IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2009 04788

CAROL ANN MATTHEWS	Plaintiff
v	
AUSNET ELECTRICITY SERVICES PTY LTD (formerly SPI ELECTRICITY PTY LTD) (ACN 064 651 118) and others according to the Schedule	Defendants
AND	
AUSNET ELECTRICITY SERVICES PTY LTD (formerly SPI ELECTRICITY PTY LTD) (ACN 064 651 118)	Plaintiff by Counterclaim
v	
ACN 060 674 580 PTY LTD and others according to the Schedule	Defendants by Counterclaim
AND	
ACN 060 674 580 PTY LTD	Plaintiff by UAM Counterclaim
v	
AUSNET ELECTRICITY SERVICES PTY LTD (formerly SPI ELECTRICITY PTY LTD) (ACN 064 651 118) and others according to the Schedule annexed to other rulings of the Court	Defendants by UAM Counterclaim

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JUDGE:	J FORREST J
WHERE HELD:	Melbourne
DATE OF HEARING:	19 September 2016
DATE OF REASONS:	29 September 2016
CASE MAY BE CITED AS:	Matthews v Ausnet Pty Ltd & Ors (Ruling No.43)
MEDIUM NEUTRAL CITATION:	[2016] VSC 583

PRACTICE AND PROCEDURE - Group proceedings - Progress of the Settlement Distribution Scheme - Concerns of a Group Member regarding the conduct of a review assessment - Amendment of the Settlement Distribution Scheme - Appointment of an independent expert by the Scheme Administrator to audit the administration in particular respects - *Supreme Court Act 1986* s 33V.

APPEARANCES:	Counsel	Solicitors
For the Scheme Administrator	Mr A Watson, the Scheme Administrator, appeared in person	Maurice Blackburn
No appearance by the other parties		

HIS HONOUR:

Introduction

1 This is the fourth ruling concerning the supervision of the administration of the Settlement Distribution Scheme (**SDS**) approved by Osborn JA on 23 December 2014.[1]

2 Save where necessary, I do not propose in the course of this ruling to re-state matters I have covered in rulings 40,[2] 41[3] and 42[4] nor the contents of the SDS, which can be inspected on the Court's website.

3 At the hearing on 19 September 2016, Mr Andrew Watson, the Scheme Administrator, advised the Court as to progress made in relation to the processing of both I-D and ELPD claims.

4 This ruling concerns four matters that arose out of that case management conference:

(a) the progress of the assessment of claims pursuant to the SDS to date;

(b) an application by Ms Vicki Ruhr, a Group Member, in relation to the conduct of the review assessment of the claim of her son, Mr Jean-Paul Ruhr, also a Group Member;

(c) consideration of some minor amendments to the SDS; and

(d) the appointment of an independent expert by the Scheme Administrator.

The hearing

5 The following was provided by interested parties for the purpose of the case

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1 See *Matthews v AusNet Electricity Services Pty Ltd (Ruling No.40)* [2015] VSC 131, *Matthews v AusNet Electricity Services Pty Ltd (Ruling No.41)* [2016] VSC 171 (rulings) and *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (approval).
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/kilmore+east+kinglake+bushfire+class+action+settlement/
The content and procedures for administering the SDS are contained in *Matthews v AusNet Electricity and Services Pty Ltd (Ruling No.40)* [2015] VSC 131 and therefore will not be repeated in this ruling.

2 [2016] VSC 131.

3 [2016] VSC 171.

4 [2016] VSC 394.

management conference:

(a) an affidavit of Mr Watson sworn 7 September 2016; and

(b) emails from Ms Ruhr of 16 and 23 September 2016 and an email from Ms Suzi Kerr on behalf of herself and Mr Denis Spooner, a Group Member, of 16 September 2016, who were unable to attend the hearing due to personal circumstances.

