Supreme Court

New South Wales

Case Name:	Williamson v Sydney Olympic Park Authority & Ors
Medium Neutral Citation:	[2022] NSWSC 1618
Hearing Date(s):	11 October 2022; 11 November 2022; 15 November 2022
Date of Orders:	28 November 2022
Decision Date:	28 November 2022
Jurisdiction:	Equity - Commercial List
Before:	Black J
Decision:	Parties to bring in agreed short minutes of order to give effect to this judgment within 7 days.
Catchwords:	CIVIL PROCEDURE — Representative proceedings — Settlement or discontinuance — Court approval — Where parties agreed to settle the representative proceedings — Where the litigation funder seeks to recover both a funders commission and "after the event" ("ATE") insurance — Whether the settlement is fair and reasonable as a whole and, in particular, whether the deductions for the funders commission and ATE insurance are fair and reasonable.
Legislation Cited:	- Civil Procedure Act 2005 (NSW), ss 173, 177, 179, 183 - Design and Building Practitioners Act 2020 (NSW) - Home Building Act 1989 (NSW) - Legal Profession Uniform Law, s 181
Cases Cited:	- Australian Securities and Investments Commission v Richards [2013] FCAFC 89 - Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3) (2020) 385 ALR 625; [2020] FCA 1885 - Blairgowrie Trading Ltd v Allco Finance Group Ltd

(Recs & Mgrs Apptd) (in liq) (No 3) (2017) 343 ALR 476; [2017] FCA 330
- BMW Australia Limited v Brewster (2019) 269 CLR 574
- Bolitho v Banksia Securities Ltd (recs and mgrs apptd) (in liq) (No 6) (2019) 63 VR 291
- Bolitho v Banksia Securities Ltd (No 18) (remitter) [2021] VSC 666
- Botsman v Bolitho and Others (No 1) (2018) 57 VR 688
- City of Swan v McGraw-Hill Companies Inc (2016) 112 ACSR 65; [2016] FCA 343
- Dorajay Pty Ltd v Aristocrat Leisure Ltd [2009] FCA 19
- Earglow Pty Ltd v Newcrest Mining Limited [2016] FCA 1433
- Endeavour River Pty Ltd v MG Responsible Entity Ltd (No 2) [2020] FCA 968
- 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) 150 ACSR 535; [2021] NSWSC 249
- Kuterba v Sirtex Medical Ltd (No 3) [2019] FCA 1374
- Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia [2022] NSWSC 1076
- Liverpool City Council v McGraw-Hill Financial Inc [2018] FCA 1289
- Lopez v Star World Enterprises Pty Ltd [1999] FCA 104
- Money Max Int Pty Ltd v QBE Insurance Group Ltd (2016) 245 FCR 191; [2016] FCAFC 148
- Newstart 123 Pty Ltd v Billabong International Ltd (2016) 343 ALR 662; [2016] FCA 1194
- P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4) [2010] FCA 1029
- Perera v GetSwift Ltd [2018] FCA 732; (2018) 263 FCR 1
- Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6) [2011] FCA 277
- Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd (No 4) [2018] NSWSC 1584
- Wetdal Pty Ltd as Trustee for the BlueCo Two

	Superannuation Fund v Estia Health Ltd [2021] FCA 475 - Williams v FAI Home Security Pty Ltd (No 4) (2000) 180 ALR 459; [2000] FCA 1925
Texts Cited:	V Morabito, "An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payment" (Monash University, January 2019)
Category:	Principal judgment
Parties:	Terry Walter Williamson (First Plaintiff) Helen Therese Williamson (Second Plaintiff) Sydney Olympic Park Authority (First Defendant) Icon Co (NSW) Pty Ltd (Second Defendant) WSP Structures Pty Ltd (Third Defendant)
Representation:	Counsel: M J Darke SC/R A Yezerski (Plaintiffs) R C A Higgins SC (Contradictor) D Sulan SC/K Sharma (Augusta Pool 1 UK Ltd) E Miers (Solicitor) (Icon Co (NSW) Pty Ltd) A J Barnett (WSP Structures Pty Ltd) Solicitors: Corrs (Plaintiffs) M2M Law (Augusta Pool 1 UK Ltd) MinterEllison (Icon Co (NSW) Pty Ltd) DLA Piper (WSP Structures Pty Ltd)
File Number(s):	2019/232749 (022)

JUDGMENT

Nature of the proceedings and factual background

1 These representative proceedings relate to the construction and partial structural failure of a 36-storey residential building known as "Opal Tower" and located in Sydney Olympic Park, New South Wales.

2 By Amended Summons filed on 5 May 2021, the Plaintiffs, Mr and Mrs Williamson, brought representative proceedings under Pt 10 of the *Civil Procedure Act* 2005 (NSW) ("CPA") on behalf of, broadly, persons who, at 24 December 2018, owned one or more of the units in Opal Tower other than the

developer or its related entities. They initially brought claims against Sydney Olympic Park Authority ("SOPA"), which is a statutory corporation which formerly owned the site on which Opal Tower now stands and procured the development of the building, for breaching statutory warranties under the *Home Building Act* 1989 (NSW). They later expanded their case to bring claims against Icon Co (NSW) Pty Ltd ("Icon"), which constructed the building, and WSP Structures Pty Ltd ("WSP"), which was the structural engineer engaged in respect of the project. The prosecution of the class action was ultimately funded by Augusta Pool 1 UK Ltd ("AP1").

3 SOPA in turn brought a Cross-Claim against Australia Avenue Developments Pty Ltd ("AAD"), which carries on the business of property development; Ecove Group Pty Ltd ("Ecove"), which was AAD's holding company, as guarantor; Icon; and WSP. Those parties brought claims against each other and against Evolution Precast Systems Pty Ltd ("Evolution"), which manufactured, supplied and installed precast panels for Opal Tower. Other proceedings were also brought by AAD and Ecove against Icon and by the Owners – Strata Plan No 97315 against Icon and SOPA, which settled at the same time as the representative proceedings.

4 On 19 May 2022, the Plaintiffs, each of the Defendants and AP1 entered into a Heads of Agreement ("HoA") to settle the class action (Ex A2), subject to Court approval under s 173 of the *Civil Procedure Act* 2005 (NSW) ("CPA"), which contemplated the appointment of Mr Ayres of Kroll as administrator of a proposed "Settlement Distribution Scheme" ("SDS"). On 7 October 2022, the Plaintiffs, the Defendants, AP1 and Mr Ayres agreed the terms of a proposed Settlement and Release Deed ("Settlement Deed") (Ex A5) in relation to the class action, subject to Court approval. By Notice of Motion filed on 7 October 2022 ("Motion"), the Plaintiffs sought an order under s 173 of the *CPA* approving the settlement of this proceeding on the terms set out in a Settlement Deed and accompanying SDS (Ex A4). I will outline the terms of those documents below. Although the executed Settlement Deed was not tendered, I was informed and proceed on the basis that it was executed by the Plaintiffs, SOPA, WSP and the proposed settlement administrator on 7 October 2022, by Icon on 10 October 2022 and by AP1 on 11 October 2022.

5 The Court requested that a contradictor be appointed in this application and the parties selected Dr Higgins to undertake that role. In that role, Dr Higgins had regard to the nature of a contradictor's role, as summarised by Dixon J in *Bolitho v Banksia Securities Ltd (recs and mgrs apptd) (in liq) (No 6)* (2019) 63 VR 291 ("*Bolitho 6*"), in assisting to ensure that a real contest is had before the Court, and made helpful submissions in that regard. Dr Higgins rightly recognised that her role included assessing whether there was a sound basis in the existing case law for certain deductions that the Plaintiffs proposed should be made from the settlement amount; whether the available evidence substantiates the deductions sought; whether the Funder Commission sought by AP1 adequately responded to the multi-factorial analysis adopted in the case law; and, in respect of a large claim for the costs of "after the event" insurance ("ATE insurance") made by AP1, drawing attention to a contest in the case law as to whether the Court should allow that deduction. Dr Higgins requested and was provided with a range of information by the Plaintiffs' solicitors to allow her to perform her role. AP1 was initially heard as an interested party in respect of the application, after it indicated that it wished to be heard on the morning of the first day of the hearing, and then joined as a respondent to the Motion. It was represented by Mr Sulan, with whom Mr Sharma appeared.

6 The Plaintiffs sought confidentiality orders under s 183 of the *CPA* or ss 7 and 8 of the *Court Suppression and Non-Publication Orders Act* 2010 (NSW) over parts of affidavits and tendered documents. I made orders of that character on the first day of the hearing, and partly revoked them at the commencement of the second day of the hearing, where it seemed to me that the public interest in providing comprehensible reasons for judgment outweighed AP1's interest in confidentiality and the Defendants' interest in avoiding any risk of disclosure of the amount for which they have settled the proceedings, if it could be deduced from other information contained in this judgment.

Affidavit evidence

7 The Plaintiffs relied on an affidavit dated 7 October 2022 of Mr Christopher Pagent, a solicitor acting for them in the proceedings. Mr Pagent outlined (Pagent [8]ff) the proposed settlement of the proceedings, to which I have

referred above, and exhibited a confidential opinion of Counsel as to the fairness and reasonableness of the settlement (Ex A3, 1-29). Mr Pagent also outlined the history of the proceedings (Pagent [15]ff) which, as I noted above, commenced as a claim by the Plaintiffs brought against SOPA alleging breach of warranties owed to the Plaintiffs and group members under the *Home Building Act* 1989 (NSW) and expanded by reason of the Plaintiffs' wider claims, the cross-claims brought by SOPA against other persons associated with the development and the cross-claims brought by those persons against each other. Mr Pagent noted (Pagent [19]) that the proceedings were managed and were to be heard together with the proceedings brought by the Owners Corporation against Icon and SOPA and the proceedings brought by Ecove and AAD against Icon and related entities, and he outlined the steps taken in the conduct of and settlement of the several proceedings.

8 Mr Pagent also referred (Pagent [30]) to a notice given to group members of the proposed settlement, in a form approved by the Court (Ex A1) in July 2022, accompanied by a Chinese translation, and he outlined the manner in which the settlement notice was distributed to group members. He also referred to the proposed deductions from the settlement sum disclosed in the settlement notice to group members, as follows:

> "Under the litigation funding agreements entered into by most Group Members, those Group Members are obliged to pay to [AP1]:
>
> (a) The claimant's share of the 'Project Costs'. The Project Costs include all costs and disbursements associated with the proceedings (including investigations before commencing the proceedings and any alternative dispute resolution process) and the upfront adverse cost insurance premium. As at 31 May 2022, the Project Costs (including work in progress) totalled around $8.7M; and
>
> (b) The Funder's Commission, calculated at 2.6X the claimant's share of the Project Costs (excluding any administrative fee or adverse costs insurance premium that is payable from Claim Proceeds). As at 31 May 2022, the Commission totalled around $15M. However [AP1] has agreed to reduce the multiple from 2.6 to 2.3, which means that the Funder's Commission is reduced by around $1.8M to around $13.2M.
>
> (Funder Entitlements)
>
> The Funder's Entitlements can only be deducted from the Settlement Sum if and to the extent that they are approved by the Court as being fair and reasonable." (Ex A1, 8)

That settlement notice also disclosed that:

> "Thirdly, a payment to the insurer for deferred adverse cost insurance premium in the amount of $2.24M will be deducted from the Settlement Sum, in addition to the upfront adverse costs insurance premium noted in paragraph b. (a)." (Ex A1, 8)

9 AP1 made much of the reduction in its commission from a multiple of 2.6X of the Project Costs (as defined) to a multiple of 2.3X of those costs in the course of submissions in this hearing. However, even after a reduction in that multiple, the Court must still whether the proposed settlement is fair and reasonable, and the fact that the amount claimed by AP1 is reduced does in itself demonstrate that the reduced amount is reasonable. The settlement notice informed group members that, after the proposed deductions, the amount available to them would be approximately $24.6 million, but did not disclose (and the Court had not then been informed) that AP1's commission was in the order of 26.1% of the settlement proceeds and the total deductions from the settlement proceeds for that commission and ATE insurance costs ("ATE costs") would together be 36.4% of the settlement proceeds. As I will note below, the limits of that disclosure undermines the weight put by AP1 at this hearing on the lack of objection to its commission received from group members.

10 Mr Pagent also outlined (Pagent [40]ff) the history of entry into a litigation funding agreement for the proceedings, initially between the Plaintiffs and Augusta Ventures Ltd ("AVL"), and the engagement of his firm. Mr Sulan in turn emphasised a proposition put by Mr Pagent in an email dated 14 January 2019 to one of the owners in relation to the choice of solicitor and funder, as follows:

> "What matters most in this case is the outcome. Just because a funder is involved in the [Plaintiffs' solicitors] proposal, it does not follow that Owners will receive less. It all depends on the result. We encourage Owners not to ask 'which proposal is the cheapest' but rather 'which proposal is likely to produce a better outcome." (Ex F1, 8).

While that proposition is not unreasonable, it did not disclose the extent to which an ultimate recovery may be reduced by ATE costs, or the risk that that would give rise to a worse result for group members than alternative funding models.

