



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD362/2016

PETERSEN SUPERANNUATION FUND PTY LTD ACN 136 059 562

Plaintiff

BANK OF QUEENSLAND LIMITED and another named in the schedule

Respondent

ORDER

JUDGE: JUSTICE MURPHY

DATE OF ORDER: 11 July 2018

WHERE MADE: Sydney

THE COURT NOTES THAT:

- A. Vannin Capital Operations Limited (**Vannin**) undertakes to the Applicant, the Group Members, and the Court, by its counsel that:
- (i) upon receipt of the reimbursements of costs and payment of remuneration under these Orders it shall be satisfied as to the whole of its rights under its funding agreements with the Applicant and Group Members and shall not take any step to enforce those funding agreements separately from these Orders;
 - (ii) the ATE premium paid to its solicitors is received to the benefit of the Applicant and solely for the purpose of payment on behalf of the Applicant to the ATE insurer in satisfaction of the Applicant's obligations under the ATE policy; and
- B. Quinn Emanuel Urquhart Sullivan (**Quinn Emanuel**) undertakes to the Applicant, the Group Members, and the Court, by its counsel that, upon receipt of the conditional fees pursuant to these Orders, it shall be satisfied as to the whole of its rights under its costs agreements with the Applicant and Group Members and shall not take any step to enforce any costs agreement separately from these Orders.



THE COURT ORDERS THAT:

Intervention

1. Pursuant to Order 9 rule 12 of the *Federal Court Rules 2011* (the **Rules**), Vannin have leave to intervene in the proceeding to:
 - (a) file its further amended interlocutory application dated 2 July 2018 (**Further Amended Application**); and
 - (b) be heard on the Applicant's application pursuant to section 33V of the *Federal Court of Australia Act 1976 (Cth)* (the **FCA Act**) (**33V application**) in respect of the relief sought in the Amended Application.

Certain Costs Approval

2. Pursuant to sections 33V and 33ZF of the FCA Act the following costs (inclusive of GST) be approved as fair and reasonable:
 - (a) \$38,500 for Gilbert & Tobin's further professional fees and disbursements;
 - (b) \$10,523.30 for the fees of the Distribution Agent (as that term is defined in paragraph 5(a) of the Orders dated 6 October 2017); and
 - (c) \$19,917.48 for the fees and disbursements of the Referee (as that term is defined in paragraph 2 of the Orders dated 27 March 2018).

Notices to Group Members and Expiry of Appeal

3. The 'notice to registered group members regarding the limitation date' (**Limitations Date Notice**), being Annexure "A" to these Orders, be distributed to all Registered Group Members (as that term is defined in the Settlement Distribution Scheme) by the Scheme Administrator together with the letters to be distributed to Registered Group Members in accordance with the Settlement Distribution Scheme.
4. The date by which the Scheme Administrator is to send to Registered Group Members the letters containing the statements of RGM Assessed Loss, contained in Clause 4.1 of the Settlement Distribution Scheme, be extended to 5:00pm on the business day after the Limitations Date Notice to registered group members on the limitation date is approved by the Court.



Appeal

5. Pursuant to sections 33ZC(6) and 33ZF of the FCA Act, and rule 35.13(b) of the Rules, the time by which any group member seeking to appeal the Orders dated 30 May 2018 (**30 May Orders**) approving the settlement, must file any appeal or application for leave to appeal is 11 July 2018.

Releases

6. The proceedings are dismissed as against the Respondents with no order as to costs with the intention that the Applicant and group members are prevented from bringing and prosecuting fresh proceedings, or claiming the same relief in fresh proceedings, as against the Respondents or either of them.


Release of security

7. All monies paid into Court by Vannin on behalf of the Applicant as security for costs in the Proceedings be released to Baker McKenzie's trust account for the benefit of Vannin after 11 July 2018 unless an appeal is commenced on or before that date in relation to the 30 May 2018 Orders, in which case the monies are not to be released until further order.

