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

Not Restricted

S CI 2014 5296

BETWEEN

Steven Elliot Williams — Plaintiff

v

AusNet Electricity Services Pty Ltd (ACN 064 651 118) & Ors — Defendants

JUDGE:	Wood AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	30 August 2017
DATE OF RULING:	4 September 2017
CASE MAY BE CITED AS:	Williams v AusNet Electricity Services Pty Ltd (Ruling No 3)
MEDIUM NEUTRAL CITATION:	[2017] VSC 528

COSTS – Class action legal costs – Relationship between rr 63.34(3) and 63.48 of the *Supreme Court (General Civil Procedure) Rules 2015*.

GROUP PROCEEDING – *Supreme Court Act 1986,* Part 4A.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr G Dalton QC with Ms C Nicholson	Maddens
No appearance for the Defendants		

HIS HONOUR:

1 On 28 August 2017 Emerton J published judgment[1] in relation to the approval of the settlement in this class action arising from the Mickleham bushfire. Conditional approval of the settlement of the action was given on the basis that the proposed settlement was fair and reasonable in the interests of group members,[2] however a question was referred to me. I heard the matter on 30 August 2017. Submissions were made, Mr Arnold gave evidence and I reserved my decision. Final approval and distribution of the settlement sum cannot occur until the issue before me is finalised. I therefore now publish my decision and reasons.

2 As part of the settlement the reasonable legal costs to be paid to the legal representatives were included in the settlement sum of $16m. A sum of $7.3m is now sought for costs. The base figure for costs is quantified on Supreme Court scale in accordance with the Costs Agreement[3] with their legal representatives ('Maddens'). There was no finding that the legal costs claimed breached the proportionality provisions of the *Civil Procedure Act 2010*.[4]

3 The plaintiffs relied on an expert report from Mr Graeme Arnold sworn on 13 June 2017. His opinion included allowances for three separate percentage loadings to be applied in addition to the base scale figures. The third loading is for a 25% 'uplift fee' and this is uncontroversial in the context of the referral of a part of the approval process to me.

4 The third loading, to be applied at the end of the process, is the 25% 'uplift fee' as provided for in s 3.4.28 of the *Legal Profession Act 2004* as the arrangements with Maddens constituted a Conditional Costs Agreement, colloquially referred to as a 'no win - no fee' agreement. Historically uplift fees have been justified on the basis that the legal representatives assume risk in the outcome of the litigation as they are

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1 *Williams v AusNet Electricity Services Pty Ltd* (2017) VSC 474.
2 Ibid at [120].
3 Ibid at [83(b)].
4 Ibid at [108] to [114].

not paid unless there is a defined successful outcome. In this matter the risk is greater as there is no litigation funder.[5] Firms undertaking work on this basis often carry the burden of disbursements for the duration of the proceeding up until finalisation. An 'uplift fee' is also legitimised on the basis of an access to justice issue, namely parties are enabled to exercise their rights in circumstances where they would not do so, absent the 'no win no fee' option.

5 The two other loadings remain unresolved as her Honour declined to deal with them and they comprise the issue referred.

6 The first one is the loading that is provided for in r 63.48 of the *Supreme Court (General Civil Procedure) Rules 2015* (the provisions of which are mirrored in item 17 in the scale - Appendix A). It is a discretion that is exercised at the time of a taxation on scale by the Costs Court.

7 Rule 63.48 provides as follows:

> **63.48 Discretionary costs**
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> (1) Except where these Rules or any order of the Court otherwise provides, the fees and allowances which are discretionary that are referred to in Appendix A shall be allowed at the discretion of the Costs Court.
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> (2) In exercising the discretion under paragraph (1), the Costs Court shall have regard to—
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> (a) the complexity of the matter;
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> (b) the difficulty or novelty of the questions involved in the matter;
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> (c) the skill, specialised knowledge and responsibility involved and the time and labour expended by the legal practitioner;
>
> (d) the number and importance of the documents prepared and perused, regardless of length;
>
> (e) the amount or value of money or property involved;
>
> (f) research and consideration of questions of law and fact;
>
> (g) the general care and conduct of the legal practitioner, having

[5] See paragraphs 35 to 37 in affidavit of Brendan Francis Prendergast sworn 25 August 2017.

regard to the instructions and all relevant circumstances;

(h) the time within which the work was required to be done;

(i) allowances otherwise made in accordance with the Scale in Appendix A;

(j) any other relevant matter.

