Equity Division
Supreme Court
New South Wales

Case Name:	**Ashita Tomi Pty Ltd as trustee for Esskay Super Fund v RCR Tomlinson Ltd trading as RCR Tomlinson Ltd**
Medium Neutral Citation:	**[2023] NSWSC 344**
Hearing Date(s):	5 April 2023
Date of Orders:	5 April 2023
Date of Decision:	5 April 2023
Jurisdiction:	Equity - Commercial List
Before:	Rees J
Decision:	Approve settlement.
Catchwords:	REPRESENTATIVE PROCEEDINGS – plaintiffs sue company and directors – 'walk away' offers made by directors – approval of settlement – s 173, Civil Procedure Act 2005 (NSW) – principles and case law review at [25]-[34].
Legislation Cited:	*Civil Procedure Act 2005* (NSW) ss 173, 179, 183 *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 7
Cases Cited:	*Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249; (2021) 150 ACSR 53 *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 *Hall v Pitcher Partners (A Firm)* [2022] FCA 1524

	Haselhurst v Toyota Motor Corporation Australia Ltd [2022] NSWSC 1076 *Hawker v Powercor Australia Ltd* [2019] VSC 521 *Jackson v GP & JM Bruty Pty Ltd (Ruling No 2)* [2017] VSC 622 *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 *Prygodicz v Commonwealth of Australia (No 2)* (2021) 173 ALD 277; [2021] FCA 634 *Re Ansett Australia Flight Engineers Superannuation Plan* [2004] VSC 18 *Swiss Re International SE v Simpson* [2018] NSWSC 233; (2018) 354 ALR 607 *Vernon v Village Life Ltd* [2009] FCA 516 *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925
Category:	Procedural rulings
Parties:	Ashita Tomi Pty Ltd Ltd as trustee for Esskay Super Fund (First Plaintiff) CJMcG Pty Ltd atf the CJMcG Superannuation Fund (Second Plaintiff) Barry Jones (Third Plaintiff)Paul Dalgleish (Second Defendant) Bruce James (Third Defendant)
Representation:	Counsel: Ms E Collins SC / Mr H Atkin (Plaintiffs) Mr G Donnellan (Second Defendant) Mr J Hutton SC (Third Defendant) Solicitors: Quinn Emanuel Urquhart & Sullivan (Plaintiffs) Mark O'Brien Legal (Second Defendant) Johnson Winter & Slattery (Third Defendant)
File Number(s):	2018/353304

JUDGMENT

1 **HER HONOUR:** This is an application under section 173 of the *Civil Procedure Act 2005* (NSW) for approval of a settlement reached with the second defendant, Dr Paul Dalgleish, and the third defendant, Bruce James.

2 The plaintiffs rely on the evidence of their solicitor, Damian Scattini, a confidential advice of their learned counsel, together with a supplementary opinion. I was much assisted by the comprehensive, well-reasoned and balanced views there expressed.

These proceedings

3 The underlying proceedings are representative proceedings commenced under Part 10 of the *Civil Procedure Act* 2005 (NSW). The plaintiffs bring claims on their own behalf and on behalf of group members against the first defendant, RCR Tomlinson Ltd (in liquidation), and two of its former directors, being the second and third defendants.

4 RCR was an engineering and infrastructure company listed on the Australian Stock Exchange (*ASX*), that went into administration in November 2018. In broad terms, the plaintiffs contend that RCR breached its continuous disclosure obligations and each of the defendants engaged in misleading or deceptive conduct by statements made concerning the performance and prospects of RCR's business in the months leading up to external administration.

5 More specifically, from around late 2016, RCR entered into several contracts relating to the engineering, procurement and construction of solar farms (*EPC Solar Contracts*). In August 2017, RCR, including through its then-CEO, Dr Dalgleish, announced to the market that its earnings for the 2017 financial year were $35.2 million, and provided positive earnings guidance to the market in relation to the 2018 financial year, forecasting strong earnings growth. In February 2018, RCR, including through its then-CEO, Dr Dalgleish, affirmed the earnings guidance.

6 On 30 July 2018, RCR entered a trading halt. On 7 August 2018, Dr Dalgleish stepped down from his roles with RCR and Mr James became interim Chief Executive Officer.

7 On 28 August 2018, RCR released its 2018 financial report, an announcement of a proposed $100 million capital raising, and an investor presentation to the ASX. By these documents, RCR announced that it had experienced significant cost overruns on a solar project known as "Project Gretel" and that its earnings before income tax for 2018 was a loss of $4.2 million. Mr James made statements that, with the capital raising and support from RCR's financier's, RCR could move forward in a position of strength and that its outlook remained positive.

