

FEDERAL COURT OF AUSTRALIA

Owners of Cargo laden on board the MV “APL England” v CMB Ocean 13 Leasing Company Pte Ltd [2022] FCA 565

File number(s): NSD 66 of 2021

Judgment of: **STEWART J**

Date of judgment: 2 May 2022

Date of publication of reasons: 17 May 2022

Catchwords: **REPRESENTATIVE PROCEEDINGS** – application for approval of class action settlement – where settlement agreement made between subrogated insurers and respondents – where insurers have indemnified group members in respect of the claims sought to be settled – where group members largely unaffected by settlement – where settlement amount constitutes more than 80% of the total claim amount – where settlement amount is to be distributed to the insurers pro-rata in respect of each group member’s claim – where legal costs not deducted from settlement amount and to be paid separately – approval granted

ADMIRALTY – maritime casualty involving scores of lost and damaged containers – representative proceeding by cargo insurers against vessel owner and demise charterer – where group members are numerous cargo owners or receivers – where defence relies on defences available to intervening contractual carriers – circular indemnities and Himalaya clauses – numerous cross claims – whether settlement of proceeding between insurers and defendants should be approved – complex and costly litigation for modest sums – settlement at more than 80% of claimed amount – approval granted

Legislation: *Federal Court of Australia Act 1976* (Cth) ss 33V(1), 33X, 33Y

Marine Insurance Act 1909 (Cth) s 85

Class Actions Practice Note (GPN-CA)

Cases cited: *Court v Spotless Group Holdings Limited* [2020] FCA 1730
Hall v Arnold Bloch Leibler (a firm) (No 2) [2022] FCA 163
Williams v FAI Homes Security Pty Ltd (No 4) [2000] FCA

1925; 180 ALR 459

Division: General Division

Registry: New South Wales

National Practice Area: Admiralty and Maritime

Number of paragraphs: 26

Date of hearing: 29 April 2022

Counsel for the Applicants: E G H Cox SC and M D Swanson

Solicitor for the Applicants: Mills Oakley

Counsel for the First, Second and Third Respondents: G J Nell SC

Counsel for the First, Second and Third Respondents: Thynne & Macartney

Solicitor for the Fourth Respondent: Clyde & Co

Solicitor for the Fifth Respondent: HWL Ebsworth Lawyers

Solicitor for the Seventh Respondent: D Shahan of Kennedys

ORDERS

NSD 66 of 2021

BETWEEN: **ST JOHN AMBULANCE AUSTRALIA LTD** (and others named in the Schedule)
First Applicant

AND: **CMB OCEAN 13 LEASING COMPANY PTE LTD** (and others named in the Schedule)
First Respondent

AND BETWEEN: **CMB OCEAN 13 LEASING COMPANY PTE LTD** (and another named in the Schedule)
First Cross-Claimant on the First Cross-Claim

AND: **ST JOHN AMBULANCE AUSTRALIA LTD** (and others named in the Schedule)
First Cross-Respondent on the First Cross-Claim

AND BETWEEN: **CH ROBINSON INTERNATIONAL INC** (and another named in the Schedule)
First Cross-Claimant on the Second Cross-Claim

AND: **ANL SINGAPORE PTE LTD**
Cross-Respondent on the Second Cross-Claim

AND BETWEEN: **COSCO SHIPPING LINES CO LTD**
Cross-Claimant on the Third Cross-Claim

AND: **CMB OCEAN 13 LEASING COMPANY PTE LTD** (and others named in the Schedule)
First Cross-Respondent on the Third Cross-Claim

ORDER MADE BY: **STEWART J**

DATE OF ORDER: **2 MAY 2022**

BY CONSENT, THE COURT ORDERS THAT:

