



Issued: 24 August 2023 4:33 PM

JUDGMENT/ORDER

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2016/00045027

TITLE OF PROCEEDINGS

First Plaintiff	Clayton William Searle
First Defendant	THE COMMONWEALTH OF AUSTRALIA

DATE OF JUDGMENT/ORDER

Date made or given	18 August 2023
Date entered	24 August 2023

TERMS OF JUDGMENT/ORDER

GARLING J MAKES THE FOLLOWING ORDERS:

1. Pursuant to rr 20.14 and 20.15 of the Uniform Civil Procedure Rules 2005 (NSW) ('UCPR'), that the Honourable Geoffrey Bellew SC be appointed to act as a senior referee ('Senior Referee'), to conduct inquiries and prepare reports to the Court in respect of the remaining group members on the questions set out in Annexure A to these orders ('the Reference').
2. Pursuant to r 20.18 of the UCPR (without affecting the powers of the Court as to costs) that the Commonwealth of Australia be liable for the fees payable to the Senior Referee.
3. Pursuant to r 20.20 of the UCPR, that the Senior Referee conduct the Reference in accordance with the terms of reference set out in Annexure B to these orders.
4. Direct that the parties deliver to the Senior Referee a copy of these orders.
5. List the matter for further directions before Beech-Jones CJ at CL on 6.10.23, with the intention that on that date the Court will appoint further referees to conduct the inquiries and prepare reports as set out in Order 1 above.
6. The parties have liberty to apply for further directions.

SEAL AND SIGNATURE



Signature	R Connor
Capacity	Chief Clerk
Date	24 August 2023

If this document was issued by means of the Electronic Case Management System (ECM), pursuant to Part 3 of the Uniform Civil Procedure Rules (UCPR), this document is taken to have been signed if the person's name is printed where his or her signature would otherwise appear.

ATTACHMENTS TO ORDERS

(searle - annexure a_2023_08_18_14_49_37_134.pdf)

(searle - annexure b_2023_08_18_14_50_05_123.pdf)

[attach.]

Annexure A

Questions for Referral

1. What is the value, if any, for each of the remaining group members of the lost opportunity to seek employment and earn income having attained a Certificate IV qualification pursuant to the Training Contract, whether within the Navy or outside of the Navy
2. The amount of damages (if any) payable by the defendant to the Remaining Group Member, including interest calculated in accordance with section 100 of the *Civil Procedure Act 2005* (NSW) and Practice Note SC Gen 16.

For the purposes of this Annexure A:

“Remaining Group Members” means the members described in paragraph 1 of the Claimants’ Outline of Opening Submissions filed on 15 February 2022 in these proceedings, excluding Clayton Searle, Patrick Burnett, Beau Denton, Benjamin Sparks, Stephen Trappett, Michael Quinn, Mostynn Williams, Elliot Gregory, Jordan Widz and Jared Wajwoda.

Annexure B

Terms of Reference

- 1 These terms of reference are subject to any more specific orders made by the Court in relation to the conduct of the Reference.
- 2 The parties are to provide such assistance to the Senior Referee and the Referees, as is reasonably necessary to assist them in the conduct of the Reference in accordance with these terms of reference.
- 3 The Senior Referee is to consider and implement such manner of conducting the Reference as will, without undue formality or delay, enable a just, quick and cheap resolution of the Reference and completion of the Senior Referee's reports.
- 4 In order to facilitate the implementation of the just, quick and cheap resolution of the Reference, a Referee is to make such directions as they consider appropriate as to the conduct of the Reference.
- 5 If any party to the Reference is dissatisfied with any directions made by a Referee, that party may apply to the Senior Referee in writing for reconsideration of the directions in question, and the Senior Referee may set aside, vary, or confirm the directions in question.
- 6 The Senior Referee and a Referee may, to the extent that he or she may consider appropriate:
 - a. make enquiries by telephone, audio-visual link, in-person, or in writing;
 - b. make any direction they consider appropriate in relation to the preparation and service of evidence and/or making of submissions by any party, including that any evidence and/or submissions be provided wholly in writing and be limited in length and topic;
 - c. make directions for the attendance of any person, and/or the production of documents, to be compelled by subpoena;
 - d. make directions for the conduct of any hearing which they consider appropriate and conduct any such hearing.
- 7 The Reference is to be conducted with as little formality and technicality as the proper consideration of the matter permits, in a manner which is proportionate to the amounts claimed. Any party is permitted to issue subpoenas to produce in respect of production of documents.
- 8 The Senior Referee may make directions delegating the conduct of any part of the Reference to any one or more of the Referees, including the determination of the amount of damages payable to any sub-group of the Remaining Group Members.
- 9 The rules of evidence do not apply to the Reference unless the Senior Referee otherwise directs that they apply to a particular Remaining Group Member or sub-group of the Remaining Group Members.
- 10 Any evidence before a Referee, unless the Senior Referee or Referee otherwise directs, be taken by way of any one or more of the following means:

