FEDERAL COURT OF AUSTRALIA

Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3) [2017] FCA 330

File number:	NSD 1609 of 2013
Judge:	**BEACH J**
Date of judgment:	31 March 2017
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – application for approval of settlement by Court pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – whether proposed settlement is fair and reasonable as between group members and the respondents – whether proposed distribution scheme is fair and reasonable as between group members – claims of unregistered group members – consideration of options dealing with claims of unregistered group members – application for common fund order – consideration of appropriate commission rate for litigation funder – setting of commission rate – approval granted
Legislation:	*Constitution* s 51(xxxi) *Corporations Act 2001* (Cth) s 177 *Federal Court of Australia Act 1976* (Cth) ss 33V, 33Z, 33ZB, 33ZF
Cases cited:	*Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 *Bayens v Kinross Gold Corporation* (2013) 117 OR (3d) 150; 2013 ONSC 4974 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)* (2015) 325 ALR 539; [2015] FCA 811 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 2)* [2016] FCA 1310 *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2016] VSC 784 *Cannon v Funds for Canada Foundation* 2013 ONSC 7686 *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311; [2004] FCA 1406 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 *Dugal v Menulife Financial Corp* (2011) 105 OR (3d) 364;

	2011 ONSC 1785
	Dugal v Menulife Financial Corp 2011 ONSC 3147
	Earglow Pty Ltd v Newcrest Mining Ltd [2016] FCA 1433
	Foley v Gay [2016] FCA 273
	Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297
	Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited (2016) 338 ALR 188; [2016] FCAFC 148
	Mutual Pools & Staff Pty Ltd v Commonwealth of Australia (1994) 179 CLR 15
	Newstart 123 Pty Ltd v Billabong International Ltd [2016] FCA 1194
	Nintendo Co Ltd v Centronics Systems Pty Ltd (1994) 181 CLR 134
	Richards v Macquarie Bank Ltd (No 5) [2013] FCA 1442
	Rooney v ArcelorMittal S.A. 2013 ONSC 7768
	The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation 2012 ONSC 2937
	Barker G, "Third Party Litigation Funding in Australia and Europe" (Working Paper No 2, Centre for Law and Economics, ANU College of Law, December 2011)
	Eisenberg, T and Miller G, "Attorney Fees and Expenses in Class Action Settlements: 1993-2008" (2010) 7(2) *Journal of Empirical Legal Studies* 248-281
	Eisenberg, T, Miller G and Germano R, "Attorneys' Fees in Class Actions: 2009-2013" (NYU Law and Economics Research Paper No. 17-02, December 2016)
	IMF (Australia) Ltd, "Submission to the Productivity Commission: Access to Justice Arrangements" (18 November 2013)
	Productivity Commission, *Productivity Commission Inquiry Report, Access to Justice Arrangements, Volume 2* (No 72, 5 September 2014)
Date of hearing:	16 February 2017
Date of last submissions:	2 March 2017
Registry:	New South Wales
Division:	General Division
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Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
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Counsel for the Applicants:	Mr M B J Lee SC with Mr W A D Edwards and Mr D J Fahey
Solicitor for the Applicants:	Maurice Blackburn
Counsel for the First Respondent:	Mr R M Foreman
Solicitor for the First Respondent:	Webb Henderson
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Solicitor for the Third Respondent:	Ashurst Australia

ORDERS

NSD 1609 of 2013

BETWEEN:	**BLAIRGOWRIE TRADING LTD** First Applicant **ALAN FLITCROFT AND CHRYSTINE FLITCROFT (AS TRUSTEES OF THE TE COCO TRUST)** Second Applicant
AND:	**ALLCO FINANCE GROUP LTD (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 007 721 129)** First Respondent **KPMG** Third Respondent
JUDGE:	**BEACH J**
DATE OF ORDER:	**31 MARCH 2017**

THE COURT ORDERS THAT:

1. Subject to orders 2 and 3 hereof, pursuant to ss 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (the Act), the settlement of this proceeding be approved on the terms set out in:

   (a) the Deed of Settlement dated 28 November 2016 (being annexure "AJW-21" to the confidential affidavit of Andrew John Watson sworn 15 February 2017) (the Settlement Deed); and

   (b) the Settlement Distribution Scheme (being annexure "AJW-1" to the affidavit of Andrew John Watson sworn 14 February 2017, together with annexure "AJW-22" to the confidential affidavit of Andrew John Watson sworn 15 February 2017, but incorporating the amendments set out in the further affidavit of Andrew John Watson sworn 16 February 2017 and as supplemented by order 2 below) (the Settlement Distribution Scheme).

2. Pursuant to ss 33V and 33ZF of the Act, the Settlement Distribution Scheme shall be taken to be modified and operate accordingly with the following definition of "Expiry Date" (in substitution for the present definition set out in annexure "AJW-1" to the

affidavit of Andrew John Watson sworn 14 February 2017): "Expiry Date" means noon on 31 March 2017.

3. Pursuant to ss 33V and 33ZF of the Act and to the extent necessary, notwithstanding cl 8(e) of the Settlement Deed, the parties thereto in the performance of their obligations or the enforcement of their rights thereunder shall treat "Expiry Date" as meaning noon on 31 March 2017.

4. Pursuant to s 33ZF of the Act, the Court authorises the applicants nunc pro tunc to enter into and give effect to the Settlement Deed.

5. Pursuant to s 33ZF of the Act or otherwise, Maurice Blackburn Pty Ltd be appointed Settlement Administrator of the Settlement Distribution Scheme and to act in accordance with the Settlement Distribution Scheme.

6. Pursuant to s 33ZF of the Act or otherwise, for the purposes of the Settlement Distribution Scheme the amount of the "Applicant's Reimbursement Payment" is approved as:

   (a) $20,000 for Mr Ian Grant Waddell; and

   (b) $20,000 for Mr Alan Flitcroft.

7. The proceeding (including all cross-claims) be dismissed.

8. All costs orders made in the proceeding to date be vacated, and there be no order as to costs in relation to any reserved or other costs of the proceeding.

9. Pursuant to r 2.43(1) of the *Federal Court Rules 2011* (Cth), all amounts paid into Court by the applicants as security for the first respondent's costs of the proceeding and/or the third respondent's costs of the proceeding be repaid to the solicitors for the applicants.

10. Maurice Blackburn Pty Ltd has liberty to apply for directions in relation to any matter arising from the Settlement Distribution Scheme.

11. The persons affected and bound by these orders include group members.

12. The respective contributions of the respondents to the payments required under the Settlement Deed be kept confidential, including in any judgment or reasons for judgment in the proceeding.

13. Pursuant to s 37AF(1)(b) of the Act, on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until further order:

(a) the evidence contained in the affidavits of Andrew John Watson sworn 15 February 2017 and 2 March 2017 and each marked "Confidential Affidavit"; and

(b) the documents referred to in paragraph [36] of the affidavit of Andrew John Watson sworn 14 February 2017 and tendered at the hearing,

not be published or disclosed without the prior leave of the Court to any person or entity other than the applicants, the applicants' legal advisers, the Judge with the carriage of the matter from time to time and officers of the Court to whom it is necessary to disclose the evidence.

14. Pursuant to s 33ZF of the Act or otherwise, Mr John Leske and GIST Superannuation Fund Pty Ltd each be treated as a Registered Group Member for the purposes of the Settlement Distribution Scheme.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 The applicants, Blairgowrie Trading Ltd (Blairgowrie) and Mr and Mrs Flitcroft (as trustees of the "Te Coco Trust"), commenced proceedings in this Court pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the Act) against inter alia, Allco Finance Group Ltd (receivers and managers appointed) (in liquidation) (Allco) and Allco's auditor, KPMG. The proceedings were commenced by the applicants on their own behalf and on behalf of other persons who acquired an interest in ordinary shares in Allco between 21 August 2007 and 27 February 2008 (the relevant period) and suffered loss or damage as a result of the alleged conduct of Allco and KPMG.

2 As against Allco, the applicants alleged, inter alia, that by and following Allco's publication and lodgement with the Australian Securities Exchange on 21 August 2007 of its preliminary final report for the year ended 30 June 2007 and until its announcement to the ASX on 27 February 2008, Allco contravened its continuous disclosure obligations and engaged in misleading or deceptive conduct.

3 As against KPMG, the applicants alleged that from the time KPMG issued its unqualified audit opinion on Allco's 2007 financial report, KPMG engaged in misleading or deceptive conduct and made false or misleading statements by representing that it had conducted the audit to an appropriate professional standard using reasonable care and skill, and that it had reasonable grounds for its opinion that Allco's financial report complied with Australian Accounting Standards and gave a true and fair view.

4 The contraventions alleged against each of Allco and KPMG arose from two separate significant defects in the financial report enclosed in Allco's preliminary final report. The applicants alleged that these two defects led the financial report to be non-compliant with Australian Accounting Standards and amounted to a failure to give a true and fair view of the financial position and performance of Allco and the consolidated Allco group as at 30 June 2007 (and thus also to contravene ss 296 and 297 of the *Corporations Act 2001* (Cth)). These two defects (the existence of which were first revealed to the market between 25 and 27 February 2008) were:

(a) first, a misclassification of $1.9 billion of interest-bearing loans as non-current, when in fact they were current; and

(b) second, a failure to disclose certain critical terms in the key debt facilities that enabled Allco to continue to operate, which terms permitted the financiers to review and potentially call up those facilities in the event that Allco's market capitalisation dropped below $2 billion. This in fact happened later in 2007.

5 Initially, there was another respondent to the proceedings, Mr Gary James Jones (as administrator ad litem of the estate of the late David Raymond Coe (deceased)). Mr Coe was the executive chairman of Allco throughout the relevant period. On 20 October 2016, the applicants discontinued the proceedings as against Mr Jones, with the approval of the Court (see *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 2)* [2016] FCA 1310).

6 On 13 November 2016, the day before the commencement of a scheduled five to six week initial trial in the proceedings, the parties agreed to a settlement subject to the approval of the Court. The settlement was the product of discussions between the parties following a mediation that occurred on 4 November 2016. The terms of the settlement were recorded in a Deed of Settlement dated 28 November 2016 (Settlement Deed).

7 Under s 33V of the Act, I have determined to approve the settlement subject to several matters. As between the applicants and group members on the one hand, and Allco and KPMG on the other hand, the settlement is strongly in favour of the group members. Moreover, the distribution protocols as between group members inter se are fair and reasonable, subject to two matters that I will need to elaborate on in some detail:

(a) First, the applicants have sought a common fund order, which I propose to grant.

(b) Second, the settlement creates two different pools of funds with group members sharing in different pools. As a result of my review of these mechanisms, one of the pools and who can share therein will need to be altered as I will explain later.

8 Let me begin with some of the relevant background.

FUNDING OF THE PROCEEDING

9 Shortly after February 2008, Maurice Blackburn together with IMF Bentham Ltd (formerly IMF (Australia) Ltd) (IMF), first began to investigate the possibility of a representative

proceeding on behalf of Allco shareholders. Potential group members were invited to enter into a funding agreement with IMF (First IMF Funding Agreement).

