



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD220/2019

**CARPENDERS PARK PTY LTD (AS TRUSTEE OF THE CARPENDERS PARK  
PTY LTD STAFF SUPERANNUATION FUND)**

Applicant

**SIMS METAL MANAGEMENT LTD ACN 114 838 630**

Respondent

**ORDER**

**JUDGE:** ACTING CHIEF JUSTICE RARES

**DATE OF ORDER:** 5 July 2019

**WHERE MADE:** Sydney

**THE COURT ORDERS THAT:**

**Common Fund Order**

1. Pursuant to ss 23 and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (FCAA) and r 1.32 of the *Federal Court Rules 2011* (Cth), subject to further order, order that upon Resolution (as defined in the Funding Terms) the Applicant and Group Members shall pay from any Claim Proceeds (as defined in the Funding Terms), the amounts referred to in sub-clauses 6 and 7 of the Funding Terms, prior to any distribution to Group Members, in accordance with the Funding Terms (Common Fund Order).
2. The Funding Terms (being Annexure A to these orders) further define and specify the amounts to be paid pursuant to Order 1.

**Confidentiality**

3. Pursuant to ss 37AF and 37AG(1)(a) of the FCAA, unless the Court orders otherwise, up to the time at which the Court makes a final order determining the claims for relief in the proceeding, in order to prevent prejudice to the proper administration of justice:



- (a) paragraphs 8, 9 and 10(b) of the confidential affidavit of Bill Petrovski sworn on 24 May 2019 and Exhibit BP-2 to that affidavit; and
- (b) paragraphs 8, 9 and 10(b) of Annexure B to the affidavit of Bill Petrovski sworn on 27 June 2019,

not be disclosed to any person or entity except to the Applicant, its legal representatives and Investor Claim Partner Pty Ltd and ICP Capital Pty Ltd, on condition that any such person or entity to whom such disclosure is made not disclose that material or any part thereof to any other person or entity without the leave of the Court first had and obtained.

**THE COURT NOTES THAT:**

**Undertaking**

- 4. The undertaking given to the Court by counsel for the Applicant on its behalf and on behalf of each of William Roberts Lawyers, Investor Claim Partner Pty Ltd and ICP Capital Pty Ltd, and given to each other, inter se, that each of them will comply with its and their obligations under the Funding Terms.

Date that entry is stamped: 9 July 2019

  
Registrar



## Annexure A

### Funding Terms

#### Definitions

1. The following definitions apply in these Funding Terms:
  - (a) **“Adverse Costs Order”** means any costs order made in favour of the Respondent against the Applicant and/or ICP and/or ICP Capital Pty Ltd in the Proceeding in respect of costs of the Respondent incurred during the Funding Term;
  - (b) **“Administration Expenses”** means the cost of the administration of any scheme for the distribution of Claim Proceeds, including fees charged by and expenses paid by the administrator (being the person or entity appointed to administer a scheme for the distribution of any Claim Proceeds), including (without limitation) court fees, barristers’ fees, external photocopying fees, IT project management fees, data processing fees, process service fees, expert report fees, external costs consultant fees, interstate agents’ fees, courier fees, travel and accommodation fees;
  - (c) **“Applicant”** means Carpenders Park Pty Ltd (as trustee of the Carpenders Park Pty Ltd Staff Superannuation Fund), and any other person who is a lead applicant or representative party in the Proceeding;
  - (d) **“Claims”** means the claim or claims the Applicant and the Group Members have or may have against the Respondent arising out of, or connected with, SGM’s alleged misleading or deceptive conduct and/or breaches of its continuing disclosure obligations in the period 21 August 2015 to 19 February 2016 (inclusive) or such other period as the Lawyers advise and the Funder accepts;
  - (e) **“Claim Proceeds”** means the sum of money, or the value of any goods or services, which is attributable to the resolution, settlement, judgment and/or enforcement of the Claims and any interest (including interest earned on trust money), and any monies recovered by virtue of a Costs Order or any agreement in respect of costs in relation to the Claims. The Claim Proceeds



refers to the gross value of these sums and is not net of any costs or expenses of conducting the Claims;