Other

8. The Scheme Administrator and the parties have liberty to apply on three days' notice.

Date that entry is stamped: 11 July 2018


Registrar



ANNEXURE “A”

PETERSEN SUPERANNUATION FUND PTY LTD V BANK OF QUEENSLAND & ANOR (NSD 362/2016)

NOTICE TO GROUP MEMBERS REGARDING LIMITATION PERIODS

Introduction

1. On 25 May 2018, the Federal Court of Australia approved the settlement of *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* (Federal Court of Australia proceedings NSD362/2016) (the **Class Action**) and the distribution of the settlement sum of \$12 million (**Settlement Amount**) in accordance with the Settlement Distribution Scheme.
2. A copy of the Settlement Distribution Scheme approved by the Court may be accessed on the Federal Court of Australia’s class actions webpage, here: <http://www.fedcourt.gov.au/law-and-practice/class-actions/class-actions>.
3. On 4 July 2018 the Court heard the balance of the settlement approval application which concerns the amount of legal costs and litigation funding charges to be deducted from the Settlement Amount. In due course the Court will make orders and give reasons in relation to the approved costs and funding charges as well as for approving the settlement.
4. In the meantime the Court has directed that the Applicant provide this Notice to Group Members to explain why the Settlement Distribution Scheme provides that. Group Members will not receive a distribution from the Settlement Amount in relation to any losses they suffered before 10 March 2010. This Notice has been approved by the Court.
5. This Notice is not legal advice and Group Members may wish to obtain their own legal advice in respect of the matters the subject of this Notice.

Limitation date

6. The law allows a certain amount of time within which a person may commence legal proceedings against another person. That amount of time is often referred to as a ‘limitation period’. Claims brought after the expiry of a limitation period will be barred



from recovering any monetary damages.

7. The part of the Settlement Distribution Scheme that provides that Group Members will not receive a distribution from the Settlement Amount for losses they suffered before 10 March 2010 is based in the relevant limitation periods for Group Member's claims. It is a key aspect of the Settlement Distribution Scheme.
8. This outcome reflects the legal position in relation to limitation periods that the Court has accepted existed in the Class Action proceedings brought by the Applicant on behalf of itself and class members against Bank of Queensland Ltd (**BOQ**) and DDH Graham Ltd (**DDH**).
9. In the proceedings, the Applicant made two claims against BOQ and DDH.
 - (a) The first claim was for breach of the contract which governed each Group Member's account with BOQ, known as a Money Market Deposit Account.
 - (b) A secondary or fall-back claim against BOQ and DDH was for knowingly assisting Sherwin Financial Planners Pty Ltd (**SFP**) in breaching its fiduciary obligations to Group Members.
10. Each of BOQ and DDH invoked the limitation period as part of their defence to the Class Action.
11. The limitation period for the first claim against BOQ and DDH for breach of contract is six years from the date that the contract was breached. The Class Action was commenced on 10 March 2016. Therefore a breach by BOQ or DDH that occurred more than six years earlier, that is before 10 March 2010 (**Limitation Date**), is out of time. Any Group Member that suffered loss from a breach of contract that occurred before the Limitation Date cannot recover it from BOQ or DDH through the Class Action.
12. That is so even where the breach of contract was not identified until some time after 10 March 2010. The proper operation of the law means that BOQ and DDH may rely on this limitation defence even where a Group Member was unaware of SFP's fraudulent misappropriations or a Group Member was unaware of the existence of the MMDA in their name until the collapse of SFP in early 2013.
13. The same limitation period does not apply directly to the second claim against BOQ



and DDH, for knowingly assisting SFP's breach of its fiduciary obligations, but BOQ and DDH would argue that the six-year period should apply to these claims by analogy. Counsel for the Applicant submitted, and the Court accepted, that in the circumstances of this case and having regard to other significant difficulties associated with the second claim, a six year limitation period was likely to apply to the second claim had the Class Action gone to trial.

14. Accordingly the Court approved the Settlement Distribution Scheme including the provision that Group Members not receive a distribution from the Settlement Amount for losses they suffered before 10 March 2010.
15. These matters will be addressed further in the reasons of the Court when the reasons are delivered.



Schedule

No: NSD362/2016

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Respondent: DDH GRAHAM LIMITED