

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

JUDGE:

J FORREST J

WHERE HELD:

Melbourne

DATE OF HEARING:

30 November 2016

DATE OF REASONS:

7 December 2016

CASE MAY BE CITED AS:

Matthews v Ausnet Pty Ltd & Ors (Ruling No 44)

MEDIUM NEUTRAL CITATION:

[2016] VSC 732



PRACTICE AND PROCEDURE - Group proceedings - Progress of the Settlement Distribution Scheme - Concerns of group members regarding the administration of the Scheme - Reports of Special Referee adopted.

APPEARANCES:

Counsel

Solicitors

For the
Scheme Administrator

Mr A Watson, the
Scheme Administrator,
appeared in person

Maurice Blackburn

Mr Dennis Spooner,
Mr Norman Archibald and
Ms Vicki Ruhr, Group
Members, appeared on their
own behalf

HIS HONOUR:

Introduction

- 1 The Scheme Administrator anticipates that he will be able to make distributions to personal injury dependency group members by late December 2016 and to economic loss property damage group members by late March/early April 2017.
- 2 At the case management conference (**CMC**) on 30 November 2016, I made orders which will hopefully facilitate that distribution. In précis, those orders related to:
 - (a) the appropriate allowance to be made to the Scheme Administrator for the costs of the administration of the Settlement Distribution Scheme (**SDS**); and
 - (b) retention of approximately \$22 million to meet any potential tax liability in relation to the interest earned on the settlement sum.¹
- 3 This ruling explains the basis for making those orders and the progress of the administration of the SDS.

Case management conference on 30 November 2016

- 4 Before I go to the evidence adduced at the CMC, it is necessary to say something about the events in the weeks preceding 30 November 2016. The CMC was originally scheduled for 23 November 2016. Prior to that date, the Court received a number of submissions from group members concerned with the manner in which the SDS has been administered by the Scheme Administrator.² There were also submissions from group members supporting the manner in which the SDS has been administered and urging the Court to make orders which would facilitate the distribution of payments.
- 5 The CMC was adjourned for a week so the Court could consider these submissions

¹ The orders (and previous orders made in the administration of the settlement) can be found on the Court's website:
<http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/kilmore+east+kinglake+bushfire+class+action+settlement/>

² A list of the material received by the Class Action Coordinator has been compiled and can be inspected upon request.

and the most recent report of the Special Referee Mr John White.

- 6 The complaints concerning the administration of the SDS focused on the following:
- (a) the quantum of the costs charged by the Scheme Administrator for administration of the SDS;
 - (b) whether there should be an audit of the Special Referee's audit of the Scheme Administrator's costs; and
 - (c) the manner in which the issue of the tax liability for interest on the settlement sum had been handled by the Scheme Administrator.

- 7 In addition to the correspondence received from group members, the Court was also provided with:

- (a) a report of the Special Referee, Mr John White, as to the costs of the administration of the SDS. This report, dated 21 November 2016, supplemented his earlier report of 1 May 2016;³ and
- (b) two affidavits of the Scheme Administrator, Mr Andrew Watson, dated 31 October 2016 and 29 November 2016.⁴

- 8 At the hearing of the conference (conducted jointly with the Murrindindi settlement case management conference conducted by John Dixon J), *viva voce* evidence was given by Mr White and Mr Watson. Both Mr White and Mr Watson were asked questions by the Court and by two group members, Mr Dennis Spooner and Ms Vicki Ruhr. At the conclusion of the evidence and having heard submissions from the group members, I determined to make the orders to which I have referred.

- 9 I should mention two other matters.

- 10 First, unfortunately, it has become apparent that there is a considerable degree of acrimony between some members of the group, as well as between some members of

³ Both reports are available for inspection on the Court's website (as above).

⁴ Each of the affidavits is available on the Court's website (as above).

the group and the Scheme Administrator. It is to be hoped, in the interests of Kinglake and surrounding communities affected by this disastrous event, that these differences can be put aside in the future.

- 11 Second, that the three group members (Mr Spooner, Mr Archibald and Ms Ruhr), who have been highly critical of the Scheme Administrator's conduct of the SDS, made it clear they did not wish their concerns about the administration of the SDS to hold up or frustrate the distribution of funds to group members. They did not oppose the making of the orders. However, as was their right, they brought a number of relevant issues to the Court's attention in relation to the administration of the SDS.
- 12 As will become apparent in a moment, I have concluded, on the material provided, that the SDS has been administered efficiently and reasonably (in terms of both time and cost) by the Scheme Administrator.

The costs of the SDS

- 13 It is not surprising that some group members have raised legitimate concerns about costs of the administration of the SDS. In total, the Scheme Administrator will have been paid slightly over \$29 million for managing the SDS. The very reason that the Court, of its own motion, determined to appoint Mr White as Special Referee was to ensure that there was independent monitoring of the quantum of the costs and to ensure that those costs incurred were consistent with the terms of the orders made by Osborn JA in approving the SDS.
- 14 I will now deal with an issue that arose in correspondence from some of the group members: that is the question of Mr White's independence and the asserted need to have a further audit of his reports. Mr White was appointed as a Special Referee by the Court after consideration of his experience and reputation as one of the State's leading costs consultants. As was evident from both his reports and evidence in Court, he has performed a difficult task expeditiously and assiduously. The suggestion that he has not acted independently is baseless. To engage an auditor to

audit the Special Referee is not only unnecessary, it would also be a waste of the pool of the group members' funds.