- (f) “**Common Benefit Work**” means Legal Work for the common benefit of Group Members, or a sub-group of Group Members;
- (g) “**Costs Order**” means an order made by a court requiring one or more parties to the Proceeding to pay the costs incurred by another party or parties to the Proceeding;
- (h) “**Deferred Project Costs**” means the Lawyers’ reasonable professional fees not paid by the Funder, (including an additional amount equal to 25% of the unpaid portion of any reasonable professional fees, including any amounts in relation to GST payable by the Lawyers, in so far as the professional fees were incurred either before or during the Funding Period);
- (i) “**Disbursement**” means any expense the Lawyers incur whether as principal or as agent on the Group Members’ behalf in relation to the Legal Work, including (without limitation) court fees, barristers’ fees, external photocopying fees, IT project management fees, data processing fees, process service fees, expert report fees, interstate agents’ fees, courier fees, travel and accommodation fees;
- (j) “**Funder**” means ICP and ICP Capital Pty Ltd;
- (k) “**Funder’s Project Costs**” means the aggregate of:
  - (A) the total monies paid by the Funder pursuant to clause 2 below; and
  - (B) to the extent not covered by sub-clause (A) above, the total monies paid by the Funder pursuant to the Funding Agreements prior to the date of the Common Funder Order, including:
    - (I) all reasonable Disbursements, including any amounts in relation to GST payable by the Lawyers, in so far as the Disbursements were incurred either before or during the Funding Period;
    - (II) the Lawyers’ reasonable professional fees, including any amounts in relation to GST payable by the Lawyers, in so far as the professional fees were incurred for the Legal Work, subject to the fee capping arrangements in Clause 6 of the Retainer Agreements;



- (III) the costs of any insurance covering any Adverse Costs Order;
  - (IV) any Costs Order which the Court makes in the Proceeding against the Applicant or other Group Member in favour of the Respondent; and
  - (V) any security for costs in the Proceeding and the costs involved in the provision of any such security.
- (l) “**Funding Agreements**” means the funding agreement, titled “ICP Agreement” between the Funder and the Applicant signed by the Applicant on 20 February 2018 and any funding agreements between the Funder and other Group Members in relation to the Claims;
  - (m) “**Funding Period**” means the period commencing on [the date the Common Fund Order is made] and ending on the date of the judgment in respect of any settlement approval application or judgment in the initial trial of the Applicant’s claim and the common issues, whichever is first to occur;
  - (n) “**Group Members**” means all persons who are identified as group members in the Proceeding including the Applicant, and who do not opt out of the Proceeding by the time specified by the Court for doing so;
  - (o) “**GST**” means goods and services tax;
  - (p) “**Individual Legal Work**” means Legal Work in connection with the specific Claims of a specific Group Member, not including Common Benefit Work;
  - (q) “**ICP**” means Investor Claim Partner Pty Ltd;
  - (r) “**Insurer**” means any insurer providing the Applicant with any Adverse Costs Order insurance in respect of the Claims;
  - (s) “**Lawyers**” means the lawyers, William Roberts Pty Ltd trading as William Roberts Lawyers, or any firm of lawyers appointed in their place by the Applicant after consultation with the Funder;
  - (t) “**Legal Costs**” means the costs referred to in paragraphs 2(a), 2(b) and 7;
  - (u) “**Legal Work**” means such advice and legal services to the Applicant and Group Members or for the Applicant and Group Members’ benefit, including the Common Benefit Work and any Individual Legal Work, as the Lawyers may consider reasonably necessary to: (a) investigate the Claims; (b) prosecute the Claims; (c) negotiate a Settlement of the Claims; and (d)



negotiate to secure and maintain funding on behalf of the Group Members in relation to the Claims;

- (v) “**Proceeding**” means the representative proceeding filed by the Applicant against SGM on 30 January 2019 in the New South Wales Registry of the Federal Court of Australia;
- (w) “**Project Costs**” means the Funder’s Project Costs and the Deferred Project Costs;
- (x) “**Resolution**” means when all or any part of the Claim Proceeds is received and, where the Claim Proceeds is received in parts, a “Resolution” occurs each time a part is received;
- (y) “**Respondent**” means SGM and any other parties named as respondents in the Proceeding;
- (z) “**Retainer Agreements**” means the retainer and costs agreement between the Lawyers and the Applicant signed by the Applicant titled “Retainer and Costs Agreement Action against Sims Metal Management Ltd” and any retainer and costs agreements between the Lawyers and other Group Members in relation to the Claims;
- (aa) “**Senior Counsel**” means the most senior counsel of those retained by the Applicant for the Proceeding;
- (bb) “**Settlement**” means any settlement, compromise, discontinuance or waiver of the Claims or part of the Claims and “**settles**” shall be construed accordingly;
- (cc) “**SGM**” means Sims Metal Management Limited ACN 114 838 630; and
- (dd) “**SGM Share**” means an ordinary fully-paid share issued by SGM;

