

AUSTRALIA / JUDGMENT

Moussa v Camden Council (No. 9)

[2026] NSWSC 1060**COURT**

Supreme Court

DECIDED

04 September 2026

BEFORE

Chen J

CASE / FILE NUMBER

2020/359004

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Supreme Court

New South Wales

Medium Neutral Citation: Moussa v Camden Council (No. 9) [2026] NSWSC 1060**Hearing dates:** 4 September 2026**Date of orders:** 4 September 2026**Decision date:** 04 September 2026**Jurisdiction:** Common Law**Before:** Chen J**Decision:** See [38]**Catchwords:** CIVIL PROCEDURE – Representative proceedings – Court approval of settlement sum – Where the funds available for distribution from the proposed settlement are significantly eroded by deductions in favour of the litigation funder and for legal costs – Whether a contradictor should be appointed**Legislation Cited:** Civil Procedure Act 2005 (NSW)
Competition and Consumer Act 2010 (Cth)
Practice Note SC Gen 17**Cases Cited:** Australian Securities and Investments Commission v Richards [2013] FCAFC 89
Bolitho v Banksia Securities Ltd (No 6) (2019) 63 VR 291; [2019] VSC 653
Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd [2021] NSWSC 249; 150 ACSR 535
Luke v Aveo Group Limited (No 3) [2023] FCA 1665
McCoy v Hino Motors Ltd (No 2) [2025] VSC 553
Stack v AMP Financial Planning Pty Ltd [2020] FCA 1839**Category:** Procedural rulings

Parties: Danny Marielle Moussa (plaintiff)
Camden Council (first defendant)
Cornish Group Spring Farm Pty Ltd (second defendant)
SMEC Testing Services Pty Ltd (third defendant)

Representation:

Counsel: W A D Edwards KC and M Kingsland (plaintiff)
S Glascott (first defendant)

Solicitors: Mayweathers (plaintiff)
McCabes (first defendant)
DWF Law (second defendant)
Wotton Kearney (third defendant)

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JUDGMENT

Introduction

Shortly prior to the allocated twelve-week hearing that was scheduled to commence on 20 July 2026, the parties in the representative proceedings known as the Camden Land Subsidence Class Action reached an in-principle settlement.

On 13 August 2026, the trial judge approved a notice to group members of the proposed settlement (requiring group members to register to participate in, or object to, the settlement by 18 September 2026), directed that a notice of motion seeking approval of that settlement be filed by 17 August 2026 and listed the application for approval for hearing on 13 October 2026.

The matter was listed for directions before me, as the judge allocated to hear the approval application, on 18 August 2026.

In the course of that listing, having reviewed the notice issued to group members, I expressed a degree of concern about the proposed “deductions” from the settlement amount and the significant degree to which they eroded the amount available to group members.

The possible appointment of a contradictor was raised and discussed. No party expressed opposition to that happening. Orders were made for the filing and service of submissions on this issue. In the end, the only party that provided submissions was the plaintiff.

These reasons deal with the question of that appointment.

Background facts

It is necessary to cover some matters of background, which I will do across three parts: first, a brief overview of the proceedings and the claims made within them; secondly, the relevant procedural history; and, thirdly, the proposed settlement.

An overview of the proceedings

By statement of claim filed 18 December 2020 (SOC), Danny Moussa commenced representative proceedings on behalf of group members. The SOC was amended on multiple occasions.

Ultimately, the proceedings were to be heard on the second further amended statement of claim filed 20 March 2024 (2FASOC). What follows is principally drawn from that pleading.

The group members were defined as follows:

those who own, or owned, land in a defined area described as the “Cornish Masterplan Area”, where that person “acquired the land after 31 December 2010” and had, or claimed to have, “suffered damage to property or economic loss as a result of damage to residential buildings located on their properties” in consequence of “the widespread presence at significant depths of inadequately compacted or uncompacted fill, or fill otherwise unsuitable due to its type, density and/or moisture content” (2FASOC, pars 1(b) and (c)(i)); and

those who own, or owned, land in a defined area described as the “Spring Farm Area”, where that person “owned the land as at 1 January 2018 or acquired the land after 1 January 2018” and had, or claimed to have, “suffered economic loss as a result of a reasonable apprehension that some land within the Spring Farm Area is unsound for building...” (2FASOC, pars 1(b) and 1(c)(ii)).

