Equity Division
Supreme Court
New South Wales

Case Name:	**Quirk v Suncorp Portfolio Services Ltd in its capacity as trustee for the Suncorp Master Trust (No 2)**
Medium Neutral Citation:	[2022] NSWSC 1457
Hearing Dates:	On the papers; submissions received 9, 12 and 22 September 2022, and 7 October 2022
Date of Orders:	25 October 2022
Date of Decision:	25 October 2022
Jurisdiction:	Equity – Commercial List
Before:	Stevenson J
Decision:	Settlement approved
Catchwords:	CIVIL PROCEDURE – representative proceedings – where plaintiff alleged defendant trustee company wrongfully used fees charged to trust beneficiaries to pay commissions – proceedings settled – large number of group members – individual claims of group members modest – amount payable to individual group members also modest – where compromise appears to reflect risks of proceeding – where some 40% of settlement available for distribution to Group Members after payment of Funder's costs, commission and other deductions
Legislation Cited:	Civil Procedure Act 2005 (NSW) Corporations Act 2001 (Cth) Court Suppression and Non-publication Orders Act 2010 (NSW) Federal Court of Australia Act 1976 (Cth) Superannuation Industry (Supervision) Act 1993 (Cth)
Cases Cited:	Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3) [2020] FCA 1885

Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3) [2017] FCA 330
BMW Australia Ltd v Brewster (2019) 269 CLR 574; [2019] HCA 45
Brewster v BMW Australia Ltd [2020] NSWCA 272
Caason Investments Pty Limited v Cao (No 2) [2018] FCA 527
Camilleri v The Trust Company (Nominees) Limited [2015] FCA 1468
Court v Spotless Group Holdings Limited [2020] FCA 1730
Davaria Pty Limited v 7-Eleven Stores Pty Ltd (2020) 281 FCR 501; [2020] FCAFC 183
Evans v Davantage Group Pty Ltd (No 3) [2021] FCA 70
Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd [2021] NSWSC 249
Hall v Arnold Bloch Leibler (a firm) (No 2) [2022] FCA 163
Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia Ltd; Bond v Nissan Motor Co (Australia) Pty Ltd; Coates v Mazda Australia Pty Ltd [2022] NSWSC 1076
In re the Takata Airbags Class Actions Settlement (Preliminary Orders) [2021] NSWSC 1153
Jenkings v Northern Territory of Australia (No 5) [2021] FCA 1585
Kelly v Willmott Forests Ltd (in liquidation) (No 4) [2016] FCA 323
Kenquist Nominees Pty Limited ATF The Kenquist Superannuation Fund v Campbell (No 6) [2020] FCA 1388
Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc) [2018] FCA 1289
Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited (No 4) [2018] NSWSC 1584
Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited [2021] FCA 475
Williams v FAI Home Security Pty Ltd (No 4) [2000] FCA 1925

Category: Principal judgment

Parties:	Kerry Michael Quirk (Plaintiff) Suncorp Portfolio Services Limited in its capacity as trustee for the Suncorp Master Trust (First Defendant) Geoffrey Edward Summerhayes (Second Defendant) Sean Carroll (Third Defendant) LCM Operations Pty Ltd (Interested Party)
Representation:	Counsel: S Habib SC with C McMeniman and R Pietriche (Plaintiff) L Armstrong KC with R Mansted (Interested Party) Solicitors: William Roberts Lawyers (Plaintiff) King & Wood Mallesons (First Defendant) Arnold Bloch Leibler (Second Defendant) King & Wood Mallesons (Third Defendant)
File Number:	2019/193556

JUDGMENT

1 I am asked to approve, under s 173 of the *Civil Procedure Act 2005* (NSW) ("the Act"), the settlement of these representative proceedings.

2 The proceedings were commenced by Mr Kerry Quirk pursuant to Pt 10 of the Act against Suncorp Portfolio Services Ltd (now known as SPSL Ltd) ("SPSL") and two of SPSL's former directors, Mr Geoffrey Summerhayes and Mr Sean Carroll.

3 The proceedings were funded by LCM Operations Pty Ltd ("the Funder").

4 SPSL is the trustee of the Suncorp Master Trust ("the Trust"). Mr Quirk and the Group Members were beneficiaries of the Trust between 1 July 2013 and 21 June 2019 ("the Relevant Period").

