

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 03402

5 BOROUGHS NY PTY LTD (ACN 632 508 304)

Plaintiff

v

STATE OF VICTORIA & ORS

Defendants

JUDGE: KEOGH J
WHERE HELD: Melbourne
DATE OF HEARING: 5 and 16 February 2024
DATE OF RULING: 21 February 2024
CASE MAY BE CITED AS: 5 Boroughs NY Pty Ltd v State of Victoria & Ors

<u>APPEARANCES on 5 February24:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	A Hochroth with H Whitwell	Quinn Emanuel Urquhart & Sullivan
For the Defendants	R Doyle SC with R Amamoo	Herbert Smith Freehills
<u>APPEARANCES on 16 February24:</u>		
For the Plaintiff	A Hochroth	Quinn Emanuel Urquhart & Sullivan
For the Defendants	L Brown SC with R Amamoo	Herbert Smith Freehills



HIS HONOUR:

- 1 In this group proceeding the parties seek, by consent, orders fixing the date by which group members may opt out of the proceeding;¹ for notice of that right to be given to group members;² and for group members who wish to obtain a benefit from any settlement that may be reached at a mediation to be conducted in November this year to register their claims.

- 2 I have read the following affidavits:
 - (a) Damian Scattini, solicitor for the plaintiff, affirmed 19 February 2024; and
 - (b) Damian Grave, solicitor for the defendants, sworn 19 February 2024.

- 3 In brief summary, the orders provide for the following:
 - (a) opt-out and soft class closure by 8 July 2024 ('class deadline');
 - (b) notices under s 33Y of the *Supreme Court Act 1986* (Vic) ('Act') to be given by the following means:
 - (i) by ordinary post and email (as available) to all businesses on a list provided by the first defendant dated 15 December 2023 ('List');
 - (ii) by email from the plaintiff's solicitors to group members who have already completed a registration process with them;
 - (iii) the first defendant issuing posts on its relevant social media accounts and website;
 - (iv) the plaintiff publishing a copy of the abridged notice on two separate occasions in appropriate newspapers;
 - (v) display on the Court's website; and
 - (vi) display on the website of Quinn Emanuel.

¹ *Supreme Court Act 1986* (Vic) s 33J.

² *Supreme Court Act 1986* (Vic) ss 33X, 33Y.



- (c) Group members registering their claims by completing an online registration process or returning a completed group member registration form to the solicitors for the plaintiff. To register, each group member must use their best endeavours to submit the required information. Group members who have already completed a registration process with the plaintiff are deemed to be registered group members, but must also use their best endeavours to submit information as required.
- (d) Group members who do not register or opt out by the class deadline will remain group members in the proceeding for all purposes but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any in-principle settlement reached at the mediation conducted in accordance with the orders.
- (e) Mediation to be conducted in November 2024 with a timetable for the plaintiff to provide particulars of its alleged loss and damage, particulars of the alleged loss and damage of at least 10 representative group members and expert reports relating to loss and damage.
- (f) The opportunity for either party to propose a further regime for notification of group members if no in-principle settlement is reached at the mediation and the parties intend to conduct a further mediation.

4 There has been extensive exchange and conferral between the parties about the subject matter of the proposed orders since October 2023. I accept that the parties have engaged in these discussions in good faith, and that they have comprehensively considered relevant issues including the rights of group members, the most efficient means of giving notice, and the group member information necessary to enhance the prospects of a successful mediation.

5 I conclude for the following reasons that the orders are appropriate to ensure that justice is done in the proceeding.



6 First, it is desirable that mediation occur and that appropriate steps be taken to enhance the prospect of the mediation being successful. The proceeding commenced in August 2020. It has been listed for trial on an estimate of 15 weeks, commencing in September 2025. The certainty achieved by a successful mediation would be of obvious benefit to group members, compared to the uncertain future of this complex litigation should it proceed to trial.

7 Second, the size of the open class and the individual and aggregate quantum of claimed losses is uncertain. I accept the parties' agreed position that there is little prospect of a mediation being successful in the absence of critical information that would allow an informed assessment to be made of the total value of the proceeding and of the return to group members from any proposed settlement. The prospect of the mediation being successful will be significantly enhanced by the proposed orders.

8 Third, I am satisfied that the process of giving notice to group members proposed by the parties is appropriate. There are approximately 121,900 Victorian business on the List prepared by the first defendant. That number is consistent with an expert estimate prepared for the plaintiff for the purpose of an earlier group costs order application. I am satisfied the List represents the best information available about the identity and contact details of likely group members. The direct notification by letter and email proposed by the parties will result in notices coming to the attention of the large number of Victorian businesses on the List. Direct notification is appropriately supported by the other means of notification set out in the orders. I am satisfied that the methods of notification are sufficiently broad and comprehensive to ensure that the notice will be brought to the attention of most of the eligible class.

9 Fourth, I am satisfied that the registration process proposed by the parties will not be overly burdensome on group members and will be appropriately administered by an experienced third party provider. Further, the orders provide a number of safeguards in relation to registration. Group members who have already registered with the plaintiff will be deemed to have registered. The orders require that a group member use its 'best endeavours' to provide information required by the registration process



which appropriately allows for circumstances where a group member may be unable to access or provide the required information. A group member may apply by the class deadline to vary the registration orders. A group member who did not register by the class deadline may seek leave to benefit from any in-principle settlement reached at mediation. The time periods provided by the orders are sufficient to allow group members to make an informed decision about the available choices to opt out, register or do nothing.

Conclusion

10 I will make orders as proposed by the parties.

CERTIFICATE

I certify that this and the 3 preceding pages are a true copy of the reasons for Ruling of the Honourable Justice Keogh of the Supreme Court of Victoria delivered on 21 February 2024.

DATED this twenty-first day of February 2024.



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Associate