8 Following the earnings announcement in August 2018, RCR's share price fell sharply. In September 2018, RCR conducted a $100 million capital raising pursuant to a prospectus, in order to address the financial impact of the write-downs announced in August 2018. In late November 2018, eight weeks after completing the $100 million capital raising, these proceedings were commenced. RCR entered into voluntary administration six days' later.

9 In March 2019, liquidators were appointed to RCR. As at June 2021, the liquidators of RCR forecast that the return to unsecured creditors in the liquidation would be nil. In August 2019, Dr Dalgleish and Mr James were joined to these proceedings.

Claims and defences

10 As against Dr Dalgleish and Mr James, the plaintiffs allege that they engaged in misleading or deceptive conduct, in contravention of section 1041H of the *Corporations Act 2001* (Cth), section 12DA of the *Australian Securities and Investment Commission Act 2001* (Cth) (*ASIC Act*), or section 18 of the Australian Consumer Law. The plaintiffs also claim that Dr Dalgleish and Mr James made false or misleading statements, in contravention of section 1041E of the *Corporations Act*.

11 In broad terms, the claims against Dr Dalgleish relate to public statements alleged to have been made by him in 2017 and 2018 as to the performance and prospects of RCR and its solar projects business. For example, Dr Dalgleish is alleged to have made the following representations on 22 February 2018:

(a) RCR's success in the renewable energy sector over the past year is expected to contribute to RCR's continuing growth momentum;

(b) RCR is well placed for expected revenue and earnings growth, with a number of contracts to flow through to support FY19 revenue; and

(c) there is a reasonable basis to expect that RCR's earnings for FY18 would exceed RCR's earnings for FY17.

12 The claims against Mr James relate to statements made by RCR in an ASX announcement made on 28 August 2018 that:

(a) with the $100 million capital raising and support from RCR's financiers announced today (ie 28 August 2018), RCR could move forward in a position of strength; and

(b) the outlook for RCR remains positive.

13 The plaintiffs allege that the making of such statements constituted misleading conduct because the statements are alleged to have lacked reasonable grounds. As against Dr Dalgleish, it is said that various information concerning the existence and materialisation of risks to RCR's business was not disclosed. As against Mr James, it is also said that he is liable under section 729 of the *Corporations Act* for misleading statements in and omissions from the prospectus issued by RCR in connection with the capital raising.

14 Dr Dalgleish admits that he made various of the statements in issue but denies that he engaged in misleading conduct. Mr James denies that he made the representation in the company's ASX announcement or engaged in misleading

conduct. He also denies that the prospectus was misleading, and raises a due diligence defence under section 731 of the *Corporations Act*.

An offer

15 In April 2020, the plaintiffs served their lay evidence. Orders were made for the defendants to provide discovery. By August 2021, the discovery process had been completed: RCR provided some 2 million documents which had not been reviewed for relevance, where the liquidators were unfunded to perform this task. By June 2022, the plaintiffs had served their expert evidence. The plaintiffs then proposed to amend their pleadings. Directions were made for proposed amended pleadings to be circulated.

16 On 27 September 2022, Mr James made an offer of settlement, suggesting that the claim against him would fail. Mr James' solicitors referred to serious deficiencies said to exist in the claims against their client and invited the plaintiffs to withdraw the claims, failing which Mr James would rely on the letter on the question of costs. Over 11 pages, the allegations against Mr James were analysed. As the representations said to have been made by Mr James were made in a company ASX announcement, it was likely that the conduct was of the company, for which Mr James was not liable. Mr James relied on *Swiss Re International SE v Simpson* [2018] NSWSC 233; (2018) 354 ALR 607 at [558]-[562] (per Hammerschlag J), which was said to be indistinguishable.

17 Further, the statements made in the ASX announcement were said to be quintessential statements of opinion as to the outlook for RCR's business and the strength of its position and would have been understood as such by their intended audience: *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 at [94]. The alleged representations were qualified by references to the "disappointing" financial impact of the cost overruns, and to the "challenging time" for RCR, and so did not convey absolute confidence in RCR's financial position. The statements would have conveyed only that the maker of the statement held the opinion expressed, and perhaps that there was a basis for the opinion: *Global*

Sportsman Pty Ltd v Mirror Newspapers Pty Ltd (1984) 2 FCR 82 at 88 (per Bowen CJ, Lockhart and Fitzgerald JJ). Where the relevant audience for the alleged representations was said to be present and possible future investors in RCR, the only meaning likely to have been conveyed was that RCR's interim CEO remained optimistic about the company notwithstanding recent adverse events. The intended audience could not have been misled by the expression of such an opinion.

