

OUTCOME DETAILS

**Supreme Court - Civil
at Supreme Court Sydney
on 15 August 2019**

2018/00353304-004 / Notice of Motion Civil - Ashita Tomi Pty Ltd as trustee for Esskay Super Fund v RCR TOMLINSON LTD trading as RCR Tomlinson Ltd

This matter is listed for Directions (Commercial) on 25 October 2019 9:45 AM before the Supreme Court - Civil at Supreme Court Sydney.

Estimated duration: 5 Minutes

I make the orders in the document entitled Short Minutes of Order which I have initialled, dated today's date and placed with the papers.

The proceedings are stood over to the directions list on 25th October 2019.

Parties have liberty to apply on three days' notice.

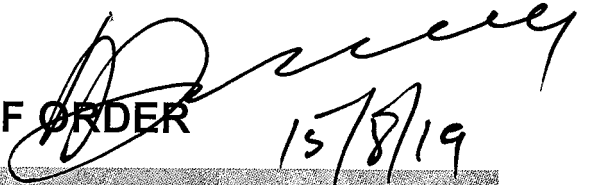
The exhibits on the Motion are returned.

Justice D Hammerschlag

Signed

Date

SHORT MINUTES OF ORDER



COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial
Registry	Sydney
Case number	2018/00353304

TITLE OF PROCEEDINGS

Plaintiff	Ashita Tomi Pty Ltd as trustee for the Esskay Super Fund ABN 79 582 038 569
Defendant	RCR Tomlinson Limited (In Liquidation) ACN 008 898 486

FILING DETAILS

Person seeking orders	Ashita Tomi Pty Ltd as trustee for the Esskay Super Fund ABN 79 582 038 569, Plaintiff
Legal representative	Damian John Scattini, Quinn Emanuel Urquhart & Sullivan
Contact name and telephone	Damian John Scattini, +61 2 9146 3500
Contact email	damianscattini@quinnemanuel.com

TERMS OF ORDER MADE BY THE COURT

Consolidation

1. Upon the terms stated in Order 2 below, the following proceedings in this Division are consolidated to become the **Consolidated Proceeding**: No 2018/00353304 (**Ashita Proceeding**), No 2019/178541 (**CJMcG Proceeding**) and No 2019/94443 (**Jones Proceeding**).
2. Order 1 is made upon the following terms:
 - 2.1 the Consolidated Proceeding is to be funded on the terms set out in the Funding Terms annexed to these orders ("**Funding Terms**");
 - 2.2 each of the Funder, the Additional Funder and the Lawyers (as those terms are defined in the Funding Terms) undertake to each other and to the Court that they will comply with their obligations under the Funding Terms, subject to further order of the Court;
 - 2.3 the Consolidated Proceeding is to bear the number No 2018/00353304;

- 2.4 the Plaintiff(s) in the Consolidated Proceeding are:
- (a) the Plaintiff in the Ashita Proceeding; and
 - (b) any Plaintiff in the CJMcG Proceeding or Jones Proceeding who or which wishes to be a Plaintiff in the Consolidated Proceeding and, by no later than one week from the date of these orders, enters into a retainer with Quinn Emanuel Urquhart & Sullivan in respect of the Consolidated Proceeding;
- 2.5 the Defendants in the Consolidated Proceeding are:
- (a) RCR Tomlinson Pty Ltd (First Defendant);
 - (b) Paul Joseph Dagleish (Second Defendant); and
 - (c) Bruce Maxwell James (Third Defendant);
- 2.6 the Plaintiffs in the Consolidated Proceeding have leave to proceed against the First Defendant on conditions that:
- (a) the Plaintiffs will not seek to enforce any judgment without the leave of the Court; and
 - (b) the First Defendant has liberty to make an application to stay the Consolidated Proceeding against it if the claims made against it are uninsured or for any other reason.
- 2.7 the Plaintiff(s) in the Consolidated Proceeding are to be represented by one firm of solicitors, being, subject to further order of the Court, Quinn Emanuel Urquhart & Sullivan;
- 2.8 the Summons and Commercial List Statement in the Consolidated Proceeding are to be substantially in the form of the proposed Amended Summons and proposed Amended Commercial List Statement annexed to the application filed by the Plaintiff in the Ashita Proceeding on 7 June 2019, subject to any further amendments necessary to give effect to the consolidation, and provided that the Summons and Commercial List Statement in the Consolidated Proceeding are not to contain any mark-up;

- 2.9 for the purposes of the Consolidated Proceeding, claims are to be taken to have been first filed at the time and in the manner in which they were first filed in any of the three unconsolidated proceedings;
- 2.10 the costs to date of each of the Ashita Proceeding, the CJMcG Proceeding and the Jones Proceeding be costs in the Consolidated Proceeding (being **Pre-Consolidation Costs**, as defined in the Funding Terms); and
- 2.11 the Plaintiff(s) in the Consolidated Proceeding have liberty to seek, on any application for approval of a settlement of the Consolidated Proceeding or for approval of costs following judgment in the Consolidated Proceeding, orders for approval of the Pre-Consolidation Costs.

