



Federal Court of Australia
District Registry: Victoria
Division: General

No: VID1375/2017

PAWEL KUTERBA
Applicant

SIRTEX MEDICAL LIMITED (ACN 78 166 122)
Respondent

ORDER

JUDGE: JUSTICE MURPHY

DATE OF ORDER: 30 April 2018

WHERE MADE: Melbourne

THE COURT NOTES THAT:

Orders 4, 5, 7, 8, 11-21 and 23 of the orders made on 15 August 2017 in proceeding VID 91 of 2017 are vacated, and the other orders apply as if made in relation to the consolidated proceeding.

THE COURT ORDERS THAT:

Consolidation

1. This proceeding (**Kuterba proceeding**) be consolidated with proceeding number VID91/2017 (*Todd Hayward v Sirtex Medical Limited*) (**Hayward proceeding**) and in the consolidated proceeding (to be identified as VID 1375 of 2017):
 - (a) Mr Kuterba and Mr Hayward be joint representative applicants (**the Joint Applicants**);
 - (b) the Amended Originating Application and Amended Statement of Claim filed in the Kuterba proceeding stand as the originating process and pleading of the representative applicants and group members in the consolidated proceeding, subject to order 3 below; and



- (c) Maurice Blackburn be the solicitors on the record for the Joint Applicants in the consolidated proceeding and shall have responsibility for the conduct of the consolidated proceeding.
2. The interlocutory application in the Kuterba proceeding filed on 2 March 2018 by Mr Kuterba be otherwise dismissed with no order as to costs.

Pleading amendment

3. The Joint Applicants have leave to file a Further Amended Originating Application and a Further Amended Statement of Claim in the consolidated proceeding to the extent necessary to formalise the consolidation and to plead the individual claim of Mr Hayward by 21 May 2018.
4. The Respondent has leave to file any defence to the Further Amended Statement of Claim by 4 June 2018.

Costs Prior to Consolidation

5. The costs of each of the Kuterba proceeding and the Hayward proceeding to date be costs in the consolidated proceeding.

Security for Costs

6. The security for costs provided by Mr Hayward pursuant to order 1 of the orders dated 19 July 2017 in the Hayward proceeding is to stand as security for costs in the consolidated proceeding in respect of costs incurred in the Hayward proceeding up to and including discovery.

Common Fund Order

7. Subject to further order:
 - (a) the Funding Terms attached as Annexure A (**Funding Terms**) are approved and shall be binding upon the Joint Applicants, the group members, IMF Bentham Limited (**IMF**), the Lawyers, and the Funder Participant, Australian Funding Partners Limited (as defined in the Funding Terms);
 - (b) the Joint Applicants and Group Members shall pay from any amounts for which the claims are settled or judgment is given in favour of the Joint Applicants and Group Members:



- (i) the costs and expenses of the proceeding, to be approved by the Court;
and
 - (ii) a percentage proportion, to be determined by the Court at a future date, of the amount for which the claims are settled or judgment is given, but group members shall be informed such percentage will be no more than 28%;
- in accordance with the Funding Terms; and
- (c) IMF shall be entitled to be paid its costs, expenses and remuneration incurred or arising pursuant to order 7(a) above and the Funding Terms.

Trial

- 8. The consolidated proceeding be listed for hearing on 1 April 2019 in Sydney, on an estimate of four weeks.

Case Management

- 9. The matter be listed for a case management hearing on 1 June 2018 at 9.30 am. By 4.00 pm on 31 May 2018 the parties shall provide to the chambers of Justice Murphy an agreed timetable for the necessary pre-trial interlocutory steps, or their competing proposals in that regard.

Subpoenas

- 10. The subpoenas issued in the Kuterba proceeding to each of Elliott Legal Pty Ltd and Australian Funding Partners Limited are discharged with no order as to costs.

Confidentiality Orders

- 11. Until further order, pursuant to sections 37AF and 37AG(1)(a) of the *Federal Court of Australia Act 1976* (Cth) (**Act**), and to prevent prejudice to the proper administration of justice, confidential exhibit MN-4 to the affidavit of Miranda Nagy affirmed 27 April 2018 be treated as confidential and is not to be disclosed to any person other than the Joint Applicants, IMF Bentham Limited and Australian Funding Partners Limited, and to group members in the consolidated proceeding upon provision of a confidentiality undertaking in a form reasonably satisfactory to the solicitors for the Joint Applicants.