Progress of the assessment of claims

I-D Claims

6 In Mr Watson's affidavit, the position as at 31 August 2016 is set out:

> 9. (a) 1,757 detailed personal injury questionnaires have been completed which equates to 100 per cent of registered personal injury and dependency group members.
>
> (b) 1,757 group members have attended a conference with an assessor which equates to 100 per cent of registered personal injury and dependency group members.
>
> (c) 18 Notices of Assessments and Statements of Reasons are currently outstanding from assessing counsel.[5] In the majority of cases, counsel was waiting the provision of further material required for the completion of their assessment which has recently been obtained and provided to them. The SDS Team is in regular contact with the assessors who have assessments outstanding and are confident based on their discussions with the assessors that the remaining assessments will be returned by the end of September 2016.
>
> (d) 1,739 Notices of Assessments and Statements of Reasons have been received from assessors to date and 12 are currently being reviewed by the SDS Team.[6]
>
> (e) 1,727 Notices of Assessments and Statements of Reasons have been reviewed by the SDS Team and have been sent or are ready to send to group members.
>
> (f) 35 requests for review have been received from group members to date.[7] Of these, 22 are quantum reviews and 13

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5 At the hearing on 19 September 2016, Mr Watson informed the Court that 2 Notices of Assessments and Statements of Reasons are currently outstanding.

6 At the hearing on 19 September 2016, Mr Watson informed the Court that 7 Notices of Assessments and Statements of Reasons are currently being reviewed by the SDS Team.

7 At the hearing on 19 September 2016, Mr Watson informed the Court that 40 requests for review have

> are threshold reviews. 17 of the 22 quantum reviews have been determined, with 12 being in favour of the group member and 5 upholding the original assessment. 5 quantum reviews remain to be determined by review counsel. 7 of the 13 threshold reviews have been determined, with 4 being in favour of the group member and 3 upholding the original assessment. 6 threshold reviews remain to be determined by a medicolegal specialist.

7 This, in effect, means that 98 per cent of all claims have been processed. Mr Watson is of the view that the assessment process should be completed by the end of October – all things being equal.

ELPD claims

8 As I mentioned in a previous ruling, there are over 9,000 claims arising out of approximately 3,500 'unique property addresses', of which two-thirds require independent assessment as an over insurance or non-insurance claim.

9 As at 31 August 2016, all the 'insurance only' and 'above insurance' claims have been allocated for assessment to ELPD assessors.[8]

10 The position, as explained by Mr Watson, is that 97 per cent of these claims have now been assessed (as at 31 August 2016, 1,545 assessments have been received from ELPD assessors) and 72 per cent have been issued with Assessment Notices. As has been previously noted, the process of assessment is different to that of I-D claims and there remains an opportunity for Group Members to raise issues with the assessments and, where necessary, if those issues are not resolved, to seek a review.

11 Mr Watson advised that out of 1,250 claims which have been wholly processed to date there has been one review application.

12 Mr Watson informed the Court that the progress in respect of the ELPD claims 'as has been the case for a while now, is a little bit less advanced, and they are, it's fair to say, more complicated and more difficult it seems'.

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been received from Group Members to date and 11 remain to be determined.

8 Affidavit of Mr Andrew Watson sworn 7 September 2016, [47].

13 Mr Watson, in his affidavit sworn 7 September 2016, deposed as follows:

> 63. In paragraphs 65 to 69 of my affidavit dated 17 June 2016, I alerted the Court to the unexpectedly high number and technically complex nature of the errors encountered by the ELPD SDS Team in the course of the initial check and software review process which were causing delays to the process of issuing FNOAs. These errors largely fall into two categories: minor data or administrative errors, or more substantive errors potentially affecting the value of the assessment.
>
> 64. Since the 21 June 2016 CMC, we have increased ELPD SOS Team resourcing and refined our existing processes to increase FNOA throughput and reduce delays caused by the investigation and correction of the issues identified in the assessments.
>
> 65. This has resulted in the SOS Team increasing the number of Final Notices of Assessment being distributed to group members by 620% since my last affidavit dated 17 June 2016.
>
> 66. In light of the increased resourcing and refinement of these processes, the ELPD SDS Team estimates that it will be able to finalise sending out Final Notices of Assessment by the end of October 2016.