1. Pursuant to s 33V(1) of the *Federal Court of Australia Act 1976* (Cth):
 - (a) the settlement of the proceeding in accordance with the deed, as executed in two counterparts, comprising exhibit A on the application (**Deed**) be approved; and
 - (b) the relevant parties have leave following the payment of the Claims Settlement Amount, as defined at item D of the “Defined Terms” of the Deed, to file notices of discontinuance (with no order as to costs) with respect to:
 - (i) the Further Amended Originating Process and the Further Amended Statement of Claim filed on 20 May 2021;
 - (ii) the Amended Notice of Cross-Claim and the Amended Statement of Cross-Claim filed on 9 September 2021 by the First and Second Respondents against the Fifth to Ninth Cross-Respondents;
 - (iii) the Notice of Cross-Claim and the Statement of Cross-Claim filed on 3 September 2021 by the Seventh Respondent; and
 - (iv) the Notice of Cross-Claim and the Statement of Cross-Claim filed on 12 October 2021 by the Fourth Respondent against the Fourth Cross-Respondent.

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

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 On 2 May 2022, I made orders by consent pursuant to s 33V(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) approving the settlement of this representative proceeding in accordance with a settlement agreement. I also granted the applicants and the numerous cross-claimants leave, following payment of the settlement amount, to file notices of discontinuance. These are my reasons for making those orders.

Background

2 As the proceeding was settled, no factual findings were required to be made. This brief synopsis of the background is gleaned from the pleadings and other documents filed in the proceeding. It is offered here only to provide context and does not reflect evidence-based findings of fact.

3 On 11 May 2020, the MV *APL England*, a Singapore-flagged 5,780 TEU cellular containership, departed Ningbo, China laden with 3,161 containers bound, ultimately, for Melbourne.

4 Early in the morning on 24 May 2020, the vessel was steaming approximately 46 nm south-east of Sydney. It encountered adverse weather reportedly including winds of force 7 on the Beaufort scale (ie, near gale) and heavy swells (5.8 – 5.9 m) causing it to undergo a series of heavy rolls. These conditions caused the vessel’s main engine to shut down briefly.

5 It was later observed that there were container stack collapses in bays 30 and 62. Numerous containers were damaged and as many as 40 were lost overboard. Following the incident, it was widely reported that numerous items, purportedly consisting of the cargo lost overboard, washed ashore at Bondi and Coogee.

The Parties and their Claims

6 The proceeding was commenced in January 2021 by St John Ambulance Australia Ltd (**Lead Applicant**) as a representative proceeding under Pt IVA of the FCA Act. The group members were described as those persons who are the owners or persons entitled to immediate possession of cargo that was lost or damaged as a result of the collapse of container stacks on the vessel in the incident. The names of the 104 group members were set out in a schedule.

7 Although not described as such in the pleadings, the group members are limited to those who were insured for the damage to or loss of their goods and were indemnified by their respective **Insurers**. Thus, although the proceeding is brought in the name of the cargo owners, it is the group members' respective insurers, acting as subrogated claimants (see s 85 of the *Marine Insurance Act 1909* (Cth)), who instructed Mills Oakley to bring the proceeding and who have the relevant financial interest in the proceeding and its settlement. There were ultimately eight such insurers. Group members were advised by notice pursuant to ss 33X and 33Y of the FCA Act back in March 2021 to advise the applicants' solicitors if they had any uninsured losses, but none so advised.

8 Initially, the only named respondents were CMB Ocean 13 Leasing Co Pte Ltd, the first respondent and registered owner of the vessel, and **APL** Co Pte Ltd, the second respondent and demise charterer. I will refer to them compendiously as **the Owners**.

9 In its original statement of claim, the Lead Applicant alleged that the Owners were bailees of goods carried on board the vessel and that they were negligent in the carriage of those goods resulting in loss and damage to the cargo. That is to say, it was not alleged that the Lead Applicant or other group members had any contractual relationship with the Owners.

10 In April 2021, the Owners filed a defence and cross-claim. The defence pleaded, inter alia, that, under certain bills of lading, the Lead Applicant contracted with the **ANL** Singapore Pte Ltd as the carrier of the relevant goods, that the Owners were entitled to the benefit of all the provisions of the ANL bills of lading and that they had taken possession of the cargo either as sub-bailees or bailees under those bills and subject to their terms. The Owners' cross-claim (**First Cross-Claim**) commenced proceedings against the Lead Applicant and ANL asserting an entitlement to an indemnity from either or both of them.