8 The second loading of 30% was provided for in the Conditional Costs Agreement with Maddens and has its genesis in r 63.34(3) of the *Supreme Court (General Civil Procedure) Rules 2015*. It is acknowledged by her Honour,[6] and Mr Arnold,[7] that r 63.34 is the basis for this 'premium'.

9 Rule 63.34 provides as follows:

> (3) The Court may, on special grounds arising out of the nature and importance or difficulty or urgency of the case, allow an increase not exceeding 30 per cent of the legal practitioner's charges allowed on taxation with respect to –
>
> (a) the proceeding generally; or
>
> (b) to any application, step or other matter in the proceeding.'

10 For completeness however, r 63.34(1) provides that 'Subject to paragraph (3)' a legal practitioner shall be 'allowed costs in accordance with the Scale in Appendix A unless the Court or the Costs Court otherwise orders'. This suggests that the allowance under r 63.34 is relevant for the purposes of r 63.48. Rule 63.34(4) also provides that the issue can be referred to the Costs Court.

11 It is clear from her Honour's judgment that the case was 'by any measure a significant and difficult proceeding.'[8] It was put to her Honour that Maddens had expertise and experience in bush fire class actions gained by acting in half of the Victorian class actions over the last 30 years.[9] There is no dispute about this.

12 In relation to a claim for the first and second loadings, a referral was made by her

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6 Ibid at [83(b)].
7 Page C3 of Annexure C to his affidavit.
8 At [112].
9 Transcript (4 July 2017), p 34, lines 23–24.

Honour on 28 August 2017 to an Associate Judge who is also a Costs Judge.[10] In the judgment her Honour was concerned that two loadings have been claimed for much the same reasons.[11] The plaintiff is in effect contending for a 'loading on a loading' on similar criteria.

13 The terms of the referral[12] are:

> 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?

14 The order[13] embodying the referral states:

> 1. The question posed in [2017] VSC 474 at paragraph [106] being '*Should the legal costs allowed by the Court include both the increase allowed under* [Supreme Court (General Civil Procedure) Rules] *r 63.34 and an increase for discretionary costs under 63.48 and, if so, what should the percentage be*?' is referred to an Associate Judge for hearing and determination pursuant to rule 77.05 of the *Supreme Court (General Civil Procedure) Rules 2015*.

15 In the judgment her Honour refers to a number of cases dealing with the approval of costs in class actions.[14] One of the cases cited is *Matthews v AusNet Electricity Services Pty Ltd* in which Osborn JA[15] accepts an expert's methodology which includes:

> (e) apply the factor for loading for skill, care and attention as claimable under each of the old or new Supreme Court scales;
>
> (f) apply the complexity loading factor as provided for under the Maurice Blackburn conditional costs agreement; and
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> (g) apply the factor of the 25 percent uplift fee to professional fees…

16 Her Honour was clearly not under any obligation to follow that methodology and in any event it appears the relationship between rr 63.34 and 63.48 may not have been closely considered in previous approvals in bush fire class actions. Hence the referral to me. The concern that has led to the referral was expressed by her Honour as

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10 Paragraph 17 of the order made 28 August 2017.
11 At [106].
12 Ibid.
13 Order made 29 August 2017 in this proceeding.
14 *Downie v Spiral Foods Pty Ltd* (2015) VSC 190 (at footnote 1), *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* (2013) FCA 626 (at footnote 14), *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232 (at footnotes 1 & 6).
15 (2014) VSC 663 at [362].

follows:

> 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 same reasons.

17 The third loading for the uplift fee is a stand-alone one. That is, there is no nexus with any other loading. The issue is whether a party can have an entitlement to a loading under both rr 63.34(3) and 63.48 and, if so, what is an appropriate loading under r 63.48 if a loading under r 63.34(3) is appropriate. Mr Arnold contends for the maximum loading allowed of 30% under r 63.34(3) and a further 25% loading under r 63.48/item 17.

