

# FEDERAL COURT OF AUSTRALIA

## Hopkins v AECOM Australia Pty Ltd (No 8) [2016] FCA 1096

File number: NSD 757 of 2012

Judge: **NICHOLAS J**

Date of judgment: 9 September 2016

Catchwords: **PRACTICE AND PROCEDURE** – representative proceedings – approval of settlement by court pursuant to s 33V of *Federal Court of Australia Act 1976* (Cth) – whether proposed settlement is fair and reasonable as between applicants and respondents – whether proposed scheme of distribution is fair and reasonable as between group members

Legislation: *Federal Court of Australia Act 1976* (Cth) Pt IVA, ss 33V, 33ZF, 37AF  
*Corporations Act 2001* (Cth) s 1013K, 1021L, 1022A, 1022B

Cases cited: *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468  
*Williams v FAI Home Security Pty Ltd(No 4)* (2000) 180 ALR 459

Date of hearing: 10 August 2016

Registry: New South Wales

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 29

Counsel for the Applicants: Mr M Pesman SC and Mr W Edwards

Solicitor for the Applicants: Maurice Blackburn

Counsel for First Respondent/Cross-

Mr M Steele SC

Claimant:

Solicitor for the First Respondent/Cross-Claimant: Baker & McKenzie

Solicitor for the Second Respondent: Mr N Briggs of Johnson Winter & Slattery

Counsel for the Third Respondent: Mr N Owens

Solicitor for the Third Respondent: Gilbert + Tobin

**Cross-Respondents:**

Solicitor for National Institute of Economic and Industry Research Pty Ltd: Ms R Hartwell of Kennedys Law

Counsel for Peter Jeremy Hicks and CPB Contractors Pty Ltd: Mr M Elliott

Solicitor for Peter Jeremy Hicks and CPB Contractors Pty Ltd: Corrs Chambers Westgarth

Counsel for RBS Group (Australia) Pty Ltd: Mr S Nixon

Solicitor for RBS Group (Australia) Pty Ltd: Ashurst

Counsel for Bilfinger Re Asset Management Pty Limited and Lend Lease Building Contractors Pty Ltd: Mr J Watson

Solicitor for Bilfinger Re Asset Management Pty Limited and Lend Lease Building Contractors Pty Ltd: Herbert Smith Freehills

Counsel for BECA Pty Ltd: Mr S Goodman

Solicitor for BECA Pty Ltd: Schweikert Harris

Solicitor for Mallesons Stephen Jaques: Mr A Meyer of Colin Biggers & Paisley

## ORDERS

NSD 757 of 2012

**BETWEEN:**            **STEPHEN HOPKINS AS TRUSTEE FOR THE HOPKINS  
SUPERANNUATION FUND  
First Applicant**

**KIM DENISE HOPKINS AS TRUSTEE FOR THE HOPKINS  
SUPERANNUATION FUND  
Second Applicant**

**AND:**                **AECOM AUSTRALIA PTY LTD ACN 093 846 925  
First Respondent**

**RIVERCITY MOTORWAY MANAGEMENT LTD  
(IN LIQUIDATION) ACN 117 343 361  
Second Respondent**

**RIVERCITY MOTORWAY SERVICES PTY LTD  
(IN LIQUIDATION) (RECEIVERS & MANAGERS  
APPOINTED) ACN 117 139 992  
Third Respondent**

**AND BETWEEN:**    **AECOM AUSTRALIA PTY LTD ACN 093 846 925  
Cross-Claimant**

**AND:**                **PARTIES IN ATTACHED SCHEDULE  
Cross-Respondents**

**JUDGE:**             **NICHOLAS J**

**DATE OF ORDER:**    **10 AUGUST 2016**

### **THE COURT ORDERS THAT:**

1. Pursuant to sections 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**Act**), the settlement of the proceeding (**the Proceeding**) be approved on the terms:
  - (a) set out in the confidential settlement document executed by the parties and other relevant persons on or by 31 May 2016 (**Settlement Document**) being **Confidential Exhibit RER 2** to the Affidavit of Richard Ryan affirmed on 28 June 2016; and
  - (b) set out in the Proposed Settlement Distribution Scheme and the Confidential Schedule A Loss Assessment Formula, being **Annexure RER 2-3** and

