal advisers about the merits of his claims and the risks associated with the action and/or material which is subject to a claim for legal professional privilege.

25 However, prior to the hearing of the application, the plaintiff filed, on a non-confidential basis, a comprehensive set of submissions in support of the application for approval of the settlement ('Open Submissions'). The Open Submissions set out much of the detail of the arrangements for settlement. Oral submissions describing

these arrangements were also made in open court. In the course of this judgment, I have attempted to described the processes and arrangements in order to give group members the best possible understanding of them.

26 The Court convened in Melbourne on 4 July 2017 to hear submissions from the plaintiff as to why settlement ought to be approved and consider any objections to the settlement made by group members. In the event, no objectors attended the hearing to make submissions.

27 Counsel for the plaintiff took the Court through most aspects of the settlement, including the notification of group members in accordance with the April 2015 orders made by T Forrest J. The Court is satisfied that there has been substantial compliance with the notification requirements in those orders and that group members have been given adequate notice of the proposed settlement and of their right to object to it.

**The proposed settlement**

28 The important terms of the Deed are as follows:

(a) The settlement of the proceeding is conditional upon Court approval;

(b) On the fifth business day of the expiration of the 28 day appeal period from the making of the settlement approval orders, the defendants will pay their share of the Settlement Sum into a Settlement Distribution Fund opened by Maddens;

(c) The Settlement Distribution Fund is to be allocated in accordance with the Scheme;

(d) Upon the making of the approval orders, and subject to the defendants' payment of the Settlement Sum:

(i) the proceeding is fully and finally settled;

(ii) the plaintiff, on his own behalf and on behalf of group members,

releases the defendants and their related entities from all claims that he or any group of members has or may have arising out of or in respect of the matters the subject of, or anything related to, the proceeding;

(iii) the Deed may be pleaded as a bar to any claim arising out of or related in any way to the matters the subject of the proceeding.

29 The Scheme provides for the Settlement Sum to be distributed in the following way:

(a) payment of the plaintiff's approved legal costs, including costs of administering the Scheme;

(b) payment of $25,000 to the plaintiff to compensate him for undertaking the role of lead plaintiff;

(c) distribution of the balance of the Settlement Sum, together with any accrued interest, to the group members and registered insurers on a pro rata basis.

30 Under the Scheme, group members who are entitled to participate in the settlement are the registered group members identified in a Schedule. The claims of registered group members will be assessed based on information and documentation already provided by them to Maddens, subject to a discretion in the Scheme Administrator to request further information or documentation and to reject any aspect of the claim.

**Relevant principles**

31 The principles that govern the exercise of the Court's power to approve a proposed settlement are well established. The Court must consider whether the proposed settlement:

(a) is fair and reasonable as between the parties having regard to the claims of the group members; and

(b) is in the interests of group members as a whole and not just in the interests of the plaintiff and the defendants.[1]

32 Whether a proposed settlement is fair and reasonable depends, among other things, on whether the Settlement Sum is fair and reasonable, and on whether the distribution of the Settlement Sum among group members pursuant to the Scheme is fair and reasonable.

33 The Court must be independently satisfied of the fairness and reasonableness of the proposed settlement. It will not be sufficient to simply assess whether the opinions expressed by the plaintiff's legal advisers appear, on their face, to be reasonable.[2]

34 The almost complete absence of substantive objections to the settlement cannot relieve the Court of its obligations.[3] Nevertheless, the assessment which the Court is able to make can ultimately be no more than one which confirms whether or not the proposed settlement is within the range of fair and reasonable outcomes.[4] Importantly, in making such an assessment, the relative prospects of success can only be broadly gauged.[5]

35 In considering whether the proposed settlement of a class action falls within the range of fair and reasonable outcomes, the Court will consider the following:[6]

(a) the complexity and duration of the litigation;

(b) the reaction of the group to the settlement;

(c) the stage of the proceeding at which the settlement is proposed;

(d) the relative risks of establishing liability;

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1 *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232, [49]-[51] ('*Rowe*'); *Matthews v SPI Electricity (Ruling No 16)* [2013] VSC 74, [35]; *Wheelahan v City of Casey* [2011] VSC 215, [57]; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [35].

2 *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [37] ('*Matthews*').