18 Ordinarily an allowance under r 63.34(3) falls to the Judge making the costs order and allowance under r 63.48/item 17 is a discretion exercised by the Costs Court at taxation where quantification occurs. As outlined above however the referral is for a determination in relation to claims for both loadings.

19 The judgment refers to a report from Grace Costs Consultants[16] who were engaged by a group of insurers. The report advocates that the maximum premium of 30% under r 63.34(3) is not reasonable if 25% is sought under r 63.48. A reduction of the 30% 'premium' to 10% is flagged. Neither expert therefore sees an issue with a loading under both Rules. The controversy between them is the size of the percentages to be allowed. It is submitted on behalf of the plaintiff that the report from Grace Costs Consultants was not sworn and the author did not have the advantage of inspecting Maddens' file.

20 The fact that an expert is unchallenged on their opinion as to an entitlement to loadings under rr 63.34 and 63.48 is not definitive. J Forrest J in *Downie*[17] stated:

> …as noted by Gordon J in *Modtech (No 1)* and Osborn JA in *Matthews* it is the Court, and not the independent expert who must decide whether fees and disbursements are reasonable.

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16 At [97] to [101].

17 (2015) VSC 190 at [180].

21 The plaintiff relies on a passage from *Foley v Gay*[18] where Beach J stated:

> …if unchallenged expert opinion is put before the Court which sets out a commercial and reasonable methodology consistent with the terms of any retainer and which demonstrates that it has been accurately and thoroughly applied to sufficient and probative source records of the solicitors, then it is no part of a judge's function to:
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> (a) reject that evidence as to whole or part without very good reason; or
>
> (b) apply one's own subjective view of what the legal work is "really worth", divorced from the reality of the current marketplace and the commercial context within which the work was carried out and the expenses incurred.

22 From the evidence of Mr Arnold a 30% loading in bush fire class actions has become the industry standard.[19] He also gave evidence that loadings of 20 to 25% were also claimed in class actions under r 63.48.[20] For reasons outlined in paragraphs [30] and [31] below there is justification to question some of the assumptions made by Mr Arnold.

23 Several principles emerge from the case law. Conducting a difficult and important case with extreme ability and diligence does not necessarily amount to special circumstances.[21] There must be special grounds arising out of the nature and importance or difficulty or urgency.[22] The presence of special knowledge in an esoteric area and scientific evidence can be factors.[23]

24 Hayne J in *Jenkins & Ors v G.J.Coles & Co Ltd*[24] reviewed the authorities in a matter involving three plaintiffs, two of whom were infants and one who was severely handicapped as a result of the incident that led to the proceedings. His Honour described the litigation as 'heavy' in relation to the level of responsibility of the practitioners and the difficulty of issues. The application for an order under r 63.34 was declined and his Honour left those matters for consideration as part of the

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18 [2016] FCA 273 at [23].
19 Transcript (30 August 2017), p 26, lines 14–16.
20 Transcript (30 August 2017), p 24, lines 25–26.
21 *Rivington v Garden* [1901] 1 Ch. 561.
22 *Williamson v North Staffordshire Railway Co* (1886) 32 Ch. D. 399 & *Paine v Chisholm* (1891) 1 QB 531.
23 *The Robin* [1892] P 95, *Moseley v Victorian Rubber Co* (1887) 57 LT 142, *Secton Pty Ltd v Delawood* Pty *Ltd* (1991) 21 IPR 136 (VSC).
24 (1993) 1 VR 155.

discretionary factors contained in Appendix A at taxation. His Honour clearly recognised that the same issues could be ventilated at taxation to achieve a percentage increase to costs based on the same factors.[25]

25 It is clear from her Honour's judgment that the case involved personal injury, property loss, fear and anxiety.[26] There were 372 group members, 13 registered insurers and four defendants in the substantive proceedings.[27] There almost were 30,000 documents, 30 lay witnesses proposed, and eight experts covering a variety of fields and expert conclaves.[28] The trial was estimated to take eight weeks. Of the 373 claims, 81 were wholly uninsured, 187 partly insured and 105 were insurance claims only.[29] I am satisfied that there are special grounds to establish some level of loading under r 63.34(3).

