IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2012 04538

KATHERINE ROWE — Plaintiff

v

AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118) (FORMERLY SPI ELECTRICITY PTY LTD)
& ORS — Defendants

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| JUDGE: | JOHN DIXON J |
| WHERE HELD: | MELBOURNE |
| DATE OF HEARING: | 30 NOVEMBER 2016 |
| DATE OF RULING: | 7 DECEMBER 2016 |
| CASE MAY BE CITED AS: | ROWE v AUSNET ELECTRICITY SERVICES PTY LTD & ORS (RULING No 9) |
| MEDIUM NEUTRAL CITATION: | [2016] VSC 731 |

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PRACTICE AND PROCEDURE – Group proceedings – Supervision of Settlement Distribution Scheme – Report of special referee – Costs – Adoption of report – *Supreme Court (General Civil Procedure) Rules 2015*, r 50.04.

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| APPEARANCES: | Counsel | Solicitors |
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| For the Scheme Administrator | Mr A Watson, the Scheme Administrator, appeared in person | Maurice Blackburn |

HIS HONOUR:

1 On 27 May 2015, Emerton J authorised the plaintiff for and on behalf of the group members and each of them to enter into and give effect to a Deed of Settlement that effected a compromise of this proceeding. By that order, I was nominated as the supervising judge with respect to the Deed and the Settlement Distribution Scheme ('SDS') that it created.[1]

2 On 14 and 30 November 2016, joint case management conferences were convened for the Scheme Administrator, Mr Andrew Watson, to report to the Court on the progress of the administration of the Murrindindi and Kilmore-East Kinglake settlement distribution schemes. As stated in previous rulings, I am only concerned to supervise the administration of the Murrindindi SDS. The Kilmore-East Kinglake group proceeding is supervised by J Forrest J.

3 The Scheme Administrator filed affidavits sworn 31 October and 29 November 2016 that detailed the progress of the administration of the SDS. I have carefully considered these affidavits and heard from Mr Watson at the case management conferences.

4 The case management conference on 30 November was principally concerned with the reports of the special referee appointed by my order of 6 May 2016 in respect of the costs of the settlement administration. A subsidiary issue concerned a transfer payment to be made from the Murrindindi SDS fund to the Kilmore-East Kinglake SDS fund.

5 Rule 50.04 of the *Supreme Court (General Civil Procedure) Rules 2015*, provides that the court may as the interests of justice require adopt the report of a special referee or decline to adopt the report in whole or in part, and make such order or give such judgement as it thinks fit. The report is of no effect unless and until adopted by the court in accordance with this rule.[2] It is accepted that the rule gives the court wide

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1 A copy of the Deed and SDS is available on the Court's website at: http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/murrindindi+black+saturday+bushfire+class+action

2 *Astor Properties Pty Ltd v L'Union des Assurance de Paris* (1989) 17 NSWLR 483, 490; *Wallfire Pty Ltd v Andwendrod Services Pty Ltd* [2003] VSC 348, [31].

and flexible discretionary jurisdiction to be exercised in the interests of justice.[3] The adoption of the special referee's opinion with respect to a question referred to the referee by the court constitutes the opinion of the court and, accordingly, its judgment on that question.[4]

6 The questions set for the special referee by my order of 6 May 2016 were –

(a) Are the costs sought in relation to the administration of the settlement distribution scheme reasonable?

(b) If not, in what amount should the costs be disallowed?

Mr White noted that his task was to determine whether the costs claimed by the scheme administrator have been reasonably incurred and are reasonable in amount.

7 It follows from the adoption of Mr White's reports by the court that I have concluded that the costs claimed by the scheme administrator were reasonably incurred and are reasonable in amount. On 30 November 2016, I made orders approving payment of the costs claimed by Maurice Blackburn stating that I would later publish my reasons for so ordering. Those reasons now follow.

8 Mr White provided two reports to the court dated 30 June 2016 and 21 November 2016. I have earlier made orders approving costs on the basis of Mr White's first report but it remains necessary to deal with issue of adoption of the reports. Each of those reports has been carefully considered and on 30 November 2016 Mr White gave evidence to the court in which he stated that his reports correctly reflect the instructions he was given, the investigations that he made, and the opinions that he honestly holds on the basis of applying his expertise.