11 Mr Sulan also draws attention to the fact that the owners initially proposed to retain another firm (Ex F1, 10), and subsequently retained their present

solicitors (Ex F1, 11). A notice sent by the "Opal Towers Owner Group" to owners of units in Opal Towers (Ex F1, 13ff), apparently about that time, in turn recorded that:

> "The Opal Tower Owners Group has undergone an exhaustive process to select the best law firm to represent all owners in a class action. We interviewed many of the top law forms in Australia … in some cases several times."

That notice stated that the Plaintiffs' solicitors were "partnering" with AVL, a "very large and well established litigation funder", which would fund the claim on a "no win, no fee" basis. The notice referred to a commission which would be greater of 12.5% of the compensation received or 2.6X the funds deployed by the funder, and to a best estimate of the costs through to a trial of $5 million plus GST and stated that:

> "To provide some context on how competitive the proposed funding rate is typical funding agreements are usually around 30%."

That notice also did not disclose the extent to which funding costs would be increased by the entry by the funder into ATE insurance arrangements, or the fact that a multiple of 2.6X the funds deployed by the funder would potentially substantially exceed the funding rate attributed to "typical funding agreements" of around 30%, when costs increased and the costs of ATE insurance were also deducted from a settlement, as has now occurred.

12 Mr Pagent noted (Pagent [41]ff) that the Plaintiffs and AVL entered a litigation funding agreement in February 2019 and, between January 2019 and July 2019, AVL entered initial litigation funding agreement with most group members. Mr Pagent's evidence (Pagent [43]) is that, in around October 2019, AP1 assumed the obligations of AVL and that many funded group members entered into a Deed of Novation, Amendment and Restatement with AVL, AP1 and the Plaintiffs' solicitors, although not all of them did so. That agreement provided for the entry into an amended and restated litigation funding agreement, which was subsequently further amended.

13 Mr Pagent refers (Pagent [44]) to AP1's agreement to increase the budget for the proceedings and further amend the litigation funding agreement in March 2021, as a result of amendments in the Plaintiffs' claim, and to an agreement by the Plaintiffs' solicitors that they would take an amount of $427,110.20

(including GST) of their costs "on risk" so that they would only be paid that amount in the event of a successful outcome, although there would be no uplift in respect of the payment of that amount. Mr Sulan drew attention to a detailed description of the budget variation and amendment of funding agreement provided by AP1 to the Plaintiffs by letter dated 26 March 2021 (Ex F2, 142ff), which referred to the funds which had been made available by AVL and AP1 for the conduct of the proceedings and to AP1's agreement to increase the budget for the proceeding and noted that:

> "There is presently $4 million of Adverse Costs Insurance for the Claim. As a result of Corrs and counsels' recommendation to amend the Plaintiffs' Commercial List Statement to include a claim against Icon Co (NSW) Pty Ltd and WSP Structures Pty Ltd under the *Design and Building Practitioners Act* 2020, a further $6 million of Adverse Cost Insurance has or will be incepted (ie a total of $10,000,000 Adverse Costs Insurance). The total amount of funding committed in connection with that insurance to date is $1,550,000 (comprised of Adverse Costs Insurance Premium and estimated costs of providing security for costs). $2,270,000 has been committed to the cost of incepting the further $6,000,000 of adverse costs insurance (comprised of Adverse Costs Insurance Premium and estimated cost of providing security for costs)." (Ex F2, 146)

That letter in turn referred to an increase in the amount of funding committed for the proceedings including costs referable to adverse costs insurance premiums. The Plaintiffs confirmed their consent to the budget variations by an endorsement to that letter dated 6 April 2021.

14 By an email dated 4 May 2021 (Pagent [45]; Ex F2, 151), funded group members were advised of the proposed amendments and requested to indicate if they did not agree to it, but it appears their consent (as distinct from their lack of objection) to those amendments was not sought. That email stated that:

> "Amending to bring the new claims has required and will require some additional work by Corrs and Counsel. That means that we will need to increase the budget for the class action.
>
> There have also been some budget overruns which require an increase to the budget …
>
> The funder, [AP1], has approved the increase to the budget.
>
> The total increase to the budget will be $1,590,626.50 including GST. Of that amount, [AP1] has agreed to fund $1,163,516.30 and Corrs has agreed to take an amount of $427,110.20 on risk. That means that Corrs only gets paid that amount in the event of a successful outcome and otherwise subject to the

> terms of the [litigation funding agreement ("LFA")]. Corrs will not obtain any uplift on that amount.
>
> [AP1] has also agreed to pay around $2,270,000 to cover costs associated with adverse costs insurance premiums and providing security for costs.
>
> Because [AP1] has agreed to deploy more funding, it is possible that amending the Commercial List Statement will increase any commission payable to [AP1] in the event of a successful outcome. We have considered that as part of our recommendation to proceed with the amendment. We remain satisfied that the amendments are in your best interests."

15 The information provided to group members by that email was less detailed than the information provided to the Plaintiffs by the letter dated 26 March 2021. As Dr Higgins points out, the statement that AP1 had agreed to pay the adverse costs insurance premiums did not draw group members' attention to the fact that that amount would be charged to them, in the event of a successful outcome of the proceedings, and the reference to it being "possible" that the amendment would increase the commission to AP1 did not disclose the inevitably that the increased commission and increased ATE costs would increase the amounts deducted from the settlement proceeds, in the event of a successful outcome. Mr Sulan fairly accepts that that email also did not disclose the increase in the deferred ATE costs which would also be deducted from group members' return on a successful outcome. A notice given to group members of amendments to the funding agreement dated 20 April 2021 (Ex F2, 157) also did not disclose those matters.

16 Mr Pagent's evidence (Pagent [48]) is that, subsequently, a small number of previously unfunded group members entered into a Further Amended LFA with AP1. I will generally refer in the judgment to the terms of that agreement in that form. Mr Pagent refers to terms of the Further Amended LFA, and Mr Sulan also undertook a close analysis of the terms of the Further Amended LFA which required review of numerous operative and definitional provisions. In doing so, Mr Sulan drew attention to, relevantly, the definitions of "Adverse Costs Insurance Premium", "Augusta Commission", "Augusta Entitlements", "Condition Subsequent" and "Project Costs" which in tun include the "Adverse Costs Insurance Premium" (as defined). Mr Sulan also drew attention to cl 6.1 of the Amended LFA, which dealt with AVL or AP1's conditional commitment to funding the "Project Costs" (as defined), payment of any "Adverse Costs Order" (as defined) and provision of security for costs. Mr Sulan also drew attention to

cl 8.1, which dealt with the "Augusta Entitlements" on a successful resolution of the proceedings and the mechanism for payment of those entitlements and "Remaining Costs" (as defined) from the "Claim Proceeds" (as defined). Schedule 2 in turn referred, in respect of the "Augusta Commission", to the amount calculated as the higher of Option 1 or Option 2, "but not exceeding any such amount as the Court determines to be fair and reasonable in all the circumstances". Mr Sulan placed heavy weight upon the fact that group members had largely committed themselves to the Further Amended LFA. I bear in mind the group members' entry into the LFAs, but the weight to be given to that matter is limited by the fact that a layperson would have had substantial difficulty understanding the commercial effect of that agreement, given its very complex provisions and definitional structure, without independent legal and financial advice; and, second, because the LFAs did *not* bind group members to a multiple of 2.6X as the Funder Commission payable to AP1, but only to that or any lesser amount that the Court assessed as fair and reasonable.

17 Mr Pagent in turn outlines (Pagent [53]ff) the quantum of legal costs and disbursements incurred by the Plaintiffs, paid and unpaid; AP1's claimed commission, the treatment of "Paid ATE costs" and "Deferred ATE Premium"; the claim by the Plaintiffs for "reimbursement" amounts; and the proposed funding equalisation order. Mr Pagent notes that, of 383 persons who appear to fall within the definition of group member and have not opted out, 341 have entered into funding agreements with AP1; 8 have entered into a funding agreement with AVL; and 34 have not entered into a funding agreement with either AP1 or AVL (Pagent [101]). Mr Pagent also sets out the structure of the losses claimed by the Plaintiffs and refers to the response of several group members to notification of the settlement.

18 Mr Pagent exhibited the then unexecuted Settlement Deed (Ex A5) to his affidavit. The Settlement Deed contemplates payment of the Settlement Sum (as defined) after the opening of a Distribution Account, which occurs after the making of Approval Orders (as defined) by the Court. The term "Approval Orders" is defined as:

> "Orders of the Court under Part 10 of the [*CPA*] approving the settlement of the Claim including the Settlement Distribution Scheme on the terms set out in this Deed or on materially similar or substantially equivalent terms."

Clause 3(b) provides that the Settlement Deed will be terminated in specified circumstances, including if the Court "finally declines" to make Approval Orders.

19 Mr Pagent also exhibited the unexecuted SDS (Ex A4) to his affidavit. Clause 10 of the SDS provides for payments from the Settlement Distribution Fund (as defined) prior to distribution to group members, namely the Funder Commission (defined as "the amount arrived at by applying a multiplier of 2.3 to the Plaintiffs' Paid Legal Costs, or as otherwise approved by the Court and set out in the Approval Orders") if a funding equalisation order is made; the Plaintiffs' Paid Legal Costs (as defined); the Paid ATE Costs (as defined); the Deferred ATE Premium (as defined); the Plaintiffs' Unpaid Legal Costs (as defined); and the Plaintiffs' Reimbursement (as defined). Once the SDS is executed, the effect of that clause would be to prevent a distribution from the Settlement Distribution Fund until the specified costs are paid. Mr Pagent also exhibited to his affidavit, and I have had regard to, other documents relating to the funding arrangements for the proceedings and the engagement of the solicitors and communications with group members in respect of the settlement.

20 The Plaintiffs also tender a report (Ex A6) of Mr Roland Matters, a costs assessor, in respect of the costs incurred by their solicitors in respect of the proceedings. Mr Matters concluded, in summary, that costs and disbursements incurred by the Plaintiffs' solicitors in the amount of $6,471,005.99 (inclusive of GST) were reasonable, subject to qualifications as to proportionality, risk share costs, the rounding up of time recorded and multiple personnel attending on each other. Mr Matters also raised a question as to whether the provision for an amount of costs or disbursements payable to the Plaintiffs' solicitors in respect of a successful outcome complied with the requirements of s 181 of the *Legal Profession Uniform Law* (2014) NSW ("*Uniform Law*"). I will address those matters below. Dr Higgins rightly recognised that an independent costs assessor, Mr Matters, had been engaged, and approached her role as contradictor on the basis that the costs assessor should principally deal with

the reasonableness of the costs incurred, although recognising that she had a role in assessing the broader approach taken by the costs assessor and addressing the proportionality of the costs incurred by the Plaintiffs' legal representatives.

21 In support of its claim to funding, AP1 in turn relies on an affidavit dated 25 October 2022 of Mr Neil Brennan, who is the managing director of Augusta Ventures (Australia) Pty Ltd and the founder of the Augusta group ("Augusta"), and is responsible for Augusta's Asia-Pacific operations. Orders were also sought under the *Court Suppression and Non-Publication Act* 2010 (NSW) in respect of substantial aspects of that evidence, which I largely declined to make, again given the public interest in allowing this judgment to be understood. Mr Brennan's evidence is that AP1 is a special purpose vehicle that funded the Plaintiffs' costs of these proceedings and "assumed the adverse costs risk", subject to insurance in respect of adverse costs, and that funding for the proceedings was originally provided by AVL, an operating entity which is a wholly-owned subsidiary of Augusta Ventures Holdings Ltd, and the funding agreement was then novated to AP1. Mr Brennan outlines (Brennan [5]ff) the Augusta group's approach to litigation funding and indicates that Augusta applies a commission-based multiple of the funds employed by Augusta. He identified, and gave evidence in somewhat general terms about, matters which Augusta takes into account in structuring funding packages.

22 Mr Brennan outlined (Brennan [16]ff) the chronology of discussions between the Plaintiffs' solicitors in these proceedings, the strata committee and Augusta in respect of funding of the proceedings. He refers (Brennan [16]) to initial discussions in late December 2018 with the solicitors now acting for the Plaintiffs and group members, who were not then acting for them but appear to have been seeking to promote their services to the owners corporation in competition with other solicitors who might have then been retained, and to the solicitors then contacting owners about a possible class action. Mr Brennan also refers (Brennan [17]-[18]) to a committee established by the owners to "[canvass] the market for the funding of the proposed class action", which subsequently acted as a "legal committee" to provide "input" to the Plaintiffs' solicitors. He addresses a meeting on or about 11 January 2019 attended by

unit owners at which the Plaintiffs' current solicitors and another firm "pitch[ed] their proposals to owners for the funding of the proposed class action." Presumably, the proposal "pitch[ed]" by the Plaintiffs' now solicitors for litigation funding was Augusta's proposal, since those solicitors are not litigation funders. Mr Brennan also refers (Brennan [20]ff) to subsequent correspondence and (Brennan [23]) to a further meeting with owners on 16 January 2019. The potential costs of ATE insurance were not, so far as Mr Brennan's evidence goes, disclosed at the meetings in January 2019 prior to the entry into arrangements between AVL and group members.