**Confidential Annexure RER 2-2** respectively to the affidavit of Richard Erle Ryan affirmed on 5 August 2016.

2. Pursuant to section 33ZF of the Act or otherwise, Maurice Blackburn be appointed Administrator of the Settlement Distribution Scheme and to act in accordance with the rules of the Settlement Distribution Scheme.
3. Pursuant to section 33ZF of the Act or otherwise, the Court authorises the Applicants *nunc pro tunc* on behalf of the group members as defined in paragraph 1 of the second further amended statement of claim filed in the proceeding on 1 April 2014 to enter into and to give effect to the Settlement Document and the transactions contemplated thereby for and on behalf of the group members.
4. Pursuant to section 33ZF of the Act, the amount of \$25,000 referred to in the affidavit of Richard Erle Ryan affirmed on 5 August 2016 be approved as the amount of the Applicants' Reimbursement Payment for the purposes of the Settlement Distribution Scheme.
5. Pursuant to section 33ZF of the Act, the Applicants' Costs identified as reasonable in the report that forms annexure **LFF-1** to the affidavit of Lydia Fogl sworn on 8 August 2016, being **\$19,188,321.81**, be approved as the total amount of the Applicants' Costs for the purposes of the Settlement Distribution Scheme.
6. Pursuant to s 37AF of the Act:
  - (a) the affidavit of Ben Slade affirmed on 5 August 2016, and the exhibit thereto (being the confidential opinion of Mr J C Sheahan QC, Mr M R Pesman SC and Mr WAD Edwards);
  - (b) Confidential Annexure RER-2-2 to the affidavit of Richard Erle Ryan affirmed on 5 August 2016;
  - (c) Confidential Annexure RER2-4 to the affidavit of Richard Erle Ryan affirmed on 5 August 2016;

be treated as confidential and be sealed on the Court file in an envelope marked "NOT TO BE OPENED EXCEPT BY LEAVE OF THE COURT OR A JUDGE" and not be published or made available to any person and any electronic version thereof be treated in an analogous fashion.

7. Pursuant to s 37AG of the Act, the order in 6 above is made on the ground that the order is necessary to prevent prejudice to the proper administration of justice because

the documents contain material subject to client legal privilege and without prejudice privilege, which privilege has not been waived.

8. Maurice Blackburn has liberty to apply for directions in connection with the Settlement Distribution Scheme.
9. The Applicants' reasonable costs of the Interlocutory Application dated 5 August 2016 be permitted to be deducted from the Settlement Distribution Fund as defined in the Settlement Distribution Scheme.
10. Within two business day of the distribution of funds to group members pursuant to the Settlement Distribution Scheme, the Applicants shall, in accordance with the Settlement Document, apply for orders dismissing the Proceeding with no order as to costs.
11. The proceeding stand over for the making of further orders to 9.30am, 21 October 2016.

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

## REASONS FOR JUDGMENT

### NICHOLAS J:

- 1 These are my reasons for making orders pursuant to s 33V and s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (“the Act”) approving the settlement of this proceeding and other orders relating to the administration of the settlement. Pursuant to the settlement, there will be payments for a total sum of \$121,000,000 inclusive of costs and expenses (“the settlement sum”).
- 2 Each of RiverCity Motorway Investment Trust (“RCMI Trust”) and RiverCity Motorway Holding Trust (“RCMH Trust”) is and was, at all relevant times, a registered managed investment scheme. The applicants acquired stapled units (“Stapled Units”) in the RCMI Trust and the RCMH Trust under an offer made by a Product Disclosure Statement (“the PDS”). The purpose of the offer was to raise funds to partly finance the design, construction and operation of the North-South Bypass Tunnel (“NSBT”) in Brisbane through the issue of the Stapled Units.
- 3 The second respondent (“RCM Management”) was the issuer of the Stapled Units and the responsible entity for each of RCMI Trust and RCMH Trust. The PDS was prepared by the third respondent, RCM Services, on behalf of RCM Management. The proceeding was commenced by the applicants as a representative proceeding under Part IVA of the Act.
- 4 The PDS was dated 21 June 2006 and lodged with the Australian Securities and Investments Commission on that date. The offer closed in July 2006 and trade in the Stapled Units on the Australian Securities Exchange commenced in August 2006.
- 5 Section 9 of the PDS, entitled “Experts’ and Consultants’ Reports”, included a summary (“the Summary Letter”) prepared by AECOM of its traffic forecasting methodology and its traffic forecasts for the “base” case (for consideration by the “equity market”) scenario but not those for the more conservative “bank” scenario (for consideration by the “debt market”) found in AECOM’s full traffic report to RCM Management in respect of the NSBT. AECOM consented to the inclusion of this material (“the Consented Material”) in the PDS pursuant to s 1013K of the *Corporations Act 2001* (Cth) (“Corporations Act”).
- 6 In this proceeding the applicants alleged that AECOM is liable under s 1022B of the Corporations Act for a contravention of s 1021L. Broadly speaking, a person who consents

to material for inclusion in a product disclosure statement, contravenes s 1021L if such material contains a misleading or deceptive statement, or omits information, which statement or omission is, or would be, materially adverse from the point of view of a reasonable person considering whether to acquire the financial product.

