FEDERAL COURT OF AUSTRALIA

McNickle v Huntsman Chemical Company Australia Pty Ltd (Settlement Approval) [2024] FCA 1353

File number:	VID 243 of 2020
Judgment of:	**LEE J**
Date of judgment:	22 November 2024
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – application for settlement approval pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – where applicant unsuccessful in initial trial concerning the alleged carcinogenic effects of Roundup produced by the Monsanto Company – where negligible prospects of any successful appeal – settlement approved – orders made
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 33V
Cases cited:	*Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119 *Luke v Aveo Group Limited (No 3)* [2023] FCA 1665 *McNickle v Huntsman Chemical Company Australia Pty Ltd (Costs)* [2024] FCA 883 *McNickle v Huntsman Chemical Company Australia Pty Ltd (Initial Trial)* [2024] FCA 807
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	19
Date of hearing:	22 November 2024
Counsel for the applicant:	Ms M Szydzik SC with Ms R Singleton
Solicitor for the applicant:	Maurice Blackburn
Counsel for the respondents:	Mr S Finch SC with Mr D Habashy

Solicitor for the respondents: Herbert Smith Freehills

ORDERS

VID 243 of 2020

BETWEEN:	**KELVIN MCNICKLE** Applicant
AND:	**HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD (ACN 004 146 338)** First Respondent
	MONSANTO AUSTRALIA PTY LTD (ACN 006 725 560) Second Respondent
	MONSANTO COMPANY Third Respondent

ORDER MADE BY:	**LEE J**
DATE OF ORDER:	**22 NOVEMBER 2024**

THE COURT ORDERS THAT:

1. Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until 5pm on 14 December 2027, the figures contained in paragraphs [15], [17]–[18] of what is described as the "Confidential Affidavit of Lee Taylor" affirmed on 19 November 2024, together with its Annexures (being LT-51, LT-52 and LT-53) are to remain confidential and their publication be prohibited (**Confidential Material**).

2. For the purposes of s 33V of the FCA Act, the settlement of the proceeding be approved on the terms set out in the deed of release dated 11 November 2024.

3. For the purposes of s 33ZB of the FCA Act, the settlement of the proceeding approved by this order affects (and hence binds) all current group members in the class action (being those described in paragraph 1 of the Second Further Amended Statement of Claim filed on 19 October 2020 who did not opt out).

4. The proceeding be dismissed.

5. There be no order as to costs and all outstanding costs orders be vacated.

6. The confidentiality order made in Order 1 above does not prevent a group member, upon application to the Associate to Justice Lee, obtaining access to the Confidential Material prior to 13 December 2024, upon provision of an undertaking to the Court to keep the Confidential Material confidential to the group member and any legal representative acting for the group member (with any such undertaking to be provided to the parties).

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

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

LEE J:

1 It is unnecessary for me to canvass the background to this proceeding, which is set out, in detail, in several earlier judgments of the Court and particularly in *McNickle v Huntsman Chemical Company Australia Pty Ltd (Initial Trial)* [2024] FCA 807 (**initial trial judgment**).

2 In that initial trial judgment, I found that the applicant in this class action, Mr McNickle, had not discharged his legal onus of proving, on the evidence adduced in the initial trial, that the use of and/or exposure to Roundup can increase an individual's risk of developing non-Hodgkin lymphoma (**NHL**) or cause an individual to develop NHL. Later, I made orders which, among other things, provided that Mr McNickle pay the respondents' (collectively, **Monsanto**) costs of the proceeding up to the date of the initial trial judgment, limited to the party/party costs of Monsanto that would have been incurred in the event that a form of initial trial relating to general causation had been ordered on 12 October 2020 (instead of 26 April 2023) (see *McNickle v Huntsman Chemical Company Australia Pty Ltd (Costs)* [2024] FCA 883).

