

FEDERAL COURT OF AUSTRALIA

Bouchere v Car Festivals Pty Ltd [2022] FCA 1070

File number(s): NSD 1446 of 2019

Judgment of: **BROMWICH J**

Date of judgment: 9 September 2022

Catchwords: **PRACTICE AND PROCEDURE** – application for settlement approval of representative proceedings pursuant s 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) – where there is no litigation funder involved – whether proposed settlement is proposed settlement is fair, reasonable and in the interests of group members as a whole – settlement approved

Legislation: *Federal Court of Australia Act 1976* (Cth) ss 33V; 33ZF
Motor Accidents (Compensation) Act 1979 (NT)
Public Trustee Act 1979 (NT) s 71

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
Mitic v Oz Minerals (No. 2) [2017] FCA 409
Tasfast Air v Mobil Oil Australia Limited [2002] VSC 457

Division: General Division

Registry: New South Wales

National Practice Area: Other Federal Jurisdiction

Number of paragraphs: 19

Date of hearing: 9 September 2022

Counsel for the Applicant: J Sheller SC

Solicitor for the Applicant: Greg Walsh and Co

Counsel for the First and Third Respondents: N Oreb

Solicitor for the First and
Third Respondents:

Hall and Wilcox

Counsel for the Second
Respondent:

H Chiu

Solicitor for the Second
Respondent:

Clyde and Co

Counsel for the Intervener:

The Intervener did not appear

ORDERS

NSD 1446 of 2019

BETWEEN: **LYNELLE BOUCHERE**
Applicant

AND: **CAR FESTIVALS PTY LTD**
First Respondent

NORTHERN TERRITORY MAJOR EVENTS PTY LTD
Second Respondent

SUMMERNATS PTY LTD
Third Respondent

ATTORNEY GENERAL OF THE NORTHERN TERRITORY
Intervener

ORDER MADE BY: BROMWICH J

DATE OF ORDER: 9 SEPTEMBER 2022

THE COURT NOTES THAT:

1. The applicant complied with order 6 of the orders made on 11 August 2022 regarding provision of the Notice of Proposed Settlement to the group members defined in paragraph 1(b) of the applicant's Second Further Amended Statement of Claim filed 27 August 2020 (**Group Members**).
2. No Group Member has opted out or given notice of objection to the proposed settlement of this proceeding.

AND THE COURT ORDERS THAT:

Approval of settlement

3. Pursuant to sections 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), the proposed settlement of the proceeding is approved and the proceedings (including all cross-claims) are dismissed upon the terms of:
 - (a) the individual settlement deeds, copies of which are Exhibits 2(a) to (l) (**Deeds**);
and

- (b) the schedule of proposed distribution of the global settlement sum which appears in Confidential Exhibit **GW2** to the affidavit of Gregory Alexander Walsh sworn 8 September 2022 (**Schedule of Distribution**).
- 4. Pursuant to section 33ZB of the Act, the persons affected and bound by the settlement are the applicant and respondents to the proceedings, the Group Members, and the Motor Accidents Compensation Commission of the Northern Territory.
- 5. Pursuant to section 33ZF of the Act,
 - (a) each Settlement Sum, as defined in the Deeds, must be paid in accordance with the terms of those Deeds and the Schedule of Distribution; and
 - (b) the legal costs and disbursements deposited to in the affidavit of Gregory Alexander Walsh sworn 9 August 2022, are approved.

Trae McLaren

- 6. Pursuant to rule 9.63 of the *Federal Court Rules 2011 (the Rules)*, Jay Bouchere, of 11 Petherick Road, Humpty Doo NT 0836, self-employed welder, be appointed as a litigation representative for Trae McLaren *nunc pro tunc*.
- 7. Pursuant to rule 1.34 of the Rules, the requirements for filing an affidavit in accordance with rules 9.63(3) and 9.64 be dispensed with.
- 8. Pursuant to r 1.33 and r 9.70(3) and s 71 of the *Public Trustee Act 1979 (NT)*, Trae McLaren's apportionment of the settlement sum is to be paid to the Public Trustee in accordance with clause 2(g) of the deed executed on his behalf, to be held for the benefit of Trae McLaren, with that amount and any interest accrued to be paid to Trae McLaren directly upon him reaching majority.

Confidentiality

- 9. Pursuant to ss 37AF and 37AG(1)(a) of the Act, to prevent prejudice to the proper administration of justice, the confidential affidavits of Gregory Alexander Walsh sworn 9 August 2022 and 8 September 2022, and the annexures and exhibits thereto, are:
 - (a) to be treated as confidential;

- (b) to be marked “suppressed” on the Court’s electronic court file;
 - (c) not to be published or made available; and
 - (d) not to be disclosed to any person or entity except the applicant and her legal representatives, with such permitted disclosures to be upon terms that none of those parties or persons disclose that material or any part thereof to any person or entity.
10. The period for which order 9 above operates is 3 years from the date of these orders, which may be varied and in respect of which there is liberty to apply generally.