10 The salient terms of the First IMF Funding Agreement were as follows:

(a) First, the representative party in the class action would determine, in consultation with Maurice Blackburn and IMF, what claims should be pursued, and would give binding instructions and make binding decisions on behalf of all group members in relation to those claims.

(b) Second, IMF would retain and instruct Maurice Blackburn and would pay the "Project Costs" (which included 65% of the legal fees payable to Maurice Blackburn, and 100% of the disbursements incurred by Maurice Blackburn, with the balance of Maurice Blackburn's fees together with a 25% uplift under s 3.4.28 of the *Legal Profession Act 2004* (Vic) and interest (defined as "the remaining costs") to be paid at the conclusion of the proceeding from any resolution sum).

(c) Third, IMF would pay any adverse costs order made in the proceeding against the lead applicant(s) and/or group members, and provide any security for costs in the proceeding.

(d) Fourth, upon receipt of any settlement or judgment sum in the proceeding, IMF was required to pay the "remaining costs" but was entitled to:

  (i) be reimbursed all amounts it had paid under the First IMF Funding Agreement;

  (ii) a project management fee equal to 20% of the lawyers' estimated costs and disbursements of the proceeding; and

  (iii) a percentage amount of the resolution sum, ranging from 17.5% (for group members who held more than 5 million shares in Allco as at 25 February 2008, and where resolution of the proceeding was achieved before 1 January 2009) up to 40% (for group members who held less than 1 million shares in Allco as at 25 February 2008, and where resolution of the proceeding was achieved after 1 July 2009), with those percentage amounts being increased by 5% for each appeal funded by IMF.

(e) Fifth, IMF would appoint Maurice Blackburn to provide the legal work to the applicant(s) and group members, and IMF would give day-to-day instructions to Maurice Blackburn on all matters concerning the proceeding.

(f) Sixth, there was a dispute resolution mechanism in the event of a dispute between IMF and a group member as to the terms of settlement of the group member's claim.

(g) Seventh, IMF could terminate its obligations under the First IMF Funding Agreement at any time by giving seven days written notice, but in such event IMF would remain liable for any costs incurred up to the date that the termination became effective, and to pay any adverse costs order to the extent that it related to costs incurred prior to the termination becoming effective.

11 In November 2008, voluntary administrators and receivers and managers were appointed to Allco. The creditors of Allco subsequently resolved that Allco be wound up. These events created a great deal of uncertainty as to the prospects of recovery in any representative proceeding on behalf of Allco shareholders.

12 In 2011, IMF proposed to vary the terms on which it would continue to fund the investigation and pursuit of a possible representative proceeding on behalf of Allco shareholders. This was due, in part, to the uncertainty as to prospects of recovery caused by Allco's liquidation, and to the relatively low number of potential group members who had entered into the First IMF Funding Agreement. IMF therefore invited potential group members (including those who had already entered into the First IMF Funding Agreement) to enter into a revised funding agreement with IMF (Second IMF Funding Agreement).

13 In summary, the differences between the First IMF Funding Agreement and the Second IMF Funding Agreement were as follows:

(a) First, IMF would no longer pay the legal costs and disbursements of Maurice Blackburn. Instead, Maurice Blackburn would conduct the proceeding on a "no-win no-fee" basis, but would be entitled to charge interest on its fees together with a 25% uplift on its fees under s 3.4.28 of the *Legal Profession Act*.

(b) Second, IMF would still pay any adverse costs order made in the proceeding against the lead applicant(s) and/or group members, and would provide any security for costs in the proceeding.

(c) Third, IMF's "funding fee" for providing the adverse costs indemnity would be reduced to a flat fee of 22.5% of the resolution sum (to be increased by a further 2.5% in the event that IMF were to provide an adverse costs indemnity for any appeal) and its "project management fee" would be altered to 5% of the actual costs and disbursements of the proceeding (as opposed to a fee of 20% of the estimated costs and disbursements).

14 In 2012, IMF decided to cease funding the investigation and pursuit of a possible representative proceeding on behalf of Allco shareholders. Again, this was due, in part, to the continuing uncertainty as to prospects of recovery referred to above, and to the relatively low number of potential group members who had entered into the Second IMF Funding Agreement. Consequently, in March 2012 IMF formally terminated each of the funding agreements which it had entered into with potential group members.

15 On 26 April 2012, two potential group members, Alan Hewson and Patricia Ann Hewson, filed an originating process in the Federal Court of Australia (NSD 596 of 2012) seeking to obtain access to any insurance policies held by Allco that would respond to the claims in any representative proceeding on behalf of Allco shareholders. That application was ultimately resolved by consent, as a result of which Allco produced to Maurice Blackburn a series of insurance policies with various different insurers having a total value of $150 million and which, prima facie, would respond to the claims in any representative proceeding on behalf of Allco shareholders.

16 In 2013, International Litigation Funding Partners Pty Ltd (ILFP) and Claims Funding Australia Pty Ltd (CFA) jointly agreed to fund this proceeding. However, in early 2014 CFA withdrew from that agreement, and ILFP alone entered into a funding agreement with each of the applicants, which specifically contemplated that a "common fund" application would be made (First ILFP Funding Agreement). The present proceeding was commenced on 8 August 2013.

17 The salient terms of the First ILFP Funding Agreement were as follows:

(a) First, Maurice Blackburn was required to consult with ILFP with regard to any significant issue in the proceeding, to properly consider its views as to the conduct of the proceeding, and to promptly respond to any reasonable request by ILFP for information relating to the proceeding, but nevertheless Maurice Blackburn were retained and instructed by the applicants, and "[ILFP] acknowledges that [Maurice Blackburn's] professional duties are owed to the [applicants] and not to [ILFP]".

(b) Second, the applicants would give binding instructions to Maurice Blackburn and make binding decisions on behalf of group members in relation to the claims of group members.

(c) Third, ILFP was entitled to participate in any settlement discussions and to be consulted as to the terms of any proposed settlement, and in the event of a disagreement between the applicants and ILFP as to the terms of any proposed settlement, the disagreement was to be resolved by senior counsel.

(d) Fourth, ILFP would pay 75% of the legal fees and 100% of the disbursements incurred by the applicants in conducting the proceeding, with the balance of the legal fees to be paid in the event of a successful outcome.

(e) Fifth, ILFP would pay any costs order which the Court made in the proceeding against the applicants insofar as the costs were incurred during the term of the Funding Agreements, and ILFP would also provide any security for the respondents' costs as agreed between the parties or as ordered by the Court.

(f) Sixth, upon receipt of any settlement or judgment sum, ILFP would be entitled to reimbursement of all amounts paid by it. In addition, ILFP would be entitled to a percentage of the "Resolution Sum" (as defined in the Funding Agreements), ranging from 22.5% to 35% depending on the number of shares held by each individual group member and the time at which "Resolution" occurred. In the event that ILFP funded an appeal or appeals from a final judgment in the proceeding, it would be entitled to a further 5% in respect of each appeal so funded. Further, upon receipt of any settlement or judgment sum, the balance would be distributed to the applicants and group members pro rata.

(g) Seventh, ILFP could terminate its obligations under the Funding Agreements at any time by giving 21 days written notice, but in such event ILFP would

remain liable to pay any costs incurred up to the date that the termination became effective, and to pay any adverse costs order to the extent that it related to costs incurred prior to the termination becoming effective. Further, ILFP would forfeit any right to a payment to the percentage of the "Resolution Sum" but would remain entitled to reimbursement of its costs out of any subsequent settlement or judgment proceeds.

(h) Eighth, any disagreement between the applicants and ILFP (other than a dispute as to settlement) was to be resolved in accordance with a stipulated procedure.

18 On 8 May 2014, the applicants filed an interlocutory application seeking orders in the nature of "common fund" orders (common fund application). The common fund application was heard on 15 and 17 December 2014, and judgment was handed down on 7 August 2015, dismissing the application (*Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In liq)* (2015) 325 ALR 539; [2015] FCA 811).

19 Following the dismissal of the common fund application, Maurice Blackburn wrote to each of the group members who had, at that time, registered their contact details with Maurice Blackburn, inviting them to enter into a revised funding agreement with ILFP (Second ILFP Funding Agreement). Save that it contemplated each group member entering into a separate agreement (rather than the applicants entering into the agreement on behalf of all group members, as was the case with the First ILFP Funding Agreement), the terms of the Second ILFP Funding Agreement were materially the same as the terms of the First ILFP Funding Agreement. However, when read together with the accompanying costs agreement between Maurice Blackburn and each of its clients, it was left to Maurice Blackburn and ILFP to determine, depending on the number of group members who ultimately entered into the Second ILFP Funding Agreement, whether ILFP would provide funding for some or all of Maurice Blackburn's professional fees in relation to the conduct of the proceeding, or would provide funding for disbursements only (with Maurice Blackburn's professional fees to be paid on a "successful outcome" as defined in the costs agreement). As events transpired, Maurice Blackburn ultimately agreed with ILFP that under the Second ILFP Funding Agreement, ILFP would provide funding for disbursements only with Maurice Blackburn's professional fees to be paid on a "successful outcome".

20 Of the 1,127 registered group members (RGMs) in this proceeding, 601 (approximately 53%) entered into the Second ILFP Funding Agreement, representing:

(a) 1,793 separate holdings (approximately 66%); and

(b) approximately 63% of the total "damaged" Allco shares of RGMs.

PROCEEDINGS IN LATE 2016 AND THE PROPOSED SETTLEMENT

21 On 1 September 2016, Allco filed an interlocutory application seeking orders in the nature of "class closure" orders. That application was opposed by the applicants and was heard by Wigney J on 2 September 2016. Although his Honour did not make formal orders disposing of the application, his Honour declined to make the "class closure" orders sought by Allco and instead indicated that the "opt out" notice to be sent to group members should invite them to register for the proceeding if they had not already done so, but with no immediate adverse consequences should they fail to do so.

22 On 6 September 2016, Wigney J made orders, inter alia, for the distribution of an opt out notice to group members, and fixed the opt out date as 4.00 pm on 21 October 2016. The orders required, inter alia, that:

(a) a notice be published in two national newspapers;

(b) the opt out notice itself be sent by email to each of the group members who had, at that time, registered their contact details with Maurice Blackburn and for whom Maurice Blackburn held a current email address, and by pre-paid post to all other group members who had, at that time, registered their contact details with Maurice Blackburn; and

(c) the opt out notice be displayed on the website of Maurice Blackburn.

23 On 13 November 2016 (the day before the trial of the proceeding was due to commence) the parties agreed to a settlement of the proceeding subject to, inter alia, the approval of the Court (the proposed settlement). The terms of the proposed settlement were subsequently recorded in the Settlement Deed.

24 The salient terms of the Settlement Deed are the following.

25 Allco and KPMG would pay the total sum of $30 million (defined in the Settlement Deed as the "First Tier Settlement Sum") notionally in settlement of the claims of RGMs, being those persons who, on or prior to 4 November 2016 (being the date of the mediation), had

registered with Maurice Blackburn to participate in the proceeding by providing their contact details and trade data to Maurice Blackburn. As I have said, those persons total 1,127. The First Tier Settlement Sum would be paid within five business days after the expiry of the "Appeal Period" (as defined in the Settlement Deed) (cl 2(b)).