### **Obligations of the Funder**

2. The Funder must:

- (a) pay to the Lawyers all reasonable Disbursements upon receipt of each bill from the Lawyers, including any amounts in relation to GST payable by the Lawyers, in so far as the Disbursements were incurred either before or during the Funding Period;
- (b) pay to the Lawyers the Lawyers’ reasonable professional fees upon receipt of each bill from the Lawyers, including any amounts in relation to GST payable



by the Lawyers, in so far as the professional fees were incurred either before or during the Funding Period and subject to the fee capping arrangements in Clause 6 of the Retainer Agreements;

- (c) pay the costs of any insurance covering any Adverse Costs Order;
- (d) pay any Costs Order which the Court makes in the Proceeding against the Applicant or other Group Member in favour of the Respondent, in so far as those costs were incurred either before or during the Funding Period; and
- (e) furnish any security for costs in the Proceeding, in the form that the Court orders, or in the absence of any order, in such other form as the Funder determines and the Respondent accepts, relating to costs incurred during the Funding Period, and shall pay the costs involved in the provision of any such security.

**Receipt and Application of Claim Proceeds**

- 3. Any Claim Proceeds will be received by the Lawyers and paid immediately into an account kept for that purpose.
- 4. If the Applicant or any Group Member obtains any Settlement or obtains any judgment in respect of the Claims, it will:
  - (a) treat any money, other asset or benefit received from the Respondent in connection with the Settlement or judgment as the Claim Proceeds; and
  - (b) cause the money, or an amount being the reasonable market value of the asset or benefit, to be delivered to the Lawyers to be dealt with as part of the Claim Proceeds.
- 5. Subject to any order of the Court, the Lawyers will:
  - (a) pay to the Funder all amounts referred to in paragraph 6 below;
  - (b) be entitled to deduct and withhold all amounts referred to in paragraph 7 below; and
  - (c) pay all Administration Expenses approved by the Court,out of the account referred to in paragraph 3, with the balance to be distributed to



the Group Members on a pro rata basis in accordance with any distribution scheme approved by the Court.

**Costs and Commission**

6. Upon Resolution, the Funder or its nominee shall be paid such amount as the Court determines to be appropriate to ensure justice be done in the Proceeding, having regard to but not exceeding:

- (a) an amount equal to the Funder's Project Costs;
- (b) an amount specified and approved by the Court, as consideration for the funding of the Proceeding, being no more than 25% of the Claim Proceeds net of Project Costs; and
- (c) an additional amount, on account of GST, being the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the consideration to be received by the Funder for any taxable supply made to the Applicant by the Funder under or in connection with these Funding Terms,

(which, for the avoidance of doubt, shall not be any amount greater than would have been payable by any group member under the Funding Agreements).

7. Upon Resolution, the Lawyers shall be paid from the Claim Proceeds, prior to any distributions to Group Members, such amount as the Court determines to be appropriate to ensure justice be done in the Proceeding, having regard to but not exceeding, the Deferred Project Costs.

8. If the aggregate of the amounts referred to in paragraphs 6 and 7 (**Aggregate Deduction**) exceeds:

- (a) fifty percent of the Claim Proceeds net of Project Costs; or
- (b) any such amounts as the Court determines to be fair and reasonable in all the circumstances,

the Aggregate Deduction shall be reduced so that it does not so exceed, with the amount of the reduction to be borne by the Funder and the Lawyers on a pro rata basis measured by the ratio as between the amount of the Funder's entitlements under clause 6(b) above and the amount of the Deferred Project Costs. The amount of the reduction to be borne by the Lawyers shall not exceed the amount of the Deferred Project Costs.

9. The amounts referred to in paragraphs 6 and 7 above will not become due or owing



by the Group Members unless and until Resolution and an order of the Court in respect of each sum amount.

**Relationship Between the Applicant, Lawyers and Funder**

10. The Lawyers' professional duties are owed to the Applicant and not to the Funder.
11. Subject to paragraphs 12 and 13:
  - (a) the Applicant will give the Lawyers day-to-day instructions in respect of issues personal to its particular claim that do not relate to Common Benefit Work; and
  - (b) ICP will give the Lawyers day-to day instructions in respect of Common Benefit Work and all other matters concerning the Claims (apart from the matters the subject of sub-paragraph (a)).
12. The Applicant has the right at any time to give instructions in relation to Common Benefit Work and all other matters concerning the Claims which override any instructions given by ICP.
13. Subject to paragraph 16 below, if the Lawyers notify ICP and the Applicant that the Lawyers consider any instructions given by ICP are not in the interests of the Applicant and Group Members, the Lawyers may seek instructions from the Applicant whose instructions will override those that may be given by ICP.
14. The Lawyers will:
  - (a) provide the Funder with confidential updates of the progress of the Proceeding;
  - (b) consult with the Funder with regard to any significant issue in the Proceeding;
  - (c) properly consider the Funder's views as to the conduct of the Proceeding; and
  - (d) promptly respond to any reasonable request by the Funder for information relating to the Proceeding.



