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

Not Restricted

S CI 2018 01290

ANTHONY JAMES LENEHAN — Plaintiff

v

POWERCOR AUSTRALIA LIMITED
(ACN 064 651 109) — Defendant

JUDGE:	John Dixon J	
WHERE HELD:	Melbourne	
DATE OF HEARING:	26 September 2018	
DATE OF JUDGMENT:	3 October 2018	
CASE MAY BE CITED AS:	Lenehan v Powercor Australia Ltd	
MEDIUM NEUTRAL CITATION:	[2018] VSC 579	First revision 3 October 2018

PRACTICE AND PROCEDURE – Group proceeding – Solicitors for the defendant made settlement offers directly to group members – Whether solicitors for defendant may communicate with group members and insurers – Whether communications misleading or unfair – Whether improper conduct on behalf of the defendant – Ordered that further correspondence be sent to group members – *Supreme Court Act 1986* (Vic) s 33ZF.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Thompson QC, with Ms G Berlic	Maddens Lawyers
For the Defendant	Mr J Ruskin QC, with Mr D McWilliams	Wotton & Kearney
For the subrogated insurers	Mr P Solomon QC, with Mr D Carolan	Hall & Wilcox Lawyers

HIS HONOUR:

1 In this class action pursuant to Part IVA of the *Supreme Court Act 1986* (Vic), the plaintiff, and group members, claim to have suffered loss and damage as a result of the Terang/Cobden bushfire on Saint Patrick's Day 2018. The proceeding is in its early stages and orders are yet to be made for an opt-out procedure.

2 At the heart of the present dispute is a letter dated 28 August 2018 from the defendant's solicitors to group members inviting them to accept an offer for early settlement of their claims detailed in an enclosed settlement agreement. The defendant's offer has been distributed in three ways.

3 Presently the size of the group has not been identified. Approximately 130 individuals have registered with the plaintiff's solicitors to participate in the proceeding ('registered group members'). The defendant has communicated with these members by sending a letter to the plaintiff's solicitors enclosing the settlement agreement.

4 There is a second set of group members who have claimed upon their insurer for the loss and damage they have suffered ('insured group members'). The exact number of members with insured, or under-insured, claims is unclear. Further, these two sub-groups are not mutually exclusive. There is likely to have been overlap. The defendant has communicated with the insured group members by sending the offer to the solicitors, Hall & Wilcox, acting for several insurers.

5 The defendant's solicitors believed that 10 group members were neither registered group members nor insured group members and have sent the letter directly to them. Subsequent events reveal that two recipients of this direct correspondence may have been represented group members, but when the application came on for hearing, the plaintiff accepted that any such communication was inadvertent and did not press the point.

6 In the result, there were effectively 12 direct recipients of the relevant communication being the plaintiff's solicitors, the insurers' solicitors and

10 unrepresented individual group members.

7 The letter of 28 August 2018 stated that the defendant was communicating with the recipient of the letter following an approach to the defendant by the recipient seeking prompt compensation for loss arising from the Terang bushfire. I note that the letter does not enquire of the recipient whether they are represented by a solicitor, as might have been prudent. However, as I have noted the issue of possible infringement of ethical rules concerning communications directly with legally represented persons was not pressed as a basis for relief and I will say no more about it.

8 Liability was denied and an early settlement scheme was proposed. Prior to 28 August 2018, the defendant had appointed Crawford, a firm of insurance loss adjusters, whose representatives had contacted some claimants. The defendant promoted Crawford as experienced experts in assessing bushfire losses.