23 Mr Brennan refers (Brennan [26]; Ex F1, 12) to a notice provided on 1 February 2019 to owners in respect of the funding arrangement, to which I referred above in respect of Mr Pagent's affidavit. On 8 February 2019, Augusta provided a relatively small amount of "seed funding" to obtain initial advice, prepare a pleading and obtain engineering input (Brennan [27]) and AVL entered a litigation funding agreement with the Plaintiffs, which did not then commit it to fund the proceedings, and an engagement letter with the Plaintiffs' solicitors on 9 February 2019 (Brennan [28], Ex F2, 30-79, 80-83, 84-101). Mr Brennan also refers (Brennan [30]), in evidence that is again given at a level of generality, to a change about that time in Augusta's funding model to increase the amount of its profit multiple, and gives evidence that:

> "The agreed Profit Multiple of 2.6X (rather than 3.3X) was a compromise by Augusta so that it would be recommended by the Strata Committee to the owners for the purpose of funding the proposed class action."

24 Mr Brennan also refers (Brennan [32]; Ex F2, 162-163) to a document provided to owners who entered into litigation funding agreements with AVL that summarised the key terms of the litigation funding agreements. That summary document referred to "costs and expenses deployed by Augusta" without any indication of the magnitude of those likely costs and expenses generally or the substantial potential cost of ATE insurance in particular. The summary of the amounts recoverable by Augusta on a "successful resolution" of the claim stated that its entitlements were:

> "(i) a return of the costs and expenses deployed by Augusta [again, I interpolate, with no specific disclosure that these would include ATE costs or of their magnitude];

(ii) any GST payable on the amount supplied to you by Augusta;

(iii) the Augusta Commission as set out in schedule 2 to the LFA. The Augusta Commission is, in summary, the higher of:

1. Option 1: a percentage of the proceeds of the claim.

…

For all other amounts (other than a buy-back) you receive from any judgment or settlement, the commission is 12.5%; or

2. Option 2: 2.6 times the costs and expenses."

That summary also did not, as I noted above, indicate the potential for the return to owners on a settlement or resolution of the proceedings to be eroded by the cost of ATE insurance.

25 Mr Brennan in turn refers (Brennan [34]) to the consideration by Augusta's investment committee, on 10 May 2019, whether to fund the proceeding. He exhibits the investment paper setting out an overview of the proposed proceeding (Ex F2, 2-8) which provided an overview of matters which gave rise to the proceedings and identified the proposed causes of action and the measure of loss and quantification, directed to a claim for damages for diminution in value of the owners' property suffered as a result of an alleged breach of warranties. The investment paper contemplated the provision of ATE insurance and provided a fuller explanation of the calculation of the Augusta commission than had then been provided to owners, as follows:

"Under the litigation financing agreements, the Augusta Commission is the greater of either the following (but not exceeding any such amount as the Court determines to be fair and reasonable in the circumstances):

(a) an amount equal to 12.5% of net claimed proceeds …; or

(b) an amount equal to 2.6X the Claimant's share of the Project Costs.

Also note that LFA provides that the Augusta Commission:

(a) in the case of multiple Project Costs, only applies over costs incurred (not Deployed Credit) and excludes any ATE Insurance premium and administrative fee; and

(b) in the case of a percentage option, is calculated over Net Claim Proceeds (and not Gross Claim Proceeds)."

26 The investment paper also identified the risks in the claim and the steps which would be taken to mitigate them, and recognised the likelihood that SOPA would file cross-claims against third parties, including the developer and the structural engineer, and that the "joinder of more defendants is likely to have

the effect of delaying proceedings and increasing complexity of the [p]roceeding[s]", but also recognised the strategic benefit to the Plaintiffs arising from SOPA's joinder of those third parties. That investment paper also noted that the budget "takes into account the likelihood of additional cross-respondents in the proceedings".

27 Mr Brennan notes (Brennan [39]) that, on about 25 July 2019, the Plaintiffs made an application for financing to Augusta, which was prepared by their solicitors, and identified the sum of $2,471,857.40 as disbursements "including insurance premiums where not deferred". I recognise that indicates that the Plaintiffs, as distinct from group members, were aware of the then potential size of that cost, although it subsequently substantially increased. Mr Brennan refers to subsequent developments in the proceedings and a further investment summary provided to Augusta's investment committee on 7 January 2020 (Brennan [41]; Ex F2, 75). That document recorded a projected return, described as an estimated return multiple, of between 2.17X and 3.6X. Mr Brennan refers (Brennan [44]) to a later budget variation proposed by the Plaintiffs' solicitors on joining the builder and structural engineer as additional defendants to the proceedings. Mr Brennan also refers (Brennan [47]) to the increased exposure as to costs resulting from that amendment and to steps taken to seek additional ATE insurance cover, and to AP1's then expectation of a distribution to class members on settlement or resolution of the proceedings.

28 On about 26 March 2021, when it was proposed that further ATE insurance be taken out, Augusta wrote to the Plaintiffs (Brennan [48]; Ex F2, 142-150), explaining that an additional $2,270,000 had been committed to the cost of obtaining further ATE insurance, although Mr Sulan recognises that advice did not refer to deferred premiums. I addressed that letter in paragraph 13 above. Mr Brennan also refers (Brennan [50], Ex F2, 159-160) to an email from the Plaintiffs' solicitors to group members on 4 May 2021 which I addressed in paragraph 14 above.

29 Mr Brennan also refers (Brennan [52]) to a conversation, at the time of a mediation which led to the settlement of the proceedings, with the Plaintiffs and their solicitor which contemplated that payment of 50% of the damages to the

group members would be a "good outcome well in line with the market" and discussed a reduction of AP1's costs multiple from 2.6X to 2.3X to achieve a 50% return for the group members and to the Plaintiffs' indication that they could agree to a settlement on that basis. I recognise that the "50%" recovery figure referred to in this conversation was not wholly arbitrary, where the return to group members accepted in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs & mgrs apptd) (in liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330 ("*Blairgowrie*") and *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374 ("*Kuterba*") were close to that figure. Mr Brennan's evidence (Brennan [55]) is that he then formed the view that it was in AP1's interests to achieve a settlement where group members would receive 50% of the settlement sum, and on that basis he agreed to reduce the profit multiple in the LFA from 2.6X to 2.3X.

30 Mr Brennan in turn refers (Brennan [56]ff) to a spreadsheet that compares the internal rates of return to AP1 at different points in the proceeding. That spreadsheet provides limited assistance in determining any issue in the proceeding, since it provides no objective basis for determining what is an appropriate rate of return for the level of risk assumed by AP1 in funding the proceedings. Mr Brennan also refers (Brennan [60]) to Augusta's investors' expectation that Augusta will not take on the adverse cost risks of the proceedings that it funds and will instead obtain ATE insurance for those adverse costs risks. Mr Brennan's evidence (Brennan [62]) is also that, if Augusta was required to self-insure for adverse cost risks in the present case, it is unlikely that a funding proposal that involved self-insurance would have been approved by its investment committee or, if it was approved, Augusta would have funded this proceeding on the basis of a higher multiple for its commission. That does not follow, because Augusta and AP1, and the Plaintiffs' solicitors, were in competition with several other firm of solicitors, at least one of which had offered to conduct the proceedings on an alternate funding basis. Had Augusta declined to fund the proceedings or offered to fund them at a higher multiple, a potential outcome was that the other firm would have instead funded the proceedings on that other basis, rather than the AVL or AP1 funding them with a higher multiple. Mr Brennan also refers (Brennan

[64]ff) to the circumstances in which ATE insurance was taken out by Augusta or AP1, but that evidence does not address the limited disclosure of that matter to group members which I have noted above.

31 AP1 also reads an affidavit dated 9 November 2021 of Mr Robert Warner, who is an insurance broker and was engaged by AVL to obtain ATE insurance in respect of the proceedings in mid-2019. Mr Warner referred to the "shallow pool" of insurers which were willing to consider providing adverse cost risk in Australian litigation and to negotiations on behalf of AVL to obtain such insurance (Warner [12]) and observes that:

> "It is inapt to describe at a level of generality a concept of a 'market rate' for ATE [i]nsurance premiums because each case is assessed and underwritten on a bespoke basis. The case by case assessment makes it inexact to seek to place clear parameters around risk factors and seek to ascribe specific pricing consequences to a particular class of risk".

32 Mr Warner nonetheless referred to common premiums for such insurance and to the difficulty in obtaining excess ATE insurance once a proceeding is at an advanced stage. I understand Mr Warner's evidence to go to a question whether the ATE insurance obtained by AVL or AP1 was obtained at competitive rates. It does not seem to me that his evidence much advances the assessment of whether the combined cost of AP1's commission and the ATE costs are consistent with a fair and reasonable settlement of the proceedings, since obtaining ATE insurance was not the only option available to a litigation funder, although it appears to be the only option that AVL or AP1 would entertain. Alternatives to obtaining ATE insurance at least included the possibility of the funder itself assuming the risk of costs of a failure of the proceedings, as other funders have done in other cases, often within a diversified portfolio of funded actions. The evidence led by AP1 does not address that possibility or any other alternatives to ATE insurance. In any event, it is not necessary to determine whether AP1 did or did not obtain "competitive" rates for the ATE insurance which it took out, within the limited market in which such insurance could then be obtained, given the disclosure issues which I identify above in respect of the deduction of ATE costs from the settlement proceeds and the lack of evidence to support the return on investment sought by AP1.

Whether the settlement of the representative proceedings is fair and reasonable

33 The Plaintiffs identify the first matter which arises for determination as whether the settlement ought be approved on the basis that it is fair and reasonable to group members as whole. The applicable principles are well-established. Section 173 of the *CPA* provides that:

> "(1) Representative proceedings may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court."

34 If a settlement is approved, it binds all persons other than those who have opted out of the proceedings under s 179(b) of the *CPA*. The Court has the power to "of its own motion or on an 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" under s 183 of the *CPA.* In approving a settlement agreement, the Court's task is to determine whether a proposed settlement is "fair and reasonable": *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925 at [19]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 at [10]; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 at [18]. Dr Higgins points out that the relevant question is whether the proposed settlement falls within a reasonable range: *Newstart 123 Pty Ltd v Billabong International Ltd* (2016) 343 ALR 662; [2016] FCA 1194 at 664. The Court's task in assessing a settlement is "an especially onerous one": *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 at [16]; *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8].

35 In *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* (2021) 150 ACSR 535; [2021] NSWSC 249 ("*DSHE Holdings*") at [12]-[14], Stevenson J described the applicable principles in such an application as follows:

> "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. The Court's role in relation to group members is supervisory and protective.

> The Court's role is analogous to that which it assumes when approving settlements on behalf of persons with a disability.
>
> 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 plaintiff group members would be exposed were the matter to proceed to trial.
>
> 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 hands following the resolution of their individual claims in the event that the settlement is approved." (citations and quotations omitted)

36 These observations were approved by Rees J in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2022] NSWSC 1076 ("*Toyota*") at [19], and her Honour there also observed (at [20]) that:

> "Thus, the first question is whether the settlement is reasonable inter partes, that is, between the representative plaintiff and defendant in each proceeding. The second question is whether the settlement is fair and reasonable inter se, that is, between group members. In determining these questions, the Court must be satisfied that the settlement has been undertaken in the interests of the group members as a whole and not just in the interests of the representative plaintiff and the defendant: *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258 (per Branson J). Further, as Goldberg J outlined in *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [19]:
>
> > Ordinarily in such circumstances the Court will take into account the amount offered to each group member, the prospects of success in the proceeding, the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer, the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement."

37 Mr Sulan fairly summarises the Court's role in respect of a settlement as follows:

> "In approving a settlement under [*CPA*] s 173, 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. That question embraces subsidiary questions concerning the approval of funding and legal costs, as the Court is concerned with evaluating what the group members will ultimately obtain in their hands. It is in this context that, in exercising the jurisdiction under s 173, the Court considers whether the legal costs incurred are reasonable and proportionate and assesses the fairness and reasonableness of the funding arrangements. Reasonableness, in this context, represents a range, with the relevant question being whether the proposed settlement falls within it."

38 I now turn to the questions whether the settlement sum is fair and reasonable between the Plaintiffs and group members and the Defendants, and whether the proposed distribution of the settlement moneys is reasonable when one looks at how each of the members of the class will be treated. Counsel for the Plaintiffs have provided a confidential opinion dated 30 September 2022 addressing the fairness and reasonableness of the settlement to group members as a whole (Ex A3, 1-29), and I have had regard to that opinion. Mr Darke submits that, having regard to all the circumstances, including the Plaintiffs' and group members' realistic "best case" and the risks attending any contested determination of the claims in this proceeding, the proposed settlement is fair and reasonable to group members as a whole. I accept that proposition in respect of the settlement as between the Plaintiffs, group members and the Defendants implemented by the HoA, and the Settlement Deed and SDS, other than so far as the Settlement Deed and the SDS provide for 36.4% of the settlement proceeds to be applied to the Funder Commission and ATE costs. I return to that question below.