3 Ibid [38].

4 Ibid [39].

5 Ibid [40].

6 *Williams v FAI Home Security Pty Ltd* (2001) 180 ALR 459; *Rowe* [2015] VSC 232, [52].

(e) the relative risks of establishing loss and damage;

(f) the risks of continuing a group proceeding;

(g) the ability of the defendants to withstand a greater judgment and the range of reasonable outcomes governing the settlement in light of the best feasible recovery;

(h) the range of reasonableness governing the settlement in light of all the attendant risks of litigation on the one hand, and the advantages of a settlement on the other; and

(i) the terms of any advice received from counsel and/or from any independent expert in relation to the issues that arise in the proceeding.

**Is the settlement fair and reasonable?**

**As between parties**

36 When considering the reasonableness of the settlement as between the plaintiff and the defendants, I have had regard to the Confidential Opinion and the pleadings, as well as the legal context in which the claims were brought and the defences advanced. In particular, I have carefully considered liability risks as they are described and analysed in the Confidential Opinion.

37 In this case, the Settlement Sum is considerably less than the total amount of the claims, either on the basis of the self-assessments carried out by the group members or on the basis assessed by Maddens, which involved adjusting claims using statistical and other tools. As a result, the reasonableness of settlement as between the parties is to be assessed, in particular, by consideration of the litigation risk and the complexity and likely duration of the litigation.

38 The litigation is complex. It involves a number of parties and many difficult contested legal and factual issues. It was estimated that the trial of the plaintiff's claim and the common questions would take approximately eight weeks, with

evidence to be called from 30 lay witnesses and eight expert witnesses. The expert witnesses will give evidence in three disciplines: electrical engineering, arboricultural and arborist training. Discovery has been extensive, involving more than 29,000 documents, and the parties' tender lists for trial indicate that approximately 3,000 documents will need to be tendered in chief. Furthermore, if the plaintiff succeeds at trial, 372 group members will need to separately establish their individual damages claims.

39 I have carefully considered the Confidential Opinion in relation to litigation risk. The risks attending the litigation are not insubstantial, as the plaintiff and group members face some risk of an adverse result at trial. The proposed settlement enables them to avoid that risk and this is a significant factor in favour of approval.

40 I have also considered the liability risk in relation to each defendant relative to the others and the plaintiff's ability to recover from each of the defendants. Again, there are significant difficulties for the plaintiff in this regard.

41 I have considered whether the settlement represents a reasonable compromise in the context of the amounts of the claimed losses.

42 Maddens have taken steps to estimate the quantum of all claims using a process of sampling and extrapolating the results across the group. I have carefully considered the methodology described in the second confidential Pendergast affidavit for estimating the amount of the claims. I am satisfied that a serious and conscientious effort has been made to accurately estimate the quantum of the claims, and that it is legitimate to consider the reasonableness of the settlement having regard to likely recovery rates that are based on these estimates.

43 The amount of the Settlement Sum relative to overall group member claims is relatively low. If the settlement is approved, each registered group member will receive about 25 per cent of their claim, after deduction of approved costs and the reimbursement payment to the plaintiff. However, I am satisfied that this reflects the liability risk to the plaintiff and group members and their prospects of recovering

from the individual defendants. In the circumstances, the Settlement Sum of $16 million represents a fair proportion of total group member claims.

44 I am also satisfied that there are other benefits to group members in settling the proceeding.

45 In *Matthews*, Osborn JA identified a number of incidental advantages of settlement, including the early finalisation of the proceeding, the avoidance of continuing personal anxiety, stress and suffering as a result of the proceeding, the advancement of payment and the containment of legal costs.[7]

46 The consequences of the Mickleham bushfire were not as severe as the major class actions which arose out of the Black Saturday bushfires, particularly the Kilmore East and Murrindindi fires. However, a number of group members did suffer personal injury and significant property loss, and suffered stress, fear and anxiety as a result of the damage wrought by the bushfire. There is a clear benefit to those group members, in particular, in not having to relive the experience of the bushfire by litigating to recover their loss and damage. All litigation involves a measure of stress and anxiety, and the proposed settlement provides the advantage of avoiding that experience for the plaintiff and all registered group members.