9 The key features of the offer were:

- the offer had been made to all parties seeking compensation;
- the defendant would pay 50 percent of losses calculated by the defendant in accordance with the settlement agreement;
- the terms of the offer had been prepared carefully with Crawford to be fair and to reflect actual values;
- damage to property would be assessed by Crawford following identified principles set out in the settlement agreement;
- payments of some or all of the claim could be made within 30 days of the submission of documents. The full amount of the offer would be paid within 30 days of assessment;
- claims for personal injury had to be supported by medical reports from treating doctors and, in the first instance, the defendant would decide within 30 days, whether to refer the claim to a medical panel. If that occurred assessment would be delayed until the medical panel reported. If the claim

was not referred to a medical panel, it 'will be assessed in accordance with common law principles for the assessment of damages within 30 days';

- if the recipient was not represented by solicitors, the defendant could provide a claims preparer to help with submission of the claim;
- the recipient was required to disclose whether they had submitted an insurance claim and whether it had been accepted.

10 It was unnecessary for the recipient to sign any agreement in the first instance, rather, the offer was accepted by submitting a claim summary with supporting documents or medical reports, as appropriate. In either case, once the defendant made the assessment the group member is informed of it and, subject to signing a release, a payment is made.

11 A critical term of the settlement agreement reads:

> Upon your acceptance of the offer agreed in accordance with the terms of this Agreement, we will ask you once the sum of the offer is agreed to sign a release in the form attached to this agreement as Appendix B.

Although the settlement agreement may amount to no more than an agreement to negotiate, some of the language of the agreement may provide a foundation for a contention on the part of the defendant that acceptance of the offer by the submission of a claim in accordance with its terms constitutes a binding agreement to accept 50 percent of the loss calculated in accordance with the terms set out in the agreement.

12 The proper construction of the agreement was not addressed in argument and I say no more about it. The present relevance of the nature of the obligations and rights being offered is to support the plaintiff's submission that the offer may be misleading or unfair. The offer makes no mention whatsoever of the rights to which a group member is entitled in the group proceeding and does not recommend that the unrepresented group member to whom it is directed should seek independent legal advice before accepting the offer.

13 Further, the language of the offer, the promotion of Crawford as experienced expert

assessors, and the failure to explicitly state that they were employed by the defendant might lead unrepresented recipients of the letter to regard Crawford as an impartial assessor, contrary to the fact. The offer is also silent about the identity of the assessor of the quantum of personal injury claims which presumably would be the defendant by its solicitors.

14 In response, the defendant pointed to clause 21 of the offer by which it agreed to pay unrepresented group members an hourly rate of $270 (GST inclusive) to engage 'a claim preparer of your choice', although such allowance was capped on a sliding scale dependant on the value of the claim being made. There is plainly a distinction between employing a claim preparer to advance a claim pursuant to the offer and a lawyer to advise whether to accept the offer.

15 The plaintiff sought extensive relief in respect of this letter. First, it sought a declaration that the offer to group members was void and not capable of acceptance. Alternatively, an order that the defendant withdraw the offer. Alternatively, an order that the defendant write to all group members informing them that the offer is suspended until further order of the court and to deliver up to the plaintiff a list of group members to whom the offer was made, verified on oath.

16 Further, until the opt-out procedure in the proceeding is finalised the plaintiff sought to preclude the defendant from communicating directly with group members without court approval and first giving 21 days' notice of the proposed communication to the plaintiff's solicitors. He also sought to restrain the defendant from communicating with insurers of group members without the prior written and informed consent of the relevant group member and from soliciting, facilitating, requesting or receiving information from insurers in relation to subrogated claims of group members without prior written and informed consent of the group member or their legal representative. Alternatively, an order that the defendant is not to make offers of settlement to group members unless 21 days prior to making such an offer it provides to the plaintiff's solicitors a copy of the offer it proposes to make and any documentation relating to that offer.

17 A number of bases for relief were sensibly abandoned by the plaintiff's counsel on the hearing of the application.

18 The crux of the plaintiff application was that the offer was unfair or misleading for the following reasons:

(a) As I have just noted, the offer did not advise the recipient of their right to seek independent legal advice or of the desirability of doing so.