9 Mr White has substantial experience as a costs lawyer, having practised exclusively in that capacity since 1987. I accept his qualifications, skills, and experience, which are set out in some detail in his first affidavit, and which were not challenged.

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3 *Kilpatrick Green Pty Ltd v Leading Synthetics Pty Ltd*, unreported, Supreme Court of Victoria, (Gillard J) 5 June, 1998, BC9802331.

4 *Skinner & Edwards (Builders) Pty Ltd v Australian Telecommunications Corp* (1992) 27 NSWLR 567, 575.

Mr White was provided with a substantial body of material, including detailed invoices rendered by Maurice Blackburn to the scheme administrator. In addition, he enjoyed unfettered access to documents and computer systems and all requests of the scheme administrator and his staff for assistance were promptly dealt with to his satisfaction.

10 The task required of Mr White by the court was novel. He identified and explained the methodology that he adopted by reference to established case law in respect of the methodology to be adopted when assessing a claim for gross sum costs on an *inter partes* basis in class actions.[5] I am satisfied that Mr White adopted a proper and appropriate methodology.

11 His methodology involved the following 7 steps –

(a) step 1 – identify the scope of work done;

(b) step 2 – identify the nature of the costs incurred over particular periods of time;

(c) step 3 – examine the copy bills of costs/tax invoices and calculate the time spent on the proceeding by each of the lawyers and non-lawyers;

(d) step 4 – examine the copy bills of costs/tax invoices and take and examine:

(i) samples of charges claimed for work done by reference to selected operators and selected dates, and

(ii) samples of disbursements claimed by reference to selected service providers and selected dates;

(e) step 5 – apply the hourly rates to be allowed to the scheme administrator and administration staff as approved by the court and detailed in schedule B to the SDS;

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5 *Matthews v Ausnet Electricity Services Pty Ltd & Ors* [2014] VSC 663, [381]; *Courtney v Medtel Pty Ltd* [2013] FCA 636; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626.

(f) step 6 - identify the number of hours relating to non-recoverable work by reason of that work not being reasonably incurred or reasonable in amount and, if any, excise that work; and

(g) step 7 – identify and, if any, reduce or deduct disbursements which appear unreasonably incurred or unreasonable in amount.

12 Mr White's affidavits set out in considerable detail the work that he undertook and the considerations that arose in respect of each step. It is not necessary to burden these reasons with all of that information.

13 In respect of step 1, Mr White concluded that he had no reason to consider that the descriptions of the scope of work done over particular periods of time as broadly deposed to in the affidavits of Mr Watson were not accurate, particularly as his opinion in this regard had been confirmed by his sampling process undertaken as part of step 4 and having regard to his examination of source documents.

14 In respect of step 2, from his examination of the bills of costs/tax invoices, those parts of the affidavit material that detailed the scope and nature of costs incurred, and other information provided by Mr Watson in respect of anticipated costs for future periods, Mr White identified that as the settlement distribution process progressed and as more claims were progressively dealt with, further administrative or logistic issues arose that were distinct from the descriptions originally provided of the work to be done. However, again, by reference to the information that was provided to him, the sampling process, and his examination of source material, he was satisfied that the descriptions of the nature of the costs incurred over particular periods of time were accurate.

15 In respect of step 3, the scheme administrator provided Mr White with detailed information about his staff, their respective positions, billing codes, recorded time allocations and so forth. Maurice Blackburn operated a time recording software system for time costing known as Elite. Elite is proprietary software marketed by Thomson Reuters, a reputable international mass media and office services

publisher, and, when giving evidence, Mr White gave a detailed explanation of the operation of this system and the reasons for regarding it as reliable. Mr White had been provided with the protocols used by Maurice Blackburn in connection with the Elite software, which provided comprehensive rules to ensure the time was allocated accurately and honestly. The scheme administrator had issued a further protocol that dealt with time recording specific to the SDS.