5 The matter was listed before me for the hearing of common questions for five weeks commencing on 23 May 2022.

6 The matter settled on the first day of the hearing for an amount of $33 million.

7 By a Further Amended Notice of Motion, filed on 26 September 2022, Mr Quirk seeks approval of the settlement and payment from the settlement sum of the following amounts:

(a) costs and disbursements already paid by the Funder – $6,182,661.39;

(b) Funder's Commission – $8,250,000;

(c) After-the-Event insurance premium ("the ATE Premium") – $1,334,160;

(d) Deferred Costs – $2,386,487.69; and

(e) Administration Costs – $504,512.47.

8 These amounts total $18,657,821.55 and represent 56.54% of the settlement sum.

9 The amount available for distribution to Group Members is $14,342.178.45, representing 43.46% of the settlement sum.

10 To understand what this means in real terms for the Group Members it is necessary to understand the nature of Mr Quirk's claims. Much of what follows, concerning the nature of those claims and the proceedings in general, is drawn with gratitude from the submissions I received from Mr Habib SC, Mr McMeniman and Mr Pietriche who appeared for Mr Quirk, and from Mr Armstrong KC and Ms Mansted who appeared for the Funder.

11 Mr Quirk's claims concern the ongoing payment of commissions ("the Commissions") to financial services licensees and their representatives in relation to SPSL products funded by fees paid by Mr Quirk and the Group Members to the Trust ("the Fees").

12 Mr Quirk alleges that:

(a) by continuing to charge the Fees to fund the ongoing payment of the Commissions, SPSL breached its statutory covenants under s 52(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth) and its analogous duties in equity, to exercise care, skill and diligence, to act in the best interests of members of the Trust, to give the interests of members priority in the face of any conflict with SPSL's interests, and to treat classes of beneficiaries fairly;

(b) the payment of the Commissions on or after 1 July 2013 contravened the ban on such commissions introduced into the *Corporations Act 2001* (Cth) by statutory amendments known as the "FOFA Reforms";

(c) in charging members the Fees to fund the payment of the Commissions, SPSL failed to advise Mr Quirk and the Group Members that they could be moved into a superannuation product under the Trust that did not involve the charging of the Fees;

(d) by charging members the Fees to fund the payment of the Commissions, SPSL engaged in unconscionable conduct; and

(e) Mr Summerhayes and Mr Carroll were knowingly involved in those statutory contraventions.

13 The Group Members are, broadly, people who were affected during the Relevant Period by the payment of the Commissions. There were some 157,500 potential group members of whom some 23,665 registered as Group Members.

14 Mr Quirk's application for approval of the settlement was listed for hearing before me on 22 September 2022. The hearing could not proceed because that date was declared the National Day of Mourning following the death of

Queen Elizabeth II. The parties agreed that, in those circumstances, I could deal with the matter on the papers, subject to receiving any further written or oral submissions as might be required. Subject to having a number of matters clarified in further supplementary written submissions, I concluded that it was not necessary for there to be an oral hearing.

Decision

15 My conclusion is that I should approve the settlement.

Principles

16 The central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the Group Members considered as a whole.[1] The Court's role in relation to group members is supervisory and protective.[2]

17 When considering the reasonableness of the settlement *inter partes*, the Court is asked to determine whether the settlement is fair and reasonable considering the alternative, which is usually the risks and costs to which the group members would be exposed were the matter to proceed to trial.[3]

18 The question of whether the settlement is reasonable *per se* cannot be separated from ancillary questions concerning the approval of funding and legal costs. The evaluation of whether a settlement is fair and reasonable "must be carried out by reference to what all group members obtain in their

[1] For example, see *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [12] (Murphy J); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 at [81] (Beach J); *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323 at [68] (Murphy J); *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 at [5(a)] (Moshinsky J); and *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited (No 4)* [2018] NSWSC 1584 at [22] (Ball J).
[2] For example, see *Kelly v Willmott Forests Ltd* at [62] and *Court v Spotless Group Holdings Limited* [2020] FCA 1730 at [8] (Murphy J).
[3] For example, see *Kelly v Willmott Forests Ltd* at [64] and *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [19] (Goldberg J).

hands following the resolution of their individual claims in the event that the settlement is approved".[4]

Orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW)

19 Mr Quirk and the Funder sought orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW) in relation to certain of the material that was made available to me for the purpose of considering whether I should approve the settlement. That material included, as is customary on applications such as this, a "Confidential Joint Opinion" of Messrs Habib, McMeniman and Pietriche directed to the reasonableness of the proposed settlement.

