

1 COMMERCIAL & EQUITY DIVISION
2 COMMERCIAL LIST - DIRECTIONS HEARING
3 IN THE SUPREME COURT OF VICTORIA
4 COURT 5
5 BEFORE THE HONOURABLE JUSTICE EMERTON
6 MONDAY 29 JULY 2013
7 PAUL ANTHONY MERCEICA & ORS

8 V.

9 SPI ELECTRICITY PTY LTD

10 - - -

11 MR L.W.L. ARMSTRONG appeared on behalf of the Plaintiff.

12 MS C. DUNN appeared on behalf of the First, Second, Third &
13 Fourth Defendants.

14 - - -

15 MR ARMSTRONG: May it please the court, my name is Lachlan
16 Armstrong and I appear for the plaintiffs in that matter.

17 HER HONOUR: Yes, thank you, Mr Armstrong.

18 MS DUNN: If Your Honour pleases, Christine Dunn, I appear for
19 State Parties but I am also authorised to represent the
20 other defendants this morning.

21 HER HONOUR: Thank you very much, Ms Dunn. The reason I have
22 called you in this morning is that I have received a
23 letter indicating that there are going to be some changes
24 to the way in which funds are to be distributed and I
25 presume there will also be an amendment to the deed.

26 MR ARMSTRONG: It has been agreed in correspondence, Your
27 Honour, and the parties have between themselves regarded
28 that as being sufficient.

29 HER HONOUR: Yes.

30 MR ARMSTRONG: The only modifications which are proposed are to
31 permit there to be more than one interim distribution.

1 HER HONOUR: Yes.

2 MR ARMSTRONG: If it is convenient to Your Honour, may I hand
3 up an affidavit of my instructor, Ms Haccou, only made
4 this morning and we apologise that it wasn't able to reach
5 Your Honour on Friday afternoon but it sets out in a
6 little more detail than that as that are covered in the
7 correspondence that came to Your Honour's chambers.

8 HER HONOUR: Yes. Well, I might ask you to take me through it.

9 MR ARMSTRONG: Certainly, Your Honour.

10 HER HONOUR: The reason I called you in is so that this can be
11 ventilated in open court.

12 MR ARMSTRONG: Yes, Your Honour, we understand.

13 HER HONOUR: Depending on the attitude of the parties
14 ultimately the transcript put on whatever website the
15 class members have access to, to follow what is going on
16 so that the changes are transparent.

17 MR ARMSTRONG: Yes, certainly.

18 HER HONOUR: So if you could take me through it, please,
19 Mr Armstrong.

20 MR ARMSTRONG: We understood that that is obviously appropriate
21 having regard to the nature of the matter, Your Honour.

22 HER HONOUR: Yes.

23 MR ARMSTRONG: And that is one of the reasons why we have put
24 together the affidavit so that Your Honour has a proper
25 evidentiary basis for the parties' reasons for the
26 proposed modification.

27 HER HONOUR: Am I being asked to approve anything or do you say
28 that it is something that can be done under the terms of
29 the deed in any event?

30 MR ARMSTRONG: Your Honour, we take the view, for the
31 plaintiff's part at least, that it is something which it

1 is in the nature of a modification to the deed.

2 HER HONOUR: Yes.

3 MR ARMSTRONG: To that extent it probably is desirable to have
4 the court's supervision.

5 HER HONOUR: Yes.

6 MR ARMSTRONG: But the flipside is it is something that we
7 regard as an entirely administrative matter.

8 HER HONOUR: Right.

9 MR ARMSTRONG: So to the extent it requires the court to be
10 involved, it only just makes it. For instance, there is
11 another change which the parties have also negotiated
12 which is to enlarge the number of people who are
13 authorised assessors for the purposes of the claims
14 assessment procedure. And I will take Your Honour to that
15 in a moment. We regard that as really entirely
16 administrative. It does not change anything under the
17 deed other than the names and number of people who are
18 agreed between the parties as appropriate to conduct the
19 loss assessment exercise.

20 HER HONOUR: Yes.

21 MR ARMSTRONG: So I mention that for the purpose of informing,
22 Your Honour, and likewise for the transcript. But we do
23 not think we need Your Honour to become involved in that
24 aspect of things but perhaps if I take Your Honour through
25 Ms Haccou's affidavit.