39 Mr Darke submits that there are no substantial objections to the proposed settlement on the part of group members, and points out that Mr Pagent exhibits the only three emails that the Plaintiffs' solicitors have received from group members that "may" be characterised as an objection in that they raised concerns about the way that group member entitlements would be calculated (Pagent [126]-[127]; Ex CJP-4, 114-119). Mr Pagent's evidence is that the Plaintiffs' solicitors responded to each of those "objections" and they have not received any further correspondence from the persons who made them (Pagent [116]; Ex CJP-4, 114-119). Mr Darke points out that none of the "objections" take issue with the overall settlement sum, and they principally raise questions (rather than concerns) as to the distribution of the settlement proceeds between group members (Pagent [127]; Ex CJP-4, 114-119). Mr Darke also submits that, to the extent that the emails raise queries as to the methodology used to quantify group members' loss or damage under particular heads of loss, those are matters in respect of which the SDS adopts a scheme that reflects the relevant legal principles. Mr Darke submits that the relatively small number of "objections", and the lack of any particularly sustained criticism

of the proposed settlement, suggests that, overall, the proposed settlement is fair and reasonable to group members as a whole. I accept that submission, again other than in respect of the treatment of AP1's Funder Commission and the treatment of ATE costs.

40 In oral submissions (T15) Mr Darke submitted that the settlement sum was fair and reasonable to group members as a whole, leaving aside the deductions from it, because it represents a significant percentage of the best case outcome for the Plaintiffs and group members in the proceedings; that result was achieved notwithstanding significant risks; and no group member has objected to the settlement on the ground that the gross settlement fund is insufficient. The first and second of these issues are supported by Counsel's opinion and the evidence of communications with group members. I am satisfied that the settlement sum is fair and reasonable to group members as a whole, putting aside the deductions from it in respect of AP1's Funder Commission and ATE costs.

41 I am also satisfied that the SDS is fair and reasonable to group members as a whole where, as Mr Darke points out (T17), cl 7 of the SDS provides for a distribution by reference to three types of claim, involving "diminution" claims as assessed by the valuation evidence which was to be led by the Plaintiffs in the proceedings; "solatium claims" which are addressed by a specified formula, consistent with the way in which the Plaintiffs proposed to put their case at the hearing and with the case law on which they relied as to the basis on which owner/occupiers and owner/investors could establish such claims; and a third category of claim described as "non-common" claims. The proposed settlement sum is in turn allocated between the three types of claims, according to the proportion which claims of that character constituted in the overall claim. Mr Darke submits (T20) and I accept that this method of distributing the settlement sum is fair and reasonable to group members as a whole, where it is rational and reflects the way in which the Plaintiffs' case was to be put if the trial proceeded, and will be administered by an independent administrator under the SDS.

Costs and deductions for AP1's claims and ATE costs

42 In addition to approval of the settlement sum and the distribution of the settlement in accordance with the Settlement Deed and the SDS, the question arises whether to approve the subtraction of costs and other deductions sought by the Plaintiffs under s 173(2) of the *CPA*. Prayer 7(a) of the Motion seeks a deduction from the settlement sum for a Funder Commission payable to AP1 in the amount of $13,074,063. Prayers 7(d) and (e) of the Motion seek orders for the deduction from the settlement sum of additional amounts paid or payable by AP1 in connection with ATE insurance obtained by AP1 in respect of the proceeding and related costs associated with the provision of security for costs. These orders are controversial because it emerged, in the course of the hearing before me, that AP1 seeks a total of 36.4% of the settlement sum for payment of its Funder Commission (which is about 26% of the settlement sum) and reimbursement of ATE costs. I should address the applicable principles before I address the parties' submissions below.

The applicable principles

43 The Plaintiffs accept that it is part of the Court's function in exercising its jurisdiction under *CPA* s 179 to assess the fairness and reasonableness of the funding arrangements and how those arrangements will operate having regard to the proposed settlement: *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277 at [38] and [42]; *City of Swan v McGraw-Hill Companies Inc* (2016) 112 ACSR 65; [2016] FCA 343 at [30] ("*McGraw-Hill*"); *Toyota* at [37].

44 In *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148 ("*Money Max*") at [80], the Full Court of the Federal Court observed:

> "We do not seek to and cannot predetermine the relevant considerations for the approval of a reasonable funding commission rate. They will be a matter for the judge hearing the approval application and it will depend upon the circumstances. However, it seems likely that the relevant considerations would include the following:
>
> > (a) the funding commission rate agreed by sophisticated class members and the number of such class members who agreed. That can be said to show acceptance of a particular rate by astute class members;

(b) the information provided to class members as to the funding commission. That may be important to understand the extent to which class members were informed when agreeing to the funding commission rate;

(c) a comparison of the funding commission with funding commissions in other Pt IVA proceedings and/or what is available or common in the market. It will be relevant to know the broad parameters of the funding commission rates available in the market;

(d) the litigation risks of providing funding in the proceeding. This is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding;

(e) the quantum of adverse costs exposure that the funder assumed. This is another important factor and the assessment must recognise that the funder assumed that risk at the commencement of the proceeding;

(f) the legal costs expended and to be expended, and the security for costs provided, by the funder;

(g) the amount of any settlement or judgment. This could be of particular significance when a very large or very small settlement or judgment is obtained. The aggregate commission received will be a product of the commission rate and the amount of settlement or judgment. It will be important to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;

(h) any substantial objections made by class members in relation to any litigation funding charges. This may reveal concerns not otherwise apparent to the Court; and

(i) class members' likely recovery "in hand" under any pre-existing funding arrangements."

45 In *Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd (No 4)* [2018] NSWSC 1584 at [24]-[25], Ball J observed that:

"It is also necessary for the Court to consider whether the costs were reasonable having regard to the terms of any agreement relating to costs and the reasonableness of the costs that are sought to be paid from the settlement amount particularly having regard to the proportion of the settlement funds to be paid in costs: *Wheelahan v City of Casey* [2011] VSC 215 at [103] per Emerton J; *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311; [2004] FCA 1406 at [61] per Sackville J; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 at [24]–[54] per Gordon J; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd(No 2)* [2013] FCA 1163 ; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) (No 9)* [2013] FCA 1350 at [58] per Jacobson J; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 at [177] per J Forrest J; *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232 at [112]–[113] per Emerton J.

In considering the reasonableness of any funding fee, it is necessary to take into account all relevant circumstances including relevantly:

(a) The information provided to group members concerning the funding commission;

(b) Whether the funding commission reflects market rates;

(c) The litigation risks of providing funding in the proceeding;

(d) The quantum of adverse costs exposure that the funder assumed;

(e) The legal costs expended and to be expended and the security for costs provided by the funder;

(f) The amount of any settlement; and

(g) Any substantial objections made by group members in relation to any litigation funding charges."

46 Dr Higgins rightly recognises that *Money Max* must now be approached with caution given the High Court's observations in *BMW Australia Limited v Brewster* (2019) 269 CLR 574 ("*Brewster*") as to the matters relevant to setting a funder's commission rate. Dr Higgins rightly points out that the weight to be given to funding commissions awarded in previous cases, so far as they indicate a "market rate", should also now be viewed with considerable scepticism and that the Court should consider matters such as a principled assessment, by evidence, of what is a reasonable return on investment, in light of the risks assumed. She refers to Dixon J's observation in *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666 at [1966] that:

> "It is fundamental that the assessment by a court of a fair and reasonable return for a litigation funder more naturally emerges from the inputs specific to the litigation funder — primarily the level of funding, and promise of funding, that it provides and the period of exposure to risk — than a denominator applied to the settlement or judgment sum. A necessary consequence of accepting this relationship between the court's role in the proper administration of justice, when assessing what is fair and reasonable, and a fair commercial return for a funder, is that real difficulties are presented for the proper administration of justice by the ex-ante assessment of a percentage of an unknown sum to be received at an undetermined future time. The settlement sum, gross or net of costs, is uncertain until case completion, and can vary enormously. This can result in extremely wide and potentially excessive and inequitable returns on what the litigation funder actually invested or put at risk." (citations omitted)

47 Dr Higgins also rightly emphases that the proper analysis is multifactorial and that relevant considerations and the weight to be given to them in any particular case will depend upon all of the circumstances: *Endeavour River Pty Ltd v MG Responsible Entity Ltd (No 2)* [2020] FCA 968 ("*Endeavour River*") at [21]. She also points out that commercial reality performs a practical check on

this analysis and, consistent with the observations of Beach J in *Kuterba* at [12], funding commissions should be approved at levels that are commercially realistic and that properly reflect the costs and risks taken by the funder, avoiding hindsight bias. I proceed on that basis. Dr Higgins also rightly recognises that there is an outer limit to the deductions that can be fairly effected in a litigation funder's favour and refers to Wigney J's observation in *McGraw-Hill* at [30] that:

> "…there may come a case where the amount to be paid to a litigation funder consequent to a settlement is so disproportionate to the risk and expense to which the funder was exposed in the proceedings, that it provides a proper basis for the Court to refuse to approve the settlement. That may be so even if the group members all entered into funding agreements and all approved the settlement."

The Funder Commission

48 Dealing first with the Funder Commission claimed by AP1, Mr Darke submits that, under cl 8.2(b) of the Further Amended LFA, AP1's entitlements include the "Augusta Commission", which is defined as the greater of Option 1 (an amount equal to 12.5% of the Net Claim Proceeds) or Option 2 (2.6 times the Claimant's Share of the Project Costs (excluding any Administrative Fee and any Adverse Costs Insurance Premium that is payable from Claim Proceeds only if there is a Resolution), as those terms are defined). Mr Darke submits that, in the events that have happened, the relevant option is Option 2 and points out that AP1 had agreed to reduce the multiplier under Option 2 from 2.6X to 2.3X. Mr Darke submits that, to calculate the "Augusta Commission", that multiplier has then been applied to the figure assessed by Mr Matters to be the reasonably incurred legal costs and disbursements paid by AP1 (being $5,684,375.20 (GST inclusive)) and the effect is to reduce the commission that would have otherwise been payable by $1,705,312.56. That submission must be qualified by the recognition in the Further Amended LFA that the Funder Commission cannot exceed the amount determined by the Court to be fair and reasonable.

49 Turning now to the factors identified in *Money Max*, there is no evidence to suggest that group members who entered into funding agreements with AVL or AP1 are generally sophisticated, and, as Dr Higgins points out, it is more likely

they had varying degrees of sophistication where their common characteristic is only their ownership of a unit in a particular unit block. The evidence to which I have referred above indicates that the fact of the Funder Commission was disclosed to group members before they entered funding agreements, but the information provided to them did not disclose, or adequately disclose, the real possibility that their returns from a settlement or resolution of their claims would be substantially eroded by deductions for ATE costs. Dr Higgins also pointed to the information provided to group members in the settlement notice, and I have addressed the scope of that notice above.

50 Dr Higgins notes that the third factor identified in *Money Max*, namely a comparison of the Funder Commission with funding commissions in other proceedings or what is common in the market, has been the subject of criticism in more recent cases. I agree with that criticism, since that comparison has a real tendency to limit the operation of market forces that might otherwise reduce funders' commissions over time, by allowing a ratcheting (or at least underpinning) effect to occur by which each funder seeks to support its rate of commission by reference to the rates of commission obtained in previous matters, so that commissions do not decline in response to market forces. Dr Higgins also recognised that the reduction in the Funder Commission sought by AP1 from a multiple of 2.6X to 2.3X "militates in favour of its fairness and reasonableness within the context of the proceeding". I have addressed that matter in paragraph 9 above.

51 Dr Higgins recognises that the Funder Commission is here calculated not as a percentage commission rate, but by reference to a multiple of the legal costs and disbursements that AP1 has funded, and refers to the consideration of a similarly structured commission by Beach J in *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 ("*Davantage*") at [58]-[73], where his Honour did not identify any objection in principle to that approach. I also do not see such an objection in principle, provided that fair disclosure is made to group members that the amount of commission payable to the funder may increase rapidly (given the multiple adopted in the calculation) as the costs of the proceedings increase. I need not address the question whether that was sufficiently

disclosed to group members here, given the conclusion that I reach on other grounds.

52 Dr Higgins submits also submits and I accept, that the Funder Commission can be understood as a factor of the capital invested by AP1, which represents "the cost of bearing the risk of all relevant costs and disbursements and the associated risk of recoverability", although that observation again requires the qualification that AP1 outsourced the risk of adverse costs orders through ATE insurance and seeks to recover the cost of doing so in addition to the Funder Commission. Importantly, Dr Higgins also observes that:

> "No expert evidence has been led in the proceeding to contextualise the resulting return to the Funder. There is no evidence from the Funder, such as financial accounts, addressing whether the return on equity is within or outside a reasonable range, or as to its return on invested capital, the equity beta for funders locally or globally, or the rate of return on equity that a funder in its circumstances might reasonably expect having regard to the level of risk assumed. The Funder has given no evidence of its portfolio of funding activities or as to the parameters of the funding commissions available in the market. The inputs that guided the Funder's initial investment decision to finance the proceeding are not exposed.
>
> Such evidentiary deficits may not be fatal, however, where the information available to the Court allows an assessment of the relative reasonableness of the Funder's commission in comparison with the costs incurred, the security paid out, the damages claimed and the recovery achieved."