(b) The offer failed to mention that the offeree is a group member of the Lenehan proceeding in which the offeree's right to claim for losses is already being pursued, notwithstanding that one purpose of the offer was to seek to resolve all claims in the proceeding.

(c) The offer did not identify the consequences of acceptance or non-acceptance of the offer. For example, the offer does not reveal that the offeree would cease to be a group member in the proceeding and would forego any entitlement to penalty interest on their damages if they accepted the assessment and executed a release.

(d) The offer failed to identify that any concluded direct negotiation did not require court approval.

(e) The offer failed to explain that the settlement principles for assessment of claims have, in substance, been determined by the defendant.

(f) The offer may impinge inappropriately on the contractual relationship between the group member and their insurer.

(g) Finally, the offer provides no recourse to a group member in circumstances where a dispute arises about the quantum of loss assessed by the defendant or its agent.

19 I accept the plaintiff's fundamental complaint that the offer may be misleading and unfair where first, it failed to identify the relationship between the offer and the

existing group proceeding in which the offeree is entitled to participate, and secondly, in a letter that does not appear to admit the possibility of further negotiation, it failed to make clear that the offeree is entitled to and might benefit from independent legal advice. In substance, the other complaints raised by the plaintiff about the offer would be substantially addressed if the offeree received independent legal advice.

20 On a number of aspects of the offer, the offeree would benefit from independent legal advice. First, there is the deduction of 50 percent, apparently in return for a prompt settlement. Next, there are issues about the true nature of the rights and obligations created by the document, particularly where the process appears to offer a group member no recourse other than to walk away if dissatisfied with the assessed quantum of loss. In respect of each of these matters, the inadequate reference to the group proceeding, and the rights enjoyed by the group member in that proceeding, is of significance.

21 Unrepresented group members would not have access to the pleadings in this proceeding or any communications between the parties during the course of the litigation to date. Although they may have some general knowledge from media reports about investigations into the fire, the defendant has not set out any reasoning in support of the 50 percent discount that is the basis of its offer save for specifying that the process supports a quick resolution.

22 The plaintiff suggested that the defendant ought to have stated, or referred to, the findings of Energy Safe Victoria's investigation into the fire in order to inform a decision as to the reasonableness of the offer. Taken in isolation, the absence of a reference to or analysis of that investigation is not, of itself, misleading. In *Hazeldene's Chicken Farm Pty Ltd v VWA (No 2)*[1] the Court of Appeal referred to the argument that a party making a Calderbank offer should not be entitled to costs unless the offeror sets out with some reasonable specificity the basis for the offeror's

[1] (2005) 13 VR 435.

contention that the offeree should accept the compromise. The Court of Appeal eschewed laying down a general rule, preferring the flexibility of a fact-sensitive enquiry.[2]

23 In the present circumstances, I consider the terms of the offer may be misleading or unfair because of the discount being imposed by the defendant and the apparent finality of the offer in the context of the proposed assessment mechanisms.

24 The plaintiff submitted that the representation that accepting the offer will result in a quick resolution of the claim was potentially misleading. This submission was based in part on prior experience in relation to other bushfire claims. I was not persuaded by this submission that, like many others, amounts to no more than a particular development of the proposition that the failure to identify the significance of the group proceeding and that the offeree is entitled to seek and might benefit from independent legal advice were the key failings of the defendant's process.

25 The parties did not dispute the proposition, established by reference to the analysis of the identically worded s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) in *Courtney v Medtel Pty Ltd*,[3] that s 33ZF of the *Supreme Court Act 1986*, empowers the court to impose constraints on a defendant's communications with a group member if such constraints are considered necessary or appropriate to ensure that justice is done in the proceeding.