26 A further amount of up to $10 million (defined in the Settlement Deed as the "Second Tier Settlement Sum") would be paid notionally in settlement of the claims of Participating Unregistered Group Members, being those persons who, on or prior to 4 November 2016, had *not* registered with Maurice Blackburn to participate in the proceeding by providing their contact details and trade data to Maurice Blackburn, but who did so prior to the "Expiry Date". The Second Tier Settlement Sum would be paid within sixty days after the "Notification Date", being the date on which Maurice Blackburn provided to Allco and KPMG the registration details of the Participating Unregistered Group Members, or upon resolution of any dispute between the parties relating to those registration details, whichever was the later (cll 2(c) and 8(g)). The "Expiry Date" has been defined as the earlier of: (i) the date that was six months after the Court approved the Settlement Distribution Scheme; and (ii) when registrations of Participating Unregistered Group Members would have the effect, upon payment, of exhausting the Second Tier Settlement Sum (cl 8(e)).

27 Clause 2(d) of the Settlement Deed set out a formula for calculating the Second Tier Settlement Sum, based on the number of "damaged" Allco shares of Participating Unregistered Group Members who registered before the "Expiry Date". It provided that for the purpose of calculating the Second Tier Settlement Sum, the first 500,000 "damaged" Allco shares of Participating Unregistered Group Members (referred to as the "Buffer") would in effect be ignored (ie they were, in effect, taken to be included in the First Tier Settlement Sum). For the purpose of my reasons it is not necessary to elaborate further on the Buffer mechanism or its commercial rationale. The Second Tier Settlement Sum would then be calculated according to the following formula:

T2DS X 20,000,000 / (RGMDS + 500,000)

where:

(a) T2DS is the total number of "damaged" Allco shares of Participating Unregistered Group Members who register before the Expiry Date, less 500,000 (ie the "Buffer");

(b) RGMDS is the total number of "damaged" Allco shares of RGMs being 15,803,327; and

(c) for the above purposes, total "damaged" Allco shares are determined as follows:

(i) for each group member, add the number of Allco shares acquired in the period 21 August 2007 to 10 February 2008, and subtract the number of Allco shares sold in that period (defined in the Settlement Deed as the "Net GM Balance"); and

(ii) add the totals in (i), but excluding any "Net GM Balance" which is less than zero, and any "Net GM Balance" for any related party of Allco.

28 In the above formula, the amount of 20,000,000 was intended to represent the amount of the First Tier Settlement Sum (ie $30 million), less the approximate amount of the applicants' legal costs (ie $10 million). Thus, the formula was broadly designed to calculate the Second Tier Settlement Sum on the basis that Participating Unregistered Group Members (after excluding the "Buffer" people) notionally received the same amount in respect of each "damaged" Allco share (T2DS) as the RGMs would notionally receive out of the First Tier Settlement Sum in respect of each "damaged" Allco share (RGMDS) (after including the "Buffer" people, but after deducting the applicants' legal costs from the First Tier Settlement Sum). That was the commercial rationale, but as will be apparent from my later reasons and the need to implement what I have later described as Option 2, that parity of treatment is no longer possible.

29 Thus, for example, if the total number of damaged Allco shares of Participating Unregistered Group Members who registered before the Expiry Date (and after excluding any Net GM Balance which was less than zero, and any Net GM Balance for any related party of Allco) were 5,000,000, the Second Tier Settlement Sum would be calculated as:

4,500,000 X 20,000,000 / (15,803,327 + 500,000)

= $5.520 million

30 Based on the above formula, the maximum Second Tier Settlement Sum of $10 million would be achieved if the total number of "damaged" Allco shares of Participating Unregistered Group Members who registered before the "Expiry Date" (after excluding any "Net GM Balance" which was less than zero, and any "Net GM Balance" for any related party of Allco) was 8,651,664, or 8,151,664 in excess of the "Buffer".

31 The proposed settlement is conditional on certain orders being made by the Court in conjunction with the approval of the settlement itself (cl 3(d));

32 The Settlement Deed also provided releases between the parties (including Allco's insurers) (cl 1.1 (definition of "Allco Claim"), 2(e), 5 and 6).

33 Let me now address some aspects of the Settlement Distribution Scheme.

34 The Settlement Distribution Scheme sets out the scheme by which it is proposed that the First Tier Settlement Sum and the Second Tier Settlement Sum be distributed. Putting to one side for the moment the Funding Commission mechanism and the common fund order aspect, the structure of the Settlement Distribution Scheme is the following:

(a) Maurice Blackburn will be appointed as administrator of the Settlement Distribution Scheme, and will deposit the Settlement Sum (comprising the First Tier Settlement Sum and the Second Tier Settlement Sum) into an account with an Australian bank, hold the Settlement Sum on trust until it is distributed, and distribute the Settlement Sum plus any interest accrued as expeditiously as possible ((cll 1.1 (definition of "Settlement Distribution Fund"), 2, 3.1 to 3.3)

(b) Maurice Blackburn will provide Allco and KPMG reasonable access to information in respect of the Participating Unregistered Group Members (being those previously unregistered group members who register after 4 November 2016 and before the "Expiry Date"), to enable them to verify the correct amount (if any) of the Second Tier Settlement Sum; any bona fide dispute in that regard will be referred by Maurice Blackburn to the Hon Peter Jacobson QC for final determination (cl 3.4).

(c) Maurice Blackburn will send out to each Registrant (comprising both the Registered Group Members and the Participating Unregistered Group Members) a "Notice of Claim Data" together with a "Participant Declaration", which will set out the trade data held by Maurice Blackburn pertaining to them, and provide each "Registrant" with an opportunity to notify Maurice Blackburn of any amendments to that data (cll 1.1 (definition of "Notice of Claim Data", "Participant Declaration", "Registrant", "Trade Data"), 4.1 to 4.4).

(d) Each "Registrant" must return to Maurice Blackburn, within 21 days, a properly executed "Participant Declaration" in the form of a statutory declaration in order to receive a distribution from the settlement (cll 4.5 to 4.8).

(e) Based on the trade data of each "Participant" (being each "Registrant" who returns a valid "Participant Declaration"), as confirmed by their "Participant Declaration", Maurice Blackburn will calculate the amount of each "Participant's" claim by applying the Loss Assessment Formula set out in Confidential Schedule B to the Settlement Distribution Scheme (cll 1.1 (definition of "First Tier Participant", "Loss Assessment Formula", "Participant", "Second Tier Participant"), 5.1 to 5.2, Confidential Schedule B).

(f) Maurice Blackburn will send out to each "Participant" a "Notice of Estimated Distribution", based on the amount of their claim and the anticipated amount of the "Residual First Tier Settlement Sum" or the "Residual Second Tier Settlement Sum" (as the case may be) (cll 1.1 (definition of "Notice of Estimated Distribution", "Residual First Tier Settlement Sum", "Residual Second Tier Settlement Sum"), 5.3 to 5.4).

(g) Unless a "Participant" within 14 days invokes their right to a review by "Independent Counsel" under cl 6, the "Notice of Estimated Distribution" will be taken to be a "Final Assessment" (cll 1.1 (definition of "Final Assessment", "Independent Counsel"), 5.5 and 6).

(h) Interest earned on the settlement sum will, in the first instance, be applied to payment of the administration costs, with such costs to be calculated at the rates set out in Schedule A to the Settlement Distribution Scheme, and subject to the approval of the Court (cll 1.1 (definition of "Administration Costs") and 7).

(i) Subject to subparagraph (j) below, the Residual First Tier Settlement Sum will be divided pro rata between:

  (i) The First Tier Participants (being those RGMs who return a valid "Participant Declaration"); and

  (ii) The Second Tier Participants (being those Participating Unregistered Group Members who return a valid "Participant Declaration")

representing the first 500,000 “damaged” Allco shares (ie the “Buffer Participants”),

and the Residual Second Tier Settlement Sum will be divided pro rata between the Second Tier Participants (other than the “Buffer Participants”) (cll 1.1 (definition of “Applicants’ Legal Costs”, “Applicants’ Reimbursement Payment”, “Funding Commission”, “Residual First Tier Settlement Sum”, “Residual Second Tier Settlement Sum”, “Residual Settlement Sum”), 8.1, 8.3 to 8.9).

(j) To the extent that the “Applicants’ Legal Costs”, the “Applicants’ Reimbursement Payments” and the “Funding Commission” (together, the “Applicants’ Total Costs and Commission”) represent more than 50% of the Settlement Sum, the “Applicants’ Legal Costs” and the “Funding Commission” will be reduced dollar for dollar until the “Applicants’ Total Costs and Commission” represents no more than 50% of the Settlement Sum (so as to ensure that no less than 50% of the Settlement Sum will be distributed to group members) (cl 8.2). In other words, in totality, the group members will receive in hand at least $20 million of the $40 million. On any view, when one considers the claims, prospects of success and recoverability, this is a substantially advantageous result for group members.

35 For completeness, I should also note the following. A copy of an earlier version of the Settlement Distribution Scheme was uploaded to the website of Maurice Blackburn on 19 December 2016, and has been available for download since that time. As at 18 January 2017 the Settlement Distribution Scheme had been downloaded 248 times. By oversight, the original copy of the Settlement Distribution Scheme that was uploaded to the website of Maurice Blackburn did not include paragraph (b) of the definition of “Group Member” (the effect of which was to exclude from participation in the settlement any person or entity that was a related party of Allco, and which expressly referred to Allco Principals Investments Pty Ltd in that regard). Consequently, an amended version of the Settlement Distribution Scheme, which did include that provision (along with some other minor typographical changes), was uploaded to the website of Maurice Blackburn on 18 January 2017 (at which time the original version of the Settlement Distribution Scheme was removed from the website), and has been available for download since that time. As at 10 February 2017, the amended version of the Settlement Distribution Scheme had been downloaded 57 times.

36 Further, there is a proposed change to the Settlement Distribution Scheme relating to the definitions of "Residual First Tier Settlement Sum" and "Residual Second Tier Settlement Sum". The proposed change to those definitions arises from the fact that the definitions which were proposed in the published versions of the Settlement Distribution Scheme would yield very disparate outcomes in terms of recovery between participants in the First Tier and participants in the Second Tier of the proposed settlement. This has arisen for the following reasons:

(a) First, the formula for the calculation of the Second Tier Settlement Sum was predicated upon all of the (then) estimated costs being deducted from the First Tier Settlement Sum, whereas the published versions of the Settlement Distribution Scheme assumed a pro rata distribution of costs.

(b) Second, as I will later elaborate on, there will be more shares participating in the Second Tier distribution than had been anticipated under the formula on which the Second Tier Settlement Sum was calculated.

37 The proposed definitions in effect deduct the bulk of the "Applicants' Legal Costs" from the First Tier Settlement Sum. Further, this deduction for legal costs is also more consistent with the calculation of the Second Tier Settlement Sum.