11 In May 2021, the Lead Applicant filed a further amended originating application and further amended statement of claim (together, **the Further Amended Pleadings**), which named the following **Additional Respondents**:

- ANL as the third respondent;
- **COSCO** as the fourth respondent;
- Orient Overseas Container Line Ltd trading as Orient Overseas Container Line (**OOCL**) as the fifth respondent;
- **Shanghai Supreme** International Freight Forwarding Co Ltd as the sixth respondent;

- CH Robinson International Inc and CH Robinson Freight Services Ltd trading as **CHR**istal Lines as the seventh respondent; and
- **China Great** Logistics Co Ltd as the eighth respondent,

each of which were contractual carriers that are pleaded to have agreed to carry cargo that was damaged or lost, ie, the group members' cargo. Of the Additional Respondents, Shanghai Supreme and China Great have not entered appearances.

12 Further, as the Lead Applicant did not have a claim in contract against each of the Additional Respondents, the Further Amended Pleadings joined the following **Additional Applicants**:

- **Kmart** Australia Ltd as the second applicant;
- Fire Safety Equipment Pty Ltd as the third applicant;
- Ilana Accessories Australia Pty Ltd as the fourth applicant;
- Reece Pty Ltd as the fifth applicant; and
- Saferoads Pty Ltd as the sixth applicant,

to represent sub-groups consisting of members with claims against their respective contractual carriers, namely the Additional Respondents.

13 Each of the claims against the respondents are pleaded to give rise to questions of law or fact common to the claims of the respective group representative and its members. There are many such common questions. They include in relation to the Owners' obligations and alleged breaches as bailees, the alleged contracts of carriage between each of the applicants and their respective respondents including the incorporation of the Hague Visby Rules and any breaches thereof, and whether the Owners qualified to benefit from Himalaya clauses in the contracts of carriage and hence circular indemnities.

14 As a result of the Further Amended Pleadings, the First Cross-Claim was amended to join COSCO and OOCL and each of the Additional Applicants as cross-respondents. The claim made against the cross-respondents is essentially the same as that claimed against the Lead Applicant and ANL, namely that the Owners are entitled to indemnities from the Additional Respondents, COSCO and/or OOCL pursuant to undertakings in certain waybills.

15 There are two further cross-claims.

16 In September 2021, CHR commenced the second cross-claim by which it claims damages in contract and in tort against ANL.

17 In October 2021, COSCO commenced the third cross-claim by which it claims damages in contract and in tort against the Owners and ANL. COSCO also pleads that the Owners and ANL are each tortfeasors who are concurrently liable to the cargo owners and, in that regard, it claims indemnity or contribution in respect of any amounts it is ordered to pay to the cargo owners. COSCO also claims an indemnity from Kmart for all the consequences of the principal action against the Owners on the basis of an undertaking that Kmart would not bring any action against anyone other than COSCO. It is to be observed that that is in substance the counterpart to the claims made by the Owners in the First Cross-Claim.

Mediation and Settlement

18 Meanwhile, on 13 August 2021, the parties were ordered to participate in mediation. The mediation was conducted over a length of time in a number of sessions with Michael McHugh SC, an experienced shipping lawyer, as mediator. The mediation was ultimately successful and the settlement thereby reached forms the genesis of the present application.

19 The settlement agreement was made on 4 April 2022 and is subject to court approval. The preamble records that the Insurers made claims in respect of the cargo in the amount of approximately \$2,302,260.30. The terms may be relevantly summarised as follows:

- (1) Upon the Court's approval, APL, the demise charterer, shall pay the settlement amount of \$2,040,000 to the Insurers' (ie, the applicants') solicitors, Mills Oakley.
- (2) Upon receipt of the settlement amount by Mills Oakley:
 - (a) all claims in relation to the loss or damage of the cargo are settled fully for the amounts set out in an annexed table;
 - (b) the Insurers are to release the respondents from all actions arising out of the incident, which release does not bind any of the group members;
 - (c) the Insurers are to indemnify the respondents who have appeared in the proceeding against any loss or liability due to a claim arising from a bill of lading or cargo;
 - (d) save for any claims between the Owners and ANL, each of the respondents who have appeared release each other from all actions arising out of the cargo; and

(e) the parties will file notices of discontinuance of each proceeding with no orders as to costs.