26 In *Courtney*, Sackville J rejected the proposition that s 33ZF(1) can be read as prohibiting the defendant from communicating with a group member unless the court has given prior approval. Sackville J stated:

> Accordingly, neither s 33ZF(1) nor any other provision in Part IVA prevents a respondent communicating with a group member in a manner which is not misleading or otherwise unfair and which does not infringe any other law or ethical constraint (such as a professional conduct rule which requires solicitors to communicate with a represented group member through the latter's own legal representatives). The principle also applies, in my opinion, to an offer made by a respondent to settle the claims of individual group

2 Ibid 442 [26]–[27].
3 (2002) 122 FCR 168 ('*Courtney*').

> members. This reflects the general policy of the law to encourage out of court settlement of disputes and to promote the individual's right to enter negotiations for settlement without inhibition.[4]

27 While not prescribing exhaustive guidelines, Sackville J suggested on the facts of the case before him that the communications with unrepresented group members ought to have met the following standard:

- the offer and any accompanying material were in writing;
- the documentation accurately explained the consequences of accepting and not accepting the offer;
- the offer allowed a period of acceptance that was sufficient to provide the group member with a genuine opportunity to obtain legal advice, should the group member have wished to do so; and
- the documentation made clear that the group member was entitled to seek and might benefit from independent legal advice.[5]

28 Sackville J did not consider it appropriate for the court to make any finding that an offer was misleading or that it induced any particular member to settle a claim. It was enough to say that, depending on the particular circumstances, the representations may have been misleading and may have induced settlements.

29 Perram J followed *Courtney* in *Capic v Ford Motor Company of Australia Ltd*,[6] noting that the jurisdiction, when used to regulate communications between a defendant and unrepresented group members, is part of the court's supervisory function. This is so because the ability of a group member and a defendant to compromise a group member's rights as a group member may afford a circumstance which would not be fair or just. Perram J observed that the categories of circumstances that may generate unfairness or injustice are not closed and in *Courtney* Sackville J was simply providing illustrative examples. I agree, with respect, with Perram J's observation that it is not the interests of those running the class action but rather the interests of

---

4 Ibid 183 [52] (citations omitted).
5 Ibid 186 [64].
6 [2016] FCA 1020.

the non-party group member that are the focus of the court's supervisory responsibility.

30 In *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd*,[7] the issue before the court was whether a communications protocol could be imposed by the applicant on the first respondent in relation to its communications with group members in the proceeding. Middleton J described the passage from *Courtney*, cited above, as an accurate statement of the law. What is required for the court to intervene in relation to communications between the individual group members and a defendant in respect of negotiations is some evidence of improper conduct on the part of the defendant.[8] Middleton J would decline to intervene to prohibit or limit communications between a defendant and an individual group member that are otherwise lawful and not subject to any ethical constraint and where those communications are not misleading and do not involve any unfairness. I agree, noting that when the issue is considered at this stage the question is whether such communications may be misleading or may involve unfairness, the test being objective and prospective.

31 In the present circumstances, I am satisfied that the offer of 28 August 2018 may be misleading or productive of unfairness in that it fails to accurately explain the consequences of acceptance or non-acceptance of the offer, particularly by failing to identify the existence of the group proceeding and the effect of the offer on the members' right to participate in that proceeding. Secondly, as I have indicated above, there were some complexities, and possible ambiguities, in the offer and the terms upon which it was put that have caused me to think that the offer may be misleading and may be unfair in a way that would be ameliorated by a clear statement that the recipient was entitled to seek and might benefit from independent legal advice. The reference to some funds being available to cover the expense of a claim preparer did not address this issue.

32 Given the scope for unfairness that I have identified, communications directly to

7 [2018] FCA 984.
8 Ibid [20].

solicitors on behalf of group members are unobjectionable. It is obvious that both the plaintiff's solicitors and the insurers' solicitors are in a position to adequately protect a group member from any prospect of being misled or of entering into an unfair settlement.

33 The defendant contended that it communicated with the unrepresented group members because they had directly approached the defendant and expressed their preference to deal directly with it. The defendant's solicitors asserted that there was a disinclination from these parties for a number of reasons to become involved in legal proceedings. While that broad assertion is noted, I am unpersuaded that the disinclination identified entitles me to assume that those unrepresented group members would not be misled or treated unfairly were they to proceed to compromise their rights on the basis of the communications as they presently stand.