20 I am persuaded that I should make those orders. It is not necessary that they be set out in these reasons.

The settlement figure

21 As I have said, the proceedings have settled on the basis of a payment by SPSL to Mr Quirk, as representative of the Group Members, of $33 million.

22 The settlement was achieved on the first morning of the five week hearing allocated to the trial of common issues, and thus before substantial costs of that hearing had been incurred.

23 There had been extensive settlement negotiations, including a mediation in April 2022 which was not successful. Further negotiations occurred in the lead up to trial.

24 The total potential value of the claim was in the order of $180 million of which some $122 million represented the total of the Fees charged to Group Members to pay the Commissions. The remaining $58 million was the amount

[4] *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 at [2] (Lee J).

to which the $122 million would have grown had it remained invested in the trust ("the Loss Return").

25 The average Fees paid by each Registered Group Member was approximately $1800. The average claim of each Registered Group Member including both Commissions and Loss Return was approximately $2635.

26 The settlement will result in an average rate of return to Registered Group Members of approximately $470, which represents around 26% of the Commissions paid by Group Members and approximately 18% of the total of Commissions and Loss Return for each Registered Group Member.

27 The settlement thus represents a significant discount for Group Members.

28 In addition to receiving the submissions to which I have referred at [10] above, I have been provided with the Confidential Joint Opinion, referred to at [19] above, which sets out a summary of the opinion of Messrs Habib, McMeniman and Pietriche as to Mr Quirk's prospects of success in the proceedings and their assessment of the likely outcome. Counsel have also provided submissions as to their views concerning the indemnity and limitation defences propounded by SPSL and Messrs Summerhayes and Carroll.

29 The Confidential Joint Opinion is comprehensive and 84 pages in length. I have given it careful consideration and am satisfied, based on the issues that counsel saw as arising in the proceedings, that the settlement figure of $33 million, although a figure far short of the maximum potential recovery, is within the range of fair and reasonable outcomes.

30 Further, as was submitted on behalf of Mr Quirk:

(a) the initial trial would not have resolved Group Members' claims. Resolution of their claims would have required further hearings and been affected by further delay after an already lengthy period

since the commencement of these proceedings and their proposed settlement;

(b) the prospect of further delay of the proceedings was exacerbated by the rigorous defences advanced by each of the defendants which posed the risk of an appeal from any decision against them and a contest in relation to the individual claims of Group Members;

(c) the settlement, as I have said, was achieved on the first day of hearing and avoided the costs that would have been involved had the matter proceeded;

(d) there have been very few objections to the proposed settlement, with the total number of objections representing only 0.012% of the potential group members;

(e) the Settlement Distribution Scheme, that I will discuss further below, proposes a sensible and practical means of distributing the settlement funds in a manner which is cost efficient, and which ensures that the rateable entitlement of Group Members is determined by reference to the quantum of their underlying claim; and

(f) while the Settlement Distribution Scheme envisages distributing settlement proceeds only to those Group Members who have registered to participate in the distribution, the fact that Group Members who did not register will not receive a share in the proceeds does not detract from the fairness of the Settlement Distribution Scheme, particularly given the relatively common use of registration processes to manage the distribution of settlement proceeds where the number of Group Members is large and the

Group Members' claims, and expected returns, are relatively small.[5]

31 Overall, I am satisfied that the settlement sum is reasonable.

Costs

32 The amount sought to be deducted from the settlement sum for costs already paid by the Funder is $6,182,661.39. These are the costs, described by the parties as the "Action Costs", that have been paid by the Funder to the solicitors acting for Mr Quirk, William Roberts Lawyers ("WRL").