3 In this latter regard, it should be noted that the solicitors for Mr McNickle, Maurice Blackburn, proffered an undertaking to the Court to the effect that it would, on behalf of Mr McNickle, pay to Monsanto any costs that Mr McNickle was required to pay in accordance with a costs order. Monsanto also proffered an undertaking to the Court that it would not enforce any costs order made against Mr McNickle directly.

4 This judgment is prompted by the fact that Mr McNickle, Maurice Blackburn, and Monsanto have now entered into a conditional agreement to settle the proceeding. In broad terms, the settlement provides for a mutual release whereby Mr McNickle and his solicitors are released from payment of Monsanto's costs of the proceeding, and Monsanto is released from Mr McNickle and group members' claims. The mutual release is conditional upon, among other matters, the Court's approval of the resolution of the proceeding under s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).

5 In considering the approval application, I have been provided with a confidential opinion of counsel as to whether the proposed settlement of the proceeding is fair, reasonable, and in the interests of group members as a whole and, more particularly, as to:

(1) the risks faced by Mr McNickle in respect of any appeal against the initial trial judgment;

(2) the risks faced by Mr McNickle in respect of establishing liability, specific causation and loss and damage at any further trial(s);

(3) the ability of Monsanto to withstand a judgment;

(4) the fairness and reasonableness of the proposed settlement;

(5) the terms of the proposed settlement; and

(6) objections made by group members.

6 There is no need to rehearse these matters in any detail. Subject to a matter to which I will return, for the reasons explained in the confidential opinion, I agree that notwithstanding the proposed settlement provides no financial benefit to Mr McNickle and group members, it is a fair and reasonable settlement having regard to the matters set out in the opinion.

7 It is unnecessary to set out the relevant principles as to approval, which are well known. It suffices to note that the fact that a proposed settlement provides no, or minimal, financial benefit to the applicant and group members (but confers a benefit on the solicitors for the applicant) does not *necessarily* mean that the settlement is not fair and reasonable having regard to the interests of the group members: see, for example, *Luke v Aveo Group Limited (No 3)* [2023] FCA 1665 (at [8] per Murphy J); *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119. As Murphy J explained in *Luke* (at [6]–[8]):

> Group members might reasonably ask how the applicants and their lawyers could conscientiously put forward the proposed settlement for approval when the group members are to receive nothing under the settlement, yet the applicants' lawyers seek payment in full for their work …
>
> … There must be a good reason why a settlement could be considered fair and reasonable from the perspective of group members, when the lawyers and litigation funders get more out of the class action than the people for whom the proceeding is brought: *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511 at [29]; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842; 132 ACSR 258 at [244].
>
> However, the fact that a proposed settlement is reached on terms which are quite unfavourable to group members does not necessarily indicate that the settlement is not fair and reasonable having regard to their interests, nor does it necessarily indicate a failure in the operation of the Pt IVA regime. Every day, in courts around the country, litigants are forced to confront the reality that their claims or defences are not as strong as they thought, and are forced to the realisation that it is appropriate to settle the case on unfavourable terms, or even to entirely capitulate …

8 By parity of reasoning, the fact solicitors may be released from a costs liability by a proposed settlement is not an insuperable barrier to approval, depending upon the circumstances.

9 As noted above, the practical effect of the proposed settlement is that: (1) Mr McNickle and the group members will not obtain any benefit (financial or otherwise); (2) Mr McNickle and his solicitors will obtain the benefit of not having to pay Monsanto's costs pursuant to the adverse costs order made on 8 August 2024; and (3) Monsanto obtains the benefit of being released from the claims against it by Mr McNickle and the group members.

10 My reasons for explaining why the proposed settlement is fair and reasonable is substantially based on the opinion of counsel and I am required to be circumspect. But in short, this is because in my assessment, Mr McNickle and the group members have negligible prospects of obtaining any compensation, and there are several significant (and probably insuperable) roadblocks in the way of Mr McNickle and the group members achieving such an outcome.