7 The applicants, Mr and Mrs Hopkins, are the trustees of the Hopkins Superannuation Fund (“HSF”). They acquired 40,000 Stapled Units on behalf of HSF on or about 4 August 2006.

8 The group members on whose behalf the applicants brought this proceeding are those persons who:

- (a) acquired an interest in Stapled Units on or about 4 August 2006; and
- (b) suffered loss or damage because of the conduct of the respondents; and
- (c) entered into a litigation funding agreement with IMF (Australia) Ltd (“IMF”) (as it then was) as at 27 July 2012.

There is a total of 696 group members.

9 The principal allegation made by the applicants against AECOM was that it did not have reasonable grounds to make its traffic forecasts which, it is alleged, substantially overestimated the annual average daily traffic that would use the NSBT. The applicants also alleged that AECOM contravened s 1021L of the Corporations Act by failing to disclose material information.

10 The applicants also allege that the PDS was “defective” for the purposes of s 1022A of the Corporations Act, that RCM Management was liable under s 1022B of the Corporations Act, as the person on whose behalf the PDS was prepared, and that RCM Services is also liable as the person who prepared the PDS or as a person who was involved in the preparation of the PDS who, directly or indirectly, caused or contributed to the PDS being defective.

11 AECOM filed cross-claims for contribution against RCM Management, RCM Services and eight other parties. These cross-claims made the proceeding far more complex than it would otherwise have been.

12 The role of the Court in considering whether to grant approval to a settlement pursuant to s 33V of the Act has been explained in many cases and I need not refer to them in any detail. I will, however, refer to Goldberg J’s decision in *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 in which his Honour said at [19]:

Ordinarily the task of a court upon an application such as this, is to determine whether the proposed settlement or compromise is fair and reasonable, having regard to the claims made on behalf of the group members who will be bound by the settlement. Ordinarily in such circumstances the Court will take into account the amount offered to each group member, the prospects of success in the proceeding, the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer, the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement.

- 13 Moshinsky J included his own comprehensive summary of the relevant principles in *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 at [5] to which I have also had regard.
- 14 The evidence before me included a confidential affidavit given by the applicants' solicitor, Mr Ben Slade, in which he explained the history of the negotiations that culminated in the proposed settlement. Those negotiations extended over many months. There were six mediations conducted with the assistance of three senior mediators.
- 15 Mr Slade also exhibited to his affidavit a copy of a confidential written joint opinion provided by counsel for the applicants, Mr JC Sheahan QC, Mr MR Pesman SC and Mr WAD Edwards.
- 16 There was also an affidavit from Mr Slade's colleague, Mr Richard Ryan, that gave a detailed account of the procedural history of the proceeding. His affidavit described in some detail the work required of the applicants' solicitors including in relation to discovery and the preparation and review of extensive written evidence including lengthy expert reports.
- 17 Mr Ryan's evidence also included details of notices given to the group members of the proposed settlement in accordance with orders made by me on 30 June 2016. Pursuant to those orders, the applicants' interlocutory application seeking approval of the proposed settlement was fixed for hearing on 10 August 2016. Those orders also required that by 5 July 2016 IMF give to group members a "Notice of Proposed Settlement, Opt Out Rights and Assessment". These were sent out to group members by email and the same form of notice was displayed on Maurice Blackburn's website.
- 18 As Mr Ryan's affidavit also explained, the proceeding was fixed for hearing commencing on 12 September 2016 and was estimated to run until 16 December 2016.

19 On 1 June 2016 I made a consent order vacating the hearing dates on the understanding that the parties to the proceeding had reached an in principle settlement of the proceeding. By that time the proceeding was at a very advanced stage.

20 I am satisfied that each of the group members is likely to have been made aware of the proposed settlement. No group member has raised any objection to the proposed settlement nor has any group member sought to opt out of the proceeding. One group member suggested in communications with the applicants' solicitors that he did not wish to participate, but he did not give an opt out notice nor raise any objection to the proposed settlement.