53 Dr Higgins also addresses case law concerning the percentage of a settlement sum that may properly be paid to a funder, although that question must here be addressed by consideration of the total of the Funder Commission and ATE insurance costs, which here total 36.4% of the settlement sum and are well above the amount that would ordinarily be allowed for a funding commission.

54 Dr Higgins points out that, in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625; [2020] FCA 1885 ("*Asirifi-Otchere*"), Lee J approved a funding commission of 25% of gross settlement proceeds, although that was a case where a judge had previously made a commencement fund order permitting a funding commission of not greater than 25%, prior to the High Court's decision in *Brewster*. His Honour there observed (at [27]-[28]) that:

> "The contradictor further submitted, however, that the proposed commission sought by Balance (being 25% of the gross settlement sum or approximately 27.57% of the net settlement sum) is too high and that the following matters

militate in favour of a lower commission rate of, say, 21%: (a) Balance only executed one funding agreement and there is accordingly no cost attributable to the conducting of a book build to be factored into the commission rate; (b) the commission was not accepted or agreed to by a sophisticated class of investors and hence 25% is, without more, an arbitrary starting point; (c) the current "tariff" (albeit in the securities class actions context) includes funding commission percentages in the low 20s; in other areas, this sort of figure accords with the 20% funding commission awarded in the stolen wages litigation (see *Pearson v Queensland (No 2)* [2020] FCA 619) and, while the funding commission in the toxic foam litigation (see *Smith v Commonwealth (No 2)* [2020] FCA 837) was in the 24–25% range, the figures recorded reveal a return on investment to the funder of between 1.07 and 2.37 (which is to be contrasted with the figure of 3.6 if a 25% commission was applied); (d) there was a reasonable basis to conclude that the level of risk undertaken by Balance was towards the lower end of the spectrum in the present proceeding; and (e) there was a relatively quick return on investment achieved in this proceeding.

All of these points, although well made, can be dealt with relatively shortly. I am satisfied this was a relatively risky case when compared to a "run of the mill" securities class action. … I am satisfied for a case of this type, a percentage return of 25% is fair given the comparables (such as they are) and particularly given this is a "legacy case" where a judge of the Court, looking at the matter from an ex ante perspective, was content to make a Commencement CFO of "not more than 25%" of gross recovery. Although the error of making such orders has now been corrected, at least the preliminary indication of a cap in such an order was done without any hindsight bias. The return is one which although a good result for the funder, is not a windfall."

55 Dr Higgins also notes that, in *Endeavour River*, Murphy J approved a funding commission of 25% of the gross settlement proceeds. Dr Higgins points out that his Honour's acceptance of that commission was informed by evidence tendered by IMF as to its return on investment across its entire portfolio of litigation funding cases, and his Honour noted (at [37]-[38] and [47]) that:

"Litigation is inherently risky, as is the funding of it. Even more so when the funded case is a large, complex, commercial class action in which it is difficult to accurately assess the liability and quantum risks at the stage when the funding commitment is made. One way a well-run litigation funder will address the inherent uncertainties in such a business is by having a portfolio of cases so as to spread the risk. IMF's 2019 Annual Report shows that it funds many different types of cases, in a variety of jurisdictions both in Australia and overseas, and using different funding models. The cases that it funds carry different levels of risk for IMF and deliver different rates of return. Even in a particular category of cases, such as shareholder class actions in Australia, … there is a great deal of variability in the rates of return it achieved in different shareholder or investor class actions, with some high returns, some modest returns, and some low returns, although no losses. A competent commercial litigation funder operating in a competitive market will price the risk it takes on in a particular case having regard to the knowledge that returns are variable between cases, with good, intermediate and bad results, including outright losses, to be expected over time.

> In a settlement approval application the Court must focus on whether the funding commission in that case is fair and reasonable, so as to avoid the funder making excessive or disproportionate profits at the expense of class members. Thus the Court may consider the funder's rate of return in that case. But while it is the interests of class members in that case which are relevant, at least in relation to commercial litigation funders, the Court may also take into account the funder's rate of return over time as that may assist in understanding the range of fair and reasonable funding rates. Having regard to its confidentiality I will not disclose the average rate of return which IMF has achieved in shareholder and investor class actions over time, but it is not in my view manifestly excessive or unreasonable. …
>
> Having regard to the matters above, the relevant considerations set out in *Money Max* at [80]; the various matters I set out in [*Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719] at [31] and Mr Bowman's responses to those matters; the variability in IMF's rate of return in shareholder class actions; and its average rate of return in shareholder class actions over time, I consider a 25% funding rate is within the range of what is a fair and reasonable funding commission. It provides IMF a funding commission of $10.5 million, which constitutes a reduction of almost $3 million on the funding commission it sought, and to which class members had agreed."

56 Dr Higgins also notes that the question of commission rates has also been noted in in the Australian class action literature, including Professor Morabito's study titled "An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payment" (Monash University, January 2019), to which Lee J referred in *Asirifi-Otchere* at [25], which indicates a median percentage of settlement funds "consumed" by funding fees in all funded cases settled during the review period (until the end of 2018) of 25%.

57 I can also give weight to the better evidence that was led in *Toyota* (although it is not, strictly, probative of any fact in these proceedings), which Rees J summarised (at [55]-56]) as follows:

> "Looking at the risk which the funder has undertaken in committing to funding these representative proceedings, the evidence indicates the risk was significant. The funder provided funding for over four and a half years. In total, the funder has expended some $18 million in legal costs. In addition, the funder provided security for costs of $8.43 million. The funder was exposed to adverse costs orders being made against it, which Mr Scattini has estimated would have exceeded $31 million. There is no doubt that the funder took on risk. I consider a commission is appropriate in these circumstances.
>
> The question is whether the rate of commission as now sought is appropriate. In this regard, Regency relied on the evidence of Greg Houston, who is an expert in this field. Mr Houston assessed the rates of commission evident from some 58 legal decisions in the Australian judicial system and assessed that the average and median rate of commission was 25%. Regency is entitled, under the funding agreement entered into with some of the group members, to

> a higher rate of 30% but nonetheless seeks 25% today. Mr Houston added that not only is the rate of commission now sought the average or median rate, but it is also, in his opinion, an appropriate internal rate of return having regard to the rate of return enjoyed on listed securities to which should be added a premium for the illiquidity of the funder's investment and an additional risk premium."

Plainly, the approach taken in that case would not support a total deduction from the settlement including both Funder Commission and ATE costs well in excess of 25%.

58 Dr Higgins also identifies a range of relevant risks in providing litigation funding, by reference to the case law, including the complexity and likely duration of the litigation; the reaction of the class to the settlement; the stage of the proceedings; the risks of establishing liability; the risks of establishing loss or damage; the risks of maintaining a class action; the ability of the respondent to withstand a greater judgment; the range of reasonableness of the settlement in light of the best recovery; the range of reasonableness of the settlement in light of all the attendant risks of litigation; and the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding. I accept that some of those risks existed here and were increased by the complexity of the issues in the proceedings, the extent to which the resolution of those issues would depend upon expert evidence, the number of parties to the proceedings, and the multiplicity of cross-claims in the proceedings. I have pointed above to the fact that AP1 outsourced the risk and cost of providing for its adverse costs exposure to ATE insurers and seeks a further deduction from the settlement proceeds for the costs of doing so, which I address below. I accept that the legal costs incurred and paid by AP1 were substantial and that the settlement sum is a substantial sum.

59 I have also had regard to the absence of concerns raised by group members in respect of litigation funding charges, as noted in Mr Pagent's evidence, although I also bear in mind that group members have, in that correspondence, tended to focus on the amount they will receive by way of compensation, rather than addressing the effect of the funding arrangements with AP1, or whether the amount payable to AP1 under those funding arrangements is reasonable. I

also have regard to the important observation of the Full Court of the Federal Court in *Money Max* at [50] that:

> "… the practical realities of class actions and the likely low level of engagement of many class members means that an absence of objection or a low level of objection to a particular proposition is often weak evidence of class members' assent and carries little weight. It may be the case, as the applicant contends, that the absence of objection is "no small thing", but care should be taken before approaching an application on the basis that class members' silence is equivalent to their assent. It is the Court's responsibility to protect class members' interests and the absence of objections or a low level of objections does not relieve it of that task." (citations omitted)

60 I recognise that Mr Sulan seeks to distinguish the position here from that in *Money Max* by reference to the fact that these proceedings concern group members' property and there has been active engagement from group members at various stages of the proceedings. I recognise that, as in *McGraw-Hill*, to which Mr Sulan refers, group members have been given information about the quantum of legal fees and disbursements to be deducted from the settlement and none have indicated opposition to them. It does not follow, however, that they have engaged closely with that matter, as distinct from the more pressing question of how much each of them will recover, or that they have been provided sufficiently detailed information, particularly as to the extent to which their return would be eroded by the combination of the Funders' Commission and ATE costs, to allow them to do so.

61 Mr Sulan also addressed the question of the Funder Commission claimed in prayer 7(a) of the Motion. AP1 relies on the affidavit of Mr Brennan, to which I have referred above, in that respect. Mr Sulan submits that the Court should take into account AP1's contractual entitlements under litigation funding agreements with the Plaintiffs and some 371 group members in considering its claims. I do so, but also have regard to the fact that those entitlements are themselves limited by reference to the Court's determination of a fair and reasonable amount, and bear in mind the disclosure issues to which I referred above.

62 Mr Sulan summarises the factual background entry into the LFAs and ATE insurance policies, by reference to Mr Brennan's affidavit, and I have had regard to that evidence. Mr Sulan submits that AP1's claim for both the 2.3X commission and ATE costs, which I address below, leading to a deduction of

36.4% from the settlement amount, is fair and reasonable in all the circumstances, having regard to specified matters, as follows:

> "a. [the Plaintiffs' solicitors] and [AVL] were selected following canvassing of a number of different law firms and an alternative funder by a representative committee of owners;
>
> b. following negotiation, the 2.6[X] commission represented the commission [AVL] was prepared to offer as part of an arrangement whereby [AVL] would not be exposed to adverse costs by reason of the entry into ATE policies. If ATE was not part of the funding package, [AVL] would not have offered funding, or it would have offered funding at a higher multiple;
>
> c. whilst the ATE [insurance] costs are higher than initially anticipated, this is a consequence of the fact that after the proceedings had commenced, advice was received to join two additional defendants thereby necessitating the entry into an additional ATE policy;
>
> d. prior to entering into the settlement agreement, [AVL] agreed to reduce its commission to 2.3x so as to achieve a 50% return to Group Members from the gross settlement sum. The gross recovery is consistent with what Augusta had initially budgeted; and
>
> e. the deductions claimed in paragraph 7 of the [M]otion, including the ATE [insurance] costs and commission, have been disclosed to Group Members and no relevant objection has been received to the deductions."

63 I am not persuaded by this submission. The proposition that AVL was selected as funder after owners had considered a number of alternative funders has less weight given the disclosure issues which I have noted above and, in particular, the absence of explanation to group members of the potential size of the ATE cost or its impact in reducing the return to group members from a successful result, and the lack of transparency about the fact that group members would be asked to pay separately for the substantial cost of a protection that is often included within the funding commission. The fact that the Funder Commission sought by AP1 was the funding commission that it wished to obtain, on the basis that it would not assume the risk of adverse cost orders, does not establish that that commission was reasonable, particularly by comparison with other cases in which similar or lesser commissions were offered by funders which did accept that risk. The proposition that ATE costs were "higher than initially anticipated" does not answer that difficulty, where it appears that the risk that would occur was also not disclosed to group members before they entered into the relevant arrangements with AVL or AP1. The proposition that AP1 will now reduce its commission to 2.3x or that the gross recovery is consistent with a 50% figure achieved in some other cases or

with what AP1 "initially budgeted" does not establish that that amount is reasonable. The fact that the deductions have been disclosed to group members and no objection has been received can only be given limited weight, where there is no reason to think that group members are sufficiently sophisticated or motivated to address this issue and the Plaintiffs cannot, in practice, oppose the funder's wishes in this respect, and do not do so here.

64 Mr Sulan also referred, in submissions, to the considerations identified in *Money Max* as relevant to whether a funding commission is reasonable, and accepted that, following *Brewster*, caution should be exercised in embarking on a comparative assessment of funding rates by reference to other cases. Mr Sulan also fairly accepts that:

> "In determining whether the deductions sought by a funder are fair and reasonable, the fact that a funder obtained ATE insurance may inform the level of risk it undertook and the commission to which the funder should fairly and reasonably be entitled, having regard to the fact that properly informed plaintiffs and group members agreed to be contractually bound to a particular rate of commission as well as reimbursement or payment of ATE [insurance] costs."

Again, that submission omits the fact that group members did not contractually commit themselves to a 2.6X multiple, where that provision was subject to the Court's determination of a fair and reasonable funding commission.

