



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD362/2016

PETERSEN SUPERANNUATION FUND PTY LTD (ACN 136 059 562)

Applicant

BANK OF QUEENSLAND LIMITED and another named in the schedule

Respondent

ORDER

JUDGE: JUSTICE MURPHY

DATE OF ORDER: 26 April 2018

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

Hearing Date of the Section 33V Application

1. The application for approval of the proposed settlement, settlement scheme, funding commission and legal costs and disbursements be listed for 25 May 2018 at 10:15am before Justice Murphy (**Section 33V Application**).
2. The notice of proposed settlement in the form marked Annexure A to these Orders (**Notice of Proposed Settlement**) is approved under sections 33X and 33Y of the *Federal Court of Australia Act 1976* (Cth) (**Act**).

Reference regarding Costs varying the Orders made by Justice Lee on 27 March 2018

3. Pursuant to sections 33ZF and 37P(2) of the Act and rule 28 of the *Federal Court Rules 2011* (Cth) (**FCR**), the following questions be referred to Roland Patrick Matters, Cost Consultant (**Referee**) for the purposes of the Referee conducting an inquiry as to the question of whether such costs are fair and reasonable (**Reference**) and making a report in writing to the Court stating the Referee's opinion on the following (**Report**):
 - (i) the legal costs and disbursements of the proceeding charged or proposed to be charged by the Applicant's former solicitors (Quinn Emanuel);



- (ii) the costs and disbursements of the proceeding claimed by Vannin;
- (iii) the legal costs and disbursements of the proceeding charged or proposed to be charged by the Applicant's solicitors (Gilbert + Tobin);
- (iv) the costs and disbursements of the security for costs application; and
- (v) the quantum of any costs thrown away by Quinn Emanuel's withdrawal from the proceeding,

(the **Reference Questions**).

4. The Reference commence immediately or on such other date as ordered by the Court or nominated by the Referee.
5. The Referee shall direct that submissions be made to him by each of Quinn Emanuel, Gilbert + Tobin and Vannin in relation to the Reference Questions and shall take those submissions into account in providing his Report.
6. The Referee is to further consider and implement such manner of conducting the Reference as will, without undue formality or delay, enable a just, efficient, timely and cost-effective resolution of the Reference to allow completion of the Report.
7. The Referee shall submit the report to the Court in accordance with FCR 28.66 to the Registrar on or before 18 May 2018.
8. Without affecting the powers of the Court as to costs, the Applicant is to be liable to the Referee for the fees payable to him.
9. The costs of the Reference shall form part of the Applicant's costs and shall be deducted from the settlement sum prior to distribution of the settlement sum to eligible group members.

Timetable for the hearing of the Section 33V Application

10. The Applicant is to cause the Notice of Proposed Settlement to be distributed to the group members by the following means:
 - (i) the solicitors for the Applicant are to instruct the Distribution Agent (as that term is defined in paragraph 5(a) of the Orders dated 6 October 2017) to cause the distribution of the Notice of Proposed Settlement by 5pm on 30 April 2018



to the email addresses and postal addresses (to the extent that such addresses have been provided) referred to in the Class Member Contact Schedule (as that term is defined in paragraph 5(a) of the Orders dated 6 October 2017);

- (ii) the solicitors for the Applicant are to instruct the Distribution Agent to inform the solicitors for all of the parties of the details of any Notice of Proposed Settlement which are returned to the Distribution Agent undelivered; and
 - (iii) continuously throughout the period from 30 April 2018 to 25 May 2013, the Notice of Proposed Settlement is to be displayed on the website of the Federal Court of Australia and be available for inspection at the District Registry of the Court in Sydney, Melbourne, Canberra, Brisbane, Adelaide, Perth, Hobart and Darwin.
11. The costs of sending, displaying and publishing the Notice of Proposed Settlement as described in Order 10 above be paid by the Applicant, on the basis that all of the above costs will subsequently fall to be dealt with by the Court as part of the costs of the proceeding.
12. Any group member that intends to appear and be heard in respect of the Section 33V Application must provide written notice (by completing the Notice of Objection to Settlement Form included in the Notice of Proposed Settlement) to the Federal Court of Australia and to the Applicant's solicitors, including any submissions to the Court, by no later than 18 May 2018.