Date that entry is stamped: 30 April 2018

Warrick Soden
Registrar



Annexure A

Funding Terms

Sirtex Medical Ltd Shareholder Class Action Funding Terms

1. Definitions and interpretation

1.1 The following definitions apply in these Funding Terms:

- Applicants** means the joint lead Applicants in the Proceedings whom, as at the commencement of the Funding Period are Pawel Kuterba and Todd Hayward.
- Claims** means the claim or claims the Applicants or any Group Member have or may have against any one or more of the Respondents for loss and damage caused to the Applicants or Group Member by the conduct of one or more of the Respondents in relation to or arising out of an Applicant's or a Group Member's acquisition of an interest in SRX Securities during the period specified in the statement of claim in respect of the Proceedings as amended from time to time.
- Consolidation Date** means the date from which VID 91 of 2017 and VID 1375 of 2017 are consolidated.
- Costs Order** means any order made by a court requiring one or more parties to the Proceedings to pay the costs incurred by another party or parties to the Proceedings.
- Funder** means IMF Bentham Limited (ACN 067 298 088), its successors and assigns.
- Funding Agreement** means a funding agreement between the Funder and (i) Pawel Kuterba or (ii) a Group Member in relation to the Claims as at the commencement of the Funding Period.
- Funder Participant** means Australian Funding Partners Limited (ACN 167 628 597) of Level 6, 41 Exhibition Street, Melbourne 3000 which entered into a Cooperation and Participation Deed with the Funder, dated 18 April 2018, regarding the consolidation of VID 91 of 2017 and VID 1375 of 2017 and its participation in



the future funding and funding returns in the Proceedings.

Funding Period means the period commencing on the date orders are made allowing a ‘common fund’ in respect of the Proceedings on the terms set out in these Funding Terms and ending upon the Termination Date.

Funding Terms means these terms.

Group Members means all persons who are identified as group members in the Proceedings and who do not validly opt out of the Proceedings.

GST Act means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Lawyers means Maurice Blackburn Pty Ltd (ACN 105 657 949), or any firm of lawyers appointed in their place by the Applicants, and with the Funder’s consent, in accordance with the Funding Agreements.

Legal Work means legal work performed by the Lawyers pursuant to the Retainer Agreements, including such advice and legal services reasonably necessary to: (a) investigate the Claims; (b) prosecute the Proceedings; (c) negotiate a Settlement of the Claims; and (d) comply with the Funding Agreements and these Funding Terms.

Other Parties means any other person or entity which:

- (a) becomes a party to the Proceedings at the initiative of a Respondent; or
- (b) the Lawyers recommend be joined to the Proceedings and in respect of whom the Funder agrees in writing to accept adverse Cost Order exposure.

Pre-Consolidation Costs means the costs incurred on behalf the respective applicants in VID 91 of 2017 and VID 1375 of 2017 in respect of the period prior to the Consolidation Date.

Proceedings means the proceedings resulting from the consolidation of VID 91 of 2017 and VID 1375 of 2017 and any other legal proceedings to prosecute some or all of the Claims, including:

- (a) proceedings brought in contemplation of those legal



proceedings including, without limitation, proceedings for preliminary discovery; and

- (b) any other proceedings or process as part of or consequent on the class action (including any alternative dispute resolution processes engaged to resolve some or all of the Claims),

but does not include any appeals of such legal proceedings or related enforcement actions unless the Funder has (in its absolute discretion) agreed to fund the particular appeal or enforcement proceedings.