The plaintiff sought to recover damages for the abovementioned losses in negligence, and under sch 2 of the Competition and Consumer Act 2010 (Cth) (‘the Australian Consumer Law’) for misleading and deceptive conduct, from three defendants:

Camden Council, the first defendant: it formerly owned some of the land comprising the Spring Farm Area that has since been developed and sold to the plaintiff and some of the group members; was alleged to be the authority who provided “certification and approval of subdivision of[,] and development on[,] the land comprising the Spring Farm Area”; and was alleged to be “the principal certifying authority for the subdivision of land located in whole or in part within the Cornish Masterplan Area” (2FASOC, par 4).

Cornish Group Spring Farm Pty Ltd, the second defendant: it formerly owned, and was the developer of, some or all of the land comprising the Spring Farm Area and was the developer of residential lots in the Cornish Masterplan Area (2FASOC, par 5).

SMEC Testing Services Pty Ltd (In Liquidation), the third defendant: it conducted a business of providing geotechnical investigation and related services (2FASOC, par 6) and was alleged to have been engaged by the second defendant to provide geotechnical investigation, advice and certification services for each, or many, of the blocks on the Cornish Masterplan Area as to whether the land was suitable for residential construction (2FASOC, pars 21 and 25).

The proceedings were also commenced against a fourth defendant, SMECTS Holding Pty Ltd, being, at all relevant times, the owner of all issued share capital in the third defendant. The proceedings as against the fourth defendant were dismissed on 8 July 2022.

Since the SOC, the plaintiff has further claimed that he and the group members (or, at least, those in connection with “the new lots”) suffered pure economic loss through the devaluing of the suburb generally, including those group members who had not suffered physical damage to their lots: the allegation being that, in “consequence of it becoming public knowledge that the new lots... are unsound for building, all properties in the Spring Farm Area have become and are likely to remain, injuriously affected in value” (the ‘stigma claims’) (SOC, pars 1(c)(i), 20 and 35; 2FASOC, pars 33-35).

The relevant procedural history

On 13-14 December 2022 and 7-8 September 2023, there was a hearing to determine the common questions to be decided.

Garling J ordered, on 28 September 2023, that 35 common questions identified be heard and determined, subject to direction by the trial judge, at an “initial hearing” – the date of which was to be later determined: *Moussa v Camden Council* (No. 5) [2023] NSWSC 1135.

By way of summary, the common questions were:

Question 1 went to the commonality of questions.

Questions 2-8 went to the development of the relevant area.

Questions 9-19 went to negligence.

Questions 20-27 went to the Australian Consumer Law claims.

Questions 28-30 went to causation.

Questions 31-33 went to stigmatisation.

Questions 34-35 went to apportionment.

On 28 October 2024, Garling J listed the plaintiff’s personal claim and the determination of the common questions for hearing for twelve weeks commencing 13 July 2026.

Shortly before the trial date, on 9 July 2026, Coleman J, who was to hear the matter, made orders noting that the parties had agreed to an in-principle settlement of the proceedings (subject to them entering into a settlement deed and the Court approving the settlement pursuant to s 173 of the Civil Procedure Act 2005 (NSW) ('CPA')). To allow the parties to document that agreement, the commencement of the hearing was adjourned on several occasions.

As earlier noted, on 13 August 2026, Coleman J made orders, inter alia, pursuant to ss 175 and 176 of the CPA approving a notice to group members of the proposed settlement, vacating the hearing (then) listed to commence on 12 August 2026 and listing the application for judicial approval for hearing on 13 October 2026.

The proposed settlement

The plaintiff filed a notice of motion on 17 August 2026 seeking orders approving the settlement. The notice of motion records that a settlement agreement and collateral agreement dated 10 August 2026 (together, "the Settlement") had been reached between the plaintiff and the three defendants (par 1). The orders made by the Court on 13 August 2026 included approving a notice, under ss 175-176 of the CPA, described as the 'Notice of Proposed Settlement' (Sch A).

The Settlement would affect and bind the plaintiff, the first, second and third defendants, all group members in the proceedings (other than those who had opted out of the proceeding under s 162 of the CPA) and a Funder (notice of motion filed 17 August 2026, par 2).

Under the Settlement, the three defendants would collectively pay a "Settlement Sum", namely \$18 million inclusive of costs, to settle the claims of the plaintiff and group members without admission of liability (Sch A, p 3, par 10).