Security for costs

3. By no later than 7 days from the date of these Orders, the Plaintiff(s) provide an initial tranche of security for the Defendants' costs by payment into Court of the sum of ~~£4.2 million or such other amount as the Court orders~~ ^{£4.2 million}, to be held in an interest bearing account.
4. If the security the subject of Order 3 is not paid strictly within the time provided for in that order:
- 4.1 the Associate to Hammerschlag J be notified of the non-payment;
- 4.2 the Consolidated Proceeding be stayed; and
- 4.3 the Defendants have liberty to apply for the Consolidated Proceeding to be permanently stayed or dismissed.
5. Orders 3 and 4 above are made without prejudice to the right of the Defendants to seek an order from the Court for further security for costs.

Common fund order

6. Pursuant to section 183 of the *Civil Procedure Act 2005* (NSW) and subject to:
- 6.1 further order of the Court; and
- 6.2 the provision of an undertaking by each of the Plaintiff(s), Quinn Emanuel Urquhart and Sullivan, Burford, and IMF to each other and to the Court that they will comply with their obligations under the Funding Terms,

upon Resolution (as defined in the Funding Terms) the Plaintiffs and Group Members shall pay from the Resolution Sum (as defined in the Funding Terms) the amounts referred to in paragraphs 8, 9 and 37 of the Funding Terms prior to any distribution to the Plaintiffs and Group Members in accordance with the Funding Terms.

Pleadings in the Consolidated Proceeding

7. By 30 August 2019, the Plaintiffs file and serve a Summons and Commercial List Statement.
8. By ~~27~~ ^{4 October} September 2019, the Defendants file and serve their Commercial List Responses.
9. By 1st October 2019, the Plaintiff(s) file and serve their Replies, if any.

Costs

10. The Plaintiffs in the Consolidated Proceeding pay the Defendants' costs thrown away by reason of the preparation of Commercial List Responses in the Jones Proceeding.
11. ~~The parties' costs of and incidental to the notices of motion filed on 12 July 2019 be costs in the cause.~~ ^{The defendants' costs} _{will} ^{their costs in the cause.} _^

Further directions

12. The matter be listed for further directions on 25 October 2019.

SEAL AND SIGNATURE

Court seal

Signature

Capacity

Date made or given

Date entered

NOTICE

Subject to limited exceptions, no variation of a judgment or order can occur except on application made within 14 days after entry of the judgment or order.

REGISTRY ADDRESS

Street address

Postal address

Telephone

ANNEXURE "A"

FUNDING TERMS

A. Definitions

1. The following definitions apply in these Funding Terms:
 - (a) **Adverse Costs Order** means any costs order made by a Court in the Proceedings against the Plaintiffs or against any Group Member representing Claims including the Claims of the Plaintiffs.
 - (b) **RCR** means RCR Tomlinson Limited (In Liquidation) ACN 008 898 486.
 - (c) **Ashita Proceeding** means Ashita Tomi Pty Ltd as trustee for the Esskay Super Fund ABN 79 582 038 569 v RCR Tomlinson Limited ACN 008 898 486 (2018/00353304).
 - (d) **ATO** means the Australian Taxation Office.
 - (e) **Budget** means the itemised budget of Legal Costs and Disbursements to be incurred in connection with the Proceedings, as set out in page 235 of Exhibit "DJS-1" of the Affidavit of Damian John Scattini affirmed 12 July 2019 in the Ashita Proceeding.
 - (f) **Claims** means the claims, demands or causes of action asserted by the Plaintiffs and/or Group Members against the Defendants in respect of or arising from the Matter.
 - (g) **Conflicts of Interest Policy** means the conflicts of interest policy stipulated in and annexed to the Funding Agreements.
 - (h) **Costs Order** means any order made by a Court in the Proceedings requiring one or more parties to the Proceedings to pay the costs incurred by another party or parties to the Proceedings.
 - (i) **Court** means any court, tribunal or arbitral forum seized with the Proceedings.
 - (j) **Defendants** means RCR and any other persons joined to the Proceedings, including Mr Paul Joseph Dalglish and Bruce Maxwell James, being former directors of RCR and proposed to be joined as defendants to the Proceedings by way of an application to amend the Commercial List Statement in the Proceedings, filed 7 June 2019.
 - (k) **Disbursements** means any disbursements and out-of-pocket expenses incurred subject to and in accordance with the Budget by the Lawyers or the Funder in connection with the Proceedings before or after the date of these Funding Terms, whether as principal or as agent, on the Plaintiffs' or the Group Members' behalf.
 - (l) **Dispute Resolution Procedure** means the procedure set out in Part G of these Funding Terms.
 - (m) **Fair Market Value** means the amount at which an asset, equity or liability could be exchanged in an arms-length transaction between informed and willing parties, other than in a forced or liquidation sale.
 - (n) **Funded Group Member** means any person who has entered into a Funding Agreement.
 - (o) **Funder** means Burford Asia Investments Pte. Ltd., an exempt private company limited by shares incorporated under the laws of Singapore with its registered

office address at 77 Robinson Road, #13-00, Robinson 77, Singapore (068896).