18 Mr James' solicitors contended that the plaintiffs' expert evidence confirmed that Mr James had a reasonable basis for the opinions expressed. The prospect that the Court would find otherwise was said to be extremely remote. Further, it was said that the expert reports failed to prove any loss. Finally, it was said that the claim against Mr James lacked commercial utility:

> … The claims against our client relate wholly to conduct between 7 August 2018 and 28 August 2018 while he was interim CEO of RCR. … the plaintiffs' case is that in the weeks after our client became interim CEO, and therefore on our client's watch, RCR did much to unwind the effect of its various alleged previous contraventions. In this context, it may be questioned whether it made sense to sue our client at all.
>
> More significantly, all of the claims against our client wholly overlap with the claims against RCR, and are materially weaker than the claims against the company.
>
> The alleged James representations were made in the 28 August 2018 ASX Announcement together or contemporaneously with various other representations by RCR, on which the plaintiffs also rely as contravening conduct. As a matter of common sense, the greater specificity of the statements by RCR alleged to have been misleading, and the sheer number of those allegedly misleading statements, mean the claims against RCR are not only inherently stronger, they also … actually make the claims against our client less likely to succeed.
>
> Additionally, because the totality of the knowledge to be imputed to RCR is significantly more extensive than our client's personal knowledge, the plaintiffs' prospects of proving that statements of opinion made by RCR were misleading or deceptive must logically be materially better (we have not considered, and do not comment on, those prospects).
>
> The Prospectus claim against our client is even worse. …
>
> Further, the claims against our client and against RCR seek to recover exactly the same losses. There are no losses sought to be recovered from our client which would not be recoverable in the stronger claims made against RCR.

> There is therefore no foreseeable scenario in which the plaintiffs might succeed against our client but fail against RCR in respect of the same conduct or any part of the claimed loss.
>
> It is not clear to us how suing our client may have the effect of increasing the possible recovery pool. As you know, indemnity against any liability that might be established against our client is provided under the same policy of insurance relied on by RCR and the second defendant, Mr Paul Dalgleish. Suing our client not only does not increase the possibly recovery pool, it depletes the pool by reason of our client's legal costs (paid out of the policy limit) and the increase in the plaintiffs' costs in pursuing an additional defendant.
>
> In light of the above, the commencement and prosecution of the plaintiffs' claims against our client has increased the costs of the proceeding without producing any prospective or real forensic or commercial benefit to the plaintiffs or the group members.
>
> …
>
> We acknowledge that large commercial litigation has a momentum of its own. However, whatever reasons may once have appeared to justify joining our client as a defendant, following the service of the plaintiffs' expert evidence, the claims against our client now demonstrably have no utility (indeed, maintaining them would appear to be adverse to your client's interests, for the reasons identified above). We urge your clients to seriously consider whether they should continue to press their claims against our client.

19 Where Mr James' costs were said to then stand at $625,000 excluding GST, an offer was made to walk away from the proceedings, with each party bearing their own costs. Mr James offered to forego the recovery of significant costs which he would otherwise seek to recover from the plaintiffs.

20 On 10 October 2022, the plaintiffs accepted Mr James' offer of settlement. On 22 November 2022, a Deed of Release and Settlement was executed with Mr James. On 7 December 2022, the plaintiffs offered to settle the proceedings against Dr Dalgleish on the same basis. The offer was accepted on 12 December 2022 and a deed in like terms was executed on 23 December 2022.

21 Motions were duly filed with the Court seeking approval of the settlements. On 23 January 2023, a Notice of Settlement was distributed to group members. The deadline for any objections to the settlement was 27 February 2023. No objections were received.

Proposed settlement

22 The terms of the settlement are recorded in substantially identical Deeds of Release and Settlement which provide for:

(a) the release of the plaintiffs' and the group members' claims against Dr Dalgleish and Mr James (clause 3.1(a)-(b)),

(b) for each party to bear their own costs of the proceeding (clause 3.1(c)), and

(c) for the proceedings to be dismissed (clause 6.3(a)).

23 That is, Dr Dalgleish and Mr James release any entitlement to costs they might otherwise have against the plaintiffs in the event of dismissal or discontinuance of the plaintiffs' and group members' claims. The parties' respective releases are conditional upon the Court approving the settlement (clause 2.1).