Summary

14 I remain satisfied that the steps taken to date by Mr Watson as Scheme Administrator have been reasonable and in the best interests of the Group Members.

Claim by Mr Jean-Paul Ruhr

15 Mr Jean-Paul Ruhr is represented by his mother, Ms Ruhr.

16 I have endeavoured, in my previous rulings (and particularly that of Ruling 42[9]), to explain that it is not this Court's role to intervene in the administration of the SDS - and I shall in a moment return to that issue. However, given Ms Ruhr's personal situation and the fact that it may assist other Group Members to understand why the Court is unable to involve itself in the administration of the SDS, I will now set out the facts and my views.

17 By emails sent to the Court on 16 and 23 September 2016, Ms Ruhr raised concerns regarding the review assessment of the claim of her son. Principally, Ms Ruhr says that the review conducted by assessing counsel was not completed in accordance

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9 See paragraph [4] of Ruling 42.

with that originally advised by Maurice Blackburn - by referral to a medico-legal expert.[10] Ms Ruhr requests that the Court direct that Mr Ruhr be assessed by such an expert.

18 On Black Saturday, Mr Ruhr was resident in the USA on a work and travel visa. He returned to Australia in September 2009 and, approximately one month later, visited the areas affected by the bushfire. His claim is based on ss 72 and 73 of the *Wrongs Act 1958* and he seeks compensation for his psychological injury.

19 In the I-D Claim Assessment - Statement of Reasons (Wrongs Act Assessment) dated 17 May 2016 Mr Ruhr's claim for compensation was assessed as 'nil'.

20 Mr Ruhr was then sent a standard form letter on 17 May 2016 enclosing the assessment and advising him of his review rights. Apparently, due to an oversight, the letter informed him (incorrectly) that he was required to have a medico-legal assessment upon review.

21 A request for review was lodged by Ms Ruhr on behalf of Mr Ruhr on 17 June 2016.

22 Following the review assessment interview on 12 July 2016, a Review Assessment was carried out and on 21 July 2016 the reviewer declined to alter Mr Ruhr's original assessment of nil compensation.

23 On 28 July 2016, on behalf of Mr Ruhr, Ms Ruhr contacted Maurice Blackburn by email to express her concern that no medico-legal assessment had been carried out. Owing to Ms Ruhr's father's ill health there were major difficulties in communication, although it is clear that Maurice Blackburn tried on multiple occasions to get in touch with Ms Ruhr.

24 The Court subsequently received email correspondence from Ms Ruhr on 12 and 16 September 2016 requesting a further review.

25 At the hearing on 19 September 2016, the Court reserved the question of whether a

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10 In email correspondence from Maurice Blackburn enclosing a letter dated 17 May 2016.

direction should be made by the Court that Mr Ruhr be assessed by a medico-legal expert.

26 Subsequent to the hearing, Maurice Blackburn informed the Court by way of email on 23 September 2016 that, after consideration of Mr Ruhr's position and the misunderstanding that resulted from the email correspondence of 17 May 2016, a medico-legal assessment of Mr Ruhr would be conducted by Dr Strauss and this appointment has been accepted by Mr Ruhr. The cost of the assessment will be borne by Maurice Blackburn, not the SDS.

27 In the circumstances, it is unnecessary for me to make any orders or directions. However I should, as promised earlier, make the Court's position on such an application clear.

28 The relevant provisions of the *Supreme Court Act 1986* read as follows:

> **33ZB Effect of judgment**
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> A judgment given in a group proceeding –
>
> (a) must describe or otherwise identify the group members who will be affected by it; and
>
> (b) subject to section 33KA, binds all persons who are such group members at the time the judgment is given.
>
> **33V 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 money, including interest, paid under a settlement or paid into court.