Common fund order

13. By 9 May 2018, Vannin shall file on a confidential basis and serve on the Applicant all confidential evidence and submissions upon which it relies to seek a Common Fund Order, in relation to which it intends to seek a confidentiality order. Such evidence shall, amongst other things, address the amount from the settlement sum which Vannin seeks to be paid (including legal costs, disbursements, funding commission sought) and provides a breakdown (including calculation and supporting documents) of all such amounts.
14. By 9 May 2018, Vannin shall file and serve on the parties all non-confidential evidence and submissions upon which it relies to seek a Common Fund Order.



Approval of proposed settlement, settlement scheme, funding commission, legal costs and disbursements

15. Quinn Emanuel be granted leave to appear at the hearing of the Section 33V Application in relation to the question of costs thrown away by Quinn Emanuel's withdrawal from the proceeding.
16. By 22 May 2018, the Applicant shall file and serve on the parties (including Vannin) all non-confidential affidavit material in respect of the proposed approval of the settlement, including the Settlement Distribution Scheme.
17. By 22 May 2018, the Applicant shall file on a confidential basis, and provide to Vannin on a confidential basis, any material over which it intends to seek orders for confidentiality in respect of the proposed approval of the settlement, Settlement Distribution Scheme, funding commission, and legal costs and disbursements.
18. By 22 May 2018, the Applicant shall file and serve submissions in respect of the proposed approval of the settlement, including the settlement scheme.
19. Leave is granted to re-list the matter on 2 business days' notice.

Confidentiality

20. Pursuant to ss 37AF and 37AG(1)(a) of the Federal Court of Australia Act 1976 (Cth), until the hearing of the s 33V application or further order of the Court, in order to prevent prejudice to the proper administration of justice, the confidential exhibit marked 'AEP1' to the affidavit of Alice Elizabeth Pailthorpe affirmed and filed 24 April 2018 is not to be published or made available and not to be disclosed to any person or entity.

Date that entry is stamped: 27 April 2018


Registrar



“A”

Petersen Superannuation Fund Pty Ltd v Bank of Queensland & Anor NSD 362/2016

NOTICE OF PROPOSED SETTLEMENT

This notice contains important information about the proposed settlement of the Petersen Superannuation Fund Pty Ltd v Bank of Queensland Class Action. You should read this notice carefully. If there is anything in it that you do not understand, you should seek legal advice.

- 1 The Federal Court of Australia has ordered that this notice be published for the information of group members in the Federal Court of Australia proceeding *Petersen Superannuation Fund Pty Ltd v Bank of Queensland & Anor* NSD 362 of 2016 (**Proceeding**).
- 2 You have received this notice because you may be a group member in the Proceeding. The outcome of the Proceeding directly affects your rights against Bank of Queensland Limited ABN 32 009 656 740 (**BOQ**) and DDH Graham Limited ABN 28 010 639 219 (**DDH**).
- 3 The parties to the Proceeding have agreed to terms for the settlement of the Proceeding as described at paragraphs 10 to 13 of this Notice. The settlement will not take effect unless and until it has been approved by the Federal Court. **If you do not oppose the settlement, no action is required by you. If you wish to oppose the settlement you must take the steps outlined in paragraph 19 of this Notice.**

Who is affected?

- 4 The Proceeding is brought by Petersen Superannuation Fund Pty Ltd ACN 136 059 562 (**Applicant** or **Petersen**) on their own behalf and on behalf of persons who invested money in a BOQ financial product, namely the “Money Market Deposit Account” (**MMDA**). The Proceeding is funded by a litigation funder, Vannin Capital Operations Limited (**the Funder**).
- 5 The Applicant is represented by Gilbert + Tobin. The former solicitors for the Applicant, Quinn Emanuel, ceased to act for the Applicant on 27 March 2018. Gilbert + Tobin’s contact details are set out in paragraph 20 below.