24 The proposed settlements will have the effect, if approved, that Dr Dalgleish and Mr James are released, but that the plaintiffs' and the group members' claims against RCR would remain on foot.

Principles

25 Drawing on my judgment in *Haselhurst v Toyota Motor Corporation Australia Ltd* [2022] NSWSC 1076 (Takata Airbag class actions) at [17]-[21], section 173 of the Civil Procedure Act provides:

> (1) Representative proceedings may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court.

26 If approved, the settlement binds all persons other than those who have opted out of the proceedings: *Civil Procedure Act,* section 179(b). The Court further has the power to "of its own motion or on an application by a party or a group

member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings": section 183.

27 As to the considerations to which the Court will have regard to in determining whether to approve a settlement, Stevenson J set out the principles in *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249; (2021) 150 ACSR 535:

> [12] The central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole. The Court's role in relation to group members is supervisory and protective. The Court's role is analogous to that which it assumes when approving settlements on behalf of persons with a disability.
>
> [13] When considering the reasonableness of the settlement *inter partes*, the Court is asked to determine whether the settlement is fair and reasonable considering the alternative, which is usually the risks and costs to which the plaintiff group members would be exposed were the matter to proceed to trial.
>
> [14] The question of whether the settlement is reasonable *per se* cannot be separated from ancillary questions concerning the approval of funding and legal costs. The evaluation of whether a settlement is fair and reasonable "must be carried out by reference to what all group members obtain in their hands following the resolution of their individual claims in the event that the settlement is approved".

See also *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5] (per Moshinsky J).

28 Thus, the first question is whether the settlement is reasonable *inter partes*, that is, between the representative plaintiff and defendants. The second question is whether the settlement is fair and reasonable *inter se*, that is, between group members. In determining these questions, the Court must be satisfied that the settlement has been undertaken in the interests of the group members as a whole and not just in the interests of the representative plaintiff and the defendant: *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258 (per Branson J). Further, as Goldberg J outlined in *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [19]:

> 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.

29 Overall, the Court's task has been described as "an especially onerous one": *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 at [16] (per Finkelstein J); *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8] (per Jacobson, Middleton and Gordon JJ).

30 Here, neither the plaintiffs nor the group members are to receive any return under the settlements. There are some (but not many) decisions in which Courts have specifically addressed "walk away" settlements of representative proceedings in which claims of group members have been released or discontinued for no return: *Hawker v Powercor Australia Ltd* [2019] VSC 521 at [25]-[30] (per Forbes J) ("… once the factual and technical position became known in greater detail, the plaintiff faced a very real risk of not succeeding … while group members will receive no compensation … nor are any of them liable for any legal costs involved … the 'walk away' settlement is within the range of fair and reasonable outcomes"); *Hall v Pitcher Partners (A Firm)* [2022] FCA 1524 at [52]-[56] (per Beach J) ("The fairness of the settlement was adequately demonstrated by the considerations set out in the confidential opinion of … counsel" and where the defendant "was only joined … because of a particular strategy … seeking to lay off risk"). In *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374, Beach J noted that, after investigation through discovery and preparation of evidence, a class action may prove to have minimal or no prospects of success, "No power contained in or philosophy underpinning Part IVA provides a proper basis for giving group members something for what turned out to be nothing or to give them something beyond what the true value of their claims are worth": at [19].

31 It is not uncommon for a cohort of group members, whose claims have emerged to be very weak, to receive nothing under a settlement, in circumstances where other group members receive a monetary return. In *Prygodicz v Commonwealth*

of Australia (No 2) (2021) 173 ALD 277; [2021] FCA 634, Murphy J approved a settlement in which "Ineligible Group Members" would have their claims released under a settlement, but receive no financial benefit. The fact that such group members “receive little or no benefit under the proposed settlement, yet are burdened with a release” did not mean that it fell outside the range of reasonable outcomes where their claims “are palpably weak and more likely than not to fail”: at [237].

32 Likewise, in *Re Ansett Australia Flight Engineers Superannuation Plan* [2004] VSC 18, Byrne J approved a settlement in which one cohort of represented persons received nothing where "it appears that these claimants have little prospect of success so there is no benefit to them for the litigation to go forwards … they will be spared the anxiety of a trial and a possible risk that part of their own costs might call upon them": at [8]; see also *Vernon v Village Life Ltd* [2009] FCA 516 at [40] (per Jacobson J) (“This is explained by the simple fact that those group members … on any view, can hardly be said to have suffered any real loss”).