The Settlement provides that the plaintiff will not press the claim that he and the group members had suffered pure economic loss as a result of the general devaluation of the Spring Farm Area caused by subsidence affecting some properties in the suburb (Sch A, p 3, par 6(c)(ii)). That is, the stigma claims are not pressed, and the claim is limited to property damage or consequential economic loss because of damage to residential buildings due to soil conditions. The plaintiff notified the Court on 1 July 2026 that it would not press the stigma claims (affidavit of André Joseph Adams sworn 11 August 2026, p 60, par 3; see also the plaintiff's submissions filed 20 August 2026, par 17(a)).

To this end, a "Settlement Distribution Scheme" was agreed to, which would limit distribution of the Settlement Sum to "Eligible Group Members", being those group members who had not opted out of the proceedings and who were the current registered owners of 1 of 64 properties identified in the Settlement (notice of motion filed 17 August 2026, pars 4-5; Sch A, p 3, pars 9-12, Annexure A). The Settlement thus restricted the distribution of the Settlement Sum to 64 Eligible Group Members out of a class of over 3000 (see plaintiff's submissions filed 20 August 2026, par 16(d)). The Settlement Distribution Scheme is proposed to be administered by the solicitor for the plaintiff and is estimated to incur "Administration Costs" in the "amount of up to \$220,000 (incl GST)" (Sch A, p 6, pars 20 and 22(d); notice of motion filed 17 August 2026, par 8).

An amount was also proposed to be deducted from the Settlement Sum for various costs and payments associated with bringing the proceedings (notice of motion dated 17 August 2026, par 7; Sch A, pp 4-7). The amount proposed to be deducted constitutes approximately 80% of the Settlement Sum. These deductions include, in favour of the plaintiff's solicitor and the Funder, what have been described as the "reimbursement of legal costs paid and funding commission" and the "deferred' solicitor's fees and uplift fees" (affidavit of André Joseph Adams sworn 11 August 2026, p 61, par 7). The Settlement indicated that the Funder and the solicitors for the plaintiff both considered that the sum to be made available for distribution to Eligible Group Members was insufficient, and that both would make submissions at the approval hearing that their fees be reduced to make more funds available for distribution (Sch A, pp 6-7, pars 22-25).

The power to appoint a contradictor

Representative proceedings may not be settled without the approval of the Court: s 173(1) of the CPA. When considering whether to approve a settlement, the Court's role in relation to group members is supervisory and protective: *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8] ('Richards'); *Findlay v DSHE Holdings Ltd*; *Mastoris v DSHE Holdings Ltd*; *Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249 at [12]. In that context, the role of Court is "to protect those group members who are not represented... and whose interests may be prejudiced by their absence": *Richards* at [8]; *Stack v AMP Financial Planning Pty Ltd* [2020] FCA 1839 at [9] ('Stack').

To that end, s 183 of the CPA provides that, in any Supreme Court representative proceedings:

"... the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings."

The power to appoint a contradictor, in the present circumstances, is undoubted (Stack at [9]) and, as the plaintiff submitted, can be sourced to this section: see, for example, *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553 at [7]. It is also relevant to observe that the Supreme Court Representative Proceedings ("Class Actions") Practice Note SC Gen 17 specifically makes provision for the appointment of a contradictor (par 39):

"The approving judge may appoint a contradictor or an amicus curiae and may direct that the costs and expenses associated with the appointment be paid out of the settlement sum."

It has been remarked that contradictors are "regularly appointed" in the context of applications for judicial approval of representative proceedings (*Luke v Aveo Group Limited (No 3)* [2023] FCA 1665 at [31]) and that their appointment enables the Court to "more effectively discharge its judicial function" (*Bolitho v Banksia Securities Ltd (No 6)* (2019) 63 VR 291; [2019] VSC 653 at [123] ('Bolitho')) by providing a mechanism to ensure that "there is a real contest between conflicting interests" and by providing "valuable input and perspective which may be otherwise unavailable": *Bolitho* at [110]; *Stack* at [9].

The plaintiff submitted, and I accept, that the following factors favour the appointment of a contradictor.