16 In respect of step 4, Mr White explained that the sampling program that he adopted involved examining in detail the work done by all file operators on a particular day on every 20th page of the bills of costs/tax invoices and examining in detail a sample of the claims for work done by a particular file operator on every alternate 20th page of those bills of costs/tax invoices. When giving evidence, Mr White explained, to my satisfaction the basis for, and appropriateness of, this sampling process, which resulted in a detailed examination of approximately 10% of the costs claimed.

17 At the stage of detailed examination of the randomly selected claims, Mr White would review the nature of the work done, whether the work was reasonably done at the time, whether the work was done by the appropriate level of file operator given the nature of the task, whether the time claimed for the work with reasonable, and whether the correct hourly rate had been applied given the level of file operator doing that work. Mr White also compared the work noted in the bills of costs/tax invoices with other source information available to him including the electronic files maintained by the scheme administrator. He noted that although some of the work was in respect of tasks which would normally not be allowed of taxation of costs as between solicitor and own client,[6] such claims were allowed because, mostly, the work was done to ensure the integrity and efficiency of the settlement distribution process, particularly having regard to the very large number of claims to be dealt with, or was done as a result of particular requirements under the SDS.

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6 For example, administrative claims for collating, reviewing and processing disbursement fee vouchers, database management and like tasks.

18 Mr White observed that step 4 was particularly involved and time-consuming but expressed his satisfaction that the cross referenced sample was sufficiently large to permit him to extrapolate his results across the total of the costs claimed. In his opinion, the work claimed in those tax invoices was reasonably done at the time of the appropriate level of file operator, that the time claim for the randomly sampled work was reasonable, and that the correct hourly rate had been applied given the level of file operator doing the work.

19 To cross check this conclusion, stack graphs were prepared which broke down the total time spent by each type of file operator for work done in respect of different administrative groupings - overview, general file, personal injury file, and property file. Examination of the stack graphs confirmed that in respect of all aspects of the SDS, appropriately, far less time was spent by principals and special counsel, senior associates, associates, solicitors and trainee lawyers than was spent by paralegals and legal assistance/litigation support staff who expended the majority of the allocated time. Appropriately, more time was spent by principals and special counsel, senior associates, and associates than was spent by paralegals and legal assistance/litigation support staff on higher-level aspects of general settlement administration. It was clear that the bulk of administrative work in both the I-D settlement administration and the ELPD settlement administration was performed by paralegals.

20 Mr White concluded that the division of time amongst file operators in the administration of the scheme was an appropriate and reasonable allocation of work across all file operators and particularly between lawyers and non-lawyers.

21 Mr White also reviewed the claims for disbursements made in each of the bills of costs/tax invoices and stated that, in his experience, the rates negotiated for counsel were well within the range of hourly and daily rates recoverable on taxation and were reasonable. He reached the same conclusion in respect of the rates fixed for comprehensive psychiatric assessments, comprehensive psychological assessments psychiatric oversights, and for medical reports and clinical notes.

22 In respect of step 5, Mr White was satisfied by the sampling that he undertook that the time recording protocols had been conscientiously followed and applied. The hourly rates that were charged were those set out in schedule B to the SDS as approved by Emerton J. Such rates had been fixed for the period of the administration.

23 Further, although it was entirely proper for Mr White to apply the hourly rates approved by the court, I invited him to explain the basis for the opinions expressed by other costs consultants to the court on the occasion when that approval was given, particularly given his observations about the distinction between administrative work and legal work recoverable on taxation. Although not relevant, I permitted Mr White to express his own opinion about the rates. Mr White considered those rates to be appropriate noting that although the SDS was an administrative process, it involved substantial legal work and could be compared with an insurer's claims department. The distinction between work of an administrative kind not normally allowed on taxation and work requiring legal skill, care and attention was not clear cut in this case and the SDS was clearly a process of significant complexity. In particular, Mr White suggested that a comparison, which he undertook, between the current Supreme Court scale rates, particularly with an appropriate complexity allowance, and the approved rates favoured the reasonableness of the approved rates. Mr White added that he could not see how the costing of the work performed in the administration of the scheme could be tackled in any way other than by time costing.