26 HER HONOUR: Yes.

27 MR ARMSTRONG: Ms Haccou is the principal of Nevin Lenne &
28 Gross which, as Your Honour knows, is one of the two firms
29 that had the conduct of the proceeding on behalf of the
30 plaintiffs and the claim group. And Ms Haccou had the
31 conduct and carriage of the proceeding right the way

1 through. At paragraph 6 and following, Ms Haccou sets out
2 the background to the terms of settlement and the fact
3 that they were ultimately executed between the parties
4 following an adjournment of the trial which was due to
5 start last week and the negotiations between the parties
6 that surrounded the imminence of that trial. That is at
7 paragraph 7.

8 Then at paragraph 8, she briefly sets out the
9 substance of the claims assessment procedure which was
10 reflected in the terms of settlement. There were
11 effectively two procedures which were to be followed in
12 relation to property loss assessments. The deed
13 contemplated that each property loss claim would be
14 reflected in a claim book. The claim books would be sent
15 to the agreed independent loss assessors who were
16 themselves to attempt to agree upon principles of
17 assessment that would be applied. The books would then be
18 assessed and a claim value attributed to each property
19 loss claim and once that value had been attributed, the
20 parties would have an opportunity to negotiate it and try
21 and resolve the claim that way. Or if they were not able
22 to agree that that was the appropriate assessment, there
23 was a dispute resolution procedure under which it could be
24 referred off for further assessment in a slightly more
25 formal way and that further assessment would be binding on
26 the parties.

27 HER HONOUR: Yes.

28 MR ARMSTRONG: The personal injury loss process involved again
29 a form of claim book being put together and those claim
30 books being sent to very eminent senior counsel of the
31 Victorian Bar who specialise in personal injury claims and

1 those counsel then conduct the assessments. There was no
2 dispute resolution procedure in relation to the personal
3 injury claims and that has not been a problem. What has
4 happened over the last 10 months or so is that the loss
5 assessors have agreed on some principles of assessment.
6 The parties have discussed between themselves the format
7 of the claim books for property loss claims. And the
8 process of having the claims put together and reflected in
9 those claim books has been undertaken.

10 The claim books have then been sent to the property
11 loss assessors as the books have become available and
12 assessments have been done for each of the property loss
13 claims. The assessors have not always been able to agree
14 on the value for a particular claim. But that has not so
15 far been a problem because the parties' representatives
16 have been able to take the competing assessments and
17 negotiate between themselves to reach an offer which has
18 been communicated ultimately to the particular group
19 members and the group members so far have been, through
20 that process, able to get to a point where there was an
21 offer that they were willing to accept. So we have not
22 yet had to go to the more formal dispute resolution
23 procedure and that is exactly what was hoped to happen.

24 HER HONOUR: Yes, and what percentage of the claims have been
25 treated in that manner; all of them, so far?

26 MR ARMSTRONG: Does Your Honour ask what percentage of the
27 total number of claims have made it through that process?

28 HER HONOUR: Yes.

29 MR ARMSTRONG: The total number I think, in terms of resolved
30 claims, is set out in - - -

31 HER HONOUR: I am sorry. I am jumping again. You take me

1 through the affidavit.

2 MR ARMSTRONG: I can answer Your Honour's question quickly. I
3 know it was here. It is paragraph 25 of Ms Haccou's
4 affidavit.

5 HER HONOUR: It is only a very small number.

6 MR ARMSTRONG: Yes, it is only a small number, Your Honour, but
7 they have been the bigger claims.

8 HER HONOUR: Right.

9 MR ARMSTRONG: These are the resolved ones.

10 HER HONOUR: Yes.

11 MR ARMSTRONG: There is a larger number which I do not have
12 ready to hand which are still going through that process.
13 So the total number of claims in the proceeding I am
14 instructed is about 200. There is something less than a
15 hundred that have made it into this process and are
16 working their way through. And there are about 25 which
17 have so far reached the stage of being resolved claims.

18 HER HONOUR: Yes.

19 MR ARMSTRONG: But some of them, in fact most of them are in
20 the decidedly bigger individual claim category. So these
21 are the larger more complex ones.