- (p) **Funder's Investment** means the Legal Costs, Disbursements and any amounts paid or payable by the Funder pursuant to any Adverse Costs Order or other Costs Order (in each case including any GST paid or payable in relation thereto).
- (q) **Funding Agreements** means any funding agreement entered into in relation to the Claims between any of the Consolidated Funders and: (i) any of the Plaintiffs; and (ii) other Group Members.
- (r) **Funding Terms** means the terms set out in this document.
- (s) **Group Members** means the persons identified as group members in the Proceedings and who do not opt out of the Proceedings by the time specified by the Court for doing so.
- (t) **GST** has the same meaning given to the term "GST" in the GST Act.
- (u) **GST Act** means A New Tax System (Goods and Services Tax) Act 1999 (Cth).
- (v) **Lawyers** means Quinn Emanuel Urquhart & Sullivan or any firm of lawyers appointed with or in substitution for them by the Plaintiffs with consent of the Funder.
- (w) **Legal Costs** means the professional fees reasonably incurred subject to and in accordance with the Budget and these Funding Terms by the Lawyers pursuant to the Retainer in connection with the Proceedings.
- (x) **Matter** means the acquisition by the Group Members of shares in RCR.
- (y) **Net Resolution Sum** means the Resolution Sum minus the total Legal Costs and Disbursements paid or incurred by the Funder in connection with the Proceedings.
- (z) **Other Parties** means any other entity joined to the Proceedings.
- (aa) **Plaintiff** means Ashita Tomi Pty Ltd as trustee for the Esskay Super Fund ABN 79 582 038 569.
- (bb) **Proceedings** means any proceeding formed from the consolidation of the Ashita Proceeding with any other proceeding.
- (cc) **Representative** means any lead Plaintiff in the Proceedings (and for the avoidance of doubt the reference to any Representative includes the Representative of a sub-group however constituted in the Proceedings).
- (dd) **Resolution** means when all or any part of the Resolution Sum is received and, where the Resolution Sum is received in parts, a "Resolution" occurs each time a part is received.
- (ee) **Resolution Sum** means the amount or amounts, or the value of any goods or services, to which Group Members (or any of constitution of the Group Members), become entitled in connection with or satisfaction or part satisfaction of the Claims, as a result of (without limitation) a settlement, judgment or arbitration and whether the said amount or value is provided by the Defendants or any other person, and for the avoidance of doubt includes any amount or value to be provided by or in respect of a person against whom any Defendants claims any indemnity, apportionment or contribution.
- (ff) **Retainer** means the Retainers and Costs Agreements between the Lawyers and: (i) the Plaintiffs; and (ii) individual Funded Group Members.

- (gg) **Senior Counsel** means a senior member of the Bar of one of the Australian States, whether titled Senior Counsel or Queen's Counsel.
- (hh) **Settlement** means any settlement, compromise, discontinuance or waiver of the Claims or part of the Claims, and "settles" shall be construed accordingly.
- (ii) **Taxable Supply** has the meaning given to the term "taxable supply" in the GST Act
- (jj) **Termination** has the meaning attributed to it under paragraph 26 of these Funding Terms.

B. The Relationship Between the Plaintiff, the Additional Plaintiffs, the Lawyers and the Consolidated Funders

- 2. The Lawyers' professional duties are owed to the Plaintiff and any Additional Plaintiff and not to the Consolidated Funders (or any one of them).
- 3. Subject to paragraph 4:
 - 3.1 the Plaintiff shall give day-to-day instructions to the Lawyers concerning the Claims and/or the Proceedings;
 - 3.2 the Lawyers shall ensure that the Plaintiff is provided with all information necessary to give informed instructions (including, for the avoidance of doubt, any information which has or may have a material impact upon the Claims, the Proceedings, or the potential for any recoveries to be obtained therein);
 - 3.3 the Plaintiff shall consult with any Additional Plaintiffs (as defined below in paragraph 31) in relation to the giving of instructions concerning significant matters;
 - 3.4 the Plaintiff shall consult with the Consolidated Funders' Committee (as defined below in paragraph 43) in relation to the giving of instructions concerning significant matters;
 - 3.5 the Lawyers shall ensure that the Additional Plaintiffs and the Consolidated Funders are provided with all information necessary to facilitate informed consultation with the Plaintiff (including, for the avoidance of doubt, any information which has or may have a material impact upon the Claims, the Proceedings, or the potential for any recoveries to be obtained therein); and
 - 3.6 if any dispute or disagreement arises between the Plaintiff and the Consolidated Funders' Committee, or between the Plaintiff and any Additional Plaintiff, regarding the Claims and/or the Proceedings, or regarding the instructions given by the Plaintiff to the Lawyers concerning the Claims and/or the Proceedings, or regarding a failure or refusal by the plaintiff to consult pursuant to subparagraphs 3.3 or 3.4 above, that dispute or disagreement will be resolved pursuant to the mechanism set out below in paragraph 17.
- 4. If the Lawyers notify the Plaintiffs and the Consolidated Funders' Committee that the Lawyers believe that circumstances exist that may give rise to a conflict of interest between the Plaintiffs and the Consolidated Funders (or any one of them), then:
 - 4.1 the Dispute Resolution Procedure shall apply; and
 - 4.2 for the purposes of the Dispute Resolution Procedure, and thereafter where consistent with the outcome of the Dispute Resolution Procedure, the Lawyers:
 - (a) shall seek instructions from the Plaintiffs;