65 Mr Sulan also submits that:

> "Critically, however, the Court must approach the task of assessing the risk undertaken by the funder in a commercially realistic manner and on a prospective basis as at the time the risk was taken. In *Money Max* at [82], the Court "recognise[d] the important role of litigation funding in providing access to justice" and approve commissions which are "commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias".
>
> The danger of hindsight bias looms large in evaluating a funder's commission at the stage of settlement and ought to be avoided. The Court should look at whether the funding rate was reasonable *as at the time it was agreed* by reference to, among other things, the market for funding rates at that time (ignoring post-contractual market developments) and also the risks of complex litigation taken on at the commencement of the proceedings, at which point the outcome may carry a high degree of uncertainty". (emphasis in original)

66 I broadly accept that proposition, but note that it does not follow that approaching these issues in a "commercially realistic manner" or on a "prospective basis" has the consequence that a litigation funder should be

entitled to the deduction of 36.4% of the settlement proceeds that it now seeks, made up of Funder Commission and ATE costs, particularly where the evidence it has lead provides no objective basis for allowing a return in excess of the several cases which have accepted returns of about 25% on better evidence than led by AP1.

67 In summary, Mr Sulan submits that (i) the Funder Commission payable to AP1 does not exceed a fair and reasonable amount, where it was the product of a competitive process and negotiation with a representative group; (ii) the return multiple is "calibrated to the risk" that AP1 was prepared to take; (iii) the initial ATE costs were incurred at competitive rates following a survey of the market; (iv) AP1's initial modelling contemplated group members would receive 51% at the time of settlement approval; and (v) there have been no objections to deductions by the Plaintiffs and group members. The first of these submissions is undermined, as I have noted above, by the issues as to adequacy of disclosure, at the time of entry into the LFA, of the extent to which the ultimate return to group members would be reduced by combining a Funder Commission and a reimbursement of ATE costs. The second submission is of limited weight, where AP1's expectations as to its return do not create an entitlement to that return, and will be moderated by the statutory environment in which class actions are conducted and the role conferred on the Court, by s 173 of the *CPA* and the terms of the LFA in approving settlements of class actions and the funding commission payable, generally and in this matter. The third submission does not assist AP1 in respect of the total return to which it is entitled. Assuming that the initial ATE costs were incurred at competitive rates, it does not follow that AP1 can reasonably recover *both* a Funder Commission comparable to that of funders which assume the risk of adverse costs orders, and reimbursement for ATE costs in addition to that Funder Commission. The fourth submission amounts to no more than a reassertion of AP1's expectations, as represented by its initial modelling. The fifth submission has limited weight where the information provided to group members did not fully expose this issue.

68 In response, Dr Higgins points out and I accept that the Plaintiffs' and AP1's evidence largely adopts a "top down" analysis of funding commissions, by

contrast with the more detailed analysis contemplated in *Bolitho 6 at* [1966]. She points out that no expert evidence has been led to contextualise the resulting return on investment generated for AP1, or to address a reasonable rate of return on its invested capital, or the equity beta for funders locally or globally, or the rate of return on equity that a funder in its circumstances might reasonably expect having regard to the level of risk assumed; and that there is a real issue as to whether the evidence permits an answer to the "basal question [of] how to determine a commercially realistic return properly reflecting the costs and risks taken by [AP1]." Mr Sulan responds to this submission by referring to the fact that there are other occasions on which Courts have allowed funding commissions or made common fund orders at 25% of the settlement sum without expert evidence being led. I accept that has occurred, particularly in earlier years; but that submission provides no support for AP1's primary position that it should be allowed both a Funder Commission of about 26% and ATE costs which would increase the deduction from the settlement to 36.4%, rather than the 25% to which Mr Sulan refers.

69 I also recognise, of course, that AP1 is not "required" to lead evidence of the kind identified by Dr Higgins, at least in the sense that AP1 has a choice whether to lead evidence, or adequate evidence, or to justify the Funder Commission or deductions that it claims. However, it seems to me that the Courts should be vigilant to ensure that litigation funders are not recovering funding commissions or other deductions which they cannot or choose not to justify by adequate evidence, and that the trend to increased scrutiny of funding arrangements in recent case law is to be welcomed. In undertaking that scrutiny, Courts may ultimately be forced to decline settlement approval if litigation funders choose not to lead adequate evidence to support funding commissions, possibly anticipating that a Court will prefer to allow an inflated return to a funder rather than deprive group members of the benefit of a settlement. I recognise that it might be said that I ultimately do not adopt that approach in this judgment, where I ultimately accept a reduced Funder Commission despite the deficiencies in the evidence led by the Plaintiffs and AP1, largely in order to avoid depriving the Plaintiffs and group members of the benefit of their settlement. Despite the inadequacies in that evidence, it seems

to me preferable here to approve the settlement after reducing the total deduction of the Funder Commission and ATE costs to a reasonable level, rather than to disapprove it. There is no utility in further delaying the approval of that settlement and consequentially delaying a distribution to the Plaintiffs and group members in order to seek better evidence as to these matters, where I cannot compel any party to lead that better evidence.

Additional deduction of ATE costs

70 Turning now to the amounts claimed by way of ATE costs, Mr Darke points out that there are two components of the ATE costs. The first is defined in the SDS as the "Paid ATE Costs", being the upfront premiums and other costs of the ATE insurance taken out by the Plaintiffs and for deeds of indemnity issued by the insurers, and paid or payable by AP1, to insure or secure the risk of the Plaintiffs being ordered to pay the costs of the Defendants in the proceedings. That component of ATE costs totals $2,901,893.84 including stamp duty and GST, which corresponds with the amount in prayer 7(d) of the Motion (Pagent [73]-[74], [77]-[91]). The second component of the ATE costs is defined in the SDS as the "Deferred ATE Premium", which is the contingent component of the premium for the ATE insurance owed by AP1. That component of the ATE costs totals $2,240,000, which corresponds with the amount in prayer 7(e) of the Motion (Pagent [75]-[76], [92]-[93]). Mr Darke contends that such costs are recoverable from a settlement sum, provided they are fair and reasonable.

71 Dr Higgins responds that there is no evidence that group members gave consent to AP1 incurring further ATE costs in March or April 2021, beyond the initial consent given in cl 8.2(b) of the LFA. While I accept that submission, it seems to me more significant that any initial consent of group members in cl 8.2(b) of the LFA was not informed, so far as the evidence goes, by any disclosure as to the extent to which the combination of the Funder Commission and ATE costs would erode the return to group members on a successful result in the proceedings.

72 I now turn to relevant case law as to the treatment of ATE costs in class action settlements. Dr Higgins notes that, in *Asirifi-Otchere* at [31], Lee J referred to his observation in *Perera v GetSwift Ltd* [2018] FCA 732; (2018) 263 FCR 1 (at

[193]) that the costs of providing security in cases which settle or are otherwise resolved favourably to the group members will ultimately be borne by them, in most cases, indirectly through payments to the funder of an amount pursuant to an approved settlement scheme and (at [194]–[195]) that:

> "I say in most cases this occurs indirectly, because the cost of security is usually "absorbed" as a cost of doing business by the funder and is, in this sense, incorporated in the consideration ultimately paid to the funder (or more accurately, absorbed in the value of the promises extracted from group members to pay an amount to a funder upon any successful resolution). That cost may be incurred in a number of ways, including the deprivation of the use of funds placed on a cash deposit or the cost associated with a funder taking out an ATE policy to cover its liability for adverse costs under the indemnity the funder has provided. Although I am aware of cases where the premium for an ATE policy is "absorbed" in the sense explained, there have been cases where the funder has attempted to recover the ATE premium in addition to obtaining a funding commission: see *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; (2016) 335 ALR 439 at 461 [105] per Murphy J and *Hardy v Reckitt Benckiser (Australia) Pty Ltd (No 3)* [2017] FCA 1165 at [13]–[15] per Nicholas J. I pause to remark that this is an illustration of the superficiality of comparing "headline" funding rates; it all depends on whether expenses (such as an ATE premium) are separately identified and passed on directly to group members or "absorbed" and passed on indirectly. Certainly for the process of any comparative analysis (or incidentally in considering the reasonableness of the total amount to be paid to a funder in the context of a s 33V application), it is the aggregate amount to be paid to the funder, including miscellaneous items such as "management fees", that is relevant."

73 His Honour also observed, in *Asirifi-Otchere* at [32], that a funder should not be permitted to recover:

> "the costs of the funder performing its central obligation to provide an indemnity against adverse costs. If a funder wishes to defray their risk of performing that obligation it is matter for the funder but, in my view, it is not a cost that ought be passed on separately to group members when the Court controls the remuneration".

I recognise that, as Mr Sulan emphasises, *Asirifi-Otchere* involved an application for a common fund order and that Lee J there made such an order at a 25% commission rate, where it would not be increased by the costs associated with ATE insurance.

74 In *Davantage*, Beach J allowed the recovery of ATE costs in addition to a funding commission, but that decision provides little support for doing so here where his Honour also observed (at [84]) that:

> "Now I have some sympathy for the view that if I was considering the first option, then allowing the ATE premiums, whether as a direct recovery or within the base, would have its difficulties. After all, the 25% first option would reflect

> the relevant remuneration or reward for all risks assumed by the funder. So, if it sought to enter into ATE insurance to defray or minimise risk, that would be on its own coin. It could not have both the relevant premiums and insist on the 25%. But I do not have that scenario."

AP1 here adopts the approach which Beach J did not have to address, and which he observed a funder "could not have".

75 Dr Higgins points out that, in *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 ("*Wetdal*"), Beach J again accepted that the amounts paid or payable by the funders under the ATE policy appeared to be costs properly and reasonably incurred for the purposes of the funding arrangements. His Honour there observed that the ATE policy in that case insured against the funder's risk of being required to indemnify the applicants for any adverse costs that they were required to pay, up to a limit; group members were informed of the funder's intention to seek orders that amounts paid or payable under the ATE policy be reimbursed from any settlement sum; deduction of those amounts paid under an ATE policy from the settlement sum was contemplated by the underlying litigation funding agreement; and, at [125]:

> "there is no occasion now to consider whether the amounts of funding commission that the funders seek to recover might affect whether the ICP entities ought be entitled to recover out of the settlement sum the amounts paid under the ATE policy. In the present case, the ICP entities seek to recover from the settlement sum their contractual entitlements under the ICP LFA. No one is asking me to make a common fund order. Now the commission payment sought to be recovered from the settlement sum simply reflects the remuneration agreed between the ICP entities and the funded group members. Therefore, I am not able to consider afresh what commission rate would reflect the relevant remuneration and reward for all risks assumed by the funders, and how such a rate ought reflect the mitigation of risk effected by the ATE policy."

Obviously, there is occasion to consider that matter in this case, where I must exercise a statutory jurisdiction as to whether the settlement should be approved, to which that matter is plainly relevant, and where the Funder Commission payable under the Further Amended LPA is, in terms, capped at the amount the Court considers fair and reasonable.

76 Mr Sulan submits that the present case is distinguishable from the decision in *Asirifi-Otchere,* which was a case concerning a common fund order, and is similar to the position in *Wetdal.* It seems to me that, contrary to Mr Sulan's

submission, Lee J was addressing matters of general application in *Asirifi-Otchere*, and I consider that his approach is both persuasive and consistent with the approach adopted by Beach J in *Davantage.* Second, AP1's rights under the Further Amended LFAs are qualified by the recognition of the Court's role noted above and it cannot rely only on rights under the LFAs, where some group members have not executed them and the Plaintiffs here seek a funding equalisation order. Third, the weight that can be given to the Further Amended LFA between AP1 and group members is qualified by the disclosure issues which I have noted above.

77 Mr Sulan also addressed the question of the "Paid ATE Costs" and "Deferred ATE Premium" claimed in prayers 7(d) – 7(e) of the Motion. AP1 relies on the affidavit of Mr Brennan, to which I have referred above in that respect. Mr Sulan relied on matters on which AP1 also relied in respect of the Funder Commission in this respect and I do not repeat my analysis of those matters above. Mr Sulan submits, in effect, that AP1 is contractually entitled to payment of those amounts under the Further Amended LFA and the better view is that the Court does not have power to vary the LFAs in respect of those amounts. I give little weight to that submission, where AP1's rights under the Further Amended LFA are limited by the recognition of the Court's role as I noted above, and the disclosure issues noted above undermine its reliance on the Further Amended LFA.