47 Furthermore, if the proposed settlement is approved, the plaintiff and registered group members will receive distribution under the Scheme within a relatively short period of time. The claims of all the registered group members have already been assessed by Maddens and, once the costs are assessed and approved, it will be possible to determine precisely the amount to be distributed to the plaintiff and each registered group member within a short period. Unlike in many other class actions, there will be no material delay associated with assessing the claims of individual group members after settlement approval. I consider that there is a significant advantage to registered group members in receiving a timely distribution.

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7 *Matthews* [2014] VSC 663, [308].

48 A further clear advantage of the proposed settlement is that it avoids the costs of proceeding with further preparation, a trial on common questions, likely subsequent appeals and individual trials of the damages claims of registered group members.

49 The group members and their insurers have been given notice of the proposed settlement. While four group members have objected to it, none has filed any material, and all bar one ultimately withdrew their objections. Each registered group member who objected was given an opportunity to read the Confidential Opinion and the independent costs report.

50 No insurer has opposed the settlement as between the parties, although an insurer group has filed a submission and an expert report by a costs consultant challenging some aspects of the costs report obtained by the plaintiff. I deal with that below.

51 The fact that no group member or insurer opposes the settlement with the defendants supports the conclusion that the settlement is fair and reasonable, and in the interests of group members as a whole. The insurers, in particular, are sophisticated litigants who have been kept informed of the progress of the proceeding.

52 As a result of the foregoing, I am satisfied that the settlement as between the parties is fair and reasonable.

**As between the group members**

53 It is necessary to consider the arrangements for the assessment of claims and the distribution of the Settlement Sum to determine whether the settlement is fair and reasonable as between the group members.

54 The critical elements of the Scheme relevant to this question are as follows:

(a) the identity of the group members entitled to participate in the settlement;

(b) the process and manner of the distribution to registered group members;

(c) the payment to the plaintiff of an amount of $25,000 defined as the

'Reimbursement Payment';

(d) the deduction of Common Benefit Legal Costs from the Settlement Sum prior to distributions being made to registered group members; and

(e) the quantum of the Common Benefit Legal Costs.

***Participation***

55 Pursuant to the Scheme, distribution of the Settlement Sum is limited to registered group members (and their insurers).

56 Limiting the right to participate in the settlement to registered group members is consistent with past orders of the Court in bushfire class actions and forms the basis upon which the proceeding has been conducted by the parties to date. The Class Closure Orders made on 8 April 2015 were made on the basis that the right of any group members or insurers to claim compensation in any settlement would be limited to group members whose claims were registered.

57 I am satisfied that group members and their insurers were given reasonable notice of the requirement to register their claims if they wished to claim compensation in any settlement and that they were provided with a fair opportunity to register. Having regard to the extensive advertising, promotion and consultation engaged in by Maddens, there is no reason to believe that there are any group members other than the registered group members who may have claims arising from the Mickleham bushfire which they or their insurers might wish to pursue and be compensated for.

58 I observe further that the parties negotiated and reached the settlement on the basis of the claims notified by the registered group members and the registered insurers, and it would be unfair to those who registered and provided information in support of their claims to now have their entitlement to share in the settlement diluted by subsequent claims that were not factored into the settlement negotiations.

***Manner of distribution***

*Claim information*

59 Under the Scheme, it is proposed that:

(a) the distribution entitlement of each registered group member will be based upon the information already held by Maddens in relation to that group member's claim and any further information provided during a limited 14 day period to be advised by the Scheme Administrator (Maddens);

(b) the Scheme Administrator may require a registered group member to provide further information if, in the administrator's opinion, the existing information insufficiently substantiates any claim or any part thereof; and

(c) registered group members will be advised of their assessed entitlement and will have ten working days to notify the administrator of any error, failing which the assessment will be deemed to have been accepted.

60 Specifically, cl 4.1 of the Scheme provides that:

> Subject to clause 4.2:
>
> (a) for the purpose of the administration of this Scheme, information provided by Group Members or held by the Administrator may be relied upon as accurate by the Administrator, in his absolute discretion, when administering the Scheme; and
>
> (b) each Group Member's distribution from the Compensation Pool will proceed on the basis of the information contained in the Claimant Records.

61 The Compensation Pool is the amount of money available for distribution once certain costs and payments have been removed. Claimant Records are defined as the records constructed by or on behalf of Maddens to contain the information for each group member and any information required to identify the group member, including names, addresses and telephone numbers.