26 There is considerable overlap between the language utilised in r 63.34(3) to justify the exercise of the discretion contained in that Rule – (i.e. nature, importance, difficulty, urgency, specialised knowledge in the case) when compared with the language utilised in 63.48(2)(a),(b),(c),(e),(f),(h) – (i.e. complexity, difficulty, specialised knowledge, value of property, consideration of questions of fact and law and time within work was required to be done).

27 The discretion to be exercised under r 63.48 is premised with the words 'Except where these Rules or any order of the Court otherwise provides'. The question could be posed – Is the wording of r 63.34(3) together with a finding and exercise of a discretion in relation to all those same matters 'otherwise providing' for the purpose of r 63.48? On the assumption that the factors exist to satisfy and justify the maximum under r 63.34(3) of 30%, is there 'double dipping' for these factors by adding a further loading under r 63.48? The wording 'except where these Rules or any order of the Court otherwise provide' clearly accommodates the situation where allowances for the same factors elsewhere via r 63.34(3) impacts on any ability to

25 Ibid at 157-158.
26 At [46]
27 Ibid at [112].
28 At [38] and [112].
29 At [71].

make an allowance for the same matters in r 63.48. An order for a loading under r 63.34(3) therefore has to be taken into account when assessing whether a loading under r 63.48 is appropriate.

28 The other specific factors in r 63.48 not overlapping with 63.34(3) are few. They are the number and importance of documents (r 63.48(2)(d)), general care and conduct (r 63.48(2)(g)), and allowances otherwise made in accordance with scale (r 63.48(2)(i)).

29 Prior to 1 April 2013 the loading deriving from the application of r 63.48 was only applied to the portion of the bill that fell within the 'instructions for brief' category. This was confined to the work involved in collating evidence and research. The loading was not applied to the whole bill. Percentages well over 25% were commonly allowed. Since the major amendment to the scale and Rules in 2013 the percentage loading is applied to the whole bill and loadings up to 15% are commonplace. This is consistent with the Court's own Practice Note.[30] A submission for 25% (as made here) is certainly unusual in the taxation of a Supreme Court matter. As outlined in paragraph [22] above it is a claim usually made in bush fire class actions.

30 In oral evidence on 30 August 2017 Mr Arnold conceded that when arriving at the figure of 25% under r 63.48 he did not consider, or factor in, that 30% was claimed under r 63.34 for similar criteria.[31] This ignores the relationship between the two rules as discussed in paragraph 27 above. Counsel for the plaintiff in fact made a submission that cognizance should be taken of the 30% provided for when assessing the loading under r 63.48.[32]

31 Further, although aware of the Practice Note Mr Arnold said it applied to party and party taxations.[33] This ignores that the scale was what was contracted for in the Costs Agreement and, in any event, the test in party and party taxations changed to

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30 *Practice Note - SC GEN 11 Costs Court* at paragraph 11.4
31 Transcript (30 August 2017), p 26, lines 3–8 & 23–26 and p 39, lines 8–14.
32 Transcript (30 August 2017), p 18, lines 4–11, p 19, lines 11–21 & p 39, lines 8–14.
33 Transcript (30 August 2017), p 24, lines 11–14.

standard/reasonable[34] from work after 1 April 2013 and this is the same test to be applied here because the work commenced after that date.

32 Taking into account a practitioner's specialised skills as a discretionary factor invites some comment. It is likely that Maddens' expertise saved time and effort in the conduct of the proceeding. Mr Arnold certainly gave evidence to that effect.[35] If this is so then there is a saving for the Court and also potentially costs savings for the defendants in the management of the proceeding. However, the application of an increased loading for this specialised knowledge as a result of their prior experience also brings the potential for some unfairness. It is previous clients and defendants who may have potentially remunerated Maddens in this educative process over the years by paying for increased hours for research and preparation during those cases. The allowance of a higher hourly rate for skilled attendances is where expertise is traditionally recognised. The combined effect of the scale hourly rate plus 25% plus 30% as contended for would result in an hourly rate in 2016 (when most work was done) of $693.55 inclusive of GST (exclusive of any uplift fee).

33 Rule 63.34(3)(b) allows a loading to be applied to 'any step or other matter in a proceeding'. Restricting the loading to just skilled work is open but for simplicity this is not an attractive option. If a maximum allowance of a 30% loading under r 63.34 is applied to all work performed by Maddens it will include photocopying, and clerical or administrative work. Maddens will be favoured by the 'high skill' loading applying to all work, including work where expertise in bush fire class actions is not relevant. In spite of that advantage to Maddens by applying 30% to all work, I am prepared to adopt that approach.