33 In such circumstances, there is a potential conflict between the interests of the representative parties – who have an interest in avoiding potential costs liability – and the interests of group members, whose claims may be released for no return. As Forrest J observed in *Jackson v GP & JM Bruty Pty Ltd (Ruling No 2)* [2017] VSC 622 at [47] (citations omitted):

> … The reality is that the only benefit from that form of settlement is to the representative plaintiff herself, who has a potential costs liability and to her lawyers, who may have been exposed to a non-party claim for the defendants’ costs. The group members receive nothing.

34 In that case, his Honour approved a ‘walk away’ settlement only in respect of "registered" group members, where group members had had the opportunity to opt out and pursue individual claims but none had done so. Unregistered group members were not prevented from exercising their right to sue if so minded: see at [47]-[48].

Is the settlement fair and reasonable *inter partes*?

35 Considering whether the settlement is reasonable as between the representative plaintiffs and the defendants, I am satisfied having regard to the matters raised in Mr James' letter of offer and the confidential advices prepared by the plaintiffs' learned counsel, that a 'walk away' offer is fair and reasonable when considered with the risks and costs inherent in proceeding to trial against Dr Dalgleish and Mr James.

36 Here, it is not only the prospects of success of the plaintiffs' claims against these defendants that is relevant but whether, in advancing these claims, the plaintiffs' position and those of the group members is thereby enhanced, materially or at all, such that it was worth the risks and costs involved. This may be an important consideration where – as here – the plaintiffs' claims against the directors are a sub-set of the claims against the company. This is a balancing exercise which the plaintiffs' counsel are well placed to undertake. It is not for me to second guess their assessment, save to say that the competing considerations have been clearly identified and weighed. I conclude that the settlement is fair and reasonable *inter partes*.

Is the settlement fair and reasonable *inter se*?

37 As noted at [33], the representative party may gain more from this settlement than the group members. The plaintiffs reduce their exposure to an adverse costs order while the group members receive nothing. That said, it is inevitable that the plaintiffs will receive more in these circumstances. It cannot be avoided. That should not deter a 'walk away' settlement being approved if it is otherwise appropriate to do so. I place considerable weight on the fact that no objection has been received by any group member to the proposed settlement. I conclude that the settlement is fair and reasonable *inter se*.

Orders

38 For these reasons, I make the following orders:

(1) Pursuant to section 173 of the *Civil Procedure Act 2005* (NSW), the settlement of the proceedings as against:

(a) the third defendant is approved on the terms set out in the Deed of Settlement and Release dated 25 November 2022 (**James Settlement Deed**); and

(b) the second defendant is approved on the terms set out in the Deed of Settlement and Release dated 23 December 2023 (**Dalgleish Settlement Deed**).

(2) Pursuant to section 183 of the *Civil Procedure Act 2005* (NSW), the plaintiffs are authorised *nunc pro tunc* to enter into the James and Dalgleish Settlement Deeds for and on behalf of all "Group Members", being those persons who acquired an interest in RCR shares during the period from 28 December 2016 and 12 November 2018, as defined at paragraph 1 of the Amended Summons filed on 6 November 2020.

(3) Pursuant to section 179 of the *Civil Procedure Act 2005* (NSW), the persons affected and bound by the James and Dalgleish Settlement Deeds are the plaintiffs, the second and third defendants, the Group Members and the funders Omni Bridgeway and Burford Capital.

(4) Pursuant to section 7 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW):

(a) paragraphs 40 to 46 of the confidential affidavit of Damian John Scattini affirmed 17 March 2023 (**Scattini Affidavit**),

(b) Confidential Exhibit DS-1 to the Scattini Affidavit, and

(c) Supplementary Opinion dated 4 April 2023,

are to be kept confidential and are not be disclosed to any person until further order on the grounds that the order is necessary to prevent prejudice to the proper administration of justice.

(5) The plaintiffs' and Group Members' claims as against the second and third defendants are dismissed with no order as to the costs of the proceedings as between the plaintiffs and the second and third defendants.

(6) All prior orders as to costs as between the plaintiffs and second and third defendants are vacated.

(7) List for further directions in the Commercial List at 10am on 9 June 2023.

(8) Liberty to apply on three days' notice.

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I certify that this and the 14 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Kelly Rees.

5 April 2023 K. Adams

…….. ……

Dated Associate