62 The Scheme provides for the maintenance and administration of Claimant Records, and for the accuracy of the information in Claimant Records to be deemed to have

been accepted by each group member. There is no entitlement to amend the information contained in the Claimant Records after the settlement has been approved by the Court. However, the Scheme contemplates that after the approval date, group members will be advised that there will be a period of 14 days in which to provide any additional documentation or information that they seek to have included in the Claimant Records. Subject to the discretion of the Scheme Administrator, no additional documentation or information will be taken into account in assessing entitlements unless it pertains to a head of loss of which the group member has not previously notified Maddens, or it is likely to have a material impact on the group member's entitlement.

63 There is no provision in the Scheme for review of an assessment.

64 According to the plaintiff, limiting the opportunity to provide additional information, put forward further claims and seek review of an assessment means that it has been possible to estimate total administration costs in advance and thereby to save costs by avoiding the need for the plaintiff to return to Court for approval of such costs once the Scheme has been administered. Were the Scheme to provide an unfettered opportunity for registered group members or their insurers to provide additional information in support of greater or additional claims, or seek review of an assessment, this would increase the cost of administering the Scheme and cause delay in the distribution of the Settlement Sum.

65 I accept this submission. The streamlined administrative process that is contemplated, which depends on the assessment of claims on the basis of information already in the hands of Maddens and finality in the assessment of entitlements, has clear advantages for group members in timeliness and cost efficiency.

66 I consider it to be fair and reasonable for the assessment of individual claims to be based on the claim information already held by Maddens. Registered group members and their insurers have been provided with a reasonable opportunity to set

out their claims and provide supporting information. I observe, in any event, that there is some flexibility in this regard, in that the Scheme administrator has a discretion to accept further documentation or information where there is a need to do so, based on the further information having a material impact on the group member's entitlement.

*Assessment of entitlements and pro rata distribution*

67 The Scheme requires the Scheme Administrator as soon as practicable after the date upon which the settlement is approved to determine the 'assessment entitlement' of each group member in accordance with Schedule A. Schedule A contains formulae for effecting a pro rata distribution, as well as adjustment and reduction mechanisms, the stated intention of which is to ensure that each group member is compensated for an equal proportion of their total loss.

68 The Scheme provides separately for the assessment of claims for economic loss and property damage ('ELPD claims') and the assessment of personal injury claims ('PI claims'). In the case of ELPD claims, each group member's information in the Claimant Records is to form the basis for the assessment, which is to be assessed in accordance with the mechanisms set out in Schedule A. In the case of the PI claims, a barrister experienced in personal injury law will carry out what is essentially a desk top assessment of the claim.

69 The mechanisms used or proposed to be used to assess entitlements seem to me to be fair and reasonable. In particular, the pro rata distribution to registered group members treats the plaintiff and each registered group member equally in circumstances where there is no reason for them not to be treated equally. It will result in a fair and reasonable distribution of the Compensation Pool.

70 The Scheme also provides for a pro rata distribution between insured registered group members and their insurers.

71 Of the 373 claims in the proceeding, 81 are wholly uninsured, 187 are partly insured and 105 are insurance only claims. For the 187 registered group members whose

assessed loss includes, but is not limited to, loss in relation to which the registered group member received indemnity under a policy of indemnity insurance, the registered group member's assessed entitlement will be distributed between the registered group member and the relevant registered insurer(s) on a pro rata basis, calculated in accordance with a formula, the intention of which is to provide for the registered group member and the registered insurer to receive the same proportion of their 'loss'.

72 The proposal for partially insured registered group members and their registered insurers to share distributions on a pro rata basis has been found to be fair and reasonable and in the interests of group members as a whole in other bushfire class actions.[8] I consider it to be fair and reasonable in this case.

73 Finally, I have given consideration to position of the group members whose claims are for pure economic loss. No allowance has been made in the Scheme for pure economic loss. I consider this to be reasonable in the circumstances, particularly as no group member has claimed to have suffered economic loss as a result of the fire that is not consequent upon loss of or damage to property.

***Reimbursement Payment***

74 The appropriateness of compensating class representatives by a reimbursement payment is well-established.[9] None of the other group members has had to carry the burden undertaken by the plaintiff. Under the Scheme, they will avoid any further burden associated with establishing their individual loss and damage.

