FEDERAL COURT OF AUSTRALIA

Stanford v DePuy International Limited (No. 7) [2017] FCA 748

File number:	NSD 213 of 2011
Judge:	**WIGNEY J**
Date of judgment:	28 June 2017
Catchwords:	**PRACTICE AND PROCEDURE** – representative proceeding– settlement distribution scheme for group members previously approved by Court – application by joint administrators of settlement scheme for Court approval of payment of administration costs – whether costs and disbursements incurred reasonable
Cases cited:	*Courtney v Medtel Pty Limited (No. 5)* [2004] FCA 1406 *Foley v Gay* [2016] FCA 273 *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626 *Re Medforce Healthcare Services Limited in liq* [2001] 3 NZLR 145 *Rowe v Ausnet Electricity Services Proprietary Limited (Ruling No. 7)* [2016] VSC 424
Date of hearing:	14, 28 June 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	29
Counsel for the First Applicant:	The First Applicant did not appear
Counsel for the Second Applicant:	The Second Applicant did not appear
Counsel for the Third Applicant:	Ms Z M Hillman

Solicitors for the Third Applicant:	Maurice Blackburn Lawyers and Shine Lawyers
Solicitor for the Respondents:	Mr T Biddle of Norton Rose Fulbright

ORDERS

NSD 213 of 2011

BETWEEN:	**TAMMY STANFORD** First Applicant
	JAMIE DUNSMORE Second Applicant
	MAURICE BLACKBURN PTY LIMITED AND SHINE LAWYERS PTY LIMITED (IN THEIR CAPACITY AS JOINT ADMINISTRATORS OF THE SETTLEMENT SCHEME) Third Applicant
AND:	**DEPUY INTERNATIONAL LIMITED** First Respondent
	JOHNSON & JOHNSON MEDICAL PTY LIMITED Second Respondent
JUDGE:	**WIGNEY J**
DATE OF ORDER:	**28 JUNE 2017**

THE COURT ORDERS THAT:

1. Pursuant to section 33ZA(2) of the *Federal Court of Australia Act (1976)* (Cth) and, or alternatively, clause 14.1 of the Settlement Scheme, the Court approves the Administrators paying the following amounts in respect of Administration Costs that are payable in accordance with clause 13.1 of the Settlement Scheme out of the Settlement Sum:

   (a) Administration Costs Payable to Maurice Blackburn

(i)	Costs	- $1,669,685.60
(ii)	Disbursements	- $453,763.82
(iii)	Total	- $2,123,449.42

   (b) Administration Costs Payable to Shine Lawyers

(i)	Costs	- $1,164,318.93
(ii)	Disbursements	- $163,398.81
(iii)	Total	- $1,327,717.24

2. Pursuant to section 33ZA(2) of the *Federal Court of Australia Act (1976)* (Cth) and, or alternatively, clause 14.1 of the Settlement Scheme, the Court approves the Administrators paying the following amount of fixed costs for work performed in preparing Eligibility Books and Claim Books in accordance with clause 13.2 of that scheme out of the Settlement Sum to Shine Lawyers $220,550.00.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from transcript)

WIGNEY J:

1 On 29 June 2016, the Court approved the settlement of this representative proceeding. In simple terms, the proceeding was an action which concerned allegedly defective medical devices known generally as ASR implants that were used in hip replacement or resurfacing surgery. The representative applicants in their own right and on behalf of other group members who, like them, had ASR implants surgically implanted, sought damages from the manufacturer and importer of the devices. The proceeding was settled for $250 million (plus interest), with that sum to be applied pursuant to a settlement scheme.

2 The present application arises because the settlement scheme will continue to run for a number of years. The scheme is administered by the former solicitors for the representative applicants. It was envisaged when the settlement was approved that it may be necessary for the matter to be relisted to deal with issues or make orders consequential to the settlement scheme.

3 By interlocutory application filed in the proceeding on 8 June 2017, the administrators sought a number of orders that could fairly be characterised as being ancillary or consequential to the settlement scheme. The first order sought to overcome the procedural complication that the administrators, being the persons most likely to need to approach the Court for orders consequential to the settlement scheme, were not parties. Given that the administrators are effectively trustees of the settlement sum, it was appropriate that they be able to approach the Court for relief relevant to their role. On 14 June 2017, the administrators were accordingly joined as applicants in the proceeding for the limited purpose of exercising the liberty granted by the Court when approving the settlement on 29 June 2016.

4 The second order sought by the administrators involved amendments to the settlement scheme. It is unnecessary to detail the nature of the amendments. Suffice it to say that they were designed to facilitate the just, efficient and cost-effective administration of the scheme. The administrators adduced affidavit evidence which explained why the amendments were necessary or desirable and in the interests of the group members participating in the scheme.