- (b) shall advise and take instructions from the Plaintiffs, even though such advice and instructions is or may be contrary to the Consolidated Funders' interests; and
 - (c) shall refrain from giving the Funder advice and from acting on the Consolidated Funders' instructions, to the extent of the conflict of interest.
- 5. Nothing in this section entitles the Plaintiffs to:
 - 5.1 breach, or authorise the breach, of any of the Funding Terms;
 - 5.2 require the Lawyers to cease to act for the Group Members, or any of the Group Members individually, in respect of the Claims; or
 - 5.3 require the Consolidated Funders (or any one of them) to cease to fund the Group Members, or any of the Group Members individually, in respect of the Claims.

C. Consolidated Funders' obligation to fund the Proceedings

- 6. The Consolidated Funders will pay in equal shares and on a joint and several basis:
 - 6.1 all Legal Costs and Disbursements of the Plaintiffs and Group Members subject to and in accordance with the Budget and these Funding Terms, including in respect of counsel, and the cost of any expert or experts in connection with the preparation and prosecution of the Proceedings and of any settlement negotiations; and
 - 6.2 any Adverse Costs Order or other Costs Order which the Court makes in the Proceedings against the Plaintiffs in so far as those costs were incurred during the term that these Funding Terms are operative.
- 7. The Consolidated Funders will in equal shares on a joint and several basis provide any security for costs in the Proceedings, in the form ordered by the Court or, in the absence of any such order, in such other form as the Funder reasonably determines and the Defendants accept, relating to costs incurred during the term that these Funding Terms are operative. Without prejudice to the obligation, the Consolidated Funders agree that an initial tranche of \$4.2 million will be paid into Court, or such other amount as the Court orders. Payment of cash into Court in respect of the initial tranche shall be effected as follows:
 - 7.1 the Funder shall pay into Court the sum of \$4.2 million or such other amount as the Court orders, such payment to be a payment made on behalf of all Consolidated Funders in equal shares, within seven (7) days of the order, or within such other time as the order provides;
 - 7.2 the Additional Funder shall pay its equal share of the sum paid into Court by the Funder pursuant to paragraph 7.1 above into the Lawyers' trust account within fourteen (14) days after the Funder makes the payment referred to in paragraph 7.1 above;
 - 7.3 the monies provided by the Additional Funder to the Lawyers pursuant to this paragraph shall be used and only used by the Lawyers to reimburse the Funder within seven (7) days of payment by the Additional Funder of the sum referred to in paragraph 7.2 above;
 - 7.4 in the event that, in the future, the Court orders that the initial tranche of security be released, then provided the Additional Funder has complied with their obligations in paragraph 7.2 above, each Consolidated Funder's equal share of that initial tranche shall be released directly to that Consolidated Funder, and the Lawyers shall take all necessary steps to facilitate that arrangement.

D. Funder's Remuneration

8. Subject to further order, pursuant to section 183 of the *Civil Procedure Act 2005* (NSW) (**CPA**), the following amounts shall be paid from any Resolution Sum to the Funder, prior to any distribution to Group Members, in accordance with the Funding Terms:
 - 8.1 an amount equal to the Funder's Investment;
 - 8.2 an amount, as remuneration for funding the Proceedings, calculated as follows:
 - (a) 15.0% of the first AUD 75,000,000 of the Net Resolution Sum;
 - (b) 17.5% of any portion of the Net Resolution Sum in excess of AUD 75,000,000 but not in excess of AUD 125,000,000; and
 - (c) 20.0% of any portion of the Net Resolution Sum in excess of AUD 125,000,000,provided that the calculation of the Funder's remuneration shall be reduced to the extent that it would result in the Plaintiffs and Group Members receiving less than 70% of the Resolution Sum;
 - 8.3 in the alternative to paragraph 8.2 above, such lower amount as remuneration to the Funder as the Court considers reasonable at the time of approval of a settlement under section 173 or judgment under section 177 of the CPA); and
 - 8.4 any GST payable by the Funder in relation to 8.2 or 8.3.
9. In addition to paragraph 8 above, if the Consolidated Funders fund an appeal, or the defence of an appeal, or any further appeal or the defence of any further appeal, a further amount shall be paid to the Consolidated Funders expressed as a percentage of the Resolution Sum as approved by the Court, in respect of each appeal so funded.
10. If the Resolution Sum is not money:
 - 10.1 the value of the consideration received will be calculated by reference to the Fair Market Value of the consideration; and
 - 10.2 the amounts referred to at paragraph 8 above shall be paid as cash or, where the Consolidated Funders' Committee elects, by an assignment, allocation or transfer of the consideration in kind.
11. No fees, commissions or other payments will become due or owing by the any Group Members to the Funder unless and until Resolution and then will not exceed the Resolution Sum.