75 Registered group members were notified of the proposed reimbursement payment in the approved notice and no registered group member or registered insurer has objected to the payment.

76 As to the quantum of the Reimbursement Payment, it is in line with payments made

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8 *Matthews* [2014] VSC 663, [395].

9 *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited (No 2)* (2006) 236 ALR 322; *Matthews* [2014] VSC 663.

to other plaintiffs in his position. The plaintiff was not asked to keep time records for his attendances. Rather, an estimate has been made of the number of hours that the plaintiff spent in attendances on Maddens staff, and related attendances. The Court was told that although some of the plaintiff's attendances related to his personal claim, these matters were relevant to the reasonableness of the proposed payment because they concerned issues common to the claim for some group members. The distinction between common benefit and individual benefit work apparently overlaps in this case.

77 I am satisfied that it is fair and reasonable having regard to the interests of group members as a whole that the plaintiff be paid the Reimbursement Payment.

**Legal costs**

78 Under the Scheme, the plaintiff's approved legal costs are to be paid from the Settlement Sum prior to any distribution to the plaintiff, registered group members and registered insurers.

79 It is the Court's role to satisfy itself that the legal costs to be deducted from the Settlement Sum are reasonable in all the circumstances. This is to protect the plaintiff and group members from unfair advantage being taken of them by the plaintiff's solicitor, particularly in circumstances where the information available to group members may be limited and they may have a correspondingly limited capacity to act as contradicters.[10]

80 The evidence upon which the Court will rely in these circumstances is evidence from an independent solicitor or costs consultant dealing with the reasonableness of the terms of the fee and retainer agreements, including any uplift fee, and whether or not the costs charged have been calculated in accordance with the fee and retainer agreements. Such advice or opinion will, in the normal course, confirm that, so far as can be determined, no significant portion of the fees and disbursements charged

10 *Matthews* [2014} VSC 663, [348]-[349].

has been inappropriately or unnecessarily incurred.

81 However, notwithstanding the provision of such advice or report, it is for the Court to determine whether the fees and disbursements are reasonable.[11]

82 In this case, the plaintiff and 205 registered group members have signed conditional costs agreements with Maddens ('Costs Agreement')[12] under which they have agreed that the plaintiff's costs would be deducted from any Settlement Sum received in priority to the distribution of payments to group members.

83 The important terms of the Costs Agreement for present purposes are the following:

(a) Professional fees and disbursements will only be charged in the event of a successful outcome (cl 7.2);

(b) Professional fees (before uplift) will be calculated in accordance with Appendix A in the Supreme Court Scale, increased by 30 per cent pursuant to r 63.34 of the *Supreme Court (General Civil Procedure) Rules 2015* to reflect the nature and importance and the difficulty of the proceedings (cl 7.4);

(c) In the event of a successful outcome, legal costs will be calculated as professional fees plus unpaid disbursements plus an 'uplift' of 25 per cent of the professional fees (covering both individual benefit work and the client's share of the common benefit work) plus interest (cl 7.6);

(d) The uplift fee is charged as a premium for conducting the proceedings on a conditional fee basis (cl 7.7);

(e) The client will be charged for both common benefit work and individual benefit work in the event of a successful outcome. For the common benefit work, the client will pay a proportional share of the total professional fees and disbursements incurred in common benefit work, plus the uplift on the fees,

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11 Ibid [355].

12 In fact, there is a pre-1 July 2015 Costs Agreement and a post 1 July 2015 Costs Agreement provided pursuant to the *Legal Profession Uniform Law*.

plus interest on the fees and disbursements (cl 7.12);

(f) Maddens are authorised in the event of a successful outcome to withdraw, transfer or deduct legal costs from the amount received into their trust account as settlement monies for that client (cl 15.1).

84 The Costs Agreement also gives estimates of legal costs, even while stating that it is not reasonably practicable to make an estimate of total legal costs. The Costs Agreement estimates the costs of the common benefit work as being in the range of $800,000 to $1.6 million.[13] As it turns out, the common benefit legal costs are significantly higher.