- 15 The methodology applied by Mr White to his task as a special referee has been comprehensively summarised by John Dixon J in the Murrindindi ruling.⁵ I adopt those remarks which apply equally to the methodology employed by Mr White in this proceeding.
- 16 I am satisfied after reading closely the reports of Mr White and having heard his evidence (in particular, his responses to questions posed by concerned group members), that both reports should be adopted by the Court and that payments of the Scheme Administrator's costs be made in accordance with Mr White's recommendations.
- 17 A number of other issues were raised by group members and responded to by Mr Watson in his affidavit of 29 November 2016. I shall not repeat in any detail those matters other than to note three matters. First, as far as I am concerned, any fear that there was a misallocation of resources to a highly expensive partner, as opposed to far less costly paralegals in the handling of the administration is dispelled by the stack graphs produced by Mr White in his two reports. Those graphs show on the basis of Mr White's sampling techniques, that the majority of the work done in the administration of the scheme was performed at the lowest rate i.e. by paralegals, as would be expected.
- 18 Second, the introduction of financial incentives for counsel carrying out assessments of ID claims has proved controversial. In an ideal world – or perhaps even a reasonable one – this would not need to have been done. However, I am satisfied that Mr Watson was faced with a real predicament: counsel were not returning assessments in a timely fashion as required. Mr Watson had utilised members of the Bar on the basis of their independence. Whilst it was unpalatable that he had to introduce a carrot to supplement the stick, this was a sensible way in which to

⁵ *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731, [10]-[27] ('Murrindindi Ruling').

accelerate the assessment of claims so that group members' distributions could proceed. This is the type of decision the Scheme Administrator is entitled to make and unless it was perceived that such a decision was egregious, a court should be loath to intervene. I have little doubt that this measure is one of the reasons that a payment to personal injury dependency members can be made this month.

19 I repeat what I have said and recorded on a number of occasions. It is not the Court's role to monitor every decision made by the Scheme Administrator. The orders of the Court and the terms of the SDS make it clear that the Administrator has a wide discretion in his management of the SDS. The very purpose of allowing that discretion is to provide the Scheme Administrator with the agility to deal with issues as they arise. The administration of a scheme of this size is by no means an easy task and the need for flexibility is necessary in ensuring that the funds secured in the settlement are distributed equitably and expeditiously.

20 Finally (and for the sake of completeness), I note that in the Murrindindi proceeding, John Dixon J ordered that the amount of \$3,782,340.77 be transferred to the settlement fund in this proceeding. The basis for doing so is articulated at [28] – [30] of the Murrindindi Ruling.⁶

The taxation liability of interest earned on the capital sum within the SDS

21 The possibility that interest earned on the capital sum would attract taxation has been live since June 2015. It was mentioned at several of the previous case conferences by the Scheme Administrator, who has regularly advised the Court:

- (a) of the risk that the interest earned on the capital sum may be taxable; and
- (b) the steps he was taking to endeavour to clarify the taxation position.

22 In his affidavit of 29 November 2016, Mr Watson deposes in considerable detail as to the steps that have been taken to try and resolve this issue and/or seek advice from appropriately qualified professionals as to the likely outcome. Annexed to the

⁶ [2016] VSC 731.

affidavit is a memorandum which goes into greater detail of steps taken. The Scheme Administrator has asked that this memorandum be kept confidential. Whilst I am determined that the group members should receive as much information as they can about matters affecting their entitlements, I am prepared to accede to Mr Watson's request. It suffices to say that disclosure at this time might be inimical to the group members' interests prior to the resolution of any litigation in the Administrative Appeals Tribunal or the Federal Court.

23 In any event, the position is clearly explained in Mr Watson's affidavit, which is open for inspection by the group members. I am satisfied, on the material provided, that the Scheme Administrator has acted appropriately in relation to these taxation issues. I am sure that the one common disappointment is that this issue cannot be finalised favourably prior to the distribution of funds. Whatever the position, I see no cause for the Court to intervene on this question of scheme administration.

24 In my view, the Scheme Administrator has determined to pursue a prudent course and withhold the full amount of the potential taxation liability on the Settlement Sum (estimated to be in excess of \$13 million) until the issue is resolved. The Scheme Administrator would then make further distributions to group members if funds become available.

Progress of the SDS to date

25 There are three points to be noted here. First, it is highly likely that the distribution to the 1757 personal injury dependency claimants will take place before the end of the year. The details are set out in Mr Watson's affidavits. The calculations have been verified by Mr Kompos of KPMG. The bottom line is that these claimants will receive marginally less than 65 per cent of their assessed claims (specifically 64.497 per cent).⁷ There is still the prospect of a further distribution of a small amount depending upon the result of discussions and/or litigation with the ATO.

26 Second, the economic loss property damage claims should be the subject of a

⁷ See paragraph [18] of Mr Watson's affidavit of 29 November 2016.

distribution before Easter 2017 (10 April 2017). A small number of claimants (31) have to be provided with final notices – and those claims may then be the subject of a review process. The current estimate is that the recovery rate for these claimants is likely to be in the region of 30 per cent of the assessed amount – although this is still fluid.

Conclusion

- 27 On the material provided, and particularly that contained in the reports of the Special Referee and the recent affidavits of the Scheme Administrator, I am satisfied that the administration of the SDS has been both reasonable and efficient. As I mentioned, I accept that a number of group members have raised legitimate concerns concerning the administration but those queries do not affect my ultimate conclusion.
- 28 A further case management conference has been scheduled for 30 January 2017.

CERTIFICATE

I certify that this and the 6 preceding pages are a true copy of the reasons for ruling of J Forrest J of the Supreme Court of Victoria delivered on 7 December 2016.

DATED this seventh day of December 2016.