22 HER HONOUR: Right.

23 MR ARMSTRONG: So in terms of the statistical overview of where
24 we are, that is the break down.

25 HIS HONOUR: Yes.

26 MR ARMSTRONG: I was describing to Your Honour what process was
27 contemplated by the deed and that that process has been
28 followed so far and pretty effectively. There have been
29 delays which I will come to in a moment. But in terms of
30 the expeditious or cost effective treatment of individual
31 claims, it has been working okay. The assessments have

1 come in. The solicitors representing the group of
2 defendants, my friend from Lander & Rogers, and the
3 solicitors representing the particular group members have
4 been able to get together. They have been developing a
5 bit of expertise, as one can imagine, in how particular
6 losses ought properly to be assessed and the negotiation
7 process has worked very well. So, so far we have not yet
8 had to call on the dispute resolution procedure. In terms
9 of the progress of payments that is then to happen under
10 the deed, that is set out or summarised in paragraph 9 of
11 Ms Haccou's affidavit.

12 HER HONOUR: Yes.

13 MR ARMSTRONG: What was contemplated or what was expected from
14 the outset was that this process would take some time and
15 claims would be negotiated and resolved in the order that
16 they were reached in the queue. So the deed had always
17 contemplated that as claims got reached, it would reach a
18 point where there was enough value sitting in the resolved
19 claims to make it cost effective to start to look at
20 interim distributions. So what the deed provided was that
21 when 60 per cent of claims by value had been resolved, or
22 10 months had passed from the date of the deed, whichever
23 was earlier, a process for one interim distribution could
24 be undertaken.

25 What was contemplated there was that the plaintiff's
26 solicitors would inform the defendants as to the value and
27 identity of all of the resolved claims and request that
28 some of the settlement funds which are currently being
29 held in a reserve account, be transferred across into the
30 solicitor's joint trust account and then a proportion of
31 the funds in the trust account would be distributed to the

1 particular claims. The reason that only a proportion
2 would be distributed is because at the end of the day the
3 group members will have to contribute to the costs of the
4 proceeding; both the costs that have been incurred in
5 relation to the common issues but which are not ultimately
6 recovered from the defendant's as party/party costs
7 pursuant to the settlement. But the group members will
8 also need to pay the solicitor/client component of costs
9 that have been incurred in processing their individual
10 claims.

11 There is there is the common issues costs and the
12 individual issues costs. For each of them there is a
13 party/party component that the defendants will pay. But
14 for each of them there will be a solicitor/client
15 component which the group members will need to pay. So
16 funds need to be kept in the trust account to make sure
17 that there is enough there to require those group members
18 ultimately to contribute their necessary share to the
19 total costs of the action that has been brought for their
20 benefit. So that is summarised in paragraph 9 of
21 Ms Haccou's affidavit.

22 HER HONOUR: Yes.

23 MR ARMSTRONG: The problem which has arisen in the way that it
24 has been dealt with is addressed in paragraphs 12 and
25 following of Ms Haccou's affidavit. As I indicated to
26 Your Honour before, the loss assessors agreed on certain
27 principles to be applied. The parties then discussed a
28 common format for the claim book to try and streamline the
29 review procedures for the various solicitors. And then
30 the processes of negotiation have gone on and they have
31 worked pretty well. But the problem that has become

1 apparent is that because the parties were anxious in the
2 settlement agreement to ensure that the assessors who were
3 engaged to do the assessment exercise were professionals
4 that the parties all regarded highly in the hope that that
5 would mean that there would be less disputation as to the
6 proper assessment.

7 That has got the downside that there has been a
8 small number of assessors available. Moreover they are
9 almost, by definition, highly regarded in their field and
10 therefore sought after. Several of them are also heavily
11 involved in the claims assessment procedures that are
12 being undertaken for the Horsham bushfire, which is
13 settled, the Coleraine bushfire, which has settled, the
14 Pomborneit bushfire, which has settled. That is on top of
15 the ordinary insurance loss work that is their daily bread
16 and butter.