*Sharing*

85 The Scheme specifically provides for 'Common Benefit Legal Costs' as approved by the Court to be paid to Maddens, along with the Reimbursement Payment, prior to any final distribution from the Settlement Distribution Fund (cl 8.4). The Common Benefit Legal Costs are defined in the Scheme as the 'professional fees and disbursements incurred by the plaintiff in relation to the proceeding and the assessment of Group Member claims for the purposes of mediation and which have been assessed by an Independent Costs Consultant and approved by the Supreme Court'.

86 Under cl 8.5 of the Scheme, Administration Costs of and incidental to the Scheme form part of the Common Benefit Legal Costs. The Administration Costs are defined as —

> the disbursements (including the costs of any expert advisers and barristers) and costs incurred by Maddens in connection with the administration of this Scheme, including but not limited to, the identification of Group Members, assessing Group Members' claims and administering the Scheme. These costs will be assessed by an Independent Costs Consultant and approved by the Supreme Court.

87 As a matter of principle, it is fair and reasonable for the plaintiff's costs and the costs

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[13] The second Costs Agreement (post 1 July 2015) gives the same estimates.

of the assessment of Group Member claims for the purposes of mediation to be shared by registered group members and registered insurers on a pro rata basis and for those costs to be paid from the Settlement Sum prior to any distribution. It has been accepted by the courts, in approving settlements of class actions, that it is fair and reasonable that legal costs incurred to achieve a settlement for the benefit of all group members be shared.[14] The inclusion of the insurers provides a means of fairly spreading the cost of the legal work among those who will benefit from it.

88 There is no difficulty with the pro-rata sharing of the plaintiff's legal costs and the administration costs.

*Quantum*

89 The legal costs in this proceeding are high relative to the Settlement Sum. The agreement that costs be paid before any distribution to registered group members means that the registered group members will recover only around 25 per cent of their claims, those claims having themselves been assessed by Maddens as generally lower than the self-assessments that were carried out.

90 Evidence about the amount of the legal costs incurred by the plaintiff is set out in the costs report dated 9 June 2017 of Graeme Arnold ('Arnold Costs Report'). Mr Arnold is a solicitor and the director of Arnold Costs Solicitors Pty Ltd. He is an experienced legal costs consultant who has given evidence or advice in a number of class actions, including in the Horsham, Coleraine and Jack River bushfire class actions.

91 Mr Arnold was provided with Maddens' entire paper file for the common liability dispute, computer records of time ledgers and disbursements associated with the paper file and an electronic copy of the discovery and subpoenaed documents. He was asked to assess the total legal costs incurred by the plaintiff in the proceeding in accordance with the Costs Agreement and to express an opinion as to whether the

14 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [24].

amount is fair and reasonable in the circumstances.

92 The methodology applied by Mr Arnold to assess the legal costs was to categorise each item of work by reference to the items in the Supreme Court Scale and to apply the Scale rates, being the base fee rates agreed under the Costs Agreement. In that process, Mr Arnold identified a number of matters that required specific comment and, in some cases, adjustment, including discovery, travel, attendances by multiple solicitors, subpoenas, counsels' fees and other disbursements.

93 Mr Arnold has calculated the costs incurred to 8 February 2017, together with the anticipated disbursements of the settlement approval process and costs of the claim rollout process to be $7,675,732.41.

94 Mr Arnold has expressed the opinion that the Costs Agreement is fair and reasonable, including the 30 per cent premium on the Supreme Court Scale and the 25 per cent conditional uplift fee, and that Maddens has made the disclosure required by s 3.4.9 of the *Legal Profession Act 2004* (Vic). He has concluded that the total costs should be reduced to $7,300,000, a reduction of approximately 5 per cent, to reflect the fact that solicitor and own client taxation usually results in some items being 'taxed off'.

95 The registered group members and registered insurers have been given notice of the legal costs for which the plaintiff seeks approval. The notice of settlement approved by the Court on 31 March 2017 and distributed to group members and insurers indicated that the amount of the plaintiff's legal costs in relation to the settlement would not exceed $9 million.

96 Only one registered group member has expressed any opposition to the approval of the plaintiff's costs and disbursements.