29 It is now necessary to return to the orders made by Osborn J when he approved the settlement shortly prior to Christmas 2014:

> THE COURT ORDERS:
>
> ...
>
> 3. Pursuant to ss 33V, 33ZF and 33ZG of the Act, settlement of the proceeding upon the terms set out in the Deed be approved.

4. Pursuant to ss 33V, 33ZF and 33ZG of the Act, the terms set out in the document titled 'Settlement Distribution Scheme' ('Scheme') be approved as the procedure for distributing among the plaintiff and group members the settlement sum payable by the defendants pursuant to the Deed.

...

Other matters

8. Pursuant to s 33ZF, the plaintiff, the group members and the Scheme Administrator (as defined in the Scheme) each have liberty to apply to the supervising judge, upon not less than 5 clear business days' notice to each other party, for orders in respect of any issue arising in relation to the administration of the Scheme.

...

11. The Honourable Justice J Forrest be nominated as supervising judge with respect to the Scheme until further order of the Associate Judge in charge of Listings.

30 Recently, in *Byrne v Javelin Asset Management,*[11] the Court of Appeal considered the binding effect of orders made in a class action which embodied a settlement deed such as the SDS (in this case):

> 55 Section 3(1) of the *Supreme Court Act* defines 'judgment' to include an 'order'. The parties contended that an order approving a settlement under s 33V is therefore a 'judgment given in a group proceeding' within the meaning of s 33ZB, with the result that when an order approving a settlement is made group members are bound, not only by the order, but by the settlement itself. There is obviously much to commend this result, as it is not to be supposed that the legislature contemplated that a settlement approved by the Court would not bind group members, in the same way as a judgment would have if the proceeding had not been compromised. That was also the view taken by Sackville J in *Courtney v Medtel Pty Ltd [No 5]* [citation omitted]. At the same time, it is common for orders to be made declaring that a plaintiff, group members and other parties are bound by the settlement pursuant to s 33ZF, which provides for the Court to make any order it thinks 'appropriate or necessary to ensure that justice is done in the proceeding' [citation omitted]. Alternatively, there are many instances, of which the present case is one, where the Court has made an order authorising a plaintiff to enter into and give effect to the settlement on behalf of group members [citation omitted]. Again, s 33ZF is an available source of power for such an order. In approving the present deed of settlement, Croft J ordered, among other things, that the plaintiffs in the group proceedings 'have the authority' of the group members '*nunc pro tunc*, to enter into and give effect to the deed of settlement and the transactions contemplated thereby for and on

11 [2016] VSCA 214.

behalf of' the group members.

> 56 In the circumstances, it is not necessary to decide whether, in the absence of an order such as those that might be made under s 33ZF, a settlement of a group proceeding is binding upon group members once approved by the Court, by operation of s 33ZB. It suffices that the present settlement was binding on group members by virtue of the orders made by the Court in this particular case.

These propositions hold good here. The SDS is binding on all Group Members, including Mr Ruhr. His rights are determined under the SDS. There is no scope for the Court to conduct its own assessment or to give directions to the reviewing assessor or the Scheme Administrator about how he or she should go about their job.

31 The only remedy available, as I see it, is that of judicial review - but that would need a party to establish that there was either jurisdictional error or procedural unfairness on the part of the administrator or the reviewer.

32 Accordingly, there would have been no role for the Court in its supervisory capacity to play in relation to Mr Ruhr's claim. I should add the following, which I doubt is of much comfort, but nevertheless demonstrates the reality of the situation: the settlement of a class action and the process of assessment and review is by no means perfect. It is not intended to be so: it is intended to provide a reasonable process by which claims of Group Members can be processed fairly and efficiently without the need for court intervention. As I have remarked previously, if this process of assessment was left to the Court, there are simply insufficient resources available which could provide timely assessments - this is putting to one side questions of cost, legal jargon and travel.