Claims against BOQ and DDH

- 6 Petersen, together with other persons in the class (**group members**), were advised by Sherwin Financial Planners Pty Ltd (**SFP**) and/or other persons and companies associated with SFP (collectively **Sherwin**) to deposit funds into a BOQ MMDA for the purpose of investment.
- 7 Petersen alleges that Sherwin acted without authority and fraudulently in respect of the funds invested in Petersen’s BOQ MMDA (the **Petersen MMDA**).



- 8 Petersen contends that BOQ and DDH, as operators and administrators of the Petersen MMDA, ought to have been on notice of any suspicious activity taking place, including any indicia of fraud, on the Petersen MMDA by Sherwin, pursuant to the obligations owed by BOQ and DDH to Petersen under the terms of the MMDA (the **Petersen Contract**).
- 9 BOQ and DDH deny Petersen's allegations. Further to this, BOQ has filed a cross claim against Petersen. In effect, the cross claim alleges that if BOQ is found to have breached the Petersen Contract and the breach (or breaches) are found to have caused loss or damage to Petersen, that being the loss of Petersen's investment funds, then Petersen is liable to indemnify BOQ under the terms of the Petersen Contract for its financial loss. Petersen denies BOQ's allegations.

The Terms of the Proposed Settlement

- 10 The Applicant, BOQ and DDH have agreed to terms for the settlement of the Proceeding without any admission of liability, subject to the approval of the Federal Court.

The settlement amount

- 11 The terms of the proposed settlement provide that the claims of the Applicant and group members are settled for an amount of \$12 million (**Settlement Sum**) inclusive of the Applicant's legal costs and disbursements (comprising a payment of \$6 million from DDH and a payment of \$6 million from BOQ). *Please note the settlement agreement requires the Settlement Sum to be kept confidential – it is only provided to you so you may consider your rights in relation to the proposed settlement.*

Some group members are to be bound by the settlement but excluded from sharing in the Settlement Sum

- 12 The proposed settlement is to be binding upon all group members in the Proceeding. It provides that all group members release the respondents from liability and are precluded from bringing any further action against the respondents in relation to the subject matter of the Proceeding. However:
 - (a) those group members who did not complete and submit a Class Member Registration Form to Quinn Emanuel by 4.00pm AEST on 14 December 2017 are **not** permitted to share in the Settlement Sum. Only those group members who completed and submitted that form by that date are so entitled; and
 - (b) because of time limits said to apply in relation to group member's claim, those group members who suffered loss or losses by reason of transactions on the group member's MMDA which occurred on or before 10 March 2010 are **not** permitted to share in the Settlement Sum with respect to losses suffered by reason of such transactions.

Deductions from the Settlement Sum before distribution to group members

- 13 The Settlement Sum is proposed to be distributed as provided in the Settlement



Distribution Scheme which will be prepared prior to the Court hearing the application for settlement approval. The following amounts are proposed to be deducted from the Settlement Sum before the balance is distributed to those group members who are entitled to share in the settlement monies:

- (a) a litigation funding commission payable to the Funder. The Applicant and some group members (**funded group members**) have entered into litigation funding agreements with the Funder (**funding agreements**). Under the funding agreements, the Funder is entitled to be paid a 25% commission of the funded group members' share of the Settlement Sum, plus reimbursement of costs or disbursements it has paid, or will pay.

The Funder has no contractual entitlement to require group members who did not enter into a funding agreement (**unfunded group members**) to pay litigation funding charges. However, it is usual for the Court to make orders that have the result that all group members have amounts deducted from their share of the Settlement Sum, so that all group members that are entitled to share in a settlement receive the same pro rata share of the settlement 'in hand'.

- (b) the legal costs and some disbursements (**Costs**) charged by the former solicitors for the Applicant, Quinn Emanuel, estimated at \$4.16 million plus GST. The amount of the Costs to be deducted is a matter for Court approval following an inquiry and report as to the reasonableness of the Costs by an independent Court-appointed referee;
- (c) certain costs and disbursements incurred on behalf of the applicant and group members, that the Funder has paid, or will pay, and which are to be reimbursed to it (**Funder Costs**). Vannin has been invoiced approximately \$3 million in Funder Costs, as at 24 April 2018, and estimates a further \$280,000 will be incurred before the completion of the class action. Again, these deductions will be reviewed by the Court, which will decide the reasonable amounts permitted to be charged;
- (d) the costs and disbursements of administering the Settlement Distribution Scheme (**Scheme Administration Costs**), estimated at \$61,000 plus GST; And
- (e) an amount of \$25,000 to reimburse the Applicant for the loss and expense it suffered in prosecuting the Proceeding for the benefit of group members.