First, the solicitors and the Funder have both formed the view that, if they were to each receive the full amount of the deductions (as set out in Sch A, p 6, par 22), there would be an insufficient sum left the Eligible Group Members (plaintiff's submissions, par 16(a)). To give some context to this, if the full amount of the deductions (approximately \$14,442,369.00) was allowed from the proposed Settlement Sum (\$18,000,000.00), the balance available for distribution (excluding any interest) would be \$3,557,631.00 (Sch A, pp 3 and 6, pars 8 and 22-23). It may be added that, even on the suggested revised "deductions" that should be made, the amount available for distribution is approximately \$7,408,826.00 (Sch A, p 6, par 25). Secondly, and relatedly, there is a dispute about the extent to which the deductions payable to the solicitors and the Funder should be reduced in order to increase the amount available for distribution to Eligible Group Members (plaintiff's submissions, par 16(b)). Thirdly, the Funder has indicated that it may seek a common fund order (plaintiff's submissions, par 16(c)). And, fourthly, "[t]he fact that only 64 [g]roup [m]embers out of a class of over 3000 [g]roup [m]embers will be eligible to participate in the [S]ettlement" – albeit that, for completeness at the present time, it should be noted that the plaintiff submitted there "is good reason for that[,] having regard to the differently composed claims of the [g]roup [m]embers" (plaintiff's submissions, par 16(d)).

Despite the plaintiff "not tak[ing] a position on whether a contradictor should be appointed" and accepting "that such a course is available" (plaintiff's submissions, pars 2 and 21), he raised three matters – it should be emphasised, in order to provide balanced submissions on the appointment question – that were submitted to stand against the appointment of a contradictor.

First, the plaintiff emphasised that the legal representatives "will be acting in the interests of the class when considering the fairness and reasonableness of the [S]ettlement" (plaintiff's submissions, par 17(a)). That may be accepted, and it is to be accorded some weight. Secondly, the plaintiff submitted that "[t]he appointment of the contradictor will come at a cost to the class" which "may be significant", particularly in circumstances where there is already a dispute about nature and extent of those costs (plaintiff's submissions, pars 17(a)-(b)). There is no doubt that the appointment of a contradictor will have a cost, but I am far from persuaded that it will be "significant", contextually or otherwise. Thirdly, the plaintiff submitted that, given the Funder and the solicitors for the plaintiff are to be separately represented on the approval application, that provided a "measure of contradiction on the issue of the deductions" (plaintiff's submissions, par 17(c)). It is difficult to assess the extent to which there will be contradiction on this issue, given no material has been served. There is, at least impressionistically, some reason to think that any contradiction will be quite confined.

There is a final matter. The plaintiff also submitted that it would be open to the Court to defer deciding whether any contradictor should be appointed until after the filing and service evidence and submissions (plaintiff's submissions, par 21) – that is, at some point after 21 September 2026 (when the primary evidence and submissions are due) or, possibly, 25 September 2026 (when the reply evidence and submissions are due). In my view, that invitation is slightly unrealistic: the

short period of time between the service of that material and the hearing of the application would all but inevitably compromise the ability of the contradictor to traverse the material and deny them a reasonable opportunity to put evidence and submissions before the Court.

None of the matters raised, alone or in combination, tell against the appointment of a contradictor – which should occur. Their appointment, I am satisfied, will provide considerable assistance to the Court, exercising its protective function, in seeking to satisfy “itself of the fairness and reasonableness of the settlement”: Bolitho at [73](c), [123].

Orders

Nothing in these reasons should be taken as an indication that the contradictor’s role will be confined to addressing the matters raised by the plaintiff. In the present circumstances, I do not consider it appropriate, particularly given the limited material available, to be more prescriptive about the particular issues which a contradictor might be required to address. In time, the issues for the contradictor’s consideration will be informed, perhaps substantially, by their own assessment of the matter.

Further, the extent to which the contradictor should be assisted by additional legal assistance is a matter upon which submissions can be made, including by the contradictor, at a subsequent listing.

For the above reasons I make the following orders:

Order, pursuant to s 183 of the Civil Procedure Act 2005 (NSW), that a contradictor be appointed in the application for judicial approval of the Settlement of the proceedings.

Order the plaintiff’s solicitor contact the proposed contradictor to confirm their willingness to accept the appointment and advise the Court, in writing via the Associate to the Honourable Justice Chen, by 7 September 2026, 4pm.

List the matter for further directions on 10 September 2026.

Grant liberty to apply on 24 hours’ notice.

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