17 HER HONOUR: Yes.

18 MR ARMSTRONG: So there have been delays at the assessment
19 stage and the process of getting claim books to the
20 assessors has gone all right. It is not really quick but
21 it is going all right. But there has then been delays in
22 getting them out the other side of the assessors, so that
23 they can come back to the solicitors for the purposes of
24 negotiation. As a result of that problem, firstly the
25 plaintiff's solicitors in January this year proposed that
26 there be additional assessors - - -

27 HER HONOUR: Yes.

28 MR ARMSTRONG: Agreed between the parties. That is now agreed.
29 For the reasons which I indicated before, we do not think
30 we need to trouble Your Honour with that but I do let
31 Your Honour know that is what is happening. Secondly

1 in February there was a proposal, initially just to defer
2 the first interim distribution. Because at that stage
3 there really were a very small number of claims which had
4 reached the point of being resolved claims that could be
5 the subject of interim distributions. But then the
6 critical thing is in paragraph 15, that in April, as a
7 result of the continuing slow progress on the interim
8 assessments, the proposal was first raised that the deed
9 of settlement be modified to permit there to be more than
10 one interim assessment. Really it became apparent that
11 we had perhaps been a little bit too optimistic and too
12 conservative in the original terms of settlement, in only
13 expressly providing for a single interim distribution.
14 At that point we had resolved the plaintiff's individual
15 claims. They had suffered quite substantial losses and
16 had resolved a very complex commercial claim by the
17 plantation company, which Your Honour might recall the
18 specific - - -

19 HER HONOUR: Yes Hancocks.

20 MR ARMSTRONG: Hancocks, that is right. It got a specific
21 treatment in the deed of settlement. That was, I think,
22 the biggest claim across the whole group. So they were
23 both sitting there resolved, but they were almost the
24 only two claims that had been resolved at that point.
25 There was then correspondence between the parties about
26 the appointment of the interim assessors. Then more
27 discussion about the interim distribution question.
28 Ultimately for reasons which do not require blame to
29 anybody, it took some time to reach agreement on the
30 proposal that there be more than one interim assessment.
31 It was not until 25 June that we were notified by the

1 defendant's that multiple interim distributions was a
2 proposition with which they were comfortable.

3 Even then, there were certain requirements that they
4 imposed on the plaintiff's solicitors regarding certain
5 undertakings relating to payments to be reimbursed to the
6 Health Insurance Commission, in respect of personal
7 injury claims, before even the interim distributions were
8 paid out. As Your Honour can imagine, there is a huge
9 range of losses that were suffered as a result of this
10 fire. All of them have their nuances and complications,
11 and one of them in relation to psychiatric claims and
12 health and medical expenses raises administrative issues
13 in terms of reimbursements to the Health Insurance
14 Commission. Nothing is ever easy.

15 But ultimately the parties reached the point of the
16 solicitors for the plaintiff being content to give the
17 undertakings that were required, and those undertakings
18 have been given. Because of the particular concern to
19 ensure that the plaintiffs who had borne, really the
20 stress and burden of the class action, and Hancocks which
21 was a very major claim, ought not wait any further than
22 they really needed to. The existing power to make an
23 interim distribution was used to make an interim
24 distribution - - -

25 HER HONOUR: So that has been done - - -

26 MR ARMSTRONG: The first - - -

27 HER HONOUR: On the ten month rule, is that right?

28 MR ARMSTRONG: Yes, Your Honour, yes.

29 HER HONOUR: I see.

30 MR ARMSTRONG: So the first interim distribution has happened.

31 HER HONOUR: So there is no capacity to make any further

1 interim distributions as the deed currently stands - or
2 stood?

3 MR ARMSTRONG: Yes, Your Honour, that is right. The imperative
4 for doing that was to try and get them something before
5 the end of the last financial year.

6 HER HONOUR: Yes.

7 MR ARMSTRONG: So that has been done. In relation to the
8 second interim distribution, there is a total of just shy
9 of five million dollars in resolved claims which have
10 been notified to the defendants.

11 HER HONOUR: Yes.

12 MR ARMSTRONG: The defendants have taken the step of releasing
13 those funds into the trust account, so they have come
14 from the reserve account - - -

15 HER HONOUR: Yes.

16 MR ARMSTRONG: Which is joint signatories from each side of the
17 ledger. It has gone into the trust account, the
18 signatories to which are representative just of the
19 plaintiff's solicitor's firms. But those funds are still
20 in that trust account, and they will not be disbursed
21 until Your Honour is content that the idea of multiple
22 interim distributions is something that the court is
23 satisfied is appropriate.

