

FEDERAL COURT OF AUSTRALIA

Schofield v TFS Manufacturing (Settlement Approval) [2023] FCA 1045

File number: NSD 181 of 2020

Judgment of: **LEE J**

Date of judgment: 24 August 2023

Date of publication of reasons: 4 September 2023

Catchwords: **REPRESENTATIVE PROCEEDINGS** – settlement approval application pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – representative proceedings brought against manufacturer and supplier of pelvic “mesh” implants – where group members afflicted by physical, psychological and psychosocial difficulties – where objections to proposed settlement received – where proposed settlement fair, reasonable and in the interests of group members – bifurcation of approval of settlement and distribution of settlement sum – settlement approved

Legislation: *Federal Court of Australia Act 1976* (Cth) Pt IVA, ss 33V(1), 33V(2)

Cases cited: *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68
Fowkes v Boston Scientific Corporation [2023] FCA 230
J & J Richards Super Pty Ltd v Linchpin Capital Group Limited (Settlement Approval) [2023] FCA 656
Lifepan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York) [2018] FCA 379
Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc) [2018] FCA 1289

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 26

Date of hearing:	24 August 2023
Counsel for the applicants:	Dr D Graham SC with Mr M Robinson
Solicitor for the applicants:	AJB Stevens Lawyers
Counsel for the third respondent:	Ms K Morgan SC with Mr D Wong
Solicitor for the third respondent:	DLA Piper Australia
Counsel for the fourth respondent:	Ms L McFee
Solicitor for the fourth respondent:	Barry Nilsson
Counsel for the fifth respondent:	Mr M Hutchings
Solicitor for the fifth respondent:	Meridian Lawyers
Counsel for the sixth respondent:	Mr D Weinberger
Solicitor for the sixth respondent:	McCabes

ORDERS

NSD 181 of 2020

BETWEEN: **LINDSEY SCHOFIELD**
First Applicant

MELISSA WEEDON
Second Applicant

AND: **TFS MANUFACTURING**
First Respondent

IVS PTY LTD
Second Respondent

COVIDIEN PTY LTD (and others named in the Schedule)
Third Respondent

ORDER MADE BY: **LEE J**

DATE OF ORDER: **24 AUGUST 2023**

THE COURT ORDERS THAT:

1. The applicant bring in proposed orders approving the settlement in proper form as directed at the approval hearing to be made in Chambers.

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:

A INTRODUCTION

1 Before the Court is a settlement approval application of a class action pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). These proceedings are the smallest of several class actions commenced in this Court by women who claim to have been injured as a consequence of having been implanted with various mesh devices for the treatment of pelvic organ prolapse (**POP**) and stress urinary incontinence (**SUI**). The other, much larger proceedings *Gill v Ethicon Sàrl*; *Talbot v Ethicon Sàrl* (NSD 310 of 2021; NSD 1590 of 2012) (**Ethicon proceedings**); *Fowkes v Boston Scientific Corporation* (NSD 244 of 2021) (**Boston Scientific proceedings**); and *Philipsen v American Medical Systems LLC* (NSD 35 of 2018) (**Philipsen proceedings**) have either settled or are the subject of a stay.

2 It is unnecessary to rehearse the principles informing settlement approval applications, which I set out in *Fowkes v Boston Scientific Corporation* [2023] FCA 230 (at [31]–[45]). Further, on the application, the Court has been provided with a comprehensive and well-reasoned confidential opinion on the proposed settlement and settlement scheme prepared by counsel for the applicants, Dr Graham SC and Mr Robinson. What follows is largely drawn from that opinion on the proposed settlement which, subject to matters to which I will return, is within the range of settlements which are fair, reasonable and in the interests of group members.

B BACKGROUND

3 The applicants, Ms Schofield and Ms Weedon, commenced these proceedings under Pt IVA of the FCA Act in February 2021. The proceedings were brought on behalf of women in whom one of two types of polypropylene mesh devices were implanted for the treatment of POP and SUI. The devices were the “Intravaginal Sling Implant” inserted with or without the use of an “IVS Tunneller” (**IVS Implant**) and the “Tissue Fixation System Implant” (**TFS Implant**) (collectively, **implants**).

4 The implants were designed by the fourth respondent, Dr Peter Petros. Dr Petros published a series of papers about the IVS Implant with Professor Ulf Ulmsten in the 1990s. Professor

Ulmsten went on to develop the transvaginal tape (**TVT**) for the treatment of SUI, which was taken up by Ethicon and was one of the mesh implants considered in the Ethicon proceedings.