24 In respect of steps 6 and 7, Mr White concluded that it could not reasonably be said that any of the work claimed or the disbursements in the bills of costs/tax invoices was unreasonably done/incurred or was unreasonable in amount.

25 To enable the pro rata distribution amounts to be calculated for each individual group member, it is also necessary to allow for anticipated future costs and I have done so. In respect of these allowances, Mr White expressed his opinion that the costs claimed would be reasonably incurred and would be reasonable in amount.

That opinion was based on the considered advice of senior members of the SDS team about the work that was likely to be required. Mr White accepted that the senior file operators were the ones most qualified to give such estimates particularly in the context of their experience in the administration of the scheme and the understanding of the work remaining to be done.

26 Mr White expressed a final opinion that from his detailed examination and analysis of the scheme, in his opinion it commenced with an extraordinary degree of planning and foresight. It would be unreasonable to expect an impossible degree of clairvoyance when the scheme was initiated, and the scheme administrator and his staff have expeditiously and appropriately dealt with unforeseen problems as they arose. Further, Mr White was 'mightily impressed' by the dedication and conscientiousness of the scheme staff, many of whom he dealt with during the course of his investigations. In his opinion, the scheme administrator had been quite transparent in his dealings and he did not find any inconsistency between what was revealed by source documents and what had been reported to him.

27 In addition to answering my questions, Mr White was cross-examined by group members from the Kilmore-East Kinglake group proceeding. Although that cross-examination was not relevant to the question of the costs incurred by the scheme administrator in the Murrindindi group proceeding, a number of pertinent issues were raised and clarified. I took the matters drawn to the court's attention during that cross-examination into account in concluding that Mr White's reports and his evidence demonstrate his thorough, analytical, and principled approach to the assessment of the issues directed to him. I was satisfied that no circumstance had been demonstrated, for example error in principle, misapprehension of evidence or unreasonableness in fact-finding, that warranted rejection of Mr White's conclusions. Accordingly, his reports were adopted in full.

28 On 30 November 2016 I also ordered that a payment be made out of the Murrindindi SDS funds to the Kilmore-East Kinglake SDS funds. I approved this payment because group members in the Murrindindi SDS obtained the benefit of a

considerable amount of planning and set-up work that was done in the Kilmore-East Kinglake SDS. It will be recalled that the Kilmore-East Kinglake group proceeding was compromised, approved, and worked commenced under the SDS, before the Murrindindi group proceeding settled.

29 At an early stage of the process of supervision of the SDS, the court was informed that the administration would operate in conjunction with the Kilmore-East Kinglake SDS to take advantage of the obvious efficiencies given the close similarities between the two schemes. Mr Watson informed me that all of the set-up work which had occurred in relation to Kilmore, such as bespoke databases and other forms of information technology processes would be applied to the Murrindindi SDS with significant benefit for that scheme in terms of saved administrative expenses. In short, the Kilmore systems were substantially replicated for Murrindindi. The benefit flowing to the Murrindindi SDS was evident by comparison of settlement administration costs as at 30 September 2016. For Kilmore, those costs constituted 6.4% of the settlement sum. The corresponding figure for Murrindindi was 2.5%. The costs of development of the scheme processes were fixed costs, not dependent on claim numbers or settlement size.

30 Accordingly, Mr Watson proposed a transfer payment to fairly distribute overhead expenses between the two schemes. The rationale for and method of quantification of the proposed transfer payment were explained in detail both to the court and to Mr White. Mr White concluded that the method of calculation of the proposed transfer payment was reasonable, as was the quantum proposed.

31 A third issue raised at the case management conference was that Mr Watson explained the position of the scheme in its dealings with the Australian Taxation Office in respect of whether the interest earned on the settlement sum in the hands of the scheme administrator is taxable and, if so, whether the costs of the scheme administration are deductible against that income. Because this issue is the subject of sensitive ongoing negotiations, the scheme administrator's report to the court about the steps taken to date, the direction in which the issue may progress, and its

implications for the SDS in the future was kept confidential. The scheme administrator informed the court that he proposes to withhold from the initial distribution sum, sufficient funds to meet the full claim made against him by the ATO for the tax liability of the scheme. An estimate has also been made of the likely administration costs that will be incurred in resolving this issue. Funds will also be retained in respect of those anticipated administration costs.