- a. any statement of agreed facts;
 - b. a sworn written statement signed by the maker of the statement provided to the Referee by a party in accordance with any directions made by the Referee (**Written Statement**);
 - c. upon an application by either party, of oral evidence by way of cross-examination and re-examination of the maker of any Written Statement, subject to such limitations as to length and topic as the Referee considers appropriate;
 - d. expert evidence provided in accordance with Schedule 7 of the *Uniform Civil Procedure Rules 2005* (NSW);
 - e. documents already discovered by the parties in the proceedings which are served in accordance with such directions as the Referee may make; and
 - f. such other means as the Referee considers appropriate.
- 11 Notwithstanding clause 10, the Referee shall in the first instance determine the Questions for Reference in respect of each Remaining Group Member on the basis of:
- a. any Written Statements, expert evidence or other documents that have been served in accordance with any directions made by the Referee;
 - b. any oral evidence;
 - c. any written submissions of the parties that have been served in accordance with any directions made by the Referee.
- 12 If any party to the Reference is dissatisfied with any determination made by any Referee in respect of a Remaining Group Member in accordance with clause (11) (**the Original Decision**), that party may apply to the Senior Referee in writing for reconsideration of the Original Decision, stating the grounds for why the Original Decision should be varied or set aside.
- 13 Upon a party making an application for reconsideration of the Original Decision to the Senior Referee in accordance with clause (12) the Senior Referee shall convene a panel of two Referees (not including the Referee who made the original determination) (**the Panel**), which Panel may include the Senior Referee, to reconsider the Questions for Reference in respect of the Remaining Group Member the subject of the Original Decision.
- 14 The Panel convened in accordance with clause (13) shall conduct a rehearing and for that purpose may conduct any hearing they consider appropriate, and may allow:
- a. any written or oral submissions that the Panel considers appropriate; and/or
 - b. on application by a party, any oral evidence by way of cross-examination and re-examination of the maker of any written statement, subject to such limitations as to length and topic as the Panel considers appropriate.
- 15 The Panel upon any such rehearing may:
- a. vary the terms of the Original Decision; or
 - b. set aside the Original Decision in whole or in part; or

- c. confirm the Original Decision; or
 - d. dismiss the application for reconsideration,
- and if it does any of (a) to (c) above, the decision of the Panel shall take the place of the Original Decision.
- 16 The Senior Referee will prepare and deliver final reports to the Court with respect to the Remaining Group Members, containing the Original Decisions or, where applicable, any decisions of the Panel that take the place of Original Decisions.
 - 17 The final reports prepared by the Senior Referee and delivered to the Court:
 - a. may consist of reports prepared in respect of sub-groups of Remaining Group Members and reports in respect of individual Remaining Group Members where it is not just, cheap and quick to deal with that individual together with the other Remaining Group Members in a sub-group that he or she would otherwise be part of (**'Reports'**);
 - b. must give reasons for the determinations on the Questions for Reference in respect of each Remaining Group Member, which reasons may be contained in the Reports.
 - 18 To the extent that the Senior Referee prepares any such final reports, these shall consist of, in relation to the Remaining Group Member(s) the subject of that report:
 - a. a copy of any written statements and transcripts of evidence;
 - b. any written submissions or transcripts of oral submissions of the parties; and
 - c. in respect of the reasons given for the opinion of the Referees on the Questions for Reference, either:
 - i. a transcript of any reasons and determination delivered ex tempore whether orally or in writing from time to time during the course of the Reference; and/or
 - ii. other statement of the Referees in writing.
 - 19 The defendant is to provide the Senior Referee and Referees with such administrative assistance as they reasonably require.
 - 20 Any amendments to the Questions for Reference or these Terms of Reference, whether by agreement or otherwise, are to be the subject of an order made by the Court.
 - 21 The Reference shall commence on such date as is directed by the Senior Referee, which date shall not be sooner than 6 October 2023.
 - 22 Notwithstanding the above date for the commencement of the Reference, the Senior Referee may immediately begin preparations for the carrying out of the Reference, including making such enquiries and directions as the Senior Referee considers appropriate to facilitate the efficient conduct of the Reference upon its commencement.
 - 23 The Senior Referee shall submit the reports to the Court in accordance with r 20.23 of the *UCPR* by the date specified in the Court's orders by email to the Chambers of Justice Garling.

- 24 If for any reason the Senior Referee is unable to comply with the order for delivery of their reports to the Court by the date in an order in these proceedings, the Senior Referee is to provide to the Court an interim report setting out the reasons for such inability and an application to extend the time within which to deliver the report to the Court to a date when the Senior Referee will be able to provide the report.
- 25 The Senior Referee and each of the parties have liberty to seek directions with respect to any matter arising upon application made on 2 business days' notice in writing, save that if a matter requires the urgent assistance of the Court, the Senior Referee or a party may approach the Chambers of Justice Garling by email, copied to the other party or parties.
- 26 The Senior Referee and each of the parties have liberty to apply to the Court to seek directions for the removal or substitution of any of the Senior Referee, Referee, or the addition of further Referees:
- a. if any Referee is unable or unavailable to carry out the Reference; or
 - b. in any other circumstance in which the Court considers it appropriate and in accordance with the just, quick and cheap resolution of the Reference, to remove or substitute any of the referees, or add further Referees.

For the purposes of this Annexure B:

Referees means any other referee, other than the Senior Referee, appointed by the Court from time to time.

Reference has the meaning given to it in order 1 of the orders above.

Senior Referee has the meaning given to it in order 1 of the orders above.