24 HER HONOUR: Yes.

25 MR ARMSTRONG: So that is set out in paragraph 21 of
26 Ms Haccou's affidavit.

27 HER HONOUR: I see.

28 MR ARMSTRONG: Then at paragraphs 23 and following, Your Honour
29 sees at paragraph 22, the letter which reached Your
30 Honour, and we apologise it was initially addressed to
31 His Honour the trial judge.

1 HER HONOUR: Yes that is all right.

2 MR ARMSTRONG: We hope that was not inappropriate. Then the
3 reasons for seeking the interim distributions, which
4 I think I have now set out, likewise set out in
5 Ms Haccou's affidavit at paragraphs 23 and following.
6 That is that although it was always expected that
7 different group members would have their entitlements
8 finalised at different points in time - and that it would
9 be appropriate for there to be at least an interim
10 distribution. So that people were not waiting any longer
11 than they really needed to. Plus admittedly an
12 expectation that the claims which were likely to be at
13 the top of the queue, were likely to be the ones that
14 involved the most grievous loss. There were a couple of
15 fatalities, there were a number of claims that involved
16 the loss of private domestic residences and associated
17 business premises - so farms and things like that, that
18 have not only the farm house but also the barn and the
19 tractor and the hay shed and farm vehicles. Really major
20 losses as a result of the fire. And they have tended to
21 be the ones that were at the top of the queue and have
22 now been through the assessment process.

23 It was always expected that they would reach the stage of
24 finalisation earlier. And that it was desirable that as
25 far as possible, given the other logistics of the case
26 and the need to keep a reserve to ensure that there was
27 sufficient funds still in trust to pay each group
28 member's fair share of the unrecovered costs of the
29 litigation. Keeping those considerations in mind,
30 nonetheless, it was desirable to have an interim
31 distribution to let those kinds of claims get their money

1 as soon as possible.

2 HER HONOUR: So is it proposed to have more than one additional
3 interim distribution?

4 MR ARMSTRONG: Yes, Your Honour.

5 HER HONOUR: How many?

6 MR ARMSTRONG: At the moment the expectation is that we would
7 not want more than three.

8 HER HONOUR: So the next cab off the rank, if I can put it that
9 way, is the 4.9 million?

10 MR ARMSTRONG: Yes.

11 HER HONOUR: I assume that involves the claims at paragraph 25?

12 MR ARMSTRONG: Yes, Your Honour.

13 HER HONOUR: Which would mean that there are many, many claims
14 outstanding.

15 MR ARMSTRONG: Yes. We are hopeful, Your Honour, that
16 obviously the period to date has involved the ironing out
17 the glitches in the overall assessment procedure.
18 Working out the parties agreed approach to particular
19 issues and that has happened and has now been progressing
20 pretty smoothly. And we have discovered the problem of
21 the assessors being pretty heavily committed and the slow
22 - the bottleneck that has been occurring as a result of
23 that.

24 HER HONOUR: So you anticipate that the further claims will be
25 processed more quickly?

26 MR ARMSTRONG: We are hoping that the further claims will now
27 start to speed up. So although it has taken about a year
28 to get the first 25 odd claims sorted, we are hoping that
29 within the next few months we will do at least a couple
30 of times that number.

31 HER HONOUR: All right. How are the people at the end of the

1 line protected?

2 MR ARMSTRONG: Ultimately - - -

3 HER HONOUR: In terms of the availability of funds in the
4 reserve account - has that been worked out mathematically
5 so that there is a guarantee that there will be money
6 there?

7 MR ARMSTRONG: Each claim is only - let's say a claim is
8 assessed at \$200,000.

9 HER HONOUR: Yes.

10 MR ARMSTRONG: Only 45 per cent of that is payable so \$90,000.

11 HER HONOUR: But as I understood it, when I approved this
12 scheme, something like \$30m-something went into the
13 reserve account.

14 MR ARMSTRONG: \$32.8m, I think it was, Your Honour.

15 HER HONOUR: \$32m went into the reserve account and at that
16 stage there was an open class.

17 MR ARMSTRONG: Yes.

18 HER HONOUR: So it was really a - I won't call it a guesstimate,
19 there had been an estimate provided of what the likely
20 claims would be or were.