32 Although it is disappointing that it has become necessary to retain funds against future contingencies that may give rise to the need for a second distribution, which necessarily will incur additional administration expenses, the scheme administrator's decision to proceed to an interim distribution as soon as possible rather than to defer distribution until the taxation issues have been resolved is proper and appropriate. The ongoing negotiations and future dealings between the scheme administrator and the ATO are not presently, and may never be, a matter for the court. If it becomes proper to do so, the scheme administrator may seek further directions from the court. It is not appropriate to say any more about the issue at this stage.

33 Finally, it is important to record that in order to avoid any further delay, the scheme administrator has continued with the process of preparing for a distribution to personal injury and dependency claimants because all assessments of I-D claimants entitlements, including review assessments, have been finalised and all that remains to be determined in order to calculate the entitlements of those claimants was to deal with the extant application in respect of costs and the transfer payment.

34 To that end, and subject to any adjustment required by this ruling (none will be required), Mr Watson prepared the Estimate of I-D Claimant Recovery and commenced the process of its review by KPMG (Mr Kompos). In view of the orders that I have now made, the assumptions made by Mr Watson and Mr Kompos were warranted. As a result, the rate of I-D Claimant recovery of their assessed claims calculated by Mr Watson and verified by Mr Kompos is 63.628%, which is slightly lower than the estimated 65% to 75% recovery rate range nominated in the Personal

Injury Brochure sent to I-D claimants. There remains, of course, a prospect of a further distribution depending on the resolution of the tax issue.

35 The total sum presently available for distribution is $274,264,432. It is reconciled as follows –

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| **Settlement sum** | **$300,000,000** |
| Plus Interest income | $12,341,121 |
| Plus future interest | $51,786 |
| Less trial costs | $20,599,046 |
| Less transfer payment | $3,782,341 |
| Less payments to plaintiff and SGM pursuant to SDS | $55,000 |
| Less costs of SDS approved to date | $7,640,151 |
| Plus bonds payable to distribution sum | $3,200 |
| Plus money owed for medical reports | $4,785 |
| Plus review costs payable to distribution sum | $12,600 |
| Less tax liability withheld | $6,047,149 |
| Less tax on future interest withheld | $25,375 |
| **Total** | **$274,264,432** |
| I-D Distribution sum | $33,374,942 |
| ELPD Distribution sum (excluding future interest and costs) | $240,889,490 |
| I-D total assessed losses | $52,453, 154 |
| Pro rata I-D recovery rate | 63.628% |

36 The remaining task is to document state of progress with ELPD claims. By September 2016, all the 'insurance only' and 'above insurance' claims had been allocated for assessment to assessors. The position, as explained by Mr Watson, is that only 7% of the above insurance claimants are yet to be provided to the settlement administration team and only one claim remains to be allocated for assessment. The total number of final notices of assessment to be distributed to individual claimants is 1169 of which 82% have been sent out. In addition, a very significant percentage of provisional notices of assessment have been sent to insurers and that part of the process is very close to finality. Some uncertainty remains about the time that may elapse if claimants seek review of their assessments, a period of 42 days being allowed under the SDS. Mr Watson expects that the procedure that permits a claimant to elect early to forego a right of review will assist in minimising delay.

37 On present indications, Mr Watson anticipates a distribution to ELPD claimants before the end of March 2017. This is consistent with the timetable that has been expected now for some time. A further indication of the likely distribution date may be available for the court at the next case management conference scheduled for 30 January 2017.

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**CERTIFICATE**

I certify that this and the 11 preceding pages are a true copy of the reasons for ruling of John Dixon J of the Supreme Court of Victoria delivered on 7 December 2016.

DATED this seventh day of December 2016.

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Associate