Project Costs

means:

- (a) the costs and expenses incurred by the Funder in performing the project investigation and project management, as contemplated by the Funding Agreements;
- (b) the costs involved in the provision by the Funder of any security for costs;
- (c) any Quantified Costs Order payable by the Funder pursuant to the Funding Agreements;
- (d) the costs associated with the Funder quantifying any adverse Costs Order;
- (e) the legal fees and disbursements of the Lawyers payable by the Funder pursuant to the Funding Agreements and Standard Lawyers Terms;
- (f) any other costs or expenses which are expressly stated to form part of the “Project Costs” payable by the Funder pursuant to the Funding Agreements;
- (g) all of the Funder’s out of pocket costs and expenses paid or incurred in relation to the conduct of the Proceedings in order to achieve resolution of the Claims, including in relation to any consultants engaged by a Funder (other than those costs and expenses already referred to in this definition); and
- (h) any GST payable on any supply made by any entity as



a result of the above costs or expenses being incurred,

and for the avoidance of doubt, and unless expressly stated otherwise, includes amounts described in (a) to (h) above which have been incurred during, or are in respect of, a period before or during the Funding Period.

Quantified Costs Order means an adverse Costs Order payable by the Funder pursuant to the Funding Agreements, which has been quantified either:

- (a) by agreement between the Funder and the Respondent;
or
- (b) by a Court order (including a Court order on taxation).

Remaining Costs is as defined in the Standard Lawyers Terms.

Resolution means when all or any part of a Resolution Sum is received and, where a Resolution Sum is received in parts, a “Resolution” occurs each time a part is received.

Resolution Sum means the amount or amounts, or the market value of any goods or services, for which some or all of the Claims are Settled, or for which judgment is given, including the value of any favourable terms of future supply of goods or services, any interest and any costs recovered pursuant to a Costs Order in favour of the Applicants or by agreement.

Respondent means Sirtex and any Other Parties named as defendants or respondents in the Proceedings.

Restricted Matters means:

1. making, amending, accepting or rejecting a Settlement proposal or any other form of instruction in respect of a Settlement; and
2. any application:
 - (a) to vary the terms of the common fund order;
 - (b) to add, or consent to the joinder of, any additional respondent in the Proceedings;
 - (c) to add a claim or the removal of a claim from the Proceedings;



- (d) to bring about class closure;
- (e) regarding orders for the security for costs in the event the Funder's deed poll is not deemed to be a sufficient security for the Proceedings.

| | |
|---------------------------------|--|
| Restricted Matter Notice | has the meaning given in clause 5.3 |
| Retainer Agreement | means a retainer and costs agreement between the Lawyers and an Applicant, or between the Lawyers and a Group Member as amended by the Standard Lawyers Terms. |
| Senior Counsel Team | means the senior counsel engaged on behalf of the Applicants, being initially Norman O'Bryan SC and Lachlan Armstrong QC. |
| Settlement | means any settlement, compromise, discontinuance or waiver of the Claims or part of the Claims, and "Settles" and "Settled" shall be construed accordingly. |
| Sirtex | means Sirtex Medical Limited. |
| SRX Securities | means an ordinary fully-paid share issued by Sirtex and listed on the Australian Securities Exchange. |
| Standard Lawyers Terms | means the Standard Lawyers Terms agreed between the Funder and the Lawyers in respect of the Proceedings, dated 8 February 2018. |
| Termination Date | means the date on which the termination of these Funding Terms in accordance with clause 7 below becomes effective. |
| Trust Account | means an interest-bearing trust account established and maintained by the Lawyers for the sole purpose of receiving Resolution Sums under these Funding Terms. |

1.2 Unless the context otherwise requires, the following rules of interpretation apply to these Funding Terms:

1.2.1 a reference to any agreement or document is a reference to such agreement or document as validly amended, varied, restated, assigned or novated from time to time (in each case, other than in breach of the relevant agreement or the provisions of these Funding Terms, in which case it shall remain a reference to such agreement or document immediately prior to such amendment); and



1.2.2 a reference to any legislation or legislative provision includes any statutory modification, amendment or re-enactment of that legislation or legislative provision, and includes any subordinate legislation or regulations issued under that legislation or legislative provision.

2. Funding Agreements and Retainer Agreements

2.1 For the duration of the Funding Period, these Funding Terms will prevail over:

2.1.1 any inconsistent provision in the Funding Agreements which, subject to these Funding Terms, shall continue in full force and effect; and

2.1.2 any inconsistent terms of the Retainer Agreements which, subject to these Funding Terms, shall continue in full force and effect.