21 Mr Ryan's affidavit also contained a detailed explanation of the proposed settlement distribution scheme. A copy of the proposed settlement scheme is exhibited to his affidavit. Group members have already been provided with provisional assessments of their entitlements. The proposed settlement scheme provides for the final assessment of compensation together with a process for checking, recalculating and independent review, in the event that any group member considers that an assessment is inaccurate.

22 Leaving aside the settlement sum, the terms of the proposed settlement are agreed by the parties to be confidential.

23 The evidence before me showed that the applicants incurred legal costs and expenses of approximately \$19.2 million in bringing this proceeding.

24 There was expert evidence before me from Ms Lydia Fogl, a highly experienced costs assessment expert. In her affidavit Ms Fogl described the history of the proceeding including the many interlocutory steps and work that was undertaken by the applicants' solicitors and counsel. Ms Fogl concluded that the professional fees, disbursements and interest charges incurred were reasonably and properly incurred in the conduct of the proceeding.

25 The proceeding raised many complex factual and legal issues including issues related to the highly specialised field of traffic forecasting. The work involved in preparing and responding to evidence directed to those issues was immense. The various cross-claims filed by AECOM raised many other factual and legal issues and made the proceeding much more complex than it would otherwise have been. The applicants' legal costs and expenses, though large in absolute amount, reflect the complexity and time consuming nature of the work the

applicants' legal representatives and experts were required to carry out over a period of about 4 years.

26 The proposed settlement and the proposed settlement scheme provide for:

- the appointment of Maurice Blackburn as the administrator of the proposed settlement scheme;
- the payment of the settlement sum to Maurice Blackburn as administrator of the proposed settlement scheme;
- the payment from the proposed settlement sum of the applicants' legal costs in the amount of \$19,188,321.81;
- the payment to the applicants of an amount of \$25,000 for the time and effort they spent providing instructions to Maurice Blackburn;
- payments to IMF in respect of both project costs and commission pursuant to funding agreements entered into between the applicants and group members with IMF;
- the payment of scheme administration costs.

27 I was satisfied that it was appropriate to appoint Maurice Blackburn as administrator of the settlement scheme. I was also satisfied that the payment to the applicants is appropriate in the circumstances. The payments to IMF will be calculated and made pursuant to the funding agreements which each of the applicants and group members previously entered into with IMF at a relatively early stage of the proceeding.

28 Having considered Mr Slade's confidential affidavit including, in particular, the confidential written opinion of counsel, and the other evidence to which I was referred, I was satisfied that the proposed settlement is fair and reasonable as between the applicants and group members, on the one hand, and the respondents, on the other hand. I was also satisfied that the proposed settlement is fair and reasonable as between the applicants and group members. In the result, I was satisfied that the proposed settlement was fair and reasonable and that it should be approved.

29 I also made orders pursuant to s 37AF of the Act to protect the confidentiality of the various confidential documents to which I have referred in these reasons and some other related material identified in such orders.

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

A handwritten signature in black ink, appearing to read 'J. O'Connell', written in a cursive style.

Associate:

Dated: 9 September 2016

## SCHEDULE OF PARTIES

NSD 757 of 2012

### Cross-Respondents

First Cross-Claim:	NATIONAL INSTITUTE OF ECONOMIC AND INDUSTRY RESEARCH PTY LTD ACN 006 234 626
Second Cross-Claim:	PETER JEREMY HICKS
Third Cross-Claim:	RIVERCITY MOTORWAY SERVICES PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 117 139 992
Fourth Cross-Claim:	RIVERCITY MOTORWAY MANAGEMENT LTD (IN LIQUIDATION) ACN 117 343 361
Fifth Cross-Claim:	CPB CONTRACTORS PTY LTD ACN 000 893 667
Sixth Cross-Claim:	RBS GROUP (AUSTRALIA) PTY LTD ACN 000 862 797 (FORMERLY ABN AMRO AUSTRALIA LIMITED)
Seventh Cross-Claim:	BILFINGER RE ASSET MANAGEMENT PTY LIMITED ACN 055 541 770 (FORMERLY BILFINGER BERGER CONCESSIONS PTY LTD)
Eighth Cross-Claim:	LEND LEASE BUILDING CONTRACTORS PTY LTD ACN 002 625 130 (FORMERLY BAULDERSTONE HORNIBROOK PTY LTD)
Ninth Cross-Claim:	BECA PTY LTD ACN 004 974 341
Tenth Cross-Claim:	MALLESONS STEPHEN JAQUES