The amendments were relatively uncontroversial. Accordingly, on 14 June 2017 an order was made directing the settlement scheme be amended as proposed by the administrators.

5 The balance of the orders sought by the administrators were somewhat more controversial. That is because they involved the Court approving the administrators' costs and disbursements in administering the scheme to date. Clause 13.1 of the settlement scheme provided, relevantly, that the "administration costs" were to be paid in such amounts as are approved by the Court from time to time. The administrators' costs were defined as including, amongst other things, the legal costs and disbursements incurred by the administrators in implementing, facilitating and giving effect to the settlement scheme or the settlement generally on a "solicitor and own client basis".

6 The fact that the administrators were entitled to have their legal costs and disbursements paid was not itself particularly controversial. That said, it would perhaps have to be more accurate to say that the administrators were being remunerated. Putting disbursements to one side, the administrators were not, strictly speaking, incurring legal costs. They were performing legal work themselves and charging for it as if acting for a client. That is, however, somewhat of a technicality. The settlement scheme plainly envisaged or intended that the administrators would administer the scheme and would be entitled to be paid for their work on a solicitor-client basis from the settlement fund subject to the approval of the Court.

7 The potentially controversial element in the orders sought by the administrators was that the costs and disbursements that the administrators asked the Court to approve were, at least at first blush, very large indeed. One of the joint administrators, **Maurice Blackburn** Pty Limited, had incurred administration costs of $1,689,685.60 and disbursements of $453,763.82, making a total claim of $2,123,449.42. The other administrator, **Shine** Lawyers Pty Limited, had incurred administration costs of $1,164,318.93 and disbursements of $163,398.81, making a total claim of $1,327,717.24. Shine had also incurred "fixed costs" for work performed in preparing eligibility and claim books pursuant to clause 13.2 of the settlement scheme. That work was charged for in accordance with the fixed amount specified in clause 13.2. The total fixed costs claimed were $220,550.00.

8 In support of their application for Court approval of these costs and disbursements, the administrators relied on lengthy affidavits sworn by principals of the two law firms, Mr Julian Schimmel on behalf of Maurice Blackburn, and Ms Janice Saddler on behalf of Shine, together with a report prepared by a legal costs consultant and solicitor with particular

expertise in assessing legal costs, Mr Ross Nicholas. The same costs consultant and solicitor had prepared an expert report in respect of the legal costs and disbursements that formed part of the settlement approval.

9 The amount of the ongoing legal costs and disbursements in relation to the administration of the scheme that are to be paid out of the settlement funds is undoubtedly an important and sensitive issue. That is because, as explained in detail in the reasons for approving the settlement of the proceeding, the settlement sum is fixed (ignoring for present purposes the interest that is to be earned on the fund) yet the number of claimants on the fund and the amount of their claims is uncertain. In simple terms, the more the fund is depleted by legal costs and disbursements incurred in administering the scheme, the higher the probability that the group members may not have their compensable loss and damage met in full from the fund. The settlement scheme is to run for at least another eight years or so. The fees the subject of this application relate only to the first year of the scheme's operation.

10 When the administrators first moved on the interlocutory application on 14 June 2017, I raised a number of queries and concerns relating to the large amount of costs and disbursements being claimed by the administrators and the adequacy of the evidence that they relied on in support of those amounts. It is unnecessary to detail the specific queries and concerns I raised concerning these matters, at least at this stage. In the end, I directed the administrators to file further evidence, including a supplementary report from Mr Nicholas, which addressed those queries and concerns.

11 In directing the filing of further evidence concerning the administration costs, I was mindful of two relevant considerations. First, in assessing the reasonableness of costs and disbursements incurred in administering a settlement scheme, the court should generally apply the same principles that are applied in approving legal costs and disbursements in the context of a settlement approval. That approach appears to have been adopted in the Supreme Court of Victoria: see *Rowe v Ausnet Electricity Services Pty Limited (Ruling No. 7)* [2016] VSC 424.

12 In short terms, in assessing the fairness and reasonableness of the legal costs component of a proposed settlement, the Court should take a pragmatic approach, seeking some independent verification of the reasonableness of the costs claimed, but not imposing an onerous or exhaustive task upon an applicant: *Courtney v Medtel Pty Limited (No. 5)* [2004] FCA 1406; (2004) 212 ALR 311. The Court's task is not to itself perform a taxation or assessment of the

fees. Rather, the Court should consider whether the fees and disbursements are unreasonable in any respect, having regard to, amongst other things, the nature of the work performed, the time taken to perform the work, the seniority of the persons undertaking the work and the appropriateness of the charge-out rates of those persons: *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626 at [32]. The Court should not approve an amount that is disproportionate, but such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute terms or high as a percentage of the total recovery: *Foley v Gay* [2016] FCA 273 at [23]-[24]. Disproportionate in the present context may be taken to mean disproportionate to the size and complexity of the scheme being administered.

