

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

Not Restricted

S CI 2010 05318

ERIN DOWNIE

Plaintiff

v

SPIRAL FOODS PTY LTD (ACN 006 292 780)

First Defendant

MUSO CO. LTD

Second Defendant

MARUSAN-AI CO. LTD

Third Defendant

JUDGE:

J FORREST J

WHERE HELD:

Melbourne

DATE OF HEARING:

4 November 2016

DATE OF REASONS:

8 November 2016

CASE MAY BE CITED AS:

Downie v Spiral Foods Pty Ltd & Ors (Ruling No 2)

MEDIUM NEUTRAL CITATION:

[2016] VSC 675

PRACTICE AND PROCEDURE – Case management conference – Progress of the Settlement Distribution Scheme – Orders made that an initial distribution from the settlement distribution fund be made to Group Members.

APPEARANCES:

Counsel

Solicitors

For the Scheme  
Administrator

Ms K Burke

Maurice Blackburn

No appearance by the other  
parties or group members

HIS HONOUR:

- 1 This class action, arising out of the supply of allegedly contaminated Bonsoy soy milk to consumers, was settled in early 2015 for \$25 million inclusive of costs, subject to Court approval. The Settlement Deed ('Deed') and the Settlement Distribution Scheme ('SDS'), setting out the process of distribution of the settlement funds, were approved by me on 8 May 2015.<sup>1</sup>
- 2 The Deed provided for payment of the costs of the proceeding and administration costs of the SDS to be made out of the settlement distribution fund ('Fund').
- 3 There are 569 registrants, nine of which are under a disability. A total of 377 registrants are eligible for compensation. All claims have completed the assessment process and the last assessment was finalised on 15 August 2016. All applications for independent review were completed on 14 October 2016.
- 4 The proceeding was listed for a further case management conference on 4 November 2016. Prior to the hearing of the conference, the Scheme Administrator, Ms Irina Lubomirska (a Maurice Blackburn partner), filed an affidavit sworn 2 November 2016, providing the Court with comprehensive updates as to the completion of the assessment process, including the final rate of recovery. That affidavit is available for inspection on the Court website.
- 5 The upshot is that the Scheme Administrator is satisfied that it is now appropriate to distribute the settlement funds: an initial distribution of approximately 100 per cent of assessed damages with a subsequent small 'top-up' – whose value is contingent upon resolution of outstanding taxation issues and calculation of the amount of costs of the administration of the SDS, as determined by Mr John White, the Special Costs Referee.
- 6 Having regard to Ms Lubomirska's affidavit, and after hearing submissions from counsel for the administrator, I made orders pursuant to s 33ZF of the *Supreme Court*

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<sup>1</sup> [2015] VSC 190 (the Settlement Ruling). A copy of the approved deed and SDS are available on the Court website at:  
<http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/bonsoy+class+action+settlement>

*Act 1986 (Vic)*, and in the alternative, pursuant to the inherent jurisdiction of the Court, that the Scheme Administrator is to make an initial distribution from the Fund to Group Members of 100 per cent of the amount in each Notice of Assessment sent by the Scheme Administrator to each Group Member, less such deductions as are applicable pursuant to law and the SDS. Deductions include repayments to Medicare, Centrelink, the Department of Veteran's Affairs and/or private health insurers.

- 7 I thank the Scheme Administrator and her team for their efficiency and competence in managing the SDS.
- 8 A copy of Mr White's report, as to the reasonableness of the costs of the administration of the SDS and in what amount (if any) of those costs should be disallowed, is yet to be received.
- 9 Finally, the Scheme Administrator is awaiting the outcome of taxation advice from the Australian Taxation Office sought in respect of the Kilmore East Kinglake class action, as to whether interest earned on a settlement sum in a personal injury action is assessable income for the purposes of taxation law, and if it is, the effect of payment of the costs of the administration on tax liability of the sum. No ruling or advice from the ATO has been received. Once received, the Scheme Administrator proposes to use the ruling or advice to inform future treatment of the interest accrued by the Fund, under this SDS. Only after this exercise is complete will a final figure for any 'top up' be able to be determined.
- 10 A further directions hearing has been fixed for 16 December 2016 to address these outstanding issues.

CERTIFICATE

I certify that this and the 2 preceding pages are a true copy of the reasons for ruling of J Forrest J of the Supreme Court of Victoria delivered on 8 November 2016.

DATED this eighth day of November 2016.

  
Associate