5 The IVS Implant was manufactured and supplied by IVS Pty Ltd (**IVS**) from an unknown date in or around August 2000. The implant was thereafter manufactured and distributed by the third respondent, Covidien Pty Limited (**Covidien**). Covidien acquired the interests and liabilities of IVS at that time. IVS has had, and continues to have, no role in this proceeding. IVS is understood to have no assets, and investigations have failed to reveal the existence of any available policy of insurance.

6 The TFS Implant was manufactured and supplied by the first respondent, TFS Manufacturing Pty Ltd (**TFS Manufacturing**), between 2004 and 2016. TFS Manufacturing entered into voluntary administration in 2021.

7 Dr Petros, a one-time registered medical practitioner and gynaecologist, is sued in negligence for using and advising the use of the implants on his own patients, or in assisting, supervising and advising other surgeons to use the implants on their patients. Dr Petros is now said to be impecunious on searches that have been conducted to date.

8 MIPS Insurance Pty Ltd (**MIPSI**) and Chubb Insurance Australia Limited (**Chubb**) were later joined as respondents to the proceedings. MIPSI is the professional indemnity insurer for Dr Petros and Chubb is the products liability insurer for TFS Manufacturing.

9 The parties have agreed to settle the proceedings for \$41.45 million inclusive of third-party repayments, legal costs and disbursements, and administration costs. The settlement involves the execution of two deeds: one for the TFS sub-group and one for the IVS and Petros sub-groups.

C CONSIDERATION

10 At the settlement approval hearing, I was provided with and marked on the application a comparison table of the average group member recovery in these proceedings compared with the Boston Scientific and Ethicon proceedings, which is set out below (footnotes omitted):

	TFS/IVS	Boston Scientific	Ethicon
Number of group members	375	2441	6158
Total damages incl. third-party recovery	\$64,688,485	\$211,157,200	\$477,337,555

Average compensation on total incl. third-party recovery	\$172,502.63	\$82,472,233.24	\$77,515.03
Total damages excl. third-party recovery	\$61,023,860	\$201,718,392	\$451,225,009
Average compensation on total excl. third-party recovery	\$162,730	\$82,638	\$73,275
Discounted total incl. third-party recovery	\$31,550,000	\$82,472,233.24	\$196,805,000
Average compensation incl. third-party recovery	\$84,133	\$33,786	\$31,959
Discounted total excl. third-party recovery	\$27,885,375	\$73,033,425	\$170,692,454
Average compensation excl. third-party recovery	\$74,361	\$29,919	\$27,719

11 As can be seen, the average compensation in this class action is significantly greater per group member compared to the settlement in both the Boston Scientific and Ethicon proceedings. Accordingly, and without descending into detail given the confidential nature of the opinion of counsel, for the reasons evident above and in the opinion, this settlement is not a borderline case. The aggregate sum in compensation forming the basis for the proposed settlement is comfortably within the range of settlements which are fair, reasonable and in the interests of group members. Further, it is rationally based: the settlement figure has been analysed in a rigorous way involving at least four steps.

12 *First*, the lawyers undertook a broad-brush, impressionistic assessment in order to assign group members to various bands or categories of damages based on the non-economic loss they might be awarded at trial.

13 *Secondly*, the lawyers used information derived from the registration process to ascertain whether the general impressions formed about group members’ non-economic loss are realistic, which, among other things, enabled conclusions to be drawn about the number of potential group members who may be entitled to compensation; group member demographics and characteristics (which may affect some heads of damages); and where most of the group members are likely to fall in terms of severity of injury and the magnitude of their claim.

14 *Thirdly*, an analysis was undertaken of a random sample of the group to determine whether the assumptions underpinning the proposed bands or categories of damages were fair, and what the total value of damages would be if the sum were extrapolated and applied to the whole.

15 *Fourthly*, the lawyers applied various deductions and discounts (both globally and to various subsets of group members) to reach an opinion about whether the settlement sum is fair, reasonable and in the interests of group members.

16 Through the process of opt-outs, approximately 370 women have been identified who have received an IVS or TFS Implant and are eligible to apply for compensation and, following the payment of damages to the lead applicants, a sum of approximately \$31,550,000 will be available for investment and distribution to group members.

D DISTRIUBTION OF THE SETTLEMENT SUM

17 At the hearing, I raised with counsel for the applicants, Dr Graham SC, as to whether it would be appropriate to bifurcate the settlement approval process under s 33V of the FCA Act: that is, approve the proposed settlement and defer for subsequent consideration the further question of the distribution of the settlement sum pursuant to any settlement scheme, including as to unpaid legal costs and disbursements: see, for example, *J & J Richards Super Pty Ltd v Linchpin Capital Group Limited (Settlement Approval)* [2023] FCA 656 (at [60]–[61]); *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68 (at 111 [198]–[203] per Tate, Whelan and Niall JJA).