3. Obligations of the Funder and the Funder Participant

3.1 Subject to the remainder of this clause 3.1, the Funder must pay the Project Costs in accordance with the terms of the Funding Agreements.

3.2 The Funder must pay any Costs Order in favour of the Respondent to the extent that it relates to costs attributable to VID1375 of 2017 in the period prior to the Consolidation Date.

3.3 The Funder Participant must pay any Costs Order in favour of the Respondent to the extent that it relates to costs attributable to VID91 of 2017 in the period prior to the Consolidation Date.

4. Costs and Commission

4.1 Upon Resolution, the Funder and the Lawyers are entitled to be paid or to have distributed the following amounts from any Resolution Sum, to be paid or distributed in the order of priority listed below and with all payments within a priority level to be made *pari passu* and *pro rata*:

4.1.1 first, pay to the Funder an amount equal to the total Pre-Consolidation Costs and the Project Costs;

4.1.2 second, pay to the Funder 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 pursuant to 4.1.1 or any other taxable supply made to any Group Member by the Funder under or in connection with the Funding Agreements and/or these Funding Terms, but only to the extent that such GST has been borne by the Funder and not recovered as an input tax credit or otherwise (unless otherwise defined, terms used in this clause have the same meaning as in the GST Act); and



4.1.3 third:

- (a) pay to the Lawyers the Remaining Costs; and
- (b) pay to the Funder, as consideration for the funding of the Proceedings, such amount, to be expressed as a percentage of the aggregate Resolution Sums, as the Court considers reasonable.

4.2 The amounts referred to in clause 4.1 above will not become due or owing by the Applicants and Group Members unless and until a Resolution occurs and must not exceed the aggregate Resolution Sums.

5. Relationship Between the Applicants, Lawyers, Funder and Funder Participant

5.1 The Lawyers' professional duties are owed to the Applicants and not to the Funder or the Funder Participant.

5.2 The Funder will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings, subject to clause 5.3 to clause 5.6 (inclusive) and clause 7, save that the Funder will not give, or procure the Applicants to give, any such instructions in relation to a Restricted Matter unless those instructions have first been agreed in writing between the Funder and the Funder Participant.

5.3 If:

5.3.1 the Funder and the Funder Participant cannot agree;

5.3.2 the Funder and the Funder Participant agree but one or both of the Applicants does not agree;

on the contents of instructions to be provided in relation to a Restricted Matter within 5 Business Days of the Funder giving notice of the same to the Funder Participant (**Restricted Matter Notice**), the Funder shall instruct the Lawyers to seek the advice of the Senior Counsel Team with such advice to be provided as soon as practicable. If the Senior Counsel Team is not unanimous in its advice, The Funder shall instruct the Lawyers to seek the advice of such independent senior counsel with plaintiff class action experience in securities class actions, as shall be agreed between the Funder and the Funder Participant, or in the absence of such agreement, shall be determined by the president of the Bar Association of New South Wales. Each of the Applicants, the Funder and the Funder Participant agree that with regard to the applicable Restricted Matter, they shall abide by the unanimous advice of the Senior Counsel Team or in the absence of unanimity, the advice of the independent senior counsel, and shall in each such case instruct the Lawyers in accordance therewith

5.4 Notwithstanding the foregoing provisions of this clause, if the Lawyers consider that instructions are required on a Restricted Matter in a shorter time period than that provided for in clause 5.3 (**Urgent Restricted Matter**), the Lawyers shall notify the



Funder of the Urgent Restricted Matter and the required time period for instructions. The Funder shall promptly notify the Funder Participant of the same (such notice constituting a Restricted Matter Notice). The Funder and the Funder Participant agree that clause 5.3 shall apply to an Urgent Restricted Matter save that the shortened time period specified by the Lawyers shall be deemed to replace “5 Business Days”.