PROPOSED COMMON FUND ORDER

38 It will be apparent from the chronology that I have set out earlier that without funding from ILFP (and in particular, the adverse costs indemnity which it provided to the applicants) the proceeding would likely not have been commenced. Maurice Blackburn was not able to identify any potential applicant who was prepared to act in that capacity without an indemnity for adverse costs.

39 As noted above, ILFP initially provided funding pursuant to the First ILFP Funding Agreement entered into by the applicants only. Following the dismissal of the common fund application, ILFP continued to fund the proceeding pursuant to the Second ILFP Funding Agreement. Neither Maurice Blackburn nor ILFP had access to Allco's share register in distributing the Second ILFP Funding Agreement to group members. Accordingly, the opportunity to enter into that agreement was limited to a small subset of the total number of group members.

40 The Second ILFP Funding Agreement provided for each group member who entered into that agreement to pay to ILFP, from their share of the "Resolution Sum", a percentage of that share as follows:

(a) for those group members who held less than 1 million Allco shares:

(i) 25% of the Resolution Sum, if resolution occurred on or by 30 June 2014 (which did not occur);

(ii) 30% of the Resolution Sum, if resolution occurred on or by 30 June 2015 (which also did not occur); and

(iii) 35% of the Resolution Sum, if resolution occurred after 30 June 2015 (which did occur); and

(b) for those group members who held 1 million or more Allco shares:

(i) 22.5% of the Resolution Sum, if resolution occurred on or by 30 June 2014 (which did not occur);

(ii) 27.5% of the Resolution Sum, if resolution occurred on or by 30 June 2015 (which also did not occur); and

(iii) 32.5% of the Resolution Sum, if resolution occurred after 30 June 2015 (which did occur).

41 Several matters should be noted at this point. First, is the various percentages. Second, "Resolution Sum" is defined in terms of *gross* recoveries (not recoveries *net* of legal costs). Third, the definition of "Resolution Sum" is sufficiently broad to include an increment added back (the amount deducted from the unfunded group members which is added back to all group members pro rata) as a result of the application of a funding equalisation mechanism. The relevance for making these observations at this point will become apparent later.

42 Pursuant to the First ILFP Funding Agreement and the Second ILFP Funding Agreement, ILFP *paid* a total of $9,640,513.62 which comprised of a portion of the professional fees payable by the applicants to Maurice Blackburn (totalling $432,002.30), disbursements payable by the applicants to Maurice Blackburn (totalling $1,958,511.32), and amounts paid into Court, totalling $7.25 million, as security for the respondents' costs of the proceeding (pursuant to consent orders made on 22 October 2015 and 20 November 2015). That security comprised of $3.5 million as security for the costs of Allco, $1 million as security for the costs of the second respondent, and $2.75 million as security for the costs of KPMG. Further,

pursuant to those funding agreements, ILFP indemnified the applicants in respect of any adverse costs orders made against them in the proceeding.

43 As I have said, as at the date of entry into the proposed settlement, 1,127 group members representing approximately 66% of the total holdings then registered in the proceeding had signed the Second ILFP Funding Agreement. Those group members who registered their claims online after the proposed settlement, pursuant to the orders of 29 November 2016, were given an opportunity after they had completed the registration to indicate their electronic acceptance of the Second ILFP Funding Agreement and the Maurice Blackburn costs agreement. They were not obliged to do so, and could complete their registration without doing so. Of those who attempted to register, approximately 63% of the total number of holdings registered pursuant to that process indicated acceptance of the Second ILFP Funding Agreement.

44 If the proposed settlement is approved by me (including the amended Settlement Distribution Scheme), Maurice Blackburn has calculated that ILFP would be contractually entitled to receive, by way of commission from those group members who have entered into the Second ILFP Funding Agreement, an amount of approximately $8,999,221.43 (in the absence of any common fund order, funding equalisation mechanism or other similar orders).

45 If a funding equalisation approach were adopted, Maurice Blackburn has calculated that ILFP would be entitled to commission as indicated in the table in the confidential affidavit of Andrew Watson of 15 February 2017 at [45]. This figure is well in excess of $10 million and is explained by a percentage being applied to the incremental add back that I have touched upon at [41] above and elaborated at [99(d)] below if a funding equalisation mechanism was permitted.

46 However, the applicants instead propose that the settlement sum be treated as in the nature of a common fund, and that ILFP be entitled to receive a flat commission of 30% of the *net* settlement sum (ie after deduction of the "Applicants' Legal Costs"), such that all group members (whether funded or unfunded, and irrespective of the number of shares which they held) would pay the same percentage commission. If such a procedure is implemented, ILFP has agreed to waive its contractual entitlement to commission under the Second ILFP Funding Agreements. Further, the amount due to ILFP under the proposed common fund will be less than its contractual entitlement and substantially less than the application of a

funding equalisation approach as explained in the confidential affidavit of Andrew Watson of 15 February 2017.

47 The proposed common fund component is dealt with in the Settlement Distribution Scheme, in particular:

(a) in cl 1.1, where "Funding Commission" is defined as "the amount, payable to ILFP, comprising 30 per cent of the remaining amount of the Settlement Sum after payment of the Applicants' Legal Costs"; and

(b) in cl 8.1, which provides (subject to cl 8.2) that "prior to any distribution from the Settlement Distribution Fund to Participants, the First Tier Settlement Sum and the Second Tier Settlement Sum shall be treated as a common fund" and that, inter alia, the Funding Commission be paid out of the Settlement Distribution Fund.

48 Previous notice has been given to group members of the applicants' intention to apply for a common fund order.

49 First, specific notice of the earlier common fund application was ordered to be, and was, given to group members in accordance with the orders made by Wigney J.

50 Second, the opt out notice that was distributed to group members in accordance with the orders made on 6 September 2016 made explicit reference to the applicants' intention to apply for a common fund order. It stated, inter alia:

> **7. Funding of this Class Action**
>
> For the purpose of funding this class action, the Applicants and some class members have entered into Funding Agreements with ILFP, the terms of which include:
>
> - ILFP will pay part of the costs incurred in conducting the class action (with the balance of those costs to be paid only if there is a successful outcome);
> - ILFP will pay any adverse costs orders which are made in the class action against the Applicants; and
> - at the conclusion of the class action (whether by settlement or judgment), ILFP is entitled to receive, as a first priority out of that person's share of the settlement or judgment amount: (i) reimbursement of that person's share of the amounts paid by ILFP under the Funding Agreements (which includes legal costs and disbursements); and (ii) a commission, being a percentage of that person's share of the settlement or judgment amount, which will vary for each class member depending on how many ordinary shares in [Allco] they held. Specifically, the percentages are:

Number of Shares Held	Resolution on or by 30 June 2014	Resolution on or by 30 June 2015	Resolution after 30 June 2015
< 1,000,000	25%	30%	35%
> or = 1,000,000	22.5%	27.5%	32.5%

[…]

(If you wish to see the full terms of the Funding Agreements, see the section below headed "Where can you obtain copies of relevant documents".)

The Applicants propose to seek orders from the Court which would have the effect that the above funding arrangements will apply to all class members, even if they have not entered into a Funding Agreement with ILFP (Common Fund Orders). The Applicants have previously applied for similar orders. Those orders were opposed by the Respondents and the Federal Court declined to make the orders at that stage of the action. The Applicants propose to make a further application, either in connection with settlement discussions (if they occur), or if a successful outcome is obtained (either by settlement or judgment). The Respondents may or may not oppose the orders at this stage.

If the Court makes Common Fund Orders, all class members who have not opted out of the action will in effect be bound by the funding arrangements and will ultimately be bound to contribute, out of any amount which they become entitled to receive by way of settlement or judgment of their claims, an amount payable to ILFP (including legal costs, disbursements and commission) as if they had agreed to the funding arrangements with ILFP.

It is possible that the court may make no order, or other orders, in respect of funding arrangements. An example of an alternative order is an "equalisation order", which would result in ILFP being paid only the total amount to which it is entitled under the funding arrangements it has actually agreed with class members, but that amount being shared across all class members rather than only those who have entered the funding arrangements.

Class members will <u>not</u> be required to pay any amounts to ILFP (or to Maurice Blackburn) unless and until there is a successful outcome in the class action, whereupon any amounts payable will be deducted from the amount to which each class member is otherwise entitled (but under no circumstances will they exceed that amount). No class member will be 'out-of-pocket' simply by remaining as a class member.

51 Third, the applicants were ordered to, and did, give notice of the present application for settlement approval to group members. That notice also made explicit reference to the applicants' intention to apply for a common fund order. It stated, inter alia:

> As part of the settlement approval, the Applicants also propose to seek orders which would have the effect that the costs of the proceeding be deducted proportionately from the Tier 1 Settlement Amount and the Tier 2 Settlement Amount prior to any distributions to group members, such that all group members bear a proportionate share of those costs. For this purpose, 'costs' includes Maurice Blackburn's legal costs, and also any entitlements of the funder of the proceeding (ILFP) pursuant to funding agreements which it entered into with Registered Group Members and/or

pursuant to orders of the Court via a 'common fund' mechanism.

As advised in previous notices to group members, for the purpose of funding the Allco Class Action, the Applicants and some group members entered into Funding Agreements with ILFP, the terms of which included that:

- ILFP would pay part of the costs incurred in conducting the Allco Class Action (with the balance of those costs to be paid upon a successful outcome);
- ILFP would pay any adverse costs orders which were made in the Allco Class Action; and
- at the conclusion of the Allco Class Action (whether by settlement or judgment), ILFP would be entitled to receive, as a first priority out of that person's share of the settlement or judgment amount: (i) reimbursement of that person's share of the amounts paid by ILFP under the Funding Agreements (which includes legal costs and disbursements); and (ii) a commission, being a percentage of that person's share of the settlement or judgment amount, which would vary for each group member depending on how many shares in [Allco] they held. Relevantly, the percentages were:

Number of Shares Held	Resolution after 30 June 2015
< 1,000,000	35%
> or = 1,000,000	32.5%

(If you wish to see the full terms of the Funding Agreements, you may contact Maurice Blackburn by email or telephone as set out below)

The Applicants propose to seek orders from the Court which would have the effect that the above funding arrangements will apply to all group members who have not opted out of the Allco Class Action and who have registered, or subsequently register, to participate in the proposed settlement (irrespective of whether they have entered into a Funding Agreement with ILFP), but with a reduced funding commission applicable to <u>all group members</u> of **30%** of the net amount remaining after reimbursement of costs (which is a reduction from the amounts set out in the above table, being up to 35% of the gross amount before reimbursement of costs) (**Common Fund Orders**). Assuming costs of approximately $10 million, this would equate to a commission to ILFP of between $6 million (if the Tier 2 Settlement Amount is zero – i.e. ($30m – $10m) x 30%) and $9 million (if the Tier 2 Settlement Amount is $10 million – i.e. ($40m – $10m) x 30%). However, ILFP and Maurice Blackburn have determined to defer part of the commission and legal costs to ensure that the amount available for distribution to group members represents at least 50% of the total settlement sum. Thus, if the Tier 2 Settlement Sum is zero, a maximum of $15 million will be deducted from the Tier 1 Settlement Sum on account of costs and commission. If the Tier 2 Settlement Sum is greater than zero, any costs and commission above $15 million may be deducted, but the total costs and commission will never exceed 50% of the total settlement sum. Full details will be set out in the 'Settlement Distribution Scheme' which, as noted above, can be inspected at the offices of Maurice Blackburn, or a copy will be provided on request.