**Confidentiality**

15. The Funder shall strictly maintain the confidentiality of any information provided to the Funder by the Applicant, any Group Member or the Lawyers for a purpose connected to the Proceeding, and shall adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information.

**Settlement**

16. If there is a disagreement between the Funder and the Applicant as to the appropriate terms for settlement of the Proceeding:
- (a) the Lawyers will brief Senior Counsel to provide an advice as to whether the proposed settlement is reasonable having regard to all the circumstances;
  - (b) a representative of the Funder may attend any conference with Senior Counsel at which the issue is to be discussed;
  - (c) the legal costs of obtaining the advice shall be met by the Funder as part of the reasonable costs of the Proceeding; and
  - (d) the advice of Senior Counsel will be final and binding on both the Applicant and the Funder.
17. Under paragraph 16 above, in determining whether a proposed settlement is reasonable having regard to all the circumstances, Senior Counsel may proceed as he or she sees fit to inform himself or herself before forming and delivering his or her advice, but any such determination shall include the following considerations:
- (a) the strengths and weaknesses of the claims of all Group Members;
  - (b) the quantum of the claims of all Group Members and any difficulties which might exist in proving that quantum;
  - (c) the recoverability of a judgment sum from the Respondent;
  - (d) the extent to which further legal costs incurred in the Proceeding are likely to be recoverable from the Respondent;
  - (e) the risk of the Funder being ordered to pay adverse costs and the quantum of such costs. Counsel will have regard to this factor as though all Group Members carried such risk rather than the Funder;



- (f) the matters set out in paragraph [248.95] of the *Australian Securities and Investments Commission's Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest* (April 2013); and
  - (g) any other matter Senior Counsel considers relevant.
18. If a dispute arises which would be referred to Senior Counsel pursuant to paragraph 16 and any of the parties to the dispute or Senior Counsel considers that it is not appropriate for counsel to advise on or determine the dispute, Senior Counsel will refer the dispute to an independent adjudicator for a final decision, save that, failing agreement within a reasonable time by the Applicant, Funders and the Lawyers as to such independent adjudicator, the dispute is to be referred to an independent adjudicator to be appointed by the President of the Law Society of New South Wales for a final decision, which will be binding on the Applicant, the Funder and the Lawyers.

**Termination**

19. The funding arrangements under these Funding Terms may only be terminated by order of the Court, granted on application made by the Applicant, the Funder or a Group Member, upon notice given to the Applicant, the Funder and such other persons as ordered by the Court.
20. If an application is made by the Funder under paragraph 19 above, and the Court grants that application, then (subject to any contrary order of the Court):
- (a) the Funder will not be entitled to receive any payment from any Claim Proceeds pursuant to paragraph 6(b) above;
  - (b) the Funder will continue to be entitled to receive payment from any Claim Proceeds pursuant to paragraphs 6(a) and 6(c) above;
  - (c) all obligations of the Funder under these Funding Terms will cease on the date the Funder's termination becomes effective, save for the following obligations accrued to the date of termination:
    - (i) payment of any outstanding costs pursuant to paragraph 2 above incurred up to the date of termination;
    - (ii) indemnification of the Group Members for any costs and



Disbursements reasonably incurred and payable to the Lawyers up to the date of termination; and

- (iii) payment of any Costs Order against any Group Members in the Proceeding in respect of costs which arise in, or are attributed to, the period ending on the date the Funder's termination becomes effective.

21. If an application is made by the Applicant or a Group Member under paragraph 19 above, and the Court grants that application, then (subject to any contrary order of the Court):

- (a) the Funder will continue to be entitled to receive payment from any Claim Proceeds pursuant to paragraph 6 above;
- (b) all obligations of the Funder under these Funding Terms will cease on the date the Funder's termination becomes effective, save for the following obligations accrued to the date of termination:
  - (i) payment of any outstanding costs pursuant to paragraph 2 above incurred up to the date of termination;
  - (ii) indemnification of the Group Members for any costs and Disbursements reasonably incurred and payable to the Lawyers up to the date of termination; and
  - (iii) payment of any Costs Order against any Group Members in the Proceeding in respect of costs which arise in, or are attributed to, the period ending on the date the Funder's termination becomes effective.

**Funding Agreements and Retainer Agreements**

22. These Funding Terms prevail over any inconsistent provision in the Funding Agreements.

23. These Funding Terms prevail over the terms of the Retainer Agreements to the extent of any inconsistency.