E. Other obligations of the Consolidated Funders

12. The Consolidated Funders:
 - 12.1 will not retain the Lawyers as their solicitors for any purpose connected with the Proceedings;
 - 12.2 will observe the Conflicts of Interest Policy and notify the Plaintiffs and the Lawyers of any changes to such policy;
 - 12.3 will comply with and implement procedures required by legislation (including under the Corporations Amendment Regulation 2012 (No. 6) (Cth));
 - 12.4 will disclose to the Plaintiffs whether or not there is any agreement between them and the Lawyers in connection with the subject matter of these Funding Terms; and

- 12.5 will provide timely and clear disclosure to the Plaintiffs of any material breach of the Corporations Amendment Regulation 2012 (No. 6) (Cth) by the Consolidated Funders in relation to the subject matter of these Funding Terms.

F. Claims Resolution and Distribution of Resolution Sum

13. If the Plaintiffs or any Group Member obtains any Settlement or obtains any judgment in respect of the Claims, it will:
- 13.1 if the Lawyers did not represent the Plaintiffs or the Group Member in executing the Settlement or in the Proceedings resulting in the judgment, give written notice of the Settlement or judgment to the Lawyers (for notification to the Consolidated Funders' Committee);
 - 13.2 treat any money, other asset or benefit received from or on behalf of any Defendants in connection with the Settlement or judgment as the Resolution Sum; and
 - 13.3 cause the money, or an amount being the reasonable market value of the asset or benefit, referred to in 13.2 to be delivered to the Lawyers to be dealt with as part of the Resolution Sum for the purposes of these Funding Terms.
14. Any Resolution Sum will be received by the Lawyers and paid immediately into an interest-bearing trust account kept for that purpose.
15. Subject to any order of the Court, the Lawyers will apply any Resolution Sum received, out of the account referred to in paragraph 14 above, in accordance with paragraph 8 above.
16. The obligations in this part F shall be continuing obligations and survive any Termination of these Funding Terms.

G. Dispute Resolution Procedure

17. If any disagreement or dispute arises between the Plaintiff and the Consolidated Funders' Committee, or the Plaintiff and any Additional Plaintiff, regarding the Claims and/or the Proceedings (including but not limited to a dispute relating to the Settlement of the Proceedings, or relating to a proposal to make an offer of Settlement, or relating to an appeal from any judgment or order in the Proceedings) the Lawyers shall notify the most senior Senior Counsel briefed in the matter of the disagreement or dispute and that Senior Counsel shall proceed as he or she thinks fit for the purpose of determining the dispute and determine the disagreement or dispute which may include a determination as to whether the proposed Settlement is fair and reasonable in the interests of the Group Members overall, or the part of the Group Members affected by the proposed Settlement, and whether the proposed Settlement should be accepted or rejected), which determination shall be binding on the Plaintiff, the Additional Plaintiffs, the Consolidated Funders and the Lawyers.

H. Use and Disclosure of Documents

Information provided to the Funder

18. The Consolidated Funders shall strictly maintain the confidentiality of any information provided to them by the Plaintiff, an Additional Plaintiff, or the Lawyers for a purpose connected to the Proceedings, and shall adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information.

Information provided to the Plaintiff regarding the Funding Arrangements

19. All information, communication or documents provided to the Plaintiff or an Additional Plaintiff at any time by the Lawyers, the Consolidated Funders or their respective officers, servants or agents for or in contemplation of the Proceedings or in relation to the Claims ("**Protected Information**"):
 - 19.1 is or may be, and will be treated as, confidential information within the meaning of equity, and "confidential communications" or "confidential documents" within the meaning of Part 3.10 of the *Evidence Act 1995* (Cth); and
 - 19.2 may be subject to joint interest privilege that the Plaintiff or an Additional Plaintiff is not at liberty to waive.
20. The Plaintiff or an Additional Plaintiff will not disclose any Protected Information to any other person without the prior written consent of:
 - 20.1 the Consolidated Funders' Committee (if the information was provided by a Consolidated Funder); or
 - 20.2 the Lawyers (if the information was provided by them).