11 I will manfully resist the significant temptation to engage in detail with the suggestion there may have been possible errors in my liability judgment that give rise to any arguable ground of appeal. It suffices to note counsel have rationally set out a basis for their assessment as to the prospects of success of any appeal and, if an appeal was somehow successful, if the matter was remitted for determination on the record or for a rehearing. Further, both general and specific causation risks are set out in the opinion, which are unnecessary to detail.

12 The evidence suggests there are 1308 registered group members. They have been given notice of the proposed settlement. The settlement was set out in plain English and made it clear that on approval, the claims of group members would be extinguished. Twenty-one group members have objected. I have read and considered these objections. It is hard not to feel real sympathy for those who strongly believe that they, or their loved ones, have suffered because of the asserted wrongs of the respondents. The last thing I wish to do is minimise the distress or disappointment of the objectors but asserting or believing a wrong occurred is very different from being able to prove it in court by reference to the available evidence.

13 The only complication is that Pt IVA contemplates, as part of the statutory scheme, that if an applicant does not want to appeal, group members can appeal an adverse determination of the common questions subject to time limits. Hence upon the appeal period for Mr McNickle expiring it would be theoretically open for a group member to, in effect, take over his role in pursuing the appeal (with all the attendant risks of such a course), although there is no present

indication that any group member either has the desire or means to undertake this step, notwithstanding being notified of the proposed extinguishment of their claims.

14 I have given close consideration as to whether it is fair that I should peremptorily shut out a group member from bringing an appeal where the time for bringing an appeal remains extant, pursuant to orders I have made extending time.

15 But in the end, this application must now be assessed in the context of the reality that any rejection of the proposed settlement would effectively force the solicitors for Mr McNickle to continue to fund an appeal they do not wish to run in order to overturn the liability findings and relieve them of the current obligation to pay a very substantial costs order. The rationale for the solicitors wishing to resolve the case in accordance with the terms proposed and not wishing to expend further costs associated with any appeal is compelling. They have already done a signal service to group members by taking the case this far – a course which has no doubt left the solicitors very considerably out of pocket. This case was very well run by both sides. After Maurice Blackburn worked diligently and skilfully in doing all they could to establish liability for the benefit of group members, it would be unreasonable to continue to expect them to expose themselves to further costs against their current better judgment.

16 Looked at in the round, I am amply satisfied that I should approve the proposed settlement, even though I am conscious that in doing so, it will extinguish group members' rights. I am conscious of the protective and supervisory role I have in relation to group members. The reason I am adopting this course is that no group member has put up their hand to take over an appeal and I think the prospect of them doing so, given the attendant risks and matters canvassed in counsel's opinion, could only be described as one that is highly theoretical.

17 Needless to say, from the point of view of Monsanto, they are paying a price to achieve certainty by this settlement. They are relieving the solicitors for Mr McNickle of a significant liability for adverse costs in exchange for bringing this long litigation to an end. On balance, it seems to me that I should deal with the bargain that has been presented to me and, as I have indicated, I consider it is a bargain worthy of court approval.

18 In making these orders, I am also conscious that if a group member wished to have access to the opinion of counsel, I should facilitate this course and have calibrated confidentiality orders appropriately. No doubt, I would have taken a different approach if there had been some

concrete demonstration of the intention and ability of a group member to file an appeal in a timely manner.

19 Accordingly, I make the following orders:

1. Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until 5pm on 14 December 2027, the figures contained in paragraphs [15], [17]–[18] of what is described as the "Confidential Affidavit of Lee Taylor" affirmed on 19 November 2024, together with its Annexures (being LT-51, LT-52 and LT-53) are to remain confidential and their publication be prohibited (**Confidential Material**).

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4. The proceeding be dismissed.

5. There be no order as to costs and all outstanding costs orders be vacated.

6. The confidentiality order made in Order 1 above does not prevent a group member, upon application to the Associate to Justice Lee, obtaining access to the Confidential Material prior to 13 December 2024, upon provision of an undertaking to the Court to keep the Confidential Material confidential to the group member and any legal representative acting for the group member (with any such undertaking to be provided to the parties).

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

Associate: M. Purcell

Dated: 22 November 2024