78 I bear in mind that Mr Sulan also submits that:

> "The power conferred by s 173 does not, in terms, allow the Court to override the parties' contractual entitlements in the course of approving a settlement. What it confers is a jurisdiction to approve (or refuse) a settlement. In this connection, there is debate in the case law as to whether the Court has power under Part 10 of the *CPA* to vary a funder's entitlements under a funding agreement when approving a settlement. First instance decisions in the Federal Court of Australia have expressed differing views on this question (in the context of analogous provisions) [referring to *Earglow* at [133]-[158]; *Blairgowrie* at [101]; *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 at [47]-[52]]. The debate has been noted by the Full Court [referring to *Money Max* at [93]-[94]] and raised (but not resolved) by the Victorian Court of Appeal [referring to *Botsman v Bolitho* (2018) 57 VR 68, [2018] VSCA 278 at [219], [376]-[377], [378], [380]-[381]].
>
> There is considerable force in the position articulated by in Liverpool City *Council v McGraw- Hill Financial Inc* [2018] FCA 1289 at [47]-[52] to the effect that the Court does not have such a power. However, it is not necessary to

> resolve the debate in the present case. Whilst [AP1] has a contractual entitlement to ATE costs under the [litigation funding agreements], its entitlement to commission is conditioned by the requirement that it does not exceed an amount that the "Court determines to be fair and reasonable in all the circumstances". Thus, the [litigation funding agreements]itself invites the Court to determine whether or not the commission sought by [AP1] is fair and reasonable (taking into account, among other things, payments in respect of ATE costs).
>
> The appropriate course in the present case would, therefore, be to allow the ATE costs as provided for in the LFA. To the extent the Court considered that the commission payable to [AP1] ought to be different from the amount sought in prayer 7(a), the LFA allows the Court to do so, thus avoiding any need to consider whether s 173 would allow the Court to override or vary the contract."

79 Importantly, as Mr Sulan fairly recognises, no question of overriding the parties' contractual entitlements as to the Funder Commission arises here, because the provision for that commission rightly recognises the Court's statutory role.

80 In written submissions for the second day of hearing, Dr Higgins also points to case law which has recognised the Court's supervisory role in representative proceedings, including the possibility that the Court might exercise the analogous power under s 33ZF of the *Federal Court Act* 1976 (Cth) to limit the amount payable from a settlement to a funder: *Pharm-A-Care Laboratories Pty Ltd v Commonwealth (No 6)* [2011] FCA 277 at [43]. I recognise that, as Dr Higgins also recognised, Wigney J approved a settlement, despite an "extremely large" funding commission, in *McGraw-Hill* at [29]-[30], as implementing the bargain between the applicant and group members and the funder. Dr Higgins also refers to subsequent cases which have recognised the Court's power to disallow or vary a funding commission including *Earglow* at [133]-[158], recognising the source of such power under ss 23, 33V, 33Z and 33ZF of the *Federal Court Act*. The Court's power to modify a contractual bargain dealing with a funding commission payable out of settlement proceedings is also recognised in *Blairgorwie* at [101], although doubted by Lee J in *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, absent an established or equitable basis to interfere with relevant contractual rights. Here, as I have noted above, it is not necessary to determine that question, where, as Mr Sulan recognises, the Further Amended LFA itself provides a basis for the Court to reduce the amount of Funder Commission payable to AP1 so that the total of the Funder Commission and the ATE costs do not exceed a reasonable amount.

81 Dr Higgins also accepts that *CPA* s 173 does not in terms allow the Court to override the parties' contractual entitlements in the course of approving a settlement, but points out that it is commonplace for statutory provisions to have an effect upon contractual relations, and points to the "protective statutory context in which [s 173] must operate" and to the Court's power, under *CPA* s 173(2), to make such orders as are just in respect to the distribution of "any money", specifically including money paid under a settlement. On the face of it, that section is sufficiently wide to allow the Court to make an order for the payment, or non-payment, of monies paid under a settlement for the costs of ATE insurance, or for the payment of a lesser amount of commission the a funder than it claims. Dr Higgins also draws attention to the Court's powers under *CPA* ss 177(1) and 183, which authorises the Court to make such orders as it thinks appropriate or necessary to ensure that justice is done in the proceedings. She draws attention to decisions in the Federal Court of Australia, dealing with corresponding provisions, and emphasises that *CPA* s 173 should not be given a narrow construction, or read as subject to implications or limitations that are not found in its terms. In any event, Dr Higgins also recognises that, as I noted above, the term "Augusta Commission" is defined in the LFA in a manner that limits the commission payable to AP1 so that it does not exceed any amount that the Court determines to be reasonable in all the circumstances.

82 Dr Higgins also recognises that AP1's proposal that its right to recover ATE costs be preserved and its commission be reduced if the Court considers that necessary, is available and pragmatic but raises the possibility that that may reflect an unsatisfactory approach to the exercise of a statutory protective power. She submits that:

> "the Funder's proposal that any cut be administered to the funding commission and not the ATE costs, is available and pragmatic, but may, depending upon the [C]ourt's reasoning, reflect an unsatisfactory approach to the exercise of a statutory protective power. Take an example. Should the Court, ex hypothesi, form the view that the voluntarily reduced funding commission of 2.3x legal costs is fair, but that the very high ATE costs were not fully disclosed to group members, and represent a risk that a funder properly undertakes to assume, such that they offend justice, it may shirk the protective jurisdiction to absorb the ATE insurance excess into a reduction on a funding commission the Court otherwise regards as fair."

Dr Higgins qualified that position in oral submissions at the third day of the hearing to recognise that an adjustment of the Funder Commission will allow a principled result.

83 I do not consider that there is any difficulty with AP1's recognition that the Funder Commission may be reduced to secure a fair and reasonable settlement, whether generally or in this case. It seems to me that the question for the Court is not whether the ATE costs in isolation from the Funder Commission, or the Funder Commission in isolation from the ATE costs, are unduly high, but whether the totality of the Funder Commission and ATE costs are so high that the settlement documented by the Settlement Deed and SDS (as distinct from the HoA, which does not provide for their payment) are not reasonable unless they reduced. I have comfortably formed that view for the reasons noted below. Where I have concluded that that deduction of *both* the Funder Commission and the ATE costs would be unreasonable, all that is require to resolve that matter is to reduce the total amount payable. The exclusion of the ATE costs on the one hand or a corresponding reduction in the Funder Commission on the other has the same economic effect, and there is no reason not to take the approach proposed by AP1 where that will adequately protect group members' interests. Dr Higgins also submits that AP1's arguments concerning contractual entitlements in any event have no bearing on the position of group members who have not entered into LFAs. I accept that submission, but no difficulty arises in that respect, or in respect of the making of a funding equalisation order, provided that the total of the Funder Commission and ATE costs deducted from the settlement are reduced to a reasonable amount. It is ultimately not necessary, for the reasons put by Mr Sulan, to determine whether the Court would have power to vary the Funder Commission specified in the Further Amended LFAs and the SDS to the extent necessary to give effect to a settlement over the opposition of the parties, since AP1 has consented to its doing so by the terms of the Further Amended LFA and proposed SDS.

84 It seems to me that the position for which AP1 contends, namely that the Funder Commission be allowed at a multiple of 2.3X, and that AP1 also be entitled to deduct Paid ATE costs and Deferred ATE Premiums from the

settlement amount, is not consistent with a fair and reasonable settlement of the proceedings. It does not reflect the position disclosed to group members at the time they entered the LFAs, where no specific disclosure was made of a deduction for Paid ATE costs or a Deferred ATE premiums, or of the potential amount of that deduction. It is not to the point that, as Mr Sulan submitted, those amounts had not been paid at the time, where AVL's and AP1's business practice and the expectations of its investors had the consequence that those amounts would inevitably be incurred, although I recognise that the costs were increased when additional Defendants were joined to the proceedings. So far as that approach would lead to a deduction in excess of 36.4% of gross settlement proceeds, it is not justified by evidence led by AP1 to support that return, and it is well above the return permitted in several of the cases noted above, including on the better evidence led by the parties in *Toyota*.

85 I do not consider I can take ATE's agreement to accept a multiple of 2.3X, reached with the Plaintiffs' and their solicitors at the mediation on the basis that AP1 would deduct ATE costs from the settlement, and simply vary that position to exclude the deduction for ATE costs, as that would fundamentally change the basis of that agreement. On balance, it seems to me that the proper course would be to allow *no more than* a commission at a multiple of 2.6X less the amount of ATE costs, so that the total commission and ATE costs equates to a multiple of no more 2.6X, being the position originally disclosed by ATE to group members when AP1 was chosen as funder.

86 However, that would result in a deduction of 29.56% of the gross settlement sum, paid to AP1 and for ATE costs, and that percentage deduction is not justified by any evidence that that would be an objectively reasonable rate of return on AP1's investment. I accept Dr Higgins' submission that a fair and reasonable settlement can be achieved, in this situation, if the total deduction from the settlement for AP1's commission and ATE insurance expenses is further reduced to 25% of the settlement amount. As I have noted above, that figure was found to be justified in several of the cases to which I have referred, including *Toyota*, by reference to better evidence than has been led by AP1 in this application. I recognise that AP1's calculation (MFI-3) suggests that its Funder Commission will then be a multiple of less than 1.7 times deployed

costs; however, that is not reason not to take that approach, where that is the consequence of AP1's business model which contemplates that it will take out external ATE insurance, and its position in doing so is not different, in principle, from that of a funder which received the same commission and applied its own capital to achieve the same costs protection as ATE insurance. That approach is, as Dr Higgins and Mr Darke point out, also consistent with the approach taken by Lee J in *Asirifi-Otchere* and by Murphy J in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* (2018) 132 ACSR 258; [2018] FCA 1842 ("*Petersen*").

87 On that basis, I will approve the settlement as documented by the HoA and also approve the Settlement Deed and SDS, as varied so that the amount of AP1's Funder Commission and ATE costs (comprising the Paid ATE Costs and the Deferred ATE Premium, both as defined) that are deducted from the settlement do not, in total, exceed 25% of the settlement received.

Deductions from settlement sum for legal costs

88 The Plaintiffs accept that it is part of the Court's role to assess whether legal costs incurred are reasonable and proportionate. In *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 ("*Earglow*") at [91], Murphy J observed that:

> "The Court has a supervisory role in relation to costs paid by class members and should scrutinise costs in the settlement approval process … The Court should satisfy itself that the arrangements in relation to legal costs meet any relevant legal requirements, contain reasonable and proportionate terms relative to the commercial context in which they were entered, and that the costs and disbursements are in accordance with the terms of the relevant agreements and are otherwise 'reasonable'." (citations omitted)

89 In *Blairgowrie* at [180]-[181], Beach J observed that:

> "… what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved and the expected benefit. The Court should not approve an amount that is disproportionate. But such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. In the latter case, spending $0.50 to recover an expected $1.00 may be proportionate if it is necessary to spend the $0.50. In the former case, the absolute dollar amount as a free-standing figure is an irrelevant metric. The question is to compare it with the benefit sought to be gained from the litigation. Moreover, one should be careful not to use hindsight bias. The question is the benefit reasonably expected to be achieved, not the benefit

> actually achieved. Proportionality looks to the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed; at the later time, circumstances may have changed to alter the calculus, but that would not deny that the work performed and its cost was proportionate at the time it was performed. Perhaps the costs claimed can be compared with the known return, but such a comparison ought not to be confused with a true proportionality analysis. Nevertheless, any disparity with the known return may invite the question whether the costs were disproportionate, but would not sufficiently answer that question."

90 In *Botsman v Bolitho and Others (No 1)* (2018) 57 VR 688 at [223], the Court of Appeal of the Supreme Court of Victoria also identified relevant factors to assessing the reasonableness of costs and disbursements including whether the work in a particular area, or in relation to a particular issue, was undertaken efficiently and appropriately; whether the work was undertaken by a person of an appropriate level of seniority; whether the charge out rate was appropriate having regard to the level of seniority of that practitioner and the nature of the work undertaken; whether the task and associated charge was appropriate, having regard to the nature of the work and the time taken to complete the task; and whether the ratio of work and interrelation of work undertaken by the solicitors and counsel was reasonable.

91 As I noted above, the Plaintiffs tender a report of an independent costs assessor, Mr Matters, and these are also addressed in the submissions of the contradictor, Ruth Higgins SC. I recognise that the evidence of costs assessors does not displace the protective role of the Court in the approval of representative proceedings, nor is it determinative as to question of whether such costs ought to be deducted from the settlement: *DSHE Holdings* at [44]; *Toyota* at [40]. Nonetheless, the evidence of an experienced costs assessor may be of great assistance to the Court in highly complex and expensive proceedings.

92 As I also noted above, Mr Matters expresses the opinion that legal costs and disbursements incurred by the Plaintiffs in the amount of $6,471,005.99 (GST inclusive) were reasonable, after excluding $232,203 (inclusive of GST) for work undertaken by personnel of the Plaintiffs' solicitors in the period 3 January 2019 to 8 February 2019. He expressed the view that he had sufficient information to address that opinion, having regard to the requirements in the

case law as to the information that should be available during an application for approval of a settlement.

