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:	16 December 2016
DATE OF JUDGMENT:	24 January 2017
CASE MAY BE CITED AS:	Downie v Spiral Foods Pty Ltd & Ors (Ruling No 3)
MEDIUM NEUTRAL CITATION:	[2017] VSC 7 (First revision 25 January 2017)

PRACTICE AND PROCEDURE – Case management conference – Progress of the Settlement Distribution Scheme – Approval of costs of the administration of the Scheme.

APPEARANCES:	Counsel	Solicitors
For the Scheme Administrator	Ms L Nichols	Maurice Blackburn
No appearance by the other parties or group members		

HIS HONOUR:

1 I have already made orders concerning the distribution of settlement payments to group members.[1]

2 This ruling relates to the costs of the administration of the Settlement Distribution Scheme (SDS).

The Settlement Distribution Scheme

3 On 7 May 2015, I approved the settlement of this class action. The terms of the SDS which formed part of the orders of the Court are set out in the reasons for judgment.[2] In particular, the SDS included the following:

(a) the appointment of Maurice Blackburn as Administrator of the SDS (clause 4); and

(b) the ability of the Administrator to deduct from the fund, amongst other things, 'any administration costs' of the SDS (clause 13). Court approval is required before a payment can be made.[3]

Reasonableness of the costs of the Administrator

4 On 27 July 2016, I appointed Mr John White, a lawyer with significant expertise in legal costs, as a special referee. I requested that he report in writing to the Court as to the reasonableness of the costs of administering the SDS.

5 On 10 November 2016, Mr White filed his report in relation to the costs sought to be charged by the Administrator for administration of the SDS. In *Rowe v Ausnet Electricity Services Pty Ltd & Ors (Ruling No 9)*,[4] John Dixon J explained in some detail the methodology employed by Mr White in that case, which was replicated in this exercise. I summarise it as follows:

(a) identify the scope of the work done;

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1 *Downie v Spiral Foods Pty Ltd & Ors (Ruling No 2)* [2016] VSC 675.
2 [2015] VSC 190.
3 Clause 13.1(d).
4 [2016] VSC 731.

(b) identify the nature of the costs incurred over a particular periods of time;

(c) 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) engage in a sampling process of work and disbursements claimed;

(e) apply the established basis for costing of the work reasonably done;

(f) identify work which was not recoverable by reason of that work not being reasonably incurred or reasonable in amount and excise any costings for that work from the figures; and

(g) identify and reduce or deduct disbursements which were unreasonably incurred or unreasonable in amount.

6 In addition to his report, I had the benefit of Mr White's explanation in Court as to the process he adopted in this exercise. I took the opportunity to ask him questions concerning various aspects of his report.[5]

7 Mr White's report is available on the website, as is the transcript of his evidence at the hearing.[6]

8 Having read the report closely and after hearing the evidence of Mr White, I am satisfied that the costs of the administration claimed are reasonable and that the report of Mr White should be adopted. This means that an amount of $3,425,816.13 will be paid to Maurice Blackburn for the administration costs of the settlement.

9 I should mention two other matters. The hourly rates applied by Mr White in determining the professional costs recoverable by Maurice Blackburn are consistent with those applied by Ms Dealehr (a costs consultant) when providing the estimate of costs for the purpose of the proceeding. Significantly, that estimate was approved by

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5 Transcript, 2.15.

6 Mr White's report and transcript of his evidence can be found on the Court's website: http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/bonsoy+class+action+settlement

Judicial Registrar Gourlay, an expert in costs quantification. Mr White informed the Court that the rates claimed were consistent with the standard basis charge for these services under the Supreme Court Scale.[7]

10 The other matter is that there was, in Mr White's opinion, an appropriate differentiation between work carried out by different categories of lawyer.[8] This demonstrated that the highly qualified (and expensive) solicitors did far less of the work than paralegals who completed the bulk of the administrative work.[9]

11 I conclude on this issue by reciting Mr White's answer to one of my questions:[10]

> My impression of this matter was that it was run extraordinarily lean, extraordinarily efficiently. I suspect that's probably as a result of learning from the other matters as well and I suspect that in future in similar sorts of matters they will become leaner and leaner as time goes by. This was a particularly good exemplar of how, in my view, the process should be run.

12 Accordingly, I made orders adopting the report of Mr White and approving payment of the sum of $3,000,858.13 to the Administrator, being the administration costs in excess of the amounts previously approved.

13 The distribution of settlement payments to group members has now been made (with one exception - to a group member who, sadly, died prior to distribution).

14 An amount of approximately $0.5 million remains in the fund, intended to cover the maximum putative tax liability of the fund. This issue has been canvassed in some detail in the decisions of John Dixon J and myself concerning the Murrindindi and Kilmore East/Kinglake settlements.[11]

15 In my view, the position taken by the Administrator is appropriate - namely, to await determination of the tax liability of the Murrindindi and KEK settlement funds. At the present time, there would seem to be no relevant distinction (at least in principle)

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7 Transcript, 6.7-6.22 and 14.17-14.15.6.

8 See attachment 3 of Mr John White's report of 10 November 2016 and Transcript, 9.15-10.17.

9 Transcript, 10.8-10.17.

10 Transcript, 15.11-15.18.

11 See *Rowe v Ausnet Electricity Services Pty Ltd & Ors (Ruling No 9)* [2016] VSC 731 and *Matthews v Ausnet Pty Ltd & Ors (Ruling No 44)* [2016] VSC 732.

between the liability of those funds and the fund in this proceeding: in other words, whether tax is payable on part or all of the income earned by the fund and what expenses are deductible (if any). It follows that once that position is resolved, the question of whether there is a further distribution of the monies remaining in the fund in this proceeding will also be settled.

CERTIFICATE

I certify that this and the 3 preceding pages are a true copy of the reasons for ruling of J Forrest J of the Supreme Court of Victoria delivered on 24 January 2017.

DATED this 24th day of January 2017.

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Associate