Final orders

11. This proceedings is dismissed with no order as to costs of the proceeding or the costs of or incidental to the proceeding (including the application for order 1 above), and there be no order as to costs in relation to any reserved or other costs of the proceeding.
12. Pursuant to s 33ZF of the Act, all costs orders previously made in the proceeding are vacated.
13. The parties have liberty to apply.

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

REASONS FOR JUDGMENT

(Delivered ex tempore)

BROMWICH J:

- 1 This is an application under ss 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (Act) for approval of a settlement of a representative proceeding brought by a lead applicant, Ms Lynelle Bouchere. There are 11 other group members, none of whom is a named applicant.
- 2 The proceeding was commenced on 3 September 2019. It arose out of injuries sustained by spectators at a three-day motoring festival held at the Inland Drag Raceway in Alice Springs in the Northern Territory in September 2017. The respondents are companies that were involved in running the motoring festival, Car Festivals Pty Ltd, Northern Territory Major Events Company Pty Ltd and Summernats Pty Ltd. There is also an intervener, the Attorney General of the Northern Territory of Australia, in relation to Ms Bouchere and five of the other group members, by reason them having been paid money under the statutory compensation scheme administered by the Northern Territory's Motor Accidents Compensation Commission (MACC) under the *Motor Accidents (Compensation) Act 1979* (NT).
- 3 On 3 September 2017, the third day of the motoring festival, there was a burnout competition as to which competing car and driver could leave the longest strips of tyre rubber on a designated area called a burnout pad. One of the competitor cars, which was modified to be fuelled by methanol, was driven to perform a burnout on the burnout pad. Flames were emitted, which was not permitted under the competition rules. The flames went in the direction of a spectator area which caused rubbish (including rubber detritus) on the burnout pad to catch alight and be projected towards the spectators. On Ms Bouchere's case, the spectators were situated too close to the burnout pad and for whom there was no adequate physical barrier, making out a clear case of negligence. A range of injuries were suffered by numerous spectators, some very serious and mostly physical, but also psychological, including by Ms Bouchere and the 11 other group members (as well as other spectators who brought separate individual proceedings, which have also settled, subject to final confirmation).
- 4 Ms Bouchere, and via her the other group members, sought orders for loss or damage based on claims under the *Australian Consumer Law* and common law negligence.

5 To complicate matters, just on the pleadings and evidence filed to date, it is apparent to me that there was real scope for there to be increased uncertainty, increased risk of an additional overall hearing time being needed (and thus costs) and increased the risk of appeals by reason that:

- (a) there was at all stages a live issue between the parties as to whether, by reason of the contribution of a motor vehicle to the injuries sustained, the causes of action advanced were precluded by the terms of the *Motor Accidents (Compensation) Act*, which had some possibility, if not likelihood, of ramifications flowing beyond this proceeding;
- (b) there were numerous cross-claims, including between the three respondents; and
- (c) there remained a question of the extent of loss and damage that could ultimately be proven.

6 An unsuccessful mediation took place on 11 November 2021. A second mediation took place over two days, being 28 April 2022 and 31 May 2022. While that second mediation did not directly and immediately result in settlement, the offers flowing each way having a considerable and perhaps predictable gap given the features outlined above, there was ultimately a settlement figure that was arrived at and accepted by Ms Bouchere. The remaining group members had the option of opting out, or objecting, but did neither. A seven day trial to commence on 5 September 2022 was vacated and a settlement hearing listed for the last day of the first week of that trial.

7 Unusually for representative proceedings, there is no litigation funder involved. Instead, the sole practice solicitor for Ms Bouchere, Mr Greg Walsh, has paid the disbursements himself over the past three plus years and conducted the litigation upon the basis of his fees being paid and those disbursements being reimbursed out of the proceeds of a successful result, and not otherwise. Senior and junior counsel have done the same. On the evidence before me, including confidential evidence, I am satisfied that all three lawyers have made a substantial and commendable contribution to the proceeding being able to be settled by compromising their claims to be paid.

8 As in all approval hearings for the settlement of representative proceedings, the live question for determination is whether the proposed settlement is fair, reasonable and in the interests of group members as a whole, and not just in the interests of Ms Bouchere and the respondents. I must be satisfied that is so in order to discharge the protective role of the Court in overseeing and approving a settlement. That role is of particular important in safeguarding the potentially vulnerable position of group members, especially in this case concerning members who are

now residents of the Northern Territory, Western Australia and one in rural New South Wales, and who are unable or otherwise unlikely to be present for the settlement hearing. The hearing was live streamed, but I am not aware of who chose to observe that hearing taking place, noting that it relied upon two open and two confidential affidavits sworn by Mr Walsh.

9 The principles pertaining to settlement approvals as briefly outlined above have been stated in greater detail in many cases, including:

- (a) *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 per Branson J at 258C;
- (b) *Tasfast Air v Mobil Oil Australia Limited* [2002] VSC 457 per Bongiorno J at [4];
- (c) *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 per Jacobson, Middleton and Gordon JJ at [8] (cited with approval in *Wigmans v AMP Limited* [2021] HCA 7; 270 CLR 623 at [82], albeit in a different context); and
- (d) *Mitic v Oz Minerals (No. 2)* [2017] FCA 409 per Middleton J at [7]-[9].