33 The end result is that the Court would not have been able to intervene in relation to Mr Ruhr's claim.

Correcting errors in the assessment process

34 The Scheme Administrator, Mr Watson, has raised the question of several amendments of the SDS, directed to ensuring that any error in the assessment of claims can be rectified.

35 The proposed amendments are directed to the following situations:

> (a) where an error affects a matter of significance in order to ensure a proper distribution (i.e. the spelling of the claimant's name or address details) to amend those errors;
>
> (b) where an error has resulted in the Claimant being assessed for less than their proper entitlement to amend the assessment (unless the error is genuinely de minimus);
>
> (c) where an error has resulted in the Claimant being assessed for a sum greater than his or her proper entitlement under the SDS:
>
> > (i) to take no further action where the error is less than $5,000 on the basis that once adjustment is made for likely recovery rates the impact of such an error is likely to be of the same order or less than the costs associated with correcting it;
> >
> > (ii) to take no further action where the error is less than 5% of the total assessed value on the basis that the ELPD assessors advise that assessments have a plus or minus 5% error margin in any event;
> >
> > (iii) to correct errors which do not fall into category (i) or (ii) above.[12]

36 The orders made by Osborn J, set out at [29], enable a party to apply to the Court for orders 'in respect of any issue arising in relation to the administration of the scheme'.

37 The SDS deals with the question of Court supervision:

> J1.1 Where the scheme administrator considers that:
>
> > (a) the procedures to be followed in the implementation of the scheme are wanting or in doubt; or
> >
> > (b) an issue has arisen in connection with the administration of this scheme which are appropriate for directions by the Court: the scheme administrator may, by correspondence addressed to the associate, the judge, or the associate justice supervising the administration of the scheme, apply to the judge or associate justice for direction.

38 With the exception of minor non-contentious changes, I do not think a Court should, unless it is necessary to, interfere with the terms of the SDS - as approved by Osborn J.

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12 Affidavit of Mr Watson of 7 September 2016, [113].

39 It is, however, appropriate for the Court to give directions to enable the proper administration of the SDS provided that such directions are consistent with its terms.

40 I think that the more preferable course is for the Court to give directions as to the administration of the SDS in the general form of the amendments sought by the Scheme Administrator. Such directions will facilitate the just and equitable distribution of funds and are consistent with the objectives and process of the SDS - as approved by the Court. I invite the Scheme Administrator to submit a minute of appropriate directions to give effect to these reasons.

Appointment of an independent expert

41 The Administrator proposes to appoint an independent expert, Mr George Kompos, director of KPMG Forensic Services, to provide a report examining and auditing the assessment data recorded in Maurice Blackburn's Matter Centre database to ensure that:

(a) the assessment data correlates with and accurately reflects the assessment amount recorded in the Notices of Assessment or Review Notices of Assessment;

(b) any interim payments have been accurately recorded;

(c) any reviews have been accurately recorded;

(d) any deductions for I-D claims, dependency claims and pro rata calculations have been accurately recorded;

(e) calculations regarding the interest earned on the investment sum as at a particular date are correct;

(f) the deductions of any tax liabilities are correct; and

(g) the deduction of administration costs and disbursements are correct.

42 In my view, it is in the interest of the Group Members that a final audit of the data be

carried out before any distributions are made. To this end, the appointment of Mr Kompos will enable the administrator to proceed to final payment with a relative degree of confidence that the distributions are consistent with the provisions of the SDS.

Other matters

43 A further case management conference is fixed for 14 November 2016 at 9.30am.

CERTIFICATE

I certify that this and the 10 preceding pages are a true copy of the reasons for ruling of Justice J Forrest of the Supreme Court of Victoria delivered on 29 September 2016.

DATED this twenty ninth day of September 2016.

Associate