(3) The settlement amount is to be distributed by Mills Oakley to the Insurers in accordance with an annexed table, which table apportions the amount pro rata in respect of their subrogated rights.

20 A number of further pertinent features are to be observed. First, the settlement amount equates to 88 per cent of the total claimed amount. Secondly, none of the settlement amount is to be paid to group members, the settlement agreement being executed by the Insurers and the respondents. As mentioned, all of the group members have been indemnified by the Insurers under their respective goods in transit or other cargo policies. And thirdly, the legal costs of the named applicants are not being met by any deduction from the settlement amount to be distributed; rather, they are being met separately by the Insurers.

The Applicable Principles

21 The applicable principles are uncontentious. The task of the Court is to determine whether the proposed settlement is fair and reasonable having regard to the interests of the group members as a whole and also inter se: See *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163 at [15]; *Court v Spotless Group Holdings Limited* [2020] FCA 1730 at [8].

22 The factors that the Court should take into account when determining whether the settlement is fair were stated by Goldberg J in *Williams v FAI Homes Security Pty Ltd (No 4)* [2000] FCA 1925; 180 ALR 459 at [19] and are now reflected in the Class Actions Practice Note (GPN-CA) at [15.5]. They are as follows:

- (a) the complexity and likely duration of the litigation;
- (b) the reaction of the class to the settlement;
- (c) the stage of the proceedings;
- (d) the risks of establishing liability;
- (e) the risks of establishing loss or damage;
- (f) the risks of maintaining a class action;
- (g) the ability of the respondent to withstand a greater judgment;
- (h) the range of reasonableness of the settlement in light of the best recovery;

- (i) the range of reasonableness of the settlement in light of all the attendant risks of the litigation; and
- (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

Consideration

23 Perhaps uniquely amongst applications of this kind, the settlement sought to be approved is not made between the applicants and the respondents. As mentioned, the parties to the agreement are, on the one hand, the Insurers exercising the applicants' and group members' subrogated rights and, on the other hand, the respondents who have appeared in the proceeding. Indeed, the settlement agreement does not purport to bind the applicants in any way. Further, it also does not allow any deduction from the settlement amount of the legal costs incurred by the parties.

24 In respect of each of the factors identified in [22] above, I observe as follows:

- (a) The litigation is likely to be complex and lengthy, and would undoubtedly involve considerable expert evidence concerning the stowage of cargo on, and seaworthiness and navigation of the vessel. Further, there is the added complexity of the numerous cross-claims, requiring determination of circular indemnities under various different bills of lading and sea waybills. The considerable cost in pursuing the claims to trial is to be contrasted with the relatively modest quantum at stake.
- (b) There have been no objections by group members to the settlement agreement despite being notified of the settlement and invited to object or opt out. It is also to be observed that save in respect of insured losses in respect of which the Insurers exercise subrogated rights in concluding the settlement agreement, the claims of group members and any other parties who may say that they have claims arising from the damage to or loss of cargo in the incident are unaffected by the settlement.
- (c) The proceeding is at an early stage; the parties have not yet commenced preparing and exchanging evidence and have not incurred any costs in that regard. Indeed, in each of the cross-claims, many of the defences have not been filed.
- (d) In light of the respondents' denial of liability and each of them relying on circular indemnity and limitations clauses, there is some risk to the applicants' ability to establish liability. That risk, as articulated by senior counsel for the applicants,

primarily concerns the inconvenience and cost of establishing a case with complex factual and legal aspects.