33 The reasonableness of those costs has been assessed by a qualified costs assessor, Mr Ian Ramsey-Stewart, who I appointed as a costs referee on 8 June 2022 ("the Referee").

34 The Referee has produced two lengthy reports in which he analysed the costs and disbursements charged by WRL. The Referee deducted from the actual costs and disbursements charged by WRL a figure in the order of $570,700 but otherwise concluded that "there is no portion of the fees or disbursements charged by WRL that have been unreasonably incurred".

35 The fees, as thus assessed by the Referee, are "fair and reasonable".[6]

36 However, what must also be considered is whether the fees are "proportionate".[7]

37 The fees charged by WRL comprise almost 18.74% of the settlement sum.

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[5] For example, see *In re the Takata Airbags Class Actions Settlement (Preliminary Orders)* [2021] NSWSC 1153; *Jenkings v Northern Territory of Australia (No 5)* [2021] FCA 1585; *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70.

[6] For example, see *Blairgowrie Trading Ltd v Allco Finance Group Ltd* at [178] (Beach J).

[7] *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia Ltd; Bond v Nissan Motor Co (Australia) Pty Ltd; Coates v Mazda Australia Pty Ltd* [2022] NSWSC 1076 at [39]-[40] (Rees J).

38 As pointed out by the Funder, there are two aspects to the proportionality question. The first is that the relevant comparator for assessing proportionality "is what settlement or judgment amount it was reasonable for the applicant's solicitors to expect would be achieved by class members, not what they actually achieved."[8] The second is that consideration must be given to the prospects of the representative plaintiff achieving a better result if the settlement is not approved, and the plaintiffs have to return to Court to "continue the battle".[9]

39 Based on what is said in counsels' Confidential Joint Opinion, those prospects appear most uncertain.

40 As I concluded, albeit in very different circumstances, in *Findlay v DSHE Holdings*, what has been achieved by the proposed settlement does appear to be the best that can be done. As with that case, I fear that, here, were I not to approve the settlement, the Group Members might in the end be worse off, despite the modest return that will result if the settlement is approved.

41 Overall, I am persuaded that the amount proposed to be paid to WRL for costs is proportionate.

The Funder's Commission and proposed common fund order

42 The Funder seeks payment of a commission of $8.25 million, being 25% of the settlement sum, and seeks a "common fund order", being a deduction from the amounts payable to group members whether or not they have entered into a funding agreement with the Funder.

[8] *Caason Investments Pty Ltd v Cao (No 2)* at [152] (Murphy J).
[9] To adopt the expression I used in *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249 at [61].

Can the Court make a common fund order?

43 Recently, Rees J considered the question of whether the Court has power to make a common fund order once proceedings have settled. Thus, her Honour said in *Haselhurst v Toyota Motor Corporation Australia Ltd*:

> "The funder seeks payment of its commission from the settlement sum, being a deduction from the amounts payable to group members whether they have entered into a funding agreement with the funder or not, being a 'common fund order'. Whether the Court has the power to make common fund orders has been subject to some controversy. The High Court, in one of the proceedings subject to this settlement, *Brewster v BMW*, held that section 183 of the *Civil Procedure Act* does not permit the Court to make common fund orders prior to settlement: *BMW Australia Ltd v Brewster*.[10] The Court did not consider the extent of the Court's power to make a common fund order under section 173(2) of the *Civil Procedure Act*. The Court of Appeal refused to answer a separate question referred to it by Sackar J on this subject: *Brewster v BMW Australia Ltd*.[11] Relevantly, Bell P (as his Honour then was) noted that no *dicta* could be identified in the High Court's judgment deciding any power under section 173 of the Act; the extent of the *ratio* in that judgment was confined to the operation of section 183: at [28].
>
> The High Court's decision in *Brewster* does not preclude a common fund order being made once proceedings have settled. Such common fund orders have since been made in the Federal Court under the equivalent provision of the *Federal Court* [*of Australia*] *Act 1976* (Cth), being section 33V: *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)*;[12] *Hall v Arnold Bloch Leibler (a firm) (No 2)*;[13] *Davaria Pty Limited v 7-Eleven Stores Pty Ltd*.[14] Following these authorities, I am thus satisfied that the Court has the power to make a common fund order under section 173(2) of the *Civil Procedure Act*."[15]

44 I agree.

Should the Court make a common fund order?