The Applicants previously applied for similar orders. Those orders were opposed by the Respondents and the Federal Court declined to make the orders at that stage of the Allco Class Action (but did not rule out the possibility of making such orders at a later stage of the action). A copy of the Court's earlier decision is available on the

> website of the Applicants' solicitors (www.mauriceblackburn.com.au/allco).
>
> It is possible that the Court may make no order, or other orders, in respect of funding arrangements. An example of an alternative order is an "equalisation order", which would result in ILFP being paid only the total amount to which it is entitled under the funding arrangements it has actually agreed with group members, but that amount being shared across all group members rather than only those who have entered the funding arrangements.
>
> Whatever orders the Court makes (if any), group members will **not** be required to pay any amounts to ILFP (or to Maurice Blackburn) otherwise than as a deduction from their entitlements under the proposed settlement (and under no circumstances will they exceed those entitlements). Thus, no group member will be 'out-of-pocket' as a result of such orders.
>
> Full details of the proposed common fund mechanism will be set out in the 'Settlement Distribution Scheme' which, as noted above, can be inspected at the offices of Maurice Blackburn, or a copy will be provided on request.

52 It is to be noted that no group member has expressed to Maurice Blackburn any objection to the proposed common fund order in response to the above notice.

OVERALL DISTRIBUTION OF THE SETTLEMENT SUM

53 In summary, in the event that I approve the proposed settlement and the Settlement Distribution Scheme, and on the assumption, which is largely made good, that:

- (a) the Second Tier Settlement Sum is $10 million (and therefore the total Settlement Sum is $40 million);
- (b) the applicants' legal costs are $10.5 million; and
- (c) the costs of administering the proposed settlement are substantially covered by interest earned on the Settlement Sum, thereby effectively cancelling each other out,

it is estimated that the Settlement Sum would be distributed roughly as follows:

	First Tier Settlement Sum	Second Tier Settlement Sum	Total
Amount Available for Distribution	$30 million	$10 million	$40 million
Applicants' Legal Costs	$10.15 m	$0.35 million	$10.5 million
Applicants' Reimbursement Payments	$30,000	$10,000	$40,000
Funder's Commission (30%)	$5.955 million	$2.895 million	$8.85 million
Net Amount Available for Distribution to Group Members	$13.865 million	$6.745 million	$20.61 million

NOTICE OF PROPOSED SETTLEMENT

54 It is appropriate at this point to elaborate on the notification protocols.

55 As the proceeding is an open class proceeding, in order to effectively give notice of the proposed settlement to both RGMs and unregistered group members (UGMs), Maurice Blackburn determined that it would be necessary to identify the universe of UGMs by utilising Allco's register of members. Allco's register of members had, during the relevant period, been maintained by Computershare Investor Services Pty Ltd (Computershare). Subsequent correspondence between Maurice Blackburn and Computershare confirmed that Computershare still held Allco's register of members (despite the fact that Allco had not been listed on the ASX since late 2008), and that it could be restored and produced if required by a subpoena. Accordingly, on 25 November 2016 Wigney J, on the application of the applicants, gave leave for a subpoena to be issued to Computershare for production of "[a]ll documents which disclose the identity, contact and trading details of all persons who, at any time during the period 14 August 2007 to 5 March 2008 (inclusive), held or acquired ordinary shares in [Allco]" (the Computershare Documents).

56 Subsequently, on 29 November 2016 Wigney J made orders for notice of the proposed settlement to be given to group members. In substance, those orders required that:

(a) a separate notice be sent to each RGM (RGM Notice) and to each UGM (UGM Notice). The form of the RGM Notice was as set out in Schedule B to the orders, and the form of the UGM Notice was as set out in Schedule C to the orders; and

(b) an advertisement (in the form set out in Schedule D to the orders) be published once in The Australian and the Australian Financial Review newspapers.

57 Specifically, the orders made on 29 November 2016 provided, inter alia, that:

(a) the various notices were to be given to group members by the date which was 14 days after the applicants obtained access to the Computershare Documents;

(b) within seven days after the applicants obtained access to the Computershare Documents, they were to provide to Allco a list of all persons who, based on those documents, appeared to be UGMs, and the most recent email address and postal address for each such person as disclosed in the Computershare Documents (UGM List);

(c) the applicants were required to send the RGM Notice (together with a covering letter in the form set out in Schedule E to the orders) by email to each RGM for whom Maurice Blackburn held a current email address, and by prepaid post to each RGM for whom Maurice Blackburn did not hold a current email address but did hold a current postal address;

(d) Allco was required to cause Computershare (or one of its related bodies corporate) to send the UGM Notice (together with a covering letter in the form set out in Schedule F to the orders) by email to each UGM for whom the UGM List disclosed an email address, and by prepaid post to each UGM for whom the UGM List did not disclose an email address but did disclose a postal address;

(e) Maurice Blackburn was required to display a copy of both the RGM Notice and the UGM Notice on its website (www.mauriceblackburn.com.au) up to and including 30 June 2017 (together with a copy of the Second Further Amended Originating Application, Second Further Amended Statement of Claim, each respondent's Defence to the Further Amended Statement of Claim, the reasons for judgment of the Court delivered on 7 August 2015 in respect of the common fund application ((2015) 325 ALR 539; [2015] FCA

811), the orders made by the Court on 6 September 2016, and the orders made by the Court on 29 November 2016).

58 On 2 December 2016 Computershare produced, in response to the above subpoena, an excel spreadsheet file, to which Maurice Blackburn obtained access on 6 December 2016, with the result that the various notices were required to be given to group members by 20 December 2016. The file produced by Computershare contained a list of all transactions relating to Allco shares recorded on the Allco register of members in the period set out in the subpoena, including the associated Holder Identification Number (HIN) or Security Reference Number (SRN), holder name, address and email address (if provided). A total of 120,203 transactions were recorded on the spreadsheet.

59 In order to derive from this data the UGM List (ie all persons who appeared to be UGMs, as required by the orders), Maurice Blackburn undertook the following steps:

(a) First, it was apparent on the face of the data that individual holders had, in many instances, made multiple transactions in the period. A de-duplication of the HIN/SRN number field was undertaken, such that each holder was only identified once in the data, producing a list of unique holders who had transacted in the period. This reduced the volume of the data from 120,203 transactions to a list of 33,877 persons who had undertaken transactions in the period.

(b) Second, Maurice Blackburn was able to identify 1,350 holdings or persons in the list who had already registered their claim in the proceeding with Maurice Blackburn, that is, they were RGMs, who would therefore receive an RGM Notice. Those persons were therefore excluded from the data, so as to produce the final UGM List consisting of 32,527 UGMs.

60 Following the finalisation of the UGM List, Maurice Blackburn contacted Webb Henderson on 13 December 2016 to ask whether, for convenience and given the time constraints, Allco had any objection to Maurice Blackburn sending the UGM List to Computershare directly, given that the 29 November 2016 orders provided for Allco to cause Computershare to send out the UGM Notice. Webb Henderson indicated that Allco had no objection to that course.

61 On 14 December 2016, Maurice Blackburn sent an email to Computershare attaching a copy of the final UGM List (together with the documents to be sent to all persons on the UGM

List, being the UGM Notice and the covering letter). Although that email was sent one day later than the seven day period required by the orders, the UGM Notice and covering letter were still able to be, and were, sent to UGMs by the required date.

62 On 15 December 2016, Maurice Blackburn spoke to Computershare and Computershare advised that it "was not really set up" to send emails to individual email addresses with personalised attachments, and that Computershare would not be able to set up this process in time to comply with the 20 December 2016 deadline, but that Computershare would be able to send the UGM Notice to all UGMs by pre-paid post by the deadline. Maurice Blackburn considered that it was important that the UGM Notice be sent to all UGMs by the deadline. In light of the email limitations indicated by Computershare, Maurice Blackburn instructed Computershare to distribute the UGM Notice and covering letter to all UGMs by prepaid post by 20 December 2016.

63 Prior to Computershare sending the UGM Notice and covering letter to UGMs, Maurice Blackburn also identified the following issues:

(a) First, as the UGM Notice was to be sent out shortly before Christmas, Maurice Blackburn considered it important to inform UGMs of Maurice Blackburn's office hours over the Christmas and New Year period. The covering letter to UGMs (as approved in Schedule F to the 29 November 2016 orders) was therefore amended to include the following additional paragraph:

> Please note that the offices of Maurice Blackburn will be closed between 26 December 2016 and 3 January 2017. We will endeavour to respond to any telephone messages or emails received during that period as soon as possible after 3 January 2017.

For the same reason, the covering letter to RGMs (as approved in Schedule E to the 29 November 2016 orders) was also amended to include that additional paragraph.

(b) Second, there were two UGMs in the UGM List who respectively represented (as custodian or adviser) approximately 1,353 and 250 accounts of persons who had acquired Allco shares in the relevant period, and who were set to receive a covering letter and UGM Notice in respect of each such account. The UGM List disclosed, respectively, four and two separate addresses for those two UGMs. Maurice Blackburn formed the view that it would be inefficient and an ineffective manner of communicating the UGM Notice for

those two UGMs to be inundated with collectively 1,603 UGM Notices and covering letters. Accordingly, Maurice Blackburn arranged for a single covering letter and UGM Notice to be sent to those two UGMs at each of the addresses disclosed in the UGM List (being six addresses in total), accompanied by a schedule which identified those accounts associated with them on the UGM List.

64 On 20 December 2016, Computershare sent out to UGMs on the UGM List, by prepaid post, 30,930 covering letters enclosing the UGM Notice. That figure of 30,930 comprised all of the UGMs identified on the final UGM List (32,527), less the 1,603 that were represented by the two UGMs, plus the six that were actually sent to those two UGMs.

65 Also on 20 December 2016 Maurice Blackburn sent out to RGMs covering letters enclosing the RGM Notice. The covering letter and the RGM Notice were sent by email to 887 separate email addresses and by pre-paid post to 169 RGMs. The total figure of 1,056 is less than the total number of 1,127 RGMs referred to above, because in some instances RGMs had nominated their adviser as the relevant contact and, where that adviser had been nominated by more than one client as the relevant contact, they would only be sent one notice (on behalf of all of their clients).

66 On 20 December 2016, an advertisement (in the form set out in Schedule D to the 29 November 2016 orders) was published in both The Australian and the Australian Financial Review newspapers.

67 On 21 December 2016, each of the documents which Maurice Blackburn was required to display under the orders of 29 November 2016 were uploaded onto the website of Maurice Blackburn and those documents have remained there ever since. Maurice Blackburn has undertaken to ensure that those documents remain on the website of Maurice Blackburn until at least 30 June 2017.