21 MR ARMSTRONG: Yes.

22 HER HONOUR: But it wasn't certain.

23 MR ARMSTRONG: No. Your Honour will recall the modelling.

24 HER HONOUR: Yes, I do recall the modelling.

25 MR ARMSTRONG: Yes. And so what happens is that \$200,000 claim
26 is an entitlement to \$90,000.

27 HER HONOUR: Yes.

28 MR ARMSTRONG: And it's the \$90,000 which is notified to the
29 defendants and it's only the \$90,000 which is released
30 from the reserve account into the trust account.

31 HER HONOUR: Yes.

1 MR ARMSTRONG: Of that \$90,000 only 50 per cent is contemplated
2 to be distributed as an interim distribution.

3 HER HONOUR: Where do I see the 50 per cent? It says up to 60
4 per cent of the total amount.

5 MR ARMSTRONG: Yes.

6 HER HONOUR: Where is the 50? I see, paragraph 20.

7 MR ARMSTRONG: Yes.

8 HER HONOUR: Yes.

9 MR ARMSTRONG: It's only been 50 per cent for the ones to date.

10 HER HONOUR: I see.

11 MR ARMSTRONG: There is provision to go to 60 per cent but it's
12 not at the moment contemplated that it would go above 50
13 per cent.

14 HER HONOUR: Doing it on the drip feed, as it were, is not
15 going to disadvantage anybody in your submission, in terms
16 of the availability of funds at the end of the day for the
17 person or persons last in line?

18 MR ARMSTRONG: We do not expect that it is going to
19 disadvantage the people last in line.

20 HER HONOUR: All right.

21 MR ARMSTRONG: And I can tell Your Honour that the assessments
22 which are coming in, that is firstly the claim books which
23 are reaching the solicitors and the assessments which are
24 being reflected in the resolved claims, is not causing us
25 to think that the modelling that we have done prior to the
26 settlement was off the mark. And so we expect as
27 presently advised or on our present information extracted
28 now from the actual claims books of the group members that
29 the settlement sum will be adequate to achieve the 45 per
30 cent recovery for each individual claim.

31 HER HONOUR: At the moment people are getting 50 per cent of 45

1 per cent as an interim payment?

2 MR ARMSTRONG: Yes.

3 HER HONOUR: All right. Yes. So Mr Armstrong, what are you
4 asking me to do today other than nod and not raise any
5 particular concerns having asked the questions that I have
6 asked?

7 MR ARMSTRONG: Your Honour, in light of the parties' agreement
8 that the terms of settlement be modified to permit up to
9 three interim distributions.

10 HER HONOUR: Yes.

11 MR ARMSTRONG: In our submission probably the desirable course
12 would be for Your Honour simply to make an order pursuant
13 to, not so much s.33V of the Supreme Court Act but s.33ZF
14 which is the general power to make orders where the
15 interests of justice require.

16 HER HONOUR: Yes.

17 MR ARMSTRONG: Noting the parties' agreement in that regard and
18 approving it for the purposes of Part IVA of the Act.

19 HER HONOUR: So noting the parties' agreement, you will have to
20 give me a form of words, Mr Armstrong. Today was the
21 first time I heard about three interim payments.

22 MR ARMSTRONG: Perhaps in the other matters, Your Honour then
23 might note that the parties to the terms of settlement of
24 the proceeding have agreed pursuant to Clause 19 of the
25 deed upon modification to Clause 10 to permit up to three
26 interim assessments and interim distributions of
27 settlement payments to group members and then the order
28 itself - - -

29 HER HONOUR: Do you want to have a think about this? I have
30 put you on the spot.

31 MR ARMSTRONG: No, I think I am happy to do it, Your Honour.

1 HER HONOUR: Yes.

2 MR ARMSTRONG: The form of order would perhaps be "That
3 pursuant to s.33ZF of the Supreme Court Act, the court
4 approves the modification to the deed of settlement".

5 HER HONOUR: Is it the deed of settlement or to the process
6 contemplated by the deed of settlement? As I understand
7 it, are you actually proposing to modify the deed? You
8 are technically but I haven't seen any drafts.