Lawyer's disclosures to Funder

21. In recognition of the fact that the Consolidated Funders each have an interest in the Resolution Sum and the efficient and effective prosecution of the Proceedings, the Lawyers shall:
 - 21.1 keep the Consolidated Funders' Committee fully informed of all matters concerning the Proceedings, including any mediation and settlement discussions (and, for the avoidance of doubt shall immediately inform the Consolidated Funders' Committee of all settlement offers or offers to engage in any alternative dispute resolution process received from the Defendants and, consistently with paragraphs 47 and 48 below, allow one or more of the Consolidated Funders to attend any such process agreed with the Defendants);
 - 21.2 consult with the Consolidated Funders' Committee with regard to any issue in or in connection with the Proceedings;
 - 21.3 properly consider the Consolidated Funders' Committee's expressed views as to any matter or issue arising in or in connection with the Proceedings or the conduct of the Proceedings;
 - 21.4 promptly provide to the Consolidated Funders' Committee any information or document reasonably requested by it relating to the Proceedings;
 - 21.5 unless specifically prohibited by the terms of a Court order or another professional obligation, provide to the Consolidated Funders' Committee with a copy of any document obtained in the Proceedings by way of discovery, subpoena or any other coercive power of the Court, subject to the Consolidated Funders and their officers' and employees' implied undertaking given to the Court; and
 - 21.6 subject to any contrary order or requirement of a Court or rules of a Court, to disclose to the Consolidated Funders' Committee such matters, consistent with the Lawyers' professional obligations to the Plaintiff, Additional Plaintiffs and Group Members, as may be necessary or convenient to enable the Consolidated Funders to assess or manage their risk in or in connection with the Proceedings or exercise any right or discretion provided by these Funding Terms.

22. Without limiting the preceding paragraph, the Lawyers may provide to the Consolidated Funders' Committee information communicated to or by potential and actual witnesses, provided that:
- 22.1 the disclosure does not cause any loss of confidentiality or privilege in the information, or is otherwise the subject of contrary advice from the Lawyers having regard to the interests of the Plaintiff, Additional Plaintiffs or the Group Members; and
 - 22.2 each Consolidated Funder remains obligated to treat the information as:
 - (a) confidential; and
 - (b) subject to privilege that the Consolidated Funder is not at liberty to waive.
23. The Lawyers are entitled to take, upon request from the Consolidated Funders' Committee, such steps as the Lawyers deem consistent with the interests of the Plaintiff, Additional Plaintiffs and Group Members to obtain from any necessary court or tribunal orders permitting the Lawyers to disclose to the Consolidated Funders' Committee any information or documents obtained from discovery, subpoenas, notices to produce, filings, examinations or any other coercive procedure, upon such terms as the Court may order.
24. The Plaintiff or Additional Plaintiffs, in providing to the Consolidated Funders' Committee any documents or information about the Claims and the Proceedings, does not waive any privilege that may attach to such documents or information unless any such privilege is expressly waived.

Funder to preserve confidentiality and privilege

25. Where any information is provided to the Consolidated Funders' Committee by the Plaintiff, Additional Plaintiffs, the Group Members or the Lawyers for a purpose connected to these Funding Terms or any Proceedings to which these Funding Terms apply (whether as a result of a related application or otherwise) each Consolidated Funder shall:
- 25.1 strictly maintain the confidentiality of the information;
 - 25.2 adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information;
 - 25.3 ensure that access to the information is only provided to the Consolidated Funders' staff who are engaged in the functions for which the information was provided to the Consolidated Funders;
 - 25.4 only use the information for purposes for which the information was provided;
 - 25.5 not disclose the information contained therein to any person other than the Lawyers or Counsel retained in the Proceedings; and
 - 25.6 at its election return or destroy in accordance with its data protection and document retention standards all records of the information to the Lawyers at the conclusion of all Proceedings to which these Funding Terms or other Funding Agreements apply.

I. Termination

26. The funding arrangements under these Funding Terms may only be terminated by order of the Court, granted on application made by the Plaintiff, an Additional Plaintiff, any or all of the Consolidated Funders or a Group Member, upon notice given to the Plaintiff, Additional Plaintiffs, Lawyers and the Consolidated Funders and such other persons as ordered by the Court ("**Termination**").

27. If an application is made by the Plaintiff, an Additional Plaintiff, a Consolidated Funder or Group Member under paragraph 26 above, and the Court grants that application, then (subject to any contrary order of the Court):
- 27.1 the Consolidated Funders' obligations to fund future costs shall cease on the date the Termination becomes effective; and
- 27.2 the Termination shall not affect:
- (a) any accrued obligations of that Consolidated Funder in respect of costs incurred prior to the date the Termination becomes effective;
 - (b) that Consolidated Funder's rights to recover any payments made pursuant to and consistent with these Funding Terms from any Resolution Sum, whether obtained before or after the Termination;
 - (c) any obligations in respect of confidentiality or privilege owed by the Plaintiff or an Additional Plaintiff;
 - (d) all obligations of that Consolidated Funder to make payment of any outstanding costs pursuant to paragraphs 6 and 7 above that are incurred or are accrued up to the date that the Termination becomes effective;
 - (e) any obligation of that Consolidated Funder to account to the Plaintiff, an Additional Plaintiff and/or Group Members for any money held by that Consolidated Funder on behalf of the Plaintiff or Additional Plaintiff which is payable to the Plaintiff, Additional Plaintiff and/or Group Members pursuant to these Funding Terms; or
 - (f) any rights of either that Consolidated Funder, the Plaintiff or an Additional Plaintiff arising from any breach of these Funding Terms.