RESPONSES FROM GROUP MEMBERS

(a) Participating Unregistered Group Members

68 The response to the UGM Notice, and the speed at which registrations of Participating Unregistered Group Members has taken place, has been unprecedented according to the evidence given by Mr Watson.

69 By 22 December 2016 (ie two days after the UGM Notice was sent out to UGMs), the "Buffer" of 500,000 "damaged" Allco shares of Participating Unregistered Group Members had been reached. Specifically, by that date, 117 UGMs (representing 119 separate holdings) had registered to participate in the proposed settlement, which represented a total of 502,173 "damaged" Allco shares.

70 As at 11.59pm on 8 February 2017, a total of 4,003 UGMs (including the "Buffer Participants") had registered to participate in the proposed settlement, representing a total of 15,995,171 "damaged" Allco shares. That amount is far in excess of the amount of total "damaged" Allco shares of UGMs required to trigger the maximum amount of the Second Tier Settlement Sum of $10 million, which amount was 8,651,664 "damaged" shares. Consequently, if the proposed settlement is approved, on any view the Second Tier Settlement Sum will be $10 million.

71 The UGM Notice advised UGMs that they could register either online via Maurice Blackburn's website or by completing and returning to Maurice Blackburn the hard copy registration form attached to the UGM Notice. Although Maurice Blackburn's offices were closed during the period from 26 December 2016 to 3 January 2017, the opportunity for UGMs to register, by either of the above methods, remained open.

72 In relation to each UGM who has now registered, Maurice Blackburn has maintained a record of the date on which they registered. In relation to those UGMs who registered online, that date is the date on which they completed the online registration process. In relation to those UGMs who registered by completing and returning to Maurice Blackburn the hard copy registration form attached to the UGM Notice, that date is the date on which the registration form was received by Maurice Blackburn.

73 Now let me explain the problem that has occurred. Based on those records, the maximum Second Tier Settlement Sum target of 8,651,664 "damaged" shares was reached at some point on 9 January 2017 (ie approximately three weeks after the UGM Notice was sent out to UGMs). Specifically, as at 11.59 pm on 9 January 2017, a total of 2,075 Participating Unregistered Group Members (representing 2,154 separate holdings) had registered to participate in the proposed settlement, representing total "damaged" Allco shares of 9,284,413. Because registrations occurred both online and by submitting hard copy registration forms, it was impossible to determine the precise intra-day order in which

registrations had occurred, and therefore the precise time on 9 January 2017 at which the maximum Second Tier Settlement Sum target of 8,651,664 "damaged" shares was reached.

74 According to the evidence before me, where a court ordered class closure or registration process has occurred (whether before or after settlement), in no instance has the value of claims registered exceeded 70% of those which had been previously registered with Maurice Blackburn and in some instances the proportion has been significantly less. The Second Tier Settlement Sum target of 8,651,664 was approximately 55% of the number of shares which had previously been registered with Maurice Blackburn. In light of the previous uptake of registrations in this matter, it was not anticipated by Maurice Blackburn that this figure would be exceeded by as much as it has.

75 In light of the foregoing, the Expiry Date for the purposes of the Settlement Deed and the Settlement Distribution Scheme was, to Maurice Blackburn's best estimate, on or about 9 January 2017. Accordingly, registrations by UGMs notionally closed on that day. Nevertheless, Maurice Blackburn has continued to record registrations which occurred after 9 January 2017, notwithstanding that if the proposed settlement and the Settlement Distribution Scheme are approved by me in their current form, those persons may not be entitled to participate in the proposed settlement. As at 11.59 pm on 8 February 2017, a total of 1,928 group members (representing 1,993 separate holdings) had registered *after* 9 January 2017, representing a total of 6,710,758 "damaged" Allco shares (the Late Registrants).

76 Up until 11.59 pm on 8 February 2017, group members with 15,995,171 additional "damaged" Allco shares have registered or attempted to register for participation in the proposed settlement. As indicated above, as a proportion of claims registered prior to the court ordered process (being over 100%) this is unprecedented. Further, the speed at which registrations were made is similarly without precedent. Apparently, it is not what Maurice Blackburn had anticipated when it reached the proposed settlement. To some extent this is evidenced by the fact that the Expiry Date for registration, absent reaching the cap, was 30 June 2017. It is apparent to me that this response is largely because of the use of the share register to contact UGMs directly and also that a settlement had in fact been reached. UGMs were much more likely to respond to notifications when a settlement had been reached, when they could endeavour to share in its fruits, than to earlier notifications. To put it bluntly, they were much more likely to positively identify their interest post-settlement than pre-settlement.

77 On 2 February 2017, Maurice Blackburn wrote to each person who was, as at that date, a Late Registrant in order to disclose the outcome predicated on Maurice Blackburn's estimate, and to provide the Late Registrant sufficient time to raise objection prior to the hearing on 16 February 2017. The letter advised them, inter alia, that:

(a) registrations had notionally closed on 9 January 2017;

(b) their registration had occurred after that date;

(c) as matters presently stood, they would not be entitled to receive any distribution from the Second Tier Settlement Sum;

(d) all aspects of the proposed settlement (including the proposed manner of distribution of the Second Tier Settlement Sum) were subject to Court approval, and the approval hearing was scheduled for 16 February 2017 at 10.15 am in Sydney; and

(e) they were entitled to object to the proposed settlement and/or to attend the hearing on 16 February 2017.

78 Maurice Blackburn also provided the same letter to all Late Registrants who had sought to register after 2 February 2017.

(b) Objections to proposed settlement

79 Maurice Blackburn has received eight written objections to the proposed settlement. Those objections from UGMs in one way or another all complain about the shortness of the time in which to register a claim so that they could participate in the Second Tier Settlement Sum. As indicated above, this was a function of the unprecedented response to the notices sent to UGMs. One also complains that the settlement sums were not pooled for distribution.

80 In addition to these written objections, Maurice Blackburn has received a further approximately 200 telephone calls and emails from UGMs predominantly in response to the 2 February 2017 letter, expressing in various ways disappointment and complaints at not being able to participate in the Second Tier Settlement Sum.

GENERAL PRINCIPLES

81 Section 33V(1) of the Act provides that a representative proceeding may not be settled without the approval of the Court. The central question is whether the proposed settlement is fair and reasonable and in the interests of the group members bound by the settlement,

considered as a whole. That entails consideration of whether the proposed settlement is, first, fair and reasonable as between the applicant (on behalf of the group members) and the respondent, and second, as between the group members inter se. A number of general principles can be distilled from the case law regarding s 33V(1) applications.

82 First, there is no single way in which a settlement should be framed, either as between the applicant/group members and the respondents (inter partes) or in relation to sharing the compensation as between group members (intra-group). Reasonableness is a range. The question is whether the proposed settlement and scheme fall within that range.

83 Second, the Court's role is not to second-guess the strategic decisions made by the applicant's legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of potential decisions, having regard to the circumstances which are known by and reasonably knowable to the applicant and its legal representatives, and that there has been a reasonable assessment of the relevant risks based on such circumstances.

84 Third, there is no definitive set of factors that must or may be taken into account in approving a settlement. But factors relevant to an assessment of the reasonableness of a proposed settlement include:

(a) the complexity and duration of the litigation;

(b) the stage of the proceedings;

(c) the risks of establishing liability, establishing damages, and maintaining the class action;

(d) the ability of the respondent to withstand a greater judgment than the prospective settlement sum;

(e) relatedly, the range of reasonableness of the settlement in light of the best recovery;

(f) the range of reasonableness of the settlement in light of all the risks of litigation; and

(g) the reaction of the class to the settlement.

85 Fourth, in relation to the fairness of the settlement as between group members, it must be ensured that the interests of the representative party, the signed-up clients of the solicitors, and any litigation funder are not being preferred over the interests of other group members, absent strong and compelling reason(s) for any such preferential treatment. Any distribution

scheme should achieve a fair and equitable division of the proceeds. In that regard the following may be noted:

(a) First, an important consideration will be whether group members were given timely notice of the essential elements, so that they have had an opportunity to take steps to protect their own position if they wished.

(b) Second, once appropriate notice has been given, the absence of objections or other response action from group members may be a relevant consideration in support of the settlement.

86 In my view, the overall settlement sum is fair and reasonable as between the applicants and group members on the one hand and the respondents on the other. It fairly reflects the strengths of the causes of actions and the realistic damages that could be awarded. This conclusion can be reached whether one aggregates the First Tier Settlement Sum with the Second Tier Settlement Sum or treats them separately. Moreover, the contributions of the separate respondents to the separate sums, the details of which are confidential, are also fair and reasonable. I have considered the thoughtful opinion of senior counsel and junior counsel for the applicants which discusses in detail the relevant factors and risks to be considered in support of the settlement sum(s). I have no reason to doubt the thoroughness, accuracy and sophistication of their analysis.

87 The difficulties in the present case have not concerned the fairness and reasonableness of the overall settlement sum or its division into two pools. Rather, the concerns relate to the deductions and allocations to be made to group members, particularly in relation to:

(a) the common fund order sought; and

(b) the Second Tier Settlement Sum and who should share therein.

88 KPMG contended that notwithstanding concerns relating to the Settlement Distribution Scheme, nevertheless such issues would not preclude me from separately approving the settlement embodied in the Settlement Deed. But I consider that to be artificial and notwithstanding cl 3(h) of that Deed. The best interests of the group members require me to consider and approve (or not approve) both aspects together.

89 Before discussing the two principal issues (and also a separate issue concerning legal costs), I should say the following concerning other matters that have been raised:

(a) First, I have no difficulty with the suitability of the Loss Assessment Formula, being confidential schedule B to the Settlement Distribution Scheme. It is entirely reasonable.

(b) Second, the relatively small deductions proposed for the time and effort of Mr Waddell ($20,000) and Mr Flitcroft ($20,000) are fair and modest. I have allowed such deductions in other cases and these are of a similar and appropriate order of magnitude.

(c) Third, there have been a number of objections from group members, but these have not concerned the overall settlement but rather in large part such group members being excluded from claiming in the Second Tier Settlement Sum or, in one case, the division into separate pools. In a later section of my reasons I have discussed UGMs and my proposal to adopt what I have described as "Option 2". This removes the foundation for most of these objections. The objection raised concerning the separate pools is a matter that I have considered but ultimately rejected. Indeed, if I was to now seek to aggregate the separate pools, substantial surgery to the Settlement Deed and the Settlement Distribution Scheme would be required, such that my only practical option would be to not approve the settlement. That would create substantial prejudice to group members that is not justifiable.

(d) Fourth, for the reasons explained in the evidence of Mr Watson, there are two group members that ought to be treated as RGMs and I will so order.

(e) Fifth, the current definition of "Group Member" in the Settlement Distribution Scheme that I am approving excludes Allco Principals Investments Pty Ltd, a related party of Allco. For the reasons given by Mr Watson in his confidential affidavit of 15 February 2017 at [9] to [15], this is appropriate. In any event, applying the Loss Assessment Formula to its claim indicates that no prejudice would be caused to it. Further, that entity has been given an opportunity to object to the settlement, but has not availed itself of that opportunity.