13 Second, and flowing from the first consideration, there is a need for an appropriate balance in relation to the level of information required by the Court in relation to the approval of the administrators' legal costs and the costs associated with the provision of that information: see *Re Medforce Healthcare Services Limited in liq* [2001] 3 NZLR 145. The Court is in a sense placed in a "Catch-22" situation. The Court is, of course, concerned to ensure that the administrators' costs are reasonably to be kept to a minimum. Yet if further information is sought by the Court to substantiate an application for the approval of the costs incurred, the effect may simply be to increase the costs.

14 Nevertheless, further information was sought, and in due course provided by the administrators. It is perhaps unnecessary, if not undesirable, to provide any detailed recitation of the further evidence. It is sufficient to make the following points concerning the evidence as a whole.

15 First, a significant proportion of Maurice Blackburn's fees and disbursements for the first year of the administration in fact relate to the settlement approval application. Maurice Blackburn's June 2016 invoice for $570,818 (plus a disbursement of $112,475) was for fees and disbursements incurred in the conduct of the settlement approval application. That was not apparent from the initial material filed in support of the approval of the fees. While the amount of those fees and disbursements was large, the settlement approval was undeniably a difficult and complex application. The cash flow analysis adopted by the actuary who gave evidence in support of the settlement approval application, Mr Atkins, estimated that the settlement approval application would cost about $250,000. As it turned out, the settlement approval application cost a good deal more than that. That discrepancy has been adequately

explained in the evidence. Many of the costs had not been incurred before Mr Atkins provided his report. Late changes were also made to the scheme, which meant that significant additional legal costs and disbursements were incurred in the days leading up to the settlement approval hearing. More importantly, Mr Nicholas' opinion was that the fees and disbursements in relation to the settlement approval application were reasonable. Another important point to emphasise is that the fees and disbursements incurred in relation to the settlement approval were, in a sense, one-off fees, and do not reflect the likely cost of the ongoing administration of the fund.

16 Second, Mr Atkins factored into his cash flow analysis of the settlement a "broad brush" estimate of $5.85 million for the settlement scheme's administration costs. The estimated costs projected to be incurred by 31 March 2017 were $2.29 million comprised of $1.75 million in fund administration, and $540,000 in expenses. If the administration costs incurred in the first year of the administration are approved and are taken to be an indication of the likely future costs of administering the scheme, it is apparent that this was a significant underestimation. That would be a matter of some concern.

17 The evidence of both Mr Schimmel and Ms Saddler, however, is that the administration costs of the first year of the scheme were unexpectedly high. That was because considerable time and expense was incurred in setting up systems, processes and information technology to deal with the administration of the fund going forward: considerable "upfront" costs were incurred so as to ensure that the scheme operates efficiently and economically in the future. Both Mr Schimmel and Ms Saddler also indicated that there were an unexpectedly large number of inquiries and a resulting significant amount of interaction between the administrators and the group members in relation to the settlement approval and the claims registration process. Both Mr Schimmel and Ms Saddler expect, on apparently reasonable grounds, that many of these upfront expenses will not be replicated in future years, that the queries and interaction will reduce and that the costs and expenses of administering the scheme will gradually taper off.

18 Third, Mr Atkins' cash flow analysis also factored into the equation an estimate of $19,776,000 for expenses associated with the assessment of group members' individual claims. That estimate was based in part on an estimate that only about 20 per cent of the group members would elect to take the "fast-track" option, which involved a one-off payment of $55,000 and no individual assessment of the group member's specific claims. The

evidence concerning the operation of the scheme in its first year, however, suggests that a much higher proportion of group members are electing to take the fast-track option. That has the immediate benefit of reducing the likely future expenses associated with the individual assessment of claims. On that basis, Mr Schimmel and Ms Saddler now estimate that the costs will most likely be in the order of $10 million rather than $19 million.

19 An important point to flow from this is that, even though the general administration costs in relation to the scheme look likely to exceed the amount that Mr Atkins factored into the cost flow analysis, the overall expenses are unlikely to exceed the overall figure of $26 million that Mr Atkins based his cash flow analysis on. It might also be emphasised, without sounding too critical, that that piece of good fortune is due to the high take-up rates of the fast-track option. It is not necessarily due to frugality or cost-saving on the part of the administrators. To be fair, however, Mr Schimmel's evidence does indicate that Maurice Blackburn, at least, has written off or not charged for significant costs it could otherwise have claimed, including work done by both lawyers and non-lawyers.

20 Fourth, and again to be fair, it is necessary to say something briefly about what has been achieved in the first year of the administration of the scheme so that the costs can be put in context. There could be little doubt that this is a uniquely complex scheme to administer. It involves almost 2000 group members whose eligibility for participation in the scheme must first be assessed before consideration can then be given to their individual compensation claims, or before they can receive fast-tracked payments. Many of the group members are elderly or in poor health. Most are unlikely to be represented by solicitors. They must accordingly rely on the administrators for the provision of advice and assistance in relation to their registration, eligibility and claims.