97 However, a group of insurers, Insurance Australia Group ('IAG'),[15] has queried

[15] IAG insurers suffered total subrogated losses of approximately $10 million as a result of the Mickleham bushfire.

whether the costs claimed are reasonable in all the circumstances. IAG has obtained a report by Grace Costs Consultants dated 30 June 2017 ('Grace Costs Report') which comments on the Arnold Costs Report and recommends that the legal costs allowed by the Court be reduced by approximately $1.6 million.

98 The Grace Costs Report was prepared by Mr Gavin Wood, a professional costs consultant with considerable experience. Mr Wood was provided with the Arnold Costs Report and letter of instructions. He was not provided with the Costs Agreement and disclosure statement or any original documentation. Mr Wood has relied upon the records and figures set out in the Arnold Costs Report.

99 In the Grace Costs Report, Mr Wood stated that he agreed with 'most matters and issues discussed' in the Arnold Costs Report, save that he assessed the total legal costs at $5,781,789.85.

100 The principal point of difference between Mr Wood and Mr Arnold lies in the 30 per cent premium that Mr Arnold has allowed to be applied to all professional charges in addition to the 25 per cent loading on scale items and the further 25 per cent conditional uplift for a successful outcome.

101 Mr Wood observes that the 30 per cent premium was a term of the Costs Agreement and that it appeared in the disclosure statement. Nonetheless, he opines that it is neither fair nor reasonable to include a 30 per cent premium in addition to the 25 per cent loading and the 25 per cent uplift. Rule 63.34(3) of the *Supreme Court (General Civil Procedure) Rules 2015* requires the identification of 'special grounds' before the Court will allow an increase 'not exceeding 30 per cent'. He opines that, while the matter has a degree of importance and difficulty, the proceeding is not so exceptional as to warrant the maximum surcharge of 30 per cent. According to Mr Wood, the premium should be 10 per cent, which would recognise that Maddens deserved 'something extra for their commendable work'.

102 The Arnold Costs Report contains the following justification for the 30 per cent premium:

> The 30 per cent premium under sub-rule 63.34(3) warrants comment. I am aware other practices specialising in plaintiff class action work in Melbourne have charged on the same basis in the past. Given Maddens' clear experience in bushfire class action work and the complexity of the legal and factual issues of the case and the total sum of the claim, some form of premium above Scale is justifiable. If another firm (even a class action specialist firm) chose to act in this matter without such a premium, then in my opinion it is likely the charges could still be of the same level overall, as Maddens' past bushfire claim experience would have caused some form of efficiency gains.

103 It was submitted by Maddens that the 30 per cent premium is justified, having regard, in particular, to their extensive experience in conducting bushfire class actions, as well as to the nature and difficulty of the proceeding. Further, the Costs Agreement provides for the 30 per cent premium and the plaintiff himself raises no objection that the Costs Agreement is other than fair and reasonable. None of the 207 registered group members who have entered into a costs agreement with Maddens has raised an objection to the 30 per cent premium.[16]

104 A further confidential affidavit filed on the eve of judgment being delivered raised further possible justifications for the 30 per cent premium.

105 However, while it is not specifically discussed in the Arnold Costs Report, the appendices to that Report reveal that, in addition to the 30 per cent loading allowed pursuant to r 63.34, a further loading of 25 per cent on professional fees incurred in connection with common cause liability work up until 8 February 2017 has been allowed, apparently pursuant to r 63.48. Rule 63.48 gives the Costs Court a discretion to allow fees and allowances having regard to such matters as the complexity of the matter, the difficulty or novelty of the questions involved in the matter and the skill, specialised knowledge and responsibility involved.

106 I am concerned that two percentage increases or loadings may have been included for costs incurred in connection with common cause liability work for much the

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[16] One objector did raise an objection to the quantum of legal costs estimated in the Notice of Settlement, particularly in relation to the size of the Settlement Sum. Arrangements were made for the objector to inspect the Arnold Costs Report and the Confidential Opinion. The objector was provided with a copy of the Open Submissions and the proposed approval orders and was advised of the 4 July hearing at which the objector could be heard by the Court. The objector did not appear at the hearing.

same reasons. The plaintiff was asked to address the Court specifically on this question at a brief hearing on 18 August 2017. Subject to any further submissions the plaintiff may wish to make and having regard to submissions already made on this issue, I have formed the view a question of the following kind should be referred for determination to an Associate Judge who sits in the Costs Court:

> Should the legal costs allowed by the Court include both the increase allowed under r 63.34 and an increase for discretionary costs under r 63.48 and, if so, what should the percentages be?