90 Let me now turn to the two principal issues. I should say that I have considered whether to appoint counsel as amicus curiae to assist me on these questions, but ultimately decided that the cost and delay involved would outweigh the potential benefits.

COMMON FUND ORDER

(a) Introduction

91 The Settlement Distribution Scheme makes provision for a funding commission to be paid to ILFP at the rate of 30% on the *net* settlement sum(s) (which is less than the 32.5% / 35% on the gross settlement sums payable under the Second ILFP Funding Agreements). There are two advantages readily apparent. The percentage rate is lower. Moreover, the rate is applied to the net recoveries (net of costs) rather than gross recoveries.

92 The Settlement Distribution Scheme incorporates a common fund regime such that all group members who stand to benefit from the proceeding bear a pro rata share of the reimbursement payments, the administration costs and the funding commission.

93 A common fund order was sought relatively early in these proceedings, though the Court found that it was then premature and ought properly be considered at a later stage of the proceedings when the facts were fully known (*Blairgowrie Trading Ltd v Allco Finance Group Ltd* (2015) 325 ALR 539; [2015] FCA 811 at [7]). The common fund order now sought is in the context of a s 33V settlement scheme, and does not adopt the form or structure put forward at the earlier point in time. Moreover, since that time, the Full Court has considered the appropriateness of orders of this kind in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 338 ALR 188; [2016] FCAFC 148. The power to make such an order in the present case is particularly reinforced by the operation of s 33V(2) as well as s 33ZF.

94 In relation to notification, each notice sent to group members since the original application for the common fund order has referred to the applicants' intention to seek such an order. This is not unimportant. If group members had not been given fair and early notice of the basis upon which it might later be suggested that they ought bear the costs of funding the proceeding, then it may well be unfair at the settlement stage to impose an arrangement of this kind rather than a funding equalisation mechanism. But that is not the present case.

95 I propose to indirectly make the common fund order sought by approving the Settlement Distribution Scheme. But before discussing my specific reasons, there are some general questions that need to be addressed, which it is convenient to discuss in the next two sections.

(b) Perceived problems with common fund orders

96 Since *Money Max*, there has been much commentary concerning common fund orders and whether they can or should be made. Given that I am essentially asked to make a common fund order and, as part of that task, to approve or set a commission rate, it is convenient to address some of the points raised. My observations should be seen as an addition to the Full Court's discussion of these questions.

Funding equalisation mechanisms

97 Some recent jurisprudence has adopted funding equalisation mechanisms. Some commentators seem to suggest that such mechanisms should be preferred to common fund orders. There are a number of difficulties with that position.

98 First, if one is considering an open class with a common fund order sought at or shortly after the inception of the proceeding, with few (if any) group members signed up to funding agreements, the context for discussing and applying a funding equalisation mechanism may simply not exist. And this is not just a temporal phenomenon in and for that case, for if a common fund order is made in such a case then there will not later arise an occasion for considering a funding equalisation mechanism. The idea of seeking and making a common fund order at or close to inception is to foreclose the need for subsequent book building with group members signed up to funding agreements; the hypothetical counterfactual simply will not arise.

99 Second, let us assume another scenario where a substantial number of group members have signed funding agreements and the issue down the track is whether a funding equalisation mechanism ought to be applied in preference to a common fund order. There will be a number of variables to consider including the following:

(a) One will need to consider the percentage of group members who have signed funding agreements as compared with the percentage of group members who have not.

(b) One will need to consider the percentage commission rate posited for the common fund order as compared with the percentage commission rate(s) stipulated in the funding agreements, and whether the rate in each case is on the net settlement sum or gross settlement sum.

(c) One may have to assume, in relation to the funding agreements, that a judge, say on a s 33V application, could not in effect modify the rate set or its payment as part of *approving* the settlement (as distinct from not approving the settlement if the commission rate is unacceptable). Judges who have applied funding equalisation mechanisms seem to have assumed this. The assumption is questionable, as I will discuss shortly.

(d) One would have to consider whether, if a funding equalisation mechanism was used, the funder would receive a greater share in any event. When a percentage amount is deducted from the unfunded group members and added back pro rata across all group members, that incrementally increases the recoveries for the funded group members. Litigation funders may then assert that they are contractually entitled to an additional amount (ie a percentage on the incremental amount). The Full Court in *Money Max* considered the prospect that, under contract, the funder could say to a funded group member that if the group member received an additional increment arising from a funding equalisation mechanism (a pro rata part of the deduction from the unfunded group members added over all funded and unfunded group members), the increment itself would be part of the "recoveries" of the funded group member on which the percentage commission rate would be payable. The Full Court was told that in all cases where a funding equalisation mechanism had been applied, the funder had also obtained a percentage of the increment added back to the recoveries of funded group members. It is not clear to me whether judges who applied such mechanisms were aware of this. Their reasons do not expressly say so. Moreover, from the arithmetic applied in those cases, it seems implicit that they may not have been so aware. I only raise this for present consideration because it is an aspect that I have had to consider in the present case.

100 As best as I can tell, where funding equalisation mechanisms have been applied, the rates (and bases) in either scenario referred to in point (b) have been the same, point (c) has been assumed and point (d) has not been considered; and as a result, point (a) has been made irrelevant. But in the case before me, the rates (and bases) referred to in (b) are different, point (c) is not assumed and I have had to consider point (d). That has also meant that point (a) has come into play.

101 Let me say something further about point (c). If it is necessary to say so, I consider that as part of any approval order under s 33V, I have power in effect to modify any contractual bargain dealing with the funding commission payable out of any settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather, it is an exercise of power under s 33V(2); for present purposes it is not necessary to invoke s 33ZF. I am empowered to make "such orders as are just with respect to the distribution of any money paid under a settlement". If I make an order that out of monies paid by a respondent, a lesser percentage than that set out in a funding agreement is to be paid to a funder, that is an exercise of statutory power which overrides the otherwise contractual entitlement. That is not an unusual scenario in many and varying contexts. It might also be said that the funding agreement itself contains an implied term reflecting this override in any event; the parties would be contracting in the known setting that the funder's percentage commission entitlement would only operate on a settlement sum if the necessary condition of Court approval had first been given.

102 Finally, it ought not to be forgotten that a funding equalisation mechanism was first introduced as an ad hoc innovation posited by practitioners seeking to expediently resolve a practical problem that had arisen in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19. It did not arise through extensive judicial evolution and exposition. No doubt where judges have applied it, they have done so conveniently and correctly in the contexts with which they were presented. But to so accept does not justify the suggestion that the mechanism is somehow to be timelessly preserved and suitable for all occasions.

The Full Court's rider in Money Max

103 Some commentators have asserted that the rider in *Money Max* (ie that group members should be no worse off than if a common fund order was not made) entailed that the result in that case could in effect be equated with a funding equalisation mechanism. So the question has been posed, "What is the difference?". There are a number of difficulties underpinning this question.

104 First, the rider was "no worse off". In other words, the rider was a floor on the downside risk for group members. The rider permitted of the situation that the group members with a common fund order could do *better* than a funding equalisation mechanism (or any other relevant counterfactual (I will explain what I mean by this in a moment)), which in fact is the case before me. In the case before me, the group members will do better than a funding

equalisation mechanism. This arises as a function of three different but interrelated elements. The common fund order commission rate is less than the fixed rates in the currently signed funding agreements and the bases are different. Further, the arithmetic supporting the principal conclusion is driven by the actual ratio of funded to unfunded group members' shares; for an explanation of what is meant by this, see the discussion in *Money Max* at [55] to [60] where the point is exemplified by some hypothetical examples. Further, the current funding agreements have the perceived vice set out earlier, which is that if a funding equalisation mechanism were to be used, the commission rates payable by the funded group members would also be applied to the *incremental* amounts added back to their share from the unfunded group members (enhancements to their "recoveries" which themselves are "recoveries") by operation of such a mechanism.

105 Second, the rider in some cases may not even use the counterfactual of a funding equalisation mechanism. The Full Court in *Money Max* left open this possibility (see at [98], [103] and [127] to [129]). In some cases where a common fund order is sought and granted close to the inception of the proceeding and where there is no book building through group members being signed up to funding agreements, discussion of any funding equalisation mechanism may be inapposite. Indeed, the rider itself might be unnecessary or otiose as there may not be a relevant or useful comparator. The rider stipulated in *Money Max* should not be decontextualized. It was discussed and stipulated in the context where a substantial number of group members had signed up to funding agreements and the respondent had asserted that if a funding equalisation order was made, group members would be better off than if the common fund order proposed in that case was made.

106 Third, let me take the question that has been posed and with which I started, "What is the difference?". What dimension of "difference" is being referred to? Let me make an assumption in favour of the proponents of their question that with the *Money Max* rider, the calculations result in the same arithmetic end point such that in total, group members have deducted from their shares an amount to be disbursed to the funder that is the same whether one is dealing with a common fund order (with the rider) on the one hand, or a funding equalisation mechanism on the other hand. So, the assumption in favour of the proponents is that for group members, the financial result is the same. But there is a difference of a different dimension. With a common fund order and the associated open class, there is enhanced access to justice. Further, the funder does not need to book build. Further, and as a consequence, the institution of proceedings may be accelerated, although this consequence is

not free of problematic features including any "race to the palace" between potential rival litigants including their lawyers and funders, although the problem with competing class actions is likely to be diminished. In other words, the question "What is the difference?" conceals the enthymematic infelicity of a foundation predicated on only considering *financial* differences. In any event, the financial foundation of identical outcome is flawed for the other reasons that I have given above.

A constitutional question?

107 It has been suggested that the making or implementation of a common fund order may amount to an acquisition of property otherwise than on just terms; this is as a consequence of group members, without their consent, having a commission amount payable to the funder deducted from their share of any settlement sum or damages. There are three preliminary points before proceeding further. This argument was not persisted with before the Full Court in *Money Max*. Further, an analogous argument was disposed of in *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 at [72] to [81] before the judgment in *Money Max* was handed down. Further, the proponents of this argument have, rather inconsistently, not suggested that a compulsory deduction from an unfunded group member under a funding equalisation mechanism of their share in any settlement raises similar perceived concerns; the add back does not fully or largely restore such a member.

108 Will the common fund order impermissibly trespass on the operation of s 51(xxxi) of the Constitution being the so-called guarantee implied in the phrase "[t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws"? Does such an order as it applies to group members effect an impermissible "acquisition" otherwise than on "just terms"?

109 First, it can be accepted that the claim or cause of action of a group member and the group member's entitlement to the proceeds of any settlement or damages is "property" as encompassed by s 51(xxxi) (*Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 and 304 per Mason CJ, Deane and Gaudron JJ and at 311 and 312 per Brennan J).

110 Second, let it also be accepted that a common fund order constitutes an "acquisition" as encompassed by s 51(xxxi), putting to one side for the moment the identity of the acquirer. It would be a triumph of form over substance to suggest otherwise (*Georgiadis* at 305).