93 Mr Darke in turn points out that prayers 7(b) and 7(c) of the Motion seek a deduction from the settlement sum of the amount found by Mr Matters to be reasonable ($6,471,005.99 (GST inclusive)), broken down into an amount of $5,684,375.20 (GST inclusive) to be paid to AP1, and of $786,631.80 (GST inclusive) to be paid to the Plaintiffs' solicitors. He submits that those costs are fair and reasonable and their deduction from the settlement sum should be approved. Dr Higgins also rightly noted that Mr Matters had undertaken a principled assessment of reasonableness; the quantum of legal costs and disbursements; and whether those costs and disbursements had been incurred by the Plaintiffs, and she noted that Mr Matters had excluded part of the amount claimed on that basis. Dr Higgins submits, and I accept, that the methodology adopted by Mr Matters is appropriate. Dr Higgins also observes that:

> "In answering the questions asked of him, Mr Matters appropriately has regard to issues such as:
>
> (a) the complexity in the conduct of the plaintiffs' claims in the proceeding: [23]-[24];
>
> (b) the number of defendants litigated against and the vigour of their defence: [25]-[27];
>
> (c) the stage the proceeding had reached at the point of settlement: [28];
>
> (d) practitioners' compliance with statutory obligations in respect of costs disclosures: [29]-[54];
>
> (e) broadly, whether the services have been provided by people of appropriate seniority: [58]-[82]."

94 Dr Higgins in turn scrutinised, in her role as contradictor, the itemisation of costs incurred by the Plaintiffs' solicitors and the manner in which they had reported to and accounted to AP1 in respect of cost estimates, budgets and variations to them. She noted that the materials provided to her included monthly matter reports between July 2019 and April 2022 provided by the Plaintiffs' solicitors to AP1, which involved a clear and ordered reporting process, as to progress of the matter and budget variations.

95 Mr Matters does not express a view (Matters [65] and [113.1]) as to the reasonableness of the legal costs quantified consequent on the rounding up of

time to the next six minute increment. In oral submissions, Mr Darke responds that that is common practice in time recording by legal representatives in litigation and generally (T24). I accept that submission, and it seems to me that there is no basis to seek to exclude that practice in dealing with legal costs in these proceedings, particularly where it is not apparent what alternative basis for assessment of the legal representatives' costs could be put in its place.

96 Mr Matters does not express a view (Matters [70], [72], [113.2]) as to the reasonableness of the amounts recorded in his Annexure C, being attendances by two or more personnel of Corrs on each other for five 6 minute units or greater with, or in the absence of, other persons such as barristers or experts. So far as the question of attendances by two or more personnel from the Plaintiffs' solicitors for 30 minutes or more is concerned, Mr Matters rightly recognises that such attendances commonly occur in proceedings of this kind. There seems to me to be no reason to doubt that those attendances are reasonably necessary, in a matter of substantial complexity, where coordination of activities of different solicitors would be a practical necessity. The Court should not here exclude recoverability of costs of supervision and coordination, where that would change incentive structures in the conduct of the proceedings, without the Court having any basis to assess the effect of its doing so. I also bear in mind, as Mr Darke submits, that there is every reason to think that AP1 was monitoring the costs incurred, where it was receiving regular reports in respect of them, and there is no suggestion that it considered that legal costs were not reasonably incurred.

97 As I noted above, Mr Matters' report (Matters [107]-[108]) also does not address proportionality between the legal costs and disbursements incurred by the Plaintiffs and the benefits which the solicitors reasonably expected the applicants and class members would achieve, on the basis that is not within his expertise. In addressing the question of proportionality, Dr Higgins submits that:

> "The necessary calculus here encompasses the following matters:
>
> (a) the total legal costs sought to be recovered are $6,471,005.99;
>
> (b) the proceedings, while initially brought against one defendant, grew in complexity over time. A congeries of cross-claims was filed. The enactment of

> the *Design and Building Practitioners Act* 2000 (NSW) resulted in the plaintiffs amending the claim, on 5 May 2021, to join Icon and WSP to the proceeding. Each defendant, and cross-claimant, was represented by sophisticated legal advisers;
>
> (c) the losses claimed by the plaintiffs comprised damages for diminution in value, additional strata fees, damages for inconvenience, and individual losses unique to group members. The plaintiffs' valuation expert, David Lunney, of Lunney Watt & Associates, quantified the total diminution in value for group members at approximately $62 million, as at 19 April 2022. Mr Pagent identifies the residue of losses claimed at Pagent 7.10.22, [108]-[15];
>
> (d) the budget for project investigation and the total budget for proceeding work identified in the Funding Agreement at Schedule 1, Tables 1 and 2;
>
> (e) the Settlement Sum …"

98 Dr Higgins submits, and I accept, that there is no apparent reason to doubt the proportionality of the legal costs and disbursements incurred. It seems to me that there is no doubt here that the costs incurred are proportionate to the favourable outcome achieved by the Plaintiffs, putting aside the question of AP1's claims. Mr Matters also does not address issues of fairness (Matters [110]), which he observes are "commonly conjunctively asked with, the reasonableness of legal costs and disbursements". Mr Darke submits that there is no reason to think that the costs and disbursements are not fair, where they are reasonable and proportionate, and I accept that submission.

99 Mr Matters expresses no view (Matters [111]-[112]) as to whether there has been compliance with the requirements of s 181 of the *Uniform Law* in respect of the Plaintiffs' Unpaid Legal Costs (as defined). That amount in issue is $786,631.80 and comprises the "Remaining Costs" and "Risk Share Costs" (as defined in cl 1 of the Further Amended LFA) (Ex A3, 201). The "Remaining Costs" comprise $359,521.60 in excess of capped amounts set out in a budget for the proceedings which was a schedule to the Further Amended LFA, and no uplift fee or interest is payable on those costs. "Risk Share Costs" are an amount of $427,110.20 which, as I noted above, the Plaintiffs' solicitors agreed to take "on risk" in March 2021 when AP1 agreed to an increase in the budget for the proceedings. Clause 8.2(b) of the Further Amended LFA provides that the Risk Share Costs and any Remaining Costs will be paid to the Plaintiffs' solicitors from the "Claim Proceeds".

100 Mr Darke's primary submission is that the engagement letter is not a "conditional costs agreement" within the meaning of s 181 of the *Uniform Law*, since it does not oblige Mr and Mrs Williamson, as clients, to pay the legal costs on the successful outcome of the matter to which the costs relate. Mr Darke alternatively submits that:

> "…Mr Matters concluded that all of the costs now sought to be deducted from the settlement sum, including the Plaintiffs' Unpaid Legal Costs, were reasonable: para 2 of Mr Matters' report. That is the relevant consideration in the exercise of the Court's power under s 173 of the [*CPA*]. In circumstances where there is no dispute that those costs were reasonable, it is appropriate that deduction of those amounts from the settlement sum be approved. As Murphy J observed in [*Petersen*] (at [116]), to deny the solicitors their reasonable costs in such circumstances would be a "harsh result", particularly where the efforts of those solicitors have resulted in a substantial settlement."

101 It seems to me that, as Mr Darke contends, s 181 of the *Uniform Law* is directed to the position between a law practice and a client, rather than a non-client, and on that basis the section is not engaged. Even if I were incorrect in that view, and I took the same approach as Murphy J in *Petersen*, where his Honour proceeded on the basis that a similar agreement was a conditional costs agreement that did not comply with s 181 of the *Uniform Law*, I would take the same approach as his Honour and approve the deduction of the reasonable and proportionate costs incurred by the Plaintiffs' solicitors from the settlement sum.

Approval of the Plaintiffs' Reimbursement

102 The Plaintiffs also address the question whether the Plaintiffs' Reimbursement (as defined in the SDS) ought to be approved. Prayers 6 and 7(f) of the Motion seeks an order that the Plaintiffs each be paid a sum of $20,000 as "Plaintiffs' Reimbursement", with that amount to be deducted from the settlement sum.

103 Mr Darke points out that the "Plaintiffs' Reimbursement" is defined in cl 1.1 of the SDS as follows:

> "**Plaintiffs' Reimbursements** means payments as approved by the Court to each of the Plaintiffs to reimburse them for the time spent and expenditure reasonably incurred in the Proceeding for the benefit of the Group Members. For the avoidance of doubt, the Plaintiffs' Reimbursements are in addition to any Settlement Payments payable to the Plaintiffs."

Mr Darke points out that, by cl 10.6 of the SDS, the Plaintiffs' Reimbursement is to be paid with 7 days of the Settlement Approval Date (as defined). Nothing

turns on that provision where I cannot approve the SDS in its present form by reason of its treatment of the Funder's claims. I will however address the substance of this issue, so far as a revised SDS will need to be prepared to give effect to this judgment.

104 Mr Darke points out that the authorities establish that such a payment to a representative plaintiff is permissible in recognition of the time and burden involved in discharging that role. In *Toyota* at [60]-[61], Rees J observed that:

> "The provision of such special allowances is permissible given the time, stress, burden, and personal inconvenience likely to arise as a result of a representative plaintiff's involvement in the proceedings. Such payments are not intended to serve as compensation for a person's participation in litigation, which would not ordinarily be compensable, but rather out of recognition of their special role as a representative plaintiff: *Findlay v DSHE Holdings* [[2021] NSWSC 249] at [67]; *Money Max* [(2016) 245 FCR 191] at [212] (per Murphy J); *Farey v National Australia Bank Ltd* [2016] FCA 340 at [42] (per Beach J). Where the quantum of the allowance is rational and reasonable, it will not diminish the reasonability of the settlement distribution: *Hodges v Waters (No 7)* (2015) 232 FCR 97; [2015] FCA 264 at [102] (per Perram J); *Evans v Health Administration Corporation* [2019] NSWSC 1781 at [45] (per Ward CJ in Eq); *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [176].
>
> As to whether the amount sought by the representative plaintiffs in these proceedings is reasonable in the circumstances, the amount sought is less than the amounts that have typically been paid to lead applicants or plaintiffs in other proceedings: see, for example, *Money Max* at [215]-[218] (per Murphy J); *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 at [129] (per Lee J); *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 at [23] (per Beach J). I consider that reimbursement of $20,000 for each representative plaintiff is fair and reasonable and, as indicated by the authorities cited, modest. I approve this deduction."

105 The Plaintiffs here seek $20,000 each. I accept that that amount is reasonable having regard to the Plaintiffs' significant efforts in the prosecution of this proceeding, as set out in paragraphs 95-97 of Mr Pagent's affidavit, where Mr and Mrs Williamson spent in excess of 300 hours working on the litigation, including attending conferences, preparing evidence and attending the mediations. I would allow the Plaintiffs' Reimbursement in the amount of $20,000 per plaintiff.

Funding equalisation order

106 The Plaintiffs also identify a question whether the Court should make a funding equalisation order, the effect of which would be to spread the costs of the Funder Commission (as defined in prayer 7(a) of the Motion) equally across all

group members whether or not they have entered into a Funder Commission with the Funder (prayer 8 of the Motion).

107 Prayer 8 of the Motion seeks an order that "the Funder Commission payable by the plaintiffs and funded group members to the Funder described in [prayer 7(a) of the Motion], be apportioned on a pro rata basis between all Group Members and deducted from the settlement sum payable to all Group Members". The effect of such an order would be to spread the sum of $13,074,063 on a pro rata basis across all 383 group members, as opposed to that cost being borne entirely by the 341 funded group members. Mr Darke submits that order would prevent the 42 unfunded group members "free riding" on the funded group members. He refers to *Brewster* at [86], where Kiefel CJ, Bell and Keane JJ observed that:

> "It may be accepted that the concern to prevent "free riding" is relevant to doing justice as between group members who are parties to the proceeding. But the equitable sharing of the expense of the proceeding may be achieved by the making of a [funding equalisation order] that reduces unfunded group members' awards by an amount equivalent to that paid by funded group members to the litigation. The cost of litigation is thus borne equitably between all group members. Group members necessarily stand in a relationship to one another as a result of the statutory scheme; the claims in the proceeding are litigated on behalf of all of them, and orders in the proceeding bind all of them. Subject to the creation of sub-groups and the determination of individual questions, the statutory scheme treats them as one group. It is, therefore, just that the costs of the proceeding be spread amongst the members of that group."

108 In *Toyota* at [51], Rees J summarised the position after *Brewster* as follows:

> "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 of the equivalent provision of the *Federal Court Act* 1976 (Cth), being section 33V: *Asirifi-Otchere v Swann Insurance (Aust) Pty Limited (No 3)* (2020) 385 ALR 625; [2020] FCA 1885 at [14]-[15] (per Lee J); *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163 at [24] (per Beach J); *Davaria Pty Limited v 7-Eleven Stores Pty Limited* (2020) 384 ALR 650 at [41] (Lee J, with whom Middleton and Moshinsky J agreed). Following these authorities, I am thus satisfied that the Court has the power to make a common fund order under to section 173(2) of the *Civil Procedure Act*."

109 Mr Darke submits that, consistently with these observations, it is just that the costs of the proceeding be spread across all group members: *Estia Health Ltd* [2021] FCA 475 at [128]. Mr Darke notes that notice of the Plaintiffs' intention to seek a funding equalisation order was provided to group members by way of

the notice of proposed settlement provided to group members in accordance with the orders made 8 July 2022 and, at the time of the hearing, the Plaintiffs are not aware of any group member objecting to the proposed funding equalisation order. He submits and I accept that it is fair, reasonable and in the interests of justice that the proposed funding equalisation order should be made.

Matters consequential upon settlement approval

110 The Plaintiffs also sought orders consequential upon settlement approval, which were uncontroversial as the position between the Plaintiffs and Defendants are concerned.

Orders

111 I direct the parties to bring in agreed short minutes of order to give effect to this judgment within 7 days.

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