J. Funding Agreements and Legal Costs Agreements

28. These Funding Terms prevail over any inconsistent provision in the Funding Agreements. Neither the Funder nor the Additional Funder may amend or vary the terms of any Funding Agreement to which they are a party without the unanimous approval, in writing, of each of the Funder and the Additional Funder.
29. These Funding Terms prevail over the terms of the Retainer to the extent of any inconsistency.

K. The Court's Proposed Funding Option

Additional Funder

30. In these Funding Terms:
- 30.1 "**Additional Funder**" means IMF Bentham Limited, acting in its capacity as the investment manager and agent for each of IMF Bentham Limited (Fund 2) Pty Ltd (ACN 621 682 504) and IMF Bentham Limited (Fund 3) Pty Ltd (ACN 621 682 460), in the 'IMF applicable funder percentage' (being the proportion, expressed as a percentage, by which the Fund 2 and Fund 3 enjoy their rights and undertake their obligations (on a several not joint and several basis) which, as at the date of these Funding Terms is 75% by IMF Fund 2 and 25% by Fund 3 and is subject to amendment by notification from IMF Bentham Limited), its successors and assigns ("IMF"); and
- 30.2 "**Consolidated Funders**" means the Funder and the Additional Funder.

Additional Plaintiffs

31. In these Funding Terms, "**Additional Plaintiffs**" means any plaintiffs in the Jones Proceeding or the CJMcG Proceeding who or which:
- 31.1 enters into a Retainer with the Lawyers in respect of the Consolidated Proceeding by 22 August 2019; and
 - 31.2 gives an undertaking to the Court to be bound by these Funding Terms in the form provided at Annexure 1 to these Funding Terms by 22 August 2019.

Pre-Consolidation Costs

32. Each Consolidated Funder shall remain solely liable to pay any amounts incurred or otherwise due to be paid by it in respect of the period up to and including the date that these Funding Terms come into effect pursuant to any Funding Agreement to which it is a party (the "**Pre-Consolidation Costs**").
33. The Plaintiff and Additional Plaintiffs will seek an order of the Court that the Pre-Consolidation Costs will be costs in the cause of the Proceedings.

Post-Consolidation Costs

34. The Lawyers shall be paid directly by each Consolidated Funder, in equal shares, on behalf of the Plaintiff, Additional Plaintiffs and Group Members, subject to and in accordance with the Budget, upon valid tax invoices promptly being rendered monthly by the Lawyers to each Consolidated Funder, within thirty (30) days of receipt of such tax invoice. The Lawyers will notify all Consolidated Funders if any Consolidated Funder fails to comply with this paragraph.
35. If any Consolidated Funder wishes to dispute an invoice, such dispute shall be referred to the Consolidated Funders' Committee, but shall not affect the obligations of the Consolidated Funders under paragraph 34. If the Consolidated Funders' Committee and the Lawyers agree that any adjustments to the disputed invoice are necessary, the necessary adjustments and any necessary refund shall be made within thirty (30) days of such agreement. If the Consolidated Funders' Committee and the Lawyers cannot resolve the dispute, it shall be resolved pursuant to the mechanism set out above in paragraph 17 (without prejudice to right of the Plaintiff, an Additional Plaintiff or any of the Consolidated Funders to have an invoice assessed pursuant the *Legal Profession Uniform Law (NSW)* or equivalent legislation).
36. To facilitate the efficient settlement of Post-Consolidation Costs, the Consolidated Funders are each required to pay \$150,000 into the Lawyers' trust account within 7 days of any order consolidating the Ashita Proceeding with the Jones Proceeding and or the CJMcG Proceeding, and the Plaintiff and the Consolidated Funders authorise the Lawyers to use such funds to pay any invoice issued under paragraph 34 above, in the event that such invoice is not paid by any Consolidated Funder in accordance with paragraphs 34 and 35 above. Payment of an invoice pursuant to this paragraph 36 does not cure a Default under paragraph 41 below.

Remuneration

37. If any obligation to pay any amounts from any Resolution Sum pursuant to paragraphs 8, 9 or 10 arises, such amounts shall be shared amongst the Consolidated Funders and Piper Alderman as follows in accordance with paragraph 15:
- 37.1 first, notwithstanding the provisions of paragraph 8.1 and on a pari passu basis:
 - (a) the Funder shall receive an amount equal to the Funder's Investment; and
 - (b) the Additional Funder shall receive an amount equal to its Additional Funding Investment (as defined in paragraph 38);