9 MR ARMSTRONG: We weren't proposing to re-engross a form of
10 deed.

11 HER HONOUR: No.

12 MR ARMSTRONG: I take Your Honour's suggestion that it would be
13 modification to the process, the distribution process
14 contemplated by the settlement agreement. "To permit up
15 to three interim assessments and consequential interim
16 distributions to the Claimants".

17 HER HONOUR: Yes.

18 MR ARMSTRONG: And I don't think we need to seek any further
19 liberty to apply. I think we continue to have that.

20 HER HONOUR: You have liberty to apply, yes.

21 MR ARMSTRONG: And we don't seek any order for costs.

22 HER HONOUR: All right. What about making this known to the
23 members, the class members?

24 MR ARMSTRONG: It is not something that s.33X requires to be
25 notified to group members.

26 HER HONOUR: No, I'm just thinking about a general notice. As
27 I mentioned to you at the outset, something along the
28 lines of the affidavit or the transcript or the order
29 being placed on a website.

30 MR ARMSTRONG: All of the group members are now by definition
31 known to the plaintiffs' solicitors.

1 HER HONOUR: Yes.

2 MR ARMSTRONG: The plaintiffs' solicitors will write to them,
3 informing them that this modification to the assessment
4 and distribution procedure has been made.

5 HER HONOUR: Yes.

6 MR ARMSTRONG: If Your Honour were content with that then we
7 will make sure that happens and it's probably a more
8 reliable means of informing group members than posting a
9 separate notice on the court website.

10 HER HONOUR: Yes.

11 MR ARMSTRONG: But if Your Honour did think that a notice were
12 appropriate then we could send up a suggested form of
13 notice to Your Honour by perhaps close of business today.

14 HER HONOUR: I am just concerned that the group members, those
15 who are interested, can access the information that they
16 need to understand why this has occurred rather than just
17 that it has occurred.

18 MR ARMSTRONG: Yes.

19 HER HONOUR: I thought you explained it very lucidly.

20 MR ARMSTRONG: Thank you, Your Honour.

21 HER HONOUR: And the transcript might be useful to people.

22 I can certainly put it on the court file but people can't
23 necessarily come down to Melbourne to search the court
24 file.

25 MR ARMSTRONG: If Your Honour would just excuse me one moment.

26 HER HONOUR: Yes.

27 MR ARMSTRONG: Your Honour, I am instructed that the
28 plaintiff's solicitors think that putting the transcript
29 up on the website might be easy enough for group members
30 to follow.

31 HER HONOUR: Yes.

1 MR ARMSTRONG: The alternative which - - -
2 HER HONOUR: The website is what? You tell me we have a class
3 action website here at the court?
4 MR ARMSTRONG: Yes.
5 HER HONOUR: Is that the website that you are referring to or
6 is there another website that - - -
7 MR ARMSTRONG: Each firm has its own website with links to the
8 Beechworth bushfire class action. We can put the
9 transcript up on those websites as well.
10 HER HONOUR: Yes.
11 MR ARMSTRONG: What we would do in that regard, Your Honour, is
12 have the first link, being a short description - a
13 lawyer's description, of what has just happened.
14 HER HONOUR: Yes.
15 MR ARMSTRONG: Then a link to the transcript. If Your Honour
16 is content for us to do that, without requiring to see if
17 the form of the words that we will use to send them - the
18 link to the transcript. Then we will do that.
19 HER HONOUR: Yes.
20 MR ARMSTRONG: Otherwise we could - - -
21 HER HONOUR: I would be content for that to occur. I was not
22 going to require you to pass any letter that you were
23 going to send out under my nose either.
24 MR ARMSTRONG: Thank you, Your Honour. We might - is Your
25 Honour proposing to put it on the court website as well?
26 HER HONOUR: I am not intimately acquainted with the way the
27 court website works. But Mr Nguyen has probably got a
28 better idea than me. I am sure it can be done. Yes
29 I can see him nodding vigorously, yes.
30 MR ARMSTRONG: Mr Nguyen and I both have a pretty good
31 familiarity with the court's bushfire class action

1 website.

2 HER HONOUR: Yes.

3 MR ARMSTRONG: It - perhaps we will put together the form of
4 words that we think would be appropriate and which will
5 be posted on the solicitor's websites containing the link
6 to the transcript.