21 As has already been said, in the first year, the administrators have put in place extensive systems and procedures to implement the scheme. Just over 1700 claimants have now registered with the scheme. Eligibility determinations have been made in 964 of those cases. Of those cases, almost 96 per cent were found to be eligible.

22 Once a group member has been found to be eligible, it is necessary to determine and assess any liens in respect of, for example, medical expenses that may have been paid to date. That too is a potentially complex and time-consuming exercise. As noted earlier, one of the surprising and unexpected aspects of the administration to date is that just over 70% of the group members who have been sent eligibility notices have elected to take the fast-track

resolution. Of that cohort, 35 per cent have had their liens resolved to date. Final fast-track payments have been made to 129 of those 232 group members totalling $7.42 million. At the time of the initial hearing, it was expected that a further approximately $6 million of fast-track payments were expected to be made within days. That has probably now occurred.

23 Fifth, since the first hearing date, the group members have been notified via the administrators' website and in correspondence of the administrators' application for the approval of their costs and disbursements. No member has registered any objection to the application. No member appeared at the hearing of the application.

24 Sixth, the administrators accept and acknowledge that the material initially put forward in support of the approval of the costs and expenses, including Mr Nicholas' first report, was insufficient and did not fully expose or illuminate the matters that the Court is entitled to expect in entertaining such applications. It is, as noted earlier, to be accepted that the Court's role in such an exercise is not the role of a taxing registrar or master. The Court does not expect that it will be provided with information which would enable it to perform its own assessment or taxation of the costs and disbursements. Nor, however, will the Court simply "rubberstamp" such applications for the approval of costs and disbursements. The administrators are in the position of trustees. They are required to properly and reasonably account for their costs and expenses, particularly when it involves remunerating themselves.

25 The material initially furnished in support of the approval of the costs and disbursements did not provide an adequate breakdown of the administration costs by description of the nature of the work undertaken. It did not provide any sufficient detail of the dates and amounts of the tax invoices rendered by the administrators in respect of their work. It did not provide any precise or detailed breakdown of the amounts billed by the so-called "fee-earners" of the respective firms, or what work was reflected in the amounts billed. It did not include an adequate breakdown of the fixed or lump-sum costs claimed by Shine in respect of the preparation of the eligibility and claim books. Perhaps most importantly, it did not include any estimate of the likely administration costs going forward in light of the costs incurred in the first year of operation of the scheme.

26 I should hasten to add that, in pointing out those deficiencies, I do not intend to be unduly critical of the administrators. As the administrators' counsel candidly submitted, the exercise of seeking approval of the administration costs has been somewhat of a learning experience for all concerned. There are, to be fair, notable differences between assessing the

reasonableness of costs incurred in a litigation setting, and assessing the reasonableness of costs involved in administering a complex scheme such as this. The administrators and Mr Nicholas were also no doubt acutely aware of the balance that needed to be struck between providing adequate supporting material and incurring further significant and perhaps unnecessary costs.

27 In any event, the deficiencies identified in the initial material have now largely been remedied. Both Mr Schimmel and Ms Saddler have addressed those matters and Mr Nicholas has prepared a supplementary report. It is unnecessary to detail further the material addressed in that additional evidence. It is broadly reflected in the general points that have just been made. I remain somewhat concerned by the size of the fees and costs incurred in the administration of the scheme to date. I am acutely aware, as I was when I approved the settlement, that there remains some risk that the settlement fund may not be sufficient to fully compensate all group members for the loss and damage they have suffered. That risk is only increased if the fund is depleted by unnecessarily high administration costs and expenses.

28 Despite those ongoing concerns, however, I am satisfied from all the material that has been put before the Court that none of the fees or disbursements in respect of which approval is sought were unnecessarily incurred. Both Mr Schimmel and Ms Saddler have provided candid and fulsome evidence concerning the work performed by their respective firms to date. Perhaps more importantly, Mr Nicholas' expert reports support the reasonableness of the costs and disbursements. Whilst his initial report may not have provided sufficient detail about certain aspects of the costs and disbursements, and certain aspects of his methodology, such deficiencies as existed have been remedied in his supplementary report. It is now readily apparent that the methodology adopted by Mr Nicholas was commercial and reasonable. The material sought and analysed by him was sufficient. His reasoning and analysis is clear and transparent. He has manifestly brought his considerable experience to bear in expressing his expert opinions in relation to the fees and disbursements. There is no reason to reject his opinions.

29 For all these reasons, I propose to make the orders sought by the administrators in relation to their costs and disbursements.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate: 

Dated: 4 July 2017