45 The question of whether I should make a common fund order is related to the question of whether the amount of commissions sought by the Funder is reasonable and proportionate.

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[10] (2019) 269 CLR 574; [2019] HCA 45.
[11] [2020] NSWCA 272 (Bell P, with whom Bathurst CJ and Payne JA agreed).
[12] [2020] FCA 1885 at [14]-[15] (Lee J).
[13] [2022] FCA 163 at [24] (Beach J).
[14] (2020) 281 FCR 501; [2020] FCAFC 183 at [41] (Lee J, with whom Middleton and Moshinsky JJ agreed).
[15] At [50]-[51].

46 Settlement of the proceedings was not conditional on the making of a common fund order. However, it has been clear throughout this litigation that the Funder would be seeking a common fund order if, as has happened, the matter settled.

47 It is not disputed before me that, but for the funding of the cost of these proceedings by the Funder, and the Funder's preparedness to risk an adverse costs order in the event that the proceedings were unsuccessful, it is unlikely that the proceedings would have commenced at all. Bearing in mind the relatively small amount of Fees paid by individual Group Members, it also seems unlikely that any Group Member would have been prepared to embark on the perils of this litigation without external funding.

48 The amount that the Funder is seeking is less than its contractual entitlement under the relevant funding agreement. Under that agreement the Funder was entitled to recover the greater of 30% of any settlement or an amount equal to three times its costs; which in this case would have been a figure in the order of $18.3 million.

49 A commission of 25%, as sought by the Funder, is also "within the range" of funding commissions paid in representative proceedings such as these. Although that amounts to a substantial figure in this case, the Funder has borne what appears to be the not inconsiderable risk that the proceedings would fail, in which event it would have had to bear the costs incurred to date as well as being subject to adverse costs orders in favour of the defendants.

50 Although, as I have said, the various amounts sought to be deducted from the settlement sum comprise some 56.54% of that sum, the corollary is that some 43.46% of the settlement sum is available for distribution to Group Members. That sum, despite being far short of the total of the Fees paid by the Group Members, is a significant sum indeed.

51 Overall, my conclusion is that the commission sought by the Funder is reasonable and proportionate.

The ATE Premium

52 The Funder paid premiums totalling $1,334,160 for ATE Premium relevant to any adverse costs order which might be made in the proceedings. There is no suggestion that the quantum of these premiums was unreasonable.

53 The member agreement provided for the recoverability of such premiums and noted that the continued funding of the proceedings by the Funder was conditional on the procurement by the Funder of this insurance.

54 There is authority that it can be appropriate to deduct After the Event insurance premiums from the settlement sum in representative proceedings.[16]

55 As was submitted on behalf of the Funder, such insurance provided Mr Quirk with an additional source from which to cover any adverse costs exposure, beyond the Funder's own financial capacity, if that were to become an issue. It also enabled the Funder to provide Mr Quirk with a means to provide security for costs, although as it happens the defendants did not press for security for costs.

56 Further, it does appear reasonable to assume that it is unlikely that the Funder would have proceeded with this litigation without such insurance or, alternatively, would have stipulated a higher funding commission had it itself borne the additional risk of bearing the entirety of an adverse costs exposure.

57 I am satisfied that it is reasonable that an amount equal to the After the Event premium be paid to the Funder from the settlement sum.

Deferred Costs

58 It is proposed that a number of Deferred Costs be deducted from the settlement amount.

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[16] *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 at [120] (Beach J); *Kenquist Nominees Pty Limited ATF The Kenquist Superannuation Fund v Campbell (No 6)* [2020] FCA 1388 at [28] (McKerracher J).

59 These comprise, first, amounts to be paid to WRL for unpaid legal costs to 22 May 2022 ($1,080,132.06) and for work done between 22 May 2022 and 22 September 2022 ($963,818.47). The Referee has reviewed each of these amounts and has expressed a view that they are reasonable.

60 Second, the figure of $315,037.16 has been proposed to be paid to the Settlement Administrator, Mr Andrew Knight from KordaMentha, for work done up to 22 September 2022. Again, the Referee has assessed and found to be reasonable this figure.