7 HER HONOUR: Yes.

8 MR ARMSTRONG: Simply for Your Honour's assistance, or
9 Mr Nguyen's assistance, we will send that form of words
10 up to the court. Whether it is adopted or not is - it is
11 just so the court can see what we are doing and may wish
12 to use a similar form of words, or its own form of words.

13 HER HONOUR: All right.

14 MR ARMSTRONG: We have had quite a lot of dealing with the
15 group members, and we will try and find a succinct
16 expression of what has happened, so they do not need to
17 go to the transcript if they do not want to.

18 HER HONOUR: Yes.

19 MR ARMSTRONG: So that was it from us, Your Honour. We think -
20 may I say as well, one reason why we are actually fixing
21 a number to the interim distributions, that is three
22 rather than one, is because it is also not in the general
23 interests of costs of the proceedings to have too many of
24 them.

25 HER HONOUR: Yes.

26 MR ARMSTRONG: There is a lot of administrative work involved
27 in each process of doing the interim assessment
28 summaries. So we think that three should see us through.
29 It may be that we only need two. Can I foreshadow to
30 Your Honour that down the track, once all of the claims
31 have in fact been assessed and are at the level of being

1 resolved claims, one issue which may need to be
2 considered, but we are not yet at the stage of needing to
3 seek orders about this. Because we are not sure if it is
4 a problem we are going to encounter. But as I said to
5 Your Honour before, one of the - when I say legacy
6 issues, is that all of the group members will need to
7 contribute pro-rata to the unrecovered solicitor /client
8 costs of agitating the common benefit issues in the
9 proceeding.

10 We will not know the solicitor /client - or the
11 unrecovered component until we know the party / party
12 component. So the parties are doing what they can to try
13 and resolve the questions of costs of the common issues
14 in the proceeding. We will try and make sure that has
15 happened by the time we are in a position to make
16 distributions to all of the claims. But if it has not
17 happened by then, what might need to happen will be that
18 there will be the last interim distribution which will
19 see all of the claims having received at least something.
20 But we will have to have reserved from all claims some
21 component to reflect their - our estimate of their likely
22 contributions to the unrecovered costs of the proceeding.
23 I simply mention that, hopefully we will not get to that
24 point, and the deed already contemplates that the
25 solicitors have a standing authority to take the
26 unrecovered cost of the proceeding pro-rata, from the
27 settlement sum before it is distributed to the group
28 members. That order was made pursuant to, I think,
29 s.33ZJ. So it may be that it is again something that is
30 entirely accommodated by the existing terms of the
31 settlement agreement. But if we encounter any

1 difficulties in that regard, then Your Honour can feel
2 assured that we will come back and make sure that
3 whatever is proposed to happen is done subject to the
4 court's supervision. I need do no more than mention
5 that.

6 HER HONOUR: Yes.

7 MR ARMSTRONG: So those were the only matters for the
8 plaintiff, Your Honour.

9 HER HONOUR: Yes thank you, Mr Armstrong. Ms Dunn, do you have
10 anything to add to that?

11 MS DUNN: No, Your Honour, the defendants are agreeable to the
12 several interim distribution process.

13 HER HONOUR: Yes.

14 MS DUNN: There was just the other matter of, as agreed, that
15 there has been an additional assessor involved in the
16 process. The deed only contemplates two named assessors.

17 HER HONOUR: Yes.

18 MS DUNN: As Mr Armstrong stated, I think it is purely
19 administrative but we felt that it was not strictly in
20 compliance with the deed, so that it should be brought to
21 your attention that there is a third person.

22 HER HONOUR: I have made a note of that. Only one extra?

23 MS DUNN: Officially one extra but he has a team of people
24 behind him is my understanding.

25 HER HONOUR: All right, thank you. I will make an order in the
26 form discussed, noting in 'Other Matters' the parties'
27 agreement that there be a modification to clause 10 of
28 the deed to permit up to three interim assessments and
29 consequential distributions to the group members or
30 Claimants. I will not make any order in relation to the
31 transcript but that will unfold as discussed.

1 MR ARMSTRONG: It will, Your Honour, yes.

2 HER HONOUR: Thank you. Nothing further?

3 MR ARMSTRONG: No thank you, Your Honour. I will go across to
4 my other little bushfire matter now.

5 HER HONOUR: Thank you. Adjourn the court until 11 o'clock
6 please.

7 - - -