- 5.5 Without limiting clause 5.3 above, in determining whether a proposed settlement is reasonable having regard to all the circumstances, Senior Counsel (whether part of the Senior Counsel Team or otherwise) 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:
- 5.5.1 the strengths and weaknesses of the claims of all Group Members;
 - 5.5.2 the quantum of the claims of all Group Members and any difficulties which might exist in proving that quantum;
 - 5.5.3 the recoverability of a judgment sum from the Respondent;
 - 5.5.4 the extent to which further legal costs incurred in the Proceedings are likely to be recoverable from the Respondent;
 - 5.5.5 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;
 - 5.5.6 the matters set out at 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
 - 5.5.7 any other matters Senior Counsel considers relevant.
- 5.6 The Applicants may override any instruction given by the Funder, other than in respect of a Restricted Matter; and in respect of a Restricted Matter, clauses 5.3 to 5.5 (inclusive) shall apply. In all other respects, the Applicants may give binding instructions to the Lawyers and make binding decisions on behalf of some or all of the Group Members in relation to the Proceedings up to the time of any court approval of settlement of the Claims or the delivery of judgment in respect of the common issues in the Proceedings, save where, in the reasonable professional opinion of the Lawyers, separate instructions are required from some or all of the Group Members.
- 5.7 The Lawyers will:
- 5.7.1 keep the Funder fully informed of all matters concerning the Claims and the Proceedings, including any mediation and settlement discussions; and



5.7.2 ensure that the Funder is given all necessary information and advice in order for the Funder to provide informed instructions.

6. Confidentiality

6.1 Subject to clause 6.2, The Funder shall strictly maintain the confidentiality of any information provided to the Funder by the Applicants or the Lawyers for a purpose connected to the Proceedings, and shall adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information.

6.2 The Funder shall be permitted to disclose to the Funder Participant any information provided to it which is the subject of clause 6.1, provided that the Funder Participant undertakes to strictly maintain the confidentiality of any information provided to it, and to use such information solely for a purpose connected to the Proceedings, and to adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information.

7. Termination

7.1 The Funder's and the Funder Participant's obligations under these Funding Terms may only be terminated by order of the Court, granted on application made by the Applicants or the Funder, and upon notice given to the Applicants, the Funder and such other persons as ordered by the Court.

7.2 If an application to terminate these Funding Terms is made by the Funder, and the Court grants that application, then all obligations of the Applicants, Group Members, the Funder, the Funder Participant and the Lawyers under these Funding Terms will cease on the Termination Date, save for the following:

7.2.1 the Funder will continue to be entitled to receive payment from any Resolution Sum (whether received before or after the Termination Date) pursuant to clauses 4.1.1 and 4.1.2 above (for the avoidance of doubt, neither the Funder nor the Lawyers will be entitled to receive any payment from any future Resolution Sums pursuant to clause 4.1.3 above); and

7.2.2 the Funder must pay:

(a) any outstanding costs pursuant to clause 3.1 above incurred up to the Termination Date; and

(b) to the extent such amounts are not captured by clause 7.2.2(a) above, any Quantified Costs Order against the Applicants (whether made before or after the Termination Date) to the extent that it relates to costs which have arisen in, or are attributed to, the period ending on the Termination Date, save that any amount thereof which relates to



costs incurred in VID91 of 2017 attributable to the period prior to the Consolidation Date shall be paid by the Funder Participant.

7.3 If an application to terminate these Funding Terms is made by the Applicants, and the Court grants that application, then all obligations of the Applicants, Group Members, the Funder and the Lawyers under these Funding Terms will cease on the Termination Date, save for the following:

7.3.1 the Funder and the Lawyers will continue to be entitled to receive payment from any Resolution Sum (whether received before or after the Termination Date) pursuant to clause 4; and

7.3.2 the Funder must pay:

(a) any outstanding costs pursuant to clause 3.1 above incurred up to the Termination Date; and

(b) to the extent such amounts are not captured by clause 7.3.2(a) above, any Quantified Costs Order against the Applicants (whether made before or after the Termination Date) to the extent that it relates to costs which have arisen in, or are attributed to, the period ending on the Termination Date.

7.4 Termination of these Funding Terms shall not affect the rights or obligations of any Group Member who has executed a Funding Agreement (including the Applicants), the Funder and/or the Lawyers under the Funding Agreements or the Retainer Agreements (as is relevant), which shall remain in full force and effect in accordance with their respective terms.