61 Finally, an amount of $27,500 is proposed to be paid to the Referee himself for the work he has done.

62 My orders of 8 June 2022 capped Mr Ramsey-Stewart's fees at this figure. That appears to me to be more than reasonable.

Administration Costs

63 A further total amount of $504,512.47 is proposed to be deducted from the settlement sum for Administration Costs.

64 These costs comprise, first, a further sum of $170,095.75 to be paid to WRL and a further $334,416.72 to be paid to the Settlement Administrator for work to be performed administering the settlement. Again, the Referee has opined that these fees are reasonable.

65 It is also proposed that there be paid $12,000 to Mr Quirk himself to reimburse him for the time and inconvenience of acting as a representative party, and a further sum of $5,000 to be paid to each of two sample group members, Mr Dean Mibus and Ms Angela Thompson, to reimburse them for the time and inconvenience incurred in playing a more active role than was required of other Group Members.

66 I have read the evidence given by Mr Ding Pan from WRL as to the role that Mr Quirk, Mr Mibus and Ms Thompson have played in progressing these

proceedings and am satisfied that the payments proposed are reasonable. It is well established that a plaintiff in a class action, and persons such as Mr Mibus and Ms Thompson, who have provided support for such a plaintiff and sacrificed time or incurred expenses in prosecuting the action on behalf of the class, should be entitled to some reimbursement from the corpus of the settlement or judgment. The proposed reimbursement of Mr Quirk, Mr Mibus and Ms Thompson appears to me to be well within the range of reasonable compensation for their involvement in the proceedings.

The Settlement Distribution Scheme

67 Messrs Habib, McMeniman and Pietriche summarised the Settlement Distribution Scheme as follows.

68 The scheme seeks to calculate Group Members' rateable entitlements to share in the settlement by reference to the actual amount of Commissions paid by each Group Member as a proportion of the total Commissions paid by all Group Members who registered to participate in the scheme.

69 I accept counsel's submission that in circumstances where:

(a) a participation rate less than the total number of Group Members can reasonably be expected, which may in turn increase a registered Group Member's proportionate share in the net settlement sum; and

(b) the net settlement sum represents a compromise on the quantum of all Group Members' claims and has been determined after deducting the costs and expenses of Mr Quirk's prosecution of the proceedings,

such methodology is a reasonable means of ensuring that Group Members receive a share of the settlement which is rationally connected to the quantum of the claim.

70 Further, as counsel pointed out, Group Members' rateable shares in the settlement sum are determined by reference to the Commissions actually paid by them, being a reasonable proxy for the Fees they were charged, rather than some other arbitrary factor. I am satisfied that the scheme advances a methodology which results in an amount received by each Group Member that is directly correlated to the quantum of each Group Member's underlying claim, and is therefore fair and reasonable.

71 The scheme provides that Group Member data retained by SPSL and supplied to the Settlement Administrator will be treated as the source of information with respect to:

(a) those persons who qualify as Group Members entitled to participate in the distribution of the net settlement proceeds; and

(b) the amount of the Fees charged to Group Members to fund the payment of Commissions during the relevant period.

72 Given the size of the group, this approach does seem to be the most practical and economic one available. It is likely that the best available records of Commissions paid in respect of each Group Member will be those held by SPSL. To invite Group Members to provide their details and evidence of Commissions paid out of their accounts, or to provide for challenges to be made or reviews to be sought by the Group Members, would likely be unworkable and disproportionately costly.

73 The Settlement Administrator was selected following a competitive tender process in which three reputable accounting firms participated.

Late registrants

74 A small number of Group Members have registered late. Mr Quirk proposes that they be allowed to participate. I see no difficulty with that, particularly because it will have minimal effect on the amount receivable by other Group Members.

Objectors

75 I have mentioned that there has been a very low rate of objection. There were initially two objectors who indicated in their Notice of Objection that they would seek to supplement their written material with oral submissions at the settlement approval hearing originally listed before me on 22 September 2022. Both these persons advised Mr Quirk's solicitor that they did not intend to object or attend any settlement approval hearing.

Conclusion

76 I invite the parties to send to my Associate Short Minutes of the Order which they propose I make to give effect to my approval of the settlement.

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