34 I consider it appropriate that the defendant's solicitors, on its behalf, communicate further with those unrepresented group members, providing a copy of the correspondence to the solicitors for the plaintiff and the insurers, making it clear that the group members are entitled to and might benefit from independent legal advice and identifying that they enjoy rights as group members in the current proceeding that would be compromised by acceptance of the defendant's offer. In that regard the defendant should accurately explain the consequences of accepting or not accepting both the offer made by the letter of 28 August 2018 and the assessment arrived at in accordance with the procedure in the settlement agreement, by comparison with the rights enjoyed as group members in the current proceeding.

35 As set out above, the plaintiff also sought to restrain or limit communications by the defendant with insurers of group members. Counsel appearing for QBE Insurance Australia (Limited) and Alliance Australia Insurance Limited sought leave to intervene for the limited purpose of making submissions in response to that particular application for relief. Their solicitor deposed that each insurer has made substantial payment to many group members in the proceeding. As I was satisfied

that these insurers were, in the words of the High Court in *Levy v Victoria*,[9] non-parties 'whose interests would be affected directly by a decision in the proceeding — that is, one who would be bound by the decision albeit not a party', the insurers 'must be entitled to intervene to protect the interest liable to be affected'.

36 The correspondence showed that in April and May 2018 the insurers wrote to their insureds stating that certain policy provisions granted the insurers the right to control recovery action taken in relation to the fire. Although the insurers are yet to decide whether to pursue recovery action, insureds were discouraged from signing up to participate in the class action as it could contravene the policy provisions and cause prejudice to the insurers. The plaintiff's solicitors required that insurers not communicate with group members (including insureds) in relation to their participation in the class action without approval of the court.

37 The insurers solicitors responded that the insurers were entitled to correspond with their insured and notified the plaintiff that the insurers, pursuant to their policy entitlements, intended to opt out their insureds from the class to pursue separate recovery action. The solicitors stated that this course of action was being taken because the insurers believed that the plaintiff's solicitors were overstretched and that the insureds could be represented in a more effective and efficient way.

38 I am not persuaded to the position advanced by the plaintiff. The prohibition on communication sought by the plaintiff is unnecessarily broad and would effectively prevent, or require the court to monitor, the exchange of any information relating to the claims of the subrogated insurers. No basis was established for such a broad prohibition and I will not impose it.

39 Further, in applying the principles stated above in order to identify when the court should intervene in communications, I am not persuaded that the communications between the defendant and the insured group members were apt to mislead or involved a risk of unfairness for insured, including underinsured, group members.

---

9 (1997) 189 CLR 579, 601.

As the insurers submitted, the matters identified in the correspondence, which principally relate to decision making in an opt-out procedure, are not presently relevant. To the extent that there is any issue between the plaintiff and the insurers in that respect, the validity of opt-out notices can be challenged, as occurred in *Johnston v Endeavour Energy*.[10] That enquiry is fact sensitive and it would be premature to enter into it. That said, as the insurers submitted, there are features of the communications that the plaintiff seeks to control that tell against any intervention by the court in reliance on its powers under s 33ZF of the *Supreme Court Act* 1986. Those matters are:

- as legally represented professional litigants, the insurers pursuing subrogated claims are not a vulnerable category of group member requiring the exercise by the court of a guardianship role;
- communications between the insurers and the defendant have taken place with their respective legal practitioners;
- insurers owe a duty of good faith to their insureds;
- the plaintiff has not identified any evidence of misleading, unfair, or unethical conduct on behalf of the defendant or the insurers in such communications.

40 For these reasons the relief sought by the plaintiff under paragraphs 5(b)and (c) of his summons filed 18 September 2018, which was opposed by the insurers, is refused.

---

10 [2015] NSWSC 1117.