10 Importantly, by reason of Mr Walsh's role and contribution, there is no issue of any funder's commission being made and no settlement scheme to be administered and paid for. As that is often an issue of greatest concern, followed by concerns about excessive legal costs, which are also not a feature of this case, the approval process and decision as to approval to be made is considerably easier than in cases in which those aspects require close consideration.

11 The settlement sum offered as a collective effort from the respondents, not differentially identified to the Court, is \$3.2 million. Of that offer sum, which has been accepted by Ms Bouchere, \$1 million will go towards legal costs and disbursements, a figure that I am satisfied involves significant compromises on the part of Mr Walsh and senior and junior counsel as noted above. That leaves a sum of \$2.2 million to be distributed to Ms Bouchere and the other group members. Also to be taken into account are gratuitous payments made by various of the respondents to all of the group members which are not sought to be recovered, totalling \$163,848.97, and payments made by MACC to Ms Bouchere and five other group members, totalling \$58,483.01, which MACC will not recoup either. Thus the overall compensation pool should be effectively added to by a sum of \$222,331.98.

12 The 12 settlement deeds signed by the respondents and separately by Ms Bouchere and by each of the other group members fall into two categories: six deeds to which MACC is a party so as to legally preclude recouping payments made, and six deeds to which MACC is not a party

because that does not apply. A copy of the 12 deeds are before me and admitted as Exhibit (a) to (l), 10 with signature pages signed by Ms Bouchere and nine other group members. At the time of giving these reasons orally, an 11th deed had the signature page which had yet to be married up with the rest of the deed, and a 12th deed has been executed by a litigation representative on behalf of a group member who is a minor, an issue detailed further below, with the signature page yet to be sent to Mr Walsh and on-sent to me. Those two signature pages will be with me before these reasons are published and before the orders I make today are entered.

13 I have considered each type of deed and am satisfied as to the effect of each for the purposes of settlement approval.

14 The settlement arrived at was very much a genuine compromise reflecting the evaluation of litigation risk by all concerned and uncertainty. In that context, the respondents support the settlement approval upon the basis of no admission of liability. They effectively still maintain that the proceeding could well have been successfully defended, while Ms Bouchere and the other group members were clearly hopeful of doing better, perhaps much better. No party could be comfortably certain that their argument would prevail, notwithstanding any confidence that might have been expressed in that regard.

15 I have had regard to the confidential opinions of senior and junior counsel, which have carefully and candidly expressed their assessment and related views on the possible outcomes and the prospects and risks. Doubtless Ms Bouchere and the other group members would have liked to do better. But the true comparator was not between the final amount each will confidentially receive and what they might have received if their case had been wholly successful, but between what they will receive and the risk that they might have got nothing at all.

16 There is one other complication to be addressed, adverted to above. One of the group members, Master Trae McLaren, is a 15 year old minor, and the son of another group member, Ms Karina Tiedeman. While Ms Tiedeman was willing to be her son's litigation representative, the respondents raised a legitimate concern about a possible conflict of interest in her assuming that role. In her place, his 35 year old brother, Mr Jay Bouchere, is willing to be his litigation representative. I have before me, admitted as Exhibit 1, a partially obscured signature page of a document signed by Mr Bouchere, consenting to being Trae McLaren's litigation representative. A full copy of document as sent to Mr Bouchere is in evidence. That consent document includes his acknowledgment of receiving legal advice from Mr Walsh to the effect

that, if the settlement was not approved and the matter instead proceeded to a defended hearing which failed, he could be liable for costs. I was informed from the Bar table, and accept, this advice was in fact given by telephone by Mr Walsh and by Ms Bouchere's senior counsel, Mr James Sheller SC. Mr Walsh also gave oral evidence to that effect.

- 17 I am satisfied that in all the circumstances that the agreed settlement amount and terms of distribution reflect a fair, reasonable and appropriate compromise from the perspective of the group members, especially given the legal complexity of the case that would otherwise have gone to trial, the uncertain likelihood of the success of Ms Bouchere and thereby the other group members, the real risk of success by the respondents, and the inevitability of judgment delay and quite likely appeal proceedings on a range of likely appeal points that are not necessary to detail. In all the circumstances, the settlement is, in all the circumstances, within the appropriate range.
- 18 Turning to the question of costs, the settlement took place at a very late stage. All that was left to be incurred on the applicants' side was trial preparation and the trial itself, although other evidentiary issues may have emerged. The costs that have been incurred are certainly not insubstantial, but they are a lot less than they would have been had the matter gone to trial and beyond and without the compromise of the lawyers. I am satisfied that proper efforts were taken to contain and minimise costs.
- 19 In all the circumstances, I am satisfied that the settlement arrived at is fair and reasonable to all group members, and that it is appropriate to approve that settlement. I make orders to that effect.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate: 

Dated: 28 September 2022