

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

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JUDGE: J FORREST J

WHERE HELD: Melbourne

DATE OF HEARING: 22 June 2016

DATE OF REASONS: 21 July 2016

CASE MAY BE CITED AS: Downie v Spiral Foods Pty Ltd & Ors

MEDIUM NEUTRAL CITATION: [2016] VSC 411

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PRACTICE AND PROCEDURE - Case management conference - Progress of the Settlement Distribution Scheme - Audit of the costs of the administration of the Settlement Distribution Scheme - Appointment of an independent costs consultant - Orders made that interim payment from the settlement distribution fund be permitted to reimburse the Scheme Administrator for the costs of the administration.

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APPEARANCES:

Counsel

Solicitors

For the Scheme  
Administrator

Ms L M Nichols

Maurice Blackburn

No appearance by the other  
parties or group members

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HIS HONOUR:

**Introduction**

1 This class action arising out of the supply of allegedly contaminated Bonsoy to consumers was settled in early 2015 for \$25 million inclusive of costs, subject to Court approval. The Settlement Deed (**Deed**) and the scheme (**SDS**) setting out the process of distribution of the settlement funds were approved by me on 8 May 2015.<sup>1</sup>

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>

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 (the **Fund**).

3 There are 569 registrants, nine of which are under a disability.

4 The purpose of this ruling is to explain the basis for a number of the orders I have made and to inform group members as to the SDS. More specifically, this ruling concerns:

- (a) the progress of the administration of the SDS to date;
- (b) the auditing of the administration costs; and
- (c) the appropriate allowance to be made to the Scheme Administrator, Ms Irina Lubomirska (a Maurice Blackburn partner), for the costs of implementing and running the scheme. The SDS has been managed by Maurice Blackburn employees under the supervision of the Scheme Administrator.

5 A comprehensive affidavit of 20 June 2016 of Ms Lubomirska which is displayed on the Court website, was filed prior to the case management conference on 22 June 2016.

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<sup>1</sup> [2015] VSC 190 (the Settlement Ruling).

## Overview of the SDS

- 6 Maurice Blackburn produced a detailed booklet, 'Personal Injury Compensation in the Bonsoy Class Action' (the **Booklet**),<sup>2</sup> for people who may have been affected by Bonsoy consumption and potentially eligible for compensation. The Booklet was distributed to all registrants from June 2015 and an electronic copy was published on the Maurice Blackburn website. The Booklet sets out the operation and process of the SDS (including the provision of information by registrants, the collection of records and reports, the assessment of the claim, the notices of assessment and the right to independent review), the losses recoverable in accordance with the SDS, the obligations of registrants, the applicable law and any potential deductions or third party repayment obligations. I do not propose to repeat its contents.
- 7 The timeframe for steps in the assessment processes for group members' claims were also detailed in the Booklet, with Maurice Blackburn providing the estimate that the it would be completed within six to twelve months. For the duration of the assessment process, the Fund is invested with any interest that is earned being applied to offset the costs of the administration. Following the completion of all the assessments, the Fund will be divided amongst the group members, by reference to the assessed value of each individual group member claim and the final rate of recovery.
- 8 It should be understood by group members that the SDS does not provide for payment immediately or shortly after assessment. Rather, save for exceptional cases, payments out of the Fund will not be made until the assessment process is completed.
- 9 The SDS also provides for ongoing supervision of the assessment and distribution process by the Court, requiring Ms Lubomirska to provide the Court with periodic updates as to the progress of the distribution process, particularly in respect of any claims for payment of administration costs.<sup>3</sup> This ruling is made as part of that exercise.

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<sup>2</sup> Ms Irina Lubomirska's affidavit of 20 June 2016, exhibit IL-3.

<sup>3</sup> Orders of Justice J Forrest made 8 May 2015.

## **The role of the Court**

- 10 Part 4A of the *Supreme Court Act 1986* (Vic) (the **Act**) deals with group proceedings. Section 33ZF provides as follows:

### **General power of court to make orders**

In any proceeding (including an appeal) conducted under this Part the Court may, of its own motion or on application by a party, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

- 11 Section 33V makes provision for the Court's supervision of a settlement:

### **Settlement and discontinuance**

- (1) A group proceeding may not be settled or discontinued without the approval of the Court.
- (2) 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.

- 12 Given the relatively limited size of the Fund, and the differing types of claims of the group members, it is important that the Court exercise the supervisory power granted by the Act (and required under the terms of the SDS) to ensure that the settlement distribution process is undertaken in a timely, efficient and cost-effective fashion. It is equally important that group members understand the Court's role and its involvement in the supervision of the distribution of the Fund. Hopefully this ruling assists in that regard.