Common Fund Order or a Funding Equalisation Order?

- 14 The Funder has applied to the Court for orders that unfunded group members be bound by similar litigation funding terms as if they had entered into a funding agreement (**Common Fund Order**). If a Common Fund Order is made all group members will be required to pay the Funder a funding commission at a reasonable Court-approved percentage rate, no more than 25% of the Settlement Sum of \$12 million.



- 15 The Applicant opposes the Common Fund Order the Funder seeks. It seeks what is known as a “funding equalisation order”, under which unfunded group members who receive monies through the settlement will have an amount deducted from their share of the settlement as if they had entered into a funding agreement. The deducted amounts will be distributed pro rata across the class as a whole. The Funder will receive no more in total than it is entitled to receive from funded group members.

Court approval

- 16 The settlement will not take effect unless and until it has been approved by the Federal Court. The Applicant will seek this approval at a hearing **at 10.15 am on 25 May 2018** in the Federal Court located in the Law Courts Building, Queens Square, Sydney. Group members may attend this hearing.
- 17 If approved, the settlement will bind all group members (other than those who have previously opted out of the Proceeding). If Court approval is granted no group member will be able to take further action against BOQ or DDH in relation to the subject matter of the Proceeding.
- 18 If the Court does not approve the settlement the Proceeding will return to Court where it will continue to be litigated by the Applicant and defended by BOQ and DDH.

If you wish to oppose the settlement

- 19 If you wish to make submissions as to why the Federal Court should not approve the proposed settlement, or the Settlement Distribution Scheme including the proposed deductions from the Settlement Sum you must file with the Court and serve on Gilbert + Tobin the attached Notice of Objection to Settlement Form, by no later than 18 May 2018, together with any evidence and submissions on which you wish to rely. Further, you or your legal representative may attend the Court hearing on 25 May 2018 to further explain why you consider the proposed settlement should not be approved.

Contact details

- 20 The address for the Applicant’s solicitors, Gilbert + Tobin is:

Gilbert + Tobin
Att: Crispian Lynch / Alice Pailthorpe
Level 35, Tower Two
200 Barangaroo Avenue
Barangaroo
NSW 2000

- 21 The address for the Federal Court is:

Petersen Superannuation Fund Pty Ltd v Bank of Queensland & Anor NSD
362/2016
Federal Court of Australia
NSW District Registry



Law Courts Building
Queens Square
NSW 2000

Further Information

- 22 Please consider the above matters carefully. If there is anything of which you are unsure, you can contact Gilbert + Tobin on (02) 9263 4632 or by email apailthorpe@gtlaw.com.au, or seek your own legal advice.



Notice of Objection to Settlement Form

No. NSD 362 of 2016

Federal Court of Australia
District Registry: New South Wales
Division: General

PETERSEN SUPERANNUATION FUND PTY LTD

Applicant

BANK OF QUEENSLAND and another named in the schedule

Respondents

To: Gilbert + Tobin
Att: Crispian Lynch / Alice Pailthorpe
Level 35, Tower Two
200 Barangaroo Avenue
Barangaroo NSW 2000

The group member identified below gives notice that an objection is made to the proposed settlement of the above-named representative proceeding. The group member's written reasons for the objection are attached to this notice.

Name of group member:	
Person completing this form (print):	
Authority of person completing this form (eg., company director, lawyer)	
Telephone contact:	
Postal address	

The Group Member does * / does not * intend to appear at the hearing of the application for approval of the Settlement.

***strike out whichever is not applicable**

Date:

.....
Signed by: [Name]

Capacity (e.g. group member or lawyer for group member):

(Note: the written reasons for the objection must be attached to this notice.)



Schedule

No: NSD362/2016

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Respondent: DDH GRAHAM LIMITED

Intervener: VANNIN CAPITAL OPERATIONS LIMITED