18 My reason for proposing this course is twofold.

19 *First*, there is much to be said for deferring for subsequent consideration the question of what precise legal costs are proposed to be deducted from the settlement sum. This is a case which has been a trip down memory lane to the unfortunate practice of solicitors engaging a costs consultant and putting evidence before the Court by which they seek to justify their fees. The Court has often deprecated this practice, which I have described on previous occasions as “next

to useless”: see *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 (at [64]); *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 (at [40]–[41]).

20 Having said that, the settlement sum is a relatively modest amount and I do not propose to reinvent the wheel and incur unnecessary costs. Hence I intend to appoint a costs referee to conduct a high-level analysis and prepare a report of no more than two pages to be provided to the Court, limited to an expenditure of \$5,000, on whether the costs that have been identified are fair and reasonable in all the circumstances. Assuming there is no issue concerning those costs, or that any deductions are relatively minor, I propose to deal then with the issue of costs approval on the papers, subject to any communication received from the solicitors for the applicants following receipt of the report. This should not be viewed as an encouragement for this notion of securing a handpicked expert to justify one’s fees to be revived in future cases.

21 *Secondly*, I consider there is utility in deferring for approval the proposed settlement distribution scheme (**SDS**). It is evident from the confidential opinion of counsel that the proposed SDS has been prepared carefully and conscientiously and, subject to a matter to which I will return presently, I would be inclined to approve it. With that said, in the Boston Scientific and Ethicon proceedings, the Hon J L B Allsop AC is in the process of preparing a report dealing with the proposed settlement distribution schemes in those proceedings, which will be provided to the Court on 8 September 2023. I would like the opportunity to review that report prior to making orders approving the settlement distribution scheme in this case. If, following receipt of the report, I consider that there is some matter which ought to be raised with the parties, a further short hearing can be arranged. Otherwise, if I am satisfied following receipt of the report that orders should be made pursuant to s 33V(2) of the FCA Act, those orders will be made in chambers.

E A FINAL MATTER

22 There is one final matter which has given me pause in approving the proposed settlement.

23 A number of objections to the proposed settlement were provided to the Court, which comprise Exhibit A on the application. Of those objections, the only objection which was not addressed by the confidential opinion of counsel in a manner which satisfies me as to the fairness and reasonableness of the proposed settlement is one raised by Ms Nollean Gallard and her

husband, Mr Doug Connelley, dated on 17 August 2023, which was supplemented by oral submissions today.

24 Ms Gallard and Mr Connelley's objection relates to a group of women who received an implant prior to 15 November 2000, which was the date upon which it appears that the second respondent, IVS, transferred intellectual property in relation to certain iterations of mesh devices to the third respondent, Covidien (previously Tyco Healthcare). Without descending into detail, the issue is that Dr Petros had already (either personally or through one of his colleagues) engaged in procedures which had involved the use of those devices on approximately 15 group members in circumstances where Dr Petros is impecunious and little is known as to his insurance position prior to 15 November 2000. The settlement proposed that these group members be excluded, but following discussion with senior counsel for the applicants, the fair and reasonable course is that these women not be excluded entirely but there be an additional recoverability deduction reflecting the fact that there is limited information as to recoverability against Dr Petros.

25 Again, this is not necessarily a matter which directly bears upon the approval of the settlement under s 33V(1) of the FCA Act, but a version of the settlement scheme will be provided to me prior to making orders under s 33V(2) reflecting a payment, subject to this additional discount, to those 15 group members and, subject to the views of senior counsel, split differently between those persons who were direct patients of Dr Petros (being, I am told, four group members) and those who were not, although I am not wedded to any particular discount figure at this stage.

F CONCLUSION

26 On the material before the Court, this is a settlement which is clearly within the range of settlements which are fair, reasonable and in the interests of group members, and ought to be approved. Accordingly, I will make orders in chambers facilitating the course I have outlined.

I certify that the preceding twenty six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate: *M. Punch*

Dated: 4 September 2023

SCHEDULE OF PARTIES

NSD 181 of 2020

Respondents

Fourth Respondent: PETER PETROS

Fifth Respondent: MIPS INSURANCE PTY LTD

Sixth Respondent: CHUBB INSURANCE AUSTRALIA LIMITED