## **Progress of the administration of the SDS**

- 13 After payment of common issue costs, interim administration costs and special interim distributions, the Fund contains \$18,438,214.65 (as at 30 May 2016). It continues to earn interest, but also is drawn upon to pay ongoing administration expenses.
- 14 Much has been done by the Scheme Administrator to progress the claims of group members. A vast majority of assessments have been concluded. There has been active and successful engagement with Medicare, Centrelink and private health insurers. Six interim distribution requests have been approved, and claims by late

registrants processed.

15 A number of claimants have not satisfied the requirements of the SDS – in the main, by not establishing a causal link between the consumption of Bonsoy and their medical condition or by failing to satisfy the threshold requirements for damages as set out in the SDS.

16 In Ms Lubomirska’s affidavit, the position as at 20 June 2016 is set out as follows:

5.2 At the time of affirming this affidavit, 533 claims have been assessed. 36 claims had not completed the assessment process (although many of these have been assessed in part and we are awaiting some piece of information to complete the assessment).

5.3 Four claims were referred to counsel for assessment pursuant to discretion in clause 8.11(a) of the Settlement Scheme, of which 3 have completed assessment.

5.4 Two claims were referred to counsel as required by clause 11.5(c) of the Settlement Scheme because they concerned Order 15 Registrants. These assessments have been finalised.

6.1 At the time of affirming this affidavit, there have been 21 applications for Independent Review. They are detailed in Part J of this affidavit:

- (a) 3 failed to post the bond and the application did not proceed.
- (b) 1 was withdrawn by the Registrant.
- (c) 1 is presently on hold to allow the Registrant to consult with a specialist and I anticipate the application will be withdrawn.
- (d) 9 applications have failed, 1 application succeeded. 6 applications are yet to be determined.

...

8.1 On the basis of extrapolation from claims that have completed assessment (approximately 94%) I anticipate that recovery rate will be 100% or greater. The forecast is not expected to be significantly affected by outcome of claims presently under review or the claims remaining to be assessed.

17 Ms Lubomirska anticipates that the outstanding assessments will be completed shortly, but that the distribution of settlement monies will occur towards the end of the year.<sup>4</sup>

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<sup>4</sup> Ms Lubomirska’s affidavit of 20 June 2016, [57.3].

18 I am satisfied that the steps taken to date by Ms Lubomirska have been reasonable and in the best interests of the group members.

#### **Audit of the costs of administering the SDS**

19 As mentioned previously, the costs of administering the SDS are paid out of the Fund. In addition to monitoring the progress of the SDS, the Court must ensure that the quantum of costs to be paid to the Scheme Administrator is reasonable. This amount is deducted from the Fund (and any accrued interest on that sum) and directly affects the amount available for distribution to group members.

20 As with other settlement schemes supervised by the Court (e.g. Kilmore East – Kinglake bushfire, Murrindindi bushfire), it is prudent and in the interests of group members that an external costs assessment of the administration costs be undertaken. I propose to appoint an independent costs consultant to conduct a high-level review of the ongoing costs of administration – in much the same way as Mr John White has monitored the costs of the Kilmore East – Kinglake bushfire. It is expected this appointment will be made within the next couple of weeks, at which time it will be communicated to group members. Orders of the Court to this effect will be made and placed on the Court website.

#### **Interim administration costs**

21 In June 2015, the Court approved an allowance of \$332,610 for administration costs. At the hearing on 22 June 2016, the Scheme Administrator applied for approval of a further sum of \$424,963.

22 On the basis of Ms Lubomirska’s affidavit, it is appropriate to permit interim payment from the fund to reimburse the Scheme Administrator for costs and disbursements incurred in the administration of the SDS.

23 Details of the administration of the SDS to date are set out in Ms Lubomirska’s affidavit. I note that no payment of the administration costs has been made to date and that it is important that any payment be made prior to 30 June 2016.

24 Orders were made on 22 June 2016 approving payment to the Scheme Administrator for the following administration costs:

Pursuant to sections 33V and 33ZF of the *Supreme Court Act 1986*, Administration Costs for the period to 1 June 2016 be approved up to the amount of \$424,963, such amount to be disbursed to Maurice Blackburn from interest accrued on the Settlement Sum to date.

25 I should add that it is understood that in the event that the auditor recommends a lower figure for these costs then there will be an appropriate adjustment.

**Other matters**

26 A further case management conference has been fixed for 14 November 2016.