107 Once this question has been decided, the Court will be in a position to approve an amount for costs taking into account any adjustments required by the decision of the Associate Judge.

108 It remains to consider a further issue raised in the Grace Costs Report, which is the more general question of whether the costs are proportionate. The argument is, as I understand it, that the legal costs are too high relative to the amount of the settlement. In my view, the argument that costs should be reduced so as to be 'proportionate' to the Settlement Sum is misconceived as a matter of law.

109 Section 24 of the *Civil Procedure Act 2010* (Vic) requires reasonable endeavours to be used to ensure that legal and other costs incurred in connection with a civil proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.

110 In *Yara Australia Pty Ltd v Oswal*,[17] the Court of Appeal held, in effect, that that the concept of proportionality in s 24 is forward looking. For each piece of work, a practitioner must consider whether the cost of the work is in proportion to the factors in s 24(a) and (b), namely the complexity and importance of the issues in dispute and the amount in dispute.[18] Hence, when assessing the expected benefit, the Court's analysis must focus on the expected realistic return *at the time the work being charged for was performed*, not the known return at a time remote from when the

17 (2013) 41 VR 302.
18 Ibid 313, [36].

work was performed. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved.[19]

111 As a result, the fact that legal costs may be high in absolute terms or as a percentage of the Settlement Sum is not a proper basis for concluding that legal costs are disproportionate.[20] It is necessary to consider whether, at the time the work was being performed, that work was not justified having regard to the complexity or importance of the issues in dispute or the amount in dispute.

112 In this case, the context in which the legal costs were incurred was a significant representative proceeding involving 372 group members and 13 registered insurers, with four defendants, each of which faced separate and substantially different allegations in negligence. All four defendants denied liability for any loss or damage flowing from the Mickleham bushfire for the whole proceeding. Throughout 2015 and 2016, the solicitors for the plaintiff were engaged in identifying and interviewing witnesses, reviewing almost 30,000 discovered and subpoenaed documents, briefing experts in a variety of fields and organising expert conclaves. The trial was estimated to run for eight weeks. It was by any measure a significant and difficult proceeding.

113 Furthermore, the expected realistic return of the claim changed during the course of preparing the proceeding. It was not until late last year that one of the parties disclosed its insurance position, resulting in a reassessment of the potential financial liability of the other defendants. The process of identifying and quantifying total losses also evolved over a lengthy period. The initial process of identifying the quantum of the claims was a self-assessment process. Subsequently, a statistician and qualified loss assessor was engaged to conduct a review of the self-assessed claims to ascertain the likely gross quantum of the claims for economic loss and property damage. The estimate of total losses was correspondingly reduced.

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19 *Foley v Gay* [2016] FCA 273, [24].
20 Ibid.

114 I am satisfied that, having regard to the way in which these matters unfolded, it could not be said that at the time the legal costs were incurred, they were disproportionate to the likely gain.

**Persons under disability**

115 Section 33F of the *Supreme Court Act 1986* (Vic) provides that while it is not necessary for persons under disability to have a litigation guardian merely to be a group member, such a person may only take a step in the proceeding or conduct part of the proceeding by the group member's litigation guardian.

116 In addition, r 15.08 of the *Supreme Court (General Civil Procedure) Rules 2015*, which concerns compromises of claims by persons under disability, requires the Court to approve any compromise.

117 Maddens have identified two registered group members to whom s 33F applies. Both are PI claims. Maddens have caused one of the claims to be assessed and the other assessment is underway.

118 The Court is asked to give conditional approval to the assessment of the claim that has been assessed pending the giving of written notice to the claimant and his litigation guardian. Having regard to the materials provided, I am content to give that approval.

119 It is further proposed that the approval of the assessment of the claim of the other claimant under disability take place 'on the papers' in due course. Again, I am content to order that the approval of the assessment of the second claim be made on the papers in due course.

**Conclusion**

120 For the foregoing reasons, I am satisfied that the settlement is fair and reasonable and in the interests of group members.

121 However, I am not yet prepared to approve the sum sought for the legal costs. The

Court will await the decision of the Associate Judge who sits in the Costs Court on the question of loadings.