34 The maximum 30% loading under r 63.34(3) has covered most of the factors in r 63.48 and the latter rule is applied 'subject to' r 63.34. There is little work left for r 63.48 to do given the narrow scope of the categories that do not overlap between the two rules. The most significant one is contained in r 63.48(2)(d), which in part

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34 Rule 63.30 *Supreme Court (General Civil Procedure) Rules 2015*.

35 Transcript (30 August 2017), p 29, lines 8–14.

includes 'the number and importance of the documents…. perused, regardless of length'. It is apparent that Mr Arnold has utilised folio rates for the discovered and subpoenaed documents rather than actual time spent.[36] This approach favours Maddens as the folio rate is set at a generous allowance on the assumption that a document might be examined on more than one occasion. He gave evidence that he removed the hours spent on documents from his calculation and assessed them on pages and folios.[37] However, it is also clear that he has quite fairly modified the full folio rates to 5%, 25% and 35% for some of the documents to allow for scanning, and examining rather than claim the full perusal rates. The volume of documents is significant. His report discloses 187,011 pages of discovery, 10,254 pages of subpoenaed documents and a further 4,150 documents comprising 89.5GB.[38]

35 There are two other comments that can be made. First, it was clear on the face of the Costs Agreement that a 30% loading under r 63.34 was the basis of Maddens taking on the matter and this was accepted by the client at the outset. Secondly, a further loading under r 63.48 is not immediately apparent to the client from the Costs Agreement as it is buried in Appendix A. It is not apparent to the client that an additional unspecified loading over and above the 30% and 25% uplift fee was potentially in play. For that reason restricting the loading to 30% with an uplift of 25% could be concluded to be a fair and reasonable result.

36 However, in view of the volume of documents, being a consideration absent from r 63.34 and specifically referred to in r 63.48, I am prepared to allow 5% under r 63.48.

Conclusion

37 The maximum loading of 30% under r 63.34(3) on all work (including clerical or administrative) is a reasonable allowance particularly given it was flagged in the Costs Agreement. The overlap of factors in rr 63.48 and 63.34(4) make it

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36 Transcript (4 July 2017), p 26, lines 6–7.
37 Transcript (30 August 2017), p 33, lines 14–17.
38 Exhibit ' GPA 1' – p 9 at [24].

inappropriate to allow a significant loading under r 63.48. A loading of 5% is appropriate given the volume of documents. The application of loadings under both rr 63.48 and 63.34(3) is appropriate in this matter. The loading of 30% under r 63.34(3) to all the proceeding is appropriate and a loading of 5% under r 63.48 is appropriate.

38 In answer to the question : '*Should the legal costs allowed by the Court include both the increase allowed under* [Supreme Court (General Civil Procedure) Rules] *r 63.34 and an increase for discretionary costs under 63.48 and, if so, what should the percentage be?'*

39 The answer is '*Yes, there should be a percentage loading under Rule 63.48 of the* Supreme Court (General Civil Procedure) Rules 2015 *of 5% in addition to a 30% loading under Rule 63.34(3) as provided for in the Costs Agreement.'*

S C H E D U L E O F P A R T I E S

S CI 2014 5296

BETWEEN:

STEVEN ELLIOT WILLIAMS	Plaintiff
- v -	
AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)	First Defendant
HUME CITY COUNCIL	Second Defendant
ACTIVE TREE SERVICES PTY LTD (ACN 002 919 299)	Third Defendant
HOMEWOOD CONSULTING PTY LTD (ACN 113 595 430)	Fourth Defendant

AND BETWEEN:

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)	Plaintiff by Counterclaim
- v -	
STEVEN ELLIOT WILLIAMS	First Defendant to Counterclaim
HUME CITY COUNCIL	Second Defendant to Counterclaim
ACTIVE TREE SERVICES PTY LTD (ACN 002 919 299)	Third Defendant to Counterclaim
HOMEWOOD CONSULTING PTY LTD (ACN 113 595 430)	Fourth Defendant to Counterclaim