- (c) Piper Alderman shall receive an amount equal to its fees incurred in the CJMcG Proceedings and held "at risk" pursuant to its retainer agreement with the Additional Plaintiffs (irrespective of whether that retainer agreement is terminated following consolidation)
- 37.2 secondly, subject to paragraph 39 and on a pari passu basis, each Consolidated Funder shall receive an equal share of each amount to be paid under paragraphs 8.2, 8.3, 8.4, 9 and 10.
- 38. The "Additional Funding Investment" shall, with respect to the Additional Funder, be the aggregate of:
 - 38.1 its share of the Pre-Consolidation Costs (as defined in paragraph 32); and
 - 38.2 the Legal Costs, Disbursements and any amounts paid or payable by it pursuant to any Adverse Costs Order or other Costs Order (in each case including any GST paid or payable in relation thereto) under paragraph 34.
- 39. For the purposes of paragraph 37.2, the Net Resolution Sum shall be deemed to be the:
 - 39.1 Resolution Sum; minus
 - 39.2 the aggregate of:
 - (a) the total Legal Costs and Disbursements paid or incurred by the Funder in connection with the Proceedings;
 - (b) the Additional Funder's Pre-Consolidation Costs as defined above in paragraph 32 (as applicable); and
 - (c) the total Post-Consolidated Costs paid or incurred by the Additional Funder in connection with the Proceedings.
- 40. Further to paragraph 15, the Lawyers will hold that portion of the Resolution Sum payable to each of the Consolidated Funders and Piper Alderman under these Funding Terms on trust for each of the Consolidated Funders.

Default

- 41. If a Consolidated Funder fails to comply with its obligations under paragraphs 6, 7, 32 or 34 to 36 (a "Defaulting Consolidated Funder") and such failure is not rectified within fourteen (14) days of the giving of written notice by the Plaintiff, an Additional Plaintiff or by a non-defaulting Consolidated Funder to the Defaulting Consolidated Funder:
 - 41.1 the Defaulting Consolidated Funder's obligations pursuant to paragraphs 6, 7, 32 and 34 to 36 above shall cease;
 - 41.2 the non-defaulting Consolidated Funder shall meet all outstanding and future obligations of the Defaulting Consolidated Funder under paragraphs 6, 7, 32 or 34 to 36 above;
 - 41.3 the entirety of the Defaulting Consolidated Funder's entitlement to receive any amount pursuant to paragraph 37.2 above shall pass to the non-defaulting Consolidated Funder and the Defaulting Consolidated Funder shall have no entitlement to any amounts pursuant to paragraph 37.2 above; and
 - 41.4 the Defaulting Consolidated Funder shall remain entitled to receive the amount due to it under paragraph 37.1 above.
- 42. Each Consolidated Funder must be in compliance with its Corporations Act requirements as set out in ASIC Regulatory Guide 248.

Consolidated Funders' Committee

- 43. The Consolidated Funders shall form a committee (the "Consolidated Funders'

Committee”) to be comprised of a representative of each Consolidated Funder.

44. The Consolidated Funders’ Committee will meet (in person or by telephone) to discuss and review any developments in the Proceedings with the Lawyers each fortnight (unless otherwise agreed by all the Consolidated Funders) and as often as is required in light of any material development in the Proceedings at the reasonable instigation of any of the Consolidated Funders.
45. Decisions of the Consolidated Funder’s Committee shall be taken unanimously. Where a unanimous decision cannot be reached, the decision shall be referred to the most senior Senior Counsel briefed in the Proceedings for resolution in accordance with paragraph 17 above.
46. The Lawyers may communicate with the Consolidated Funders’ Committee by email at the email address provided by each of the members of the committee.
47. The Consolidated Funders’ Committee will vote on one representative of the Consolidated Funders’ Committee attending any mediation or settlement discussions. Absent unanimous agreement amongst the Consolidated Funders’ Committee on one representative attending any mediation or settlement discussions, the Consolidated Funders may each attend any mediation or settlement discussions.
48. Where a representative of the Consolidated Funders’ Committee is to attend any mediation or settlement discussions on behalf of the Consolidated Funders’ Committee, pursuant to paragraph 47, that representative shall attend any mediation and settlement discussions and promptly and reasonably consult with the Consolidated Funders’ Committee about the progress of such discussions and any material issues of substance or process that arise including any settlement offer. In the event of a dispute in respect of the scope and performance of a Consolidated Funder’s obligations under this paragraph 48, the dispute shall be referred to the most senior Senior Counsel briefed in the Proceedings for resolution in accordance with paragraph 17 above.

Appeals

49. Each Consolidated Funder shall elect whether or not it wishes to participate in the funding of an appeal of a final order, or the defence of an appeal of a final order, or any further appeal or the defence of any further appeal of a final order (Appeal).
50. If a Consolidated Funder elects not to fund an Appeal, it will be deemed to be a Defaulting Consolidated Funder for the purpose of paragraph 41.

Miscellaneous

51. Any decision to vary the Budget shall be made by the Consolidated Funders’ Committee (such that, pursuant to paragraph 45 above, if the Consolidated Funders’ Committee is unable to reach a unanimous decision, the decision shall be referred to the most senior Senior Counsel briefed in the Proceedings for resolution in accordance with paragraph 17 above).
52. The Plaintiff, Lawyers and Consolidated Funders submit to the exclusive jurisdiction of the Courts of New South Wales in respect of all matters relating to these Funding Terms.