- (e) The risk of failing to establishing loss or damage, once liability is established, would appear to be relatively low.
- (f) Given that the proceeding is in effect brought by insurers, who can be taken to be well-resourced and experienced litigants, the risk in maintaining the class action if the settlement were not approved would appear to be remote – perhaps limited to an economic calculus as to whether it was worth incurring substantial costs in order to realise a relatively modest sum.
- (g) There is nothing to suggest that the respondents would not be able to withstand a greater judgment amount.
- (h) On the applicants’ view, the settlement amount constitutes more than 88 per cent of the total claim amount; on the respondents’ view, the settlement amount is more than the quantum of the total losses. I am satisfied that the settlement amount is within the range of reasonable settlements, in light of the best likely recovery.
- (i) For the same reasons as those in relation to (h), the settlement is also within the range of reasonableness in light of all the attendant risks of litigation, particularly in light of the cross-claims.
- (j) The Court has received privileged evidence which records the views of counsel, the legal representatives and the mediator.

25 Further, I am satisfied that there is essentially no risk to the group members: in respect of the claims brought in the proceeding and settled, their rights have been subrogated to the Insurers who are in truth the claimants in this proceeding; in respect of any other claims that the group members might otherwise have, they are entirely unaffected by the settlement agreement.

26 In the circumstances, I am satisfied that the settlement agreement is fair and reasonable, especially in light of the apportionment of the settlement amount pro-rated in accordance with the group members’ respective claims. For these reasons, I made the orders sought by the parties on 2 May 2022.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for

Judgment of the Honourable Justice
Stewart.

Associate:

Dated: 17 May 2022

SCHEDULE OF PARTIES

NSD 66 of 2021

Applicants

Second Applicant:	KMART AUSTRALIA LTD
Third Applicant:	FIRE SAFETY EQUIPMENT PTY LTD
Fourth Applicant:	ILANA ACCESSORIES AUSTRALIA PTY LTD
Fifth Applicant:	REECE PTY LTD
Sixth Applicant:	SAFEROADS PTY LTD

Respondents

Second Respondent:	APL CO PTE LTD
Third Respondent:	ANL SINGAPORE PTE LTD
Fourth Respondent:	COSCO SHIPPING LINES CO LTD
Fifth Respondent:	ORIENT OVERSEAS CONTAINER LINE LTD TRADING AS ORIENT OVERSEAS CONTAINER LINE
Sixth Respondent:	SHANGHAI SUPREME INTERNATIONAL FREIGHT FORWARDING CO LTD
Seventh Respondent:	CH ROBINSON INTERNATIONAL INC AND CH ROBINSON FREIGHT SERVICES LTD TRADING AS CHRISTAL LINES
Eighth Respondent:	CHINA GREAT LOGISTICS CO LTD

Cross-Claimants on the First Cross-Claim

Second Cross-Claimant:	APL CO PTE LTD
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Cross-Respondents on the First Cross-Claim

Second Cross-Respondent:	ANL SINGAPORE PTE LTD
Third Cross-Respondent:	COSCO SHIPPING LINES CO LTD
Fourth Cross-Respondent:	ORIENT OVERSEAS CONTAINER LINE LTD TRADING AS ORIENT OVERSEAS CONTAINER LINE

Fifth Cross-Respondent: KMART AUSTRALIA LTD
Sixth Cross-Respondent: FIRE SAFETY EQUIPMENT PTY LTD
Seventh Cross-Respondent: ILANA ACCESSORIES AUSTRALIA PTY LTD
Eighth Cross-Respondent: REECE PTY LTD
Ninth Cross-Respondent: SAFEROADS PTY LTD

Cross-Claimants on the Second Cross-Claim

Second Cross-Claimant: CH ROBINSON FREIGHT SERVICES LTD

Cross-Respondents on the Third Cross-Claim

Second Cross-Respondent: APL CO PTE LTD
Third Cross-Respondent: ANL SINGAPORE PTE LTD
Fourth Cross-Respondent: KMART AUSTRALIA LTD