111 Third, the "acquirer" is not the Commonwealth or any of its authorities or agencies. But this does not matter in and of itself (see *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 165 per Dawson J). I will proceed on the basis that the identity of the acquirer not being the Commonwealth is no impediment to the operation of s 51(xxxi) save for the qualification that the identity of the acquirer may be relevant to the *purpose* of the acquisition and to the question of whether it is a "purpose in respect of which the Parliament has power to make laws".

112 But once one proceeds beyond the satisfaction of these foundational elements of the argument, the so-called constitutional impediment becomes illusory.

113 First, the present context, being the making of a common fund order, is an exercise of judicial power rather than legislative power. Now no doubt it is impermissible for the legislature to confer power on the Court to do indirectly what it could not do directly. But nothing in Part IVA generally or ss 33V and 33ZF specifically could be so described.

114 Second, I need do little more than refer again to *Georgiadis* at 306 and 307 per Mason CJ, Deane and Gaudron JJ where it was said:

> Not every Commonwealth law with respect to the acquisition of property falls within s 51(xxxi) of the Constitution. It may be outside that paragraph because, although it effects an acquisition of property, it is a law of a kind that is clearly within some other head of legislative power. That is the case with a law imposing taxation or a law providing for the sequestration of the estate of a bankrupt. Or it may be outside s 51(xxxi) because it effects an acquisition of a kind that does not permit of just terms, as in the case of a law imposing a penalty by way of forfeiture. And, it may fall outside s 51(xxxi) because it cannot fairly be characterized as a law for the acquisition of property for a purpose in respect of which the Parliament has power to make laws. That will generally be the case with laws directed to resolving competing claims or providing for "the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest". (footnotes omitted)

115 And if this is not sufficient, to this may be added what was said in *Nintendo* in the joint reasons at 161:

> The cases also establish that a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution. The Act is a law of that nature. It cannot properly, either in whole or in part, be characterised as a law with respect to the acquisition of property for the purposes of that section. Its relevant character is that of a law for the adjustment and regulation of the competing claims, rights and liabilities of the designers or first makers of original circuit layouts

> and those who take advantage of, or benefit from, their work. Consequently, it is beyond the reach of s 51(xxxi)'s guarantee of just terms. (footnotes omitted)

116 The point is that Part IVA and the provisions that I am acting under are not properly characterised as a law with respect to the acquisition of property. At most, what I may have before me are laws conferring statutory power which are "appropriate and adapted to the achievement of an objective falling within another head of power where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed" (*Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (1994) 179 CLR 155 at 179 per Brennan J). But even then, such a concession is too generous. In the present context, there is no "necessary or characteristic" feature as such in any event. Generally, the laws that I am considering are not directed to the acquisition of property at all (see *Mutual Pools* at 170 to 172 per Mason CJ).

117 But in any event, I would consider that "just terms" have been provided. First, group members have had an opportunity to opt out and pursue their own claims elsewhere. Second, for those that have not opted out, the commission to be deducted is fair consideration for the services provided by the funder and the risk that it undertook, as I will explain later. Generally, it is difficult to see how the price paid by a group member for staying in the proceeding (namely a reasonable commission, which reasonableness is to be assumed on this hypothesis, and which commission is only to be paid and deducted from a settlement sum or damages), which proceeding would have been uneconomic for them to take separately or could not be taken by them, could be anything other than on just terms. For completeness, if the commission was not reasonable, then the constitutional issue would not arise as there would either be an absence of power or the power would not be exercised.

Fixing commission rates

118 It has been suggested that a Court cannot or should not fix a commission rate.

119 In my view the Court has power, as part of making a common fund order, to fix a commission rate as part of that order. The ambit of ss 33V and 33ZF in the context of a settlement, as discussed in *Money Max*, is sufficiently broad. More generally, if a Court has the power to make a common fund order, fixing a commission rate at the appropriate time and on appropriate material is a necessary corollary thereof.

120 Whether a Court should set a commission rate and the rate to be used is largely a forensic question depending upon the material available to the judge at the time the order is sought. It

is not to be determined by some value laden proposition clothed in the language that it is not a suitable issue for the exercise of judicial power. After all, judges set legal costs by scales, rates, individual amounts and total or capped amounts, whether ex ante or ex post; a commission or funding rate may be seen as a relevant analogue. Further, some judges in fixing the remuneration of external insolvency practitioners also readily engage in such exercises, including ex ante or ex post rates of remuneration. In other contexts, judges have set rates of remuneration for trustees administering trust assets. In yet other contexts, judges set discount rates on some aspects of common law damages. They may also set interest rates less than statutory interest rate entitlements. In general, the question is not whether the rate setting for a common fund order is a suitable subject matter for the exercise of judicial power. Rather, the question is whether, in a particular case, a judge is in a position to or should set a rate by the application of the appropriate judicial method tailored to the circumstances of the individual case.

121 And once one appreciates that perspective, the answer to the question of whether a judge should set a commission rate depends upon the forensic context and the adequacy of the information provided. And as with other contexts, such as damages assessments including the value of lost opportunities, the judge has to do the best he or she can on the evidence available, albeit incomplete or imperfect. Moreover, the fact that the question may in part be evaluative and one upon which reasonable minds might differ is no bar to engaging in the task.

122 Yet another argument suggests that the judge ought not be the market setter. But the judge is not setting a market rate, but rather a rate referable to the individual circumstances of the particular case before him or her. But the rate set may be contextually informed by an actual or putative market rate, including reference to rates in foreign jurisdictions, particularly where demand side or supply side substitutability is not necessarily confined by geographic limitations. The rate set may also be informed by the risks faced by litigation funders in investing in litigation generally, not just the case in question, which may also be affected by whether a funder has a diversified spread of litigation investments and not a small pool of such investments thereby producing overall higher risk for the undiversified funder. In other words, what is the equity beta for funders locally or globally? And consequently, what is the rate of return on equity that a funder locally or globally might reasonably expect given the level of risk for such a business, ie funding litigation? And is the funder earning disproportionate returns? If so, that may indicate that there is no true “price” competition in

the litigation funding market and that the commission rates are higher than what a workably competitive market might be expected to deliver. Now these are all interesting questions. And no doubt a judge is not in a position to investigate such questions in any detail. But a review of the financial accounts of the funder and other funders, as I have done in the present case, might quickly allay concerns that standard commission rates are somehow producing rates of return on equity so outside a reasonable range such as to cast doubt on whether standard commission rates should be used as a benchmark or at least for a contextual check. But if the judge's concerns are not allayed, all that means is that the judge might put to one side standard or putative market rates as a benchmark and set a rate based only on evidence concerning the case before him. In other words, it is no argument for not setting a rate at all, but rather it may justify putting to one side putative market rates or comparable data.

123 Finally, it has been suggested that the Court should not set a rate, but leave it to the party(s) to posit a rate that the judge can then approve. But say the judge considers the rate to be too high. Is there sense in a judge not approving a rate until such time when the notional bid falls to a level that the judge would then approve? To say that such an exercise is not the setting of a rate is to nurture form over substance. Perhaps it is being said that the judge should approve the rate when it falls within a reasonable range. But if that is the contention, the proposition fails for another reason. If the Court's task under Part IVA is to consider the best interests of the group members, then consistently with that objective, it should be setting an actual rate rather than merely approving a rate within a reasonable range, which latter rate may be higher than that which the judge might set if he or she was fixing the rate.

(c) Comparative Analysis

Overview

124 Before dealing with the particular case before me and the suitability of a common fund order, it is not unhelpful to make a comparative analysis of funding commissions in Australia and certain foreign jurisdictions. Under the proposed settlement, a common fund with a 30% funding commission on the net settlement sum (ie after deduction of costs) is proposed. This would result in ILFP receiving a funding commission of approximately $8.85 million, or approximately 22.1% of the gross settlement sum of $40 million. Funding commission and contingency fee percentages are generally expressed as a percentage of the gross settlement sum. Accordingly, for present purposes, the appropriate comparator (to the extent that any comparison can be made) is the figure of 22.1%, rather than the figure of 30%.

Australia

125 It is usual for a litigation funding agreement to provide for the funder to receive, upon resolution of the proceeding (whether by way of settlement or judgment), reimbursement of all costs and expenses which the funder has paid, plus a percentage of the resolution sum (usually now defined as the gross resolution sum, inclusive of costs). That percentage varies from case to case, but is most commonly in the range of 25% to 45%. The proposed, in essence, 22.1% rate compares favourably with the usual range.

126 In securities class actions specifically, it is relatively common to have differing commission rates based on both the time of resolution (with lower percentages for earlier resolution) and the number of eligible shares of the claimant (with lower percentages for greater volumes of eligible shares). Rates of commission will vary from case to case, but retail investors most commonly pay a figure of around 35%, whilst institutional investors most commonly pay a figure of around 30% of the gross resolution sum.

127 In addition, it is not uncommon for litigation funders to charge a "project management fee", usually calculated as a percentage of the costs paid by the funder. These fees can be substantial. Some agreements provide for a project management fee of 20% of the costs paid (which include not just legal fees but also other costs, such as amounts associated with the provision of security). But ILFP does not charge such fees, which is commendable.

128 Further, some funders (usually UK-based), who provide funding in Australia, do so on terms which provide for the receipt of either a percentage funding commission or a multiple (usually three times) of the funder's investment (which usually includes legal costs and the costs of obtaining "after-the-event" insurance), whichever is the greater. After-the-event insurance is usually procured after the event giving rise to the claim has occurred and generally covers the applicant's lawyers' disbursements and exposure to the risk of an adverse costs order. I should say that requiring a return of a multiple of the funder's investment can lead to very large proportions of a settlement sum being paid to the funder, particularly in cases where costs represent a substantial proportion of the settlement sum. This may produce an undesirable multiplier effect.

129 Murphy J in *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 at [166] to [177] set out a useful discussion of funding commission rates in Australia. I have also had regard to some of the publicly available material which he has referenced, particularly the following:

(a) The Productivity Commission in *Productivity Commission Inquiry Report, Access to Justice Arrangements, Volume 2* (No 72, 5 September 2014) at page 608, discussed the Australian market in the following terms:

> The Australian market has operated for two decades. Initially funding only insolvency cases, litigation funders gradually expanded into funding large commercial claims and class actions. The first involvement by a third party funder in a class action in Australia occurred in 2001 when Insolvency Litigation Fund Pty Ltd (a subsidiary of Bentham IMF) funded an industrial dispute relating to the termination of waterfront worker contracts. Morabito (2010) identified a further 17 third party funded class actions in subsequent years.
>
> A small number of well-established firms operate in the local market. Two are listed on the Australian Securities Exchange: Australia's largest funder, Bentham IMF Ltd, and Hillcrest Litigation Services Limited (HLS). Other funders in the market include LCM Litigation Fund Pty Ltd and Litigation Lending Services Pty Ltd. Several Australian funders have invested in litigation overseas, and international litigation funders have also entered the Australian market in recent years including Comprehensive Legal Funding LLC, International Litigation Funding Partners Pte Ltd and Quantum Litigation Funding Pty Ltd (Grave et al. 2012).

(b) Dr George Barker in "Third Party Litigation Funding in Australia and Europe" (Working Paper No 2, Centre for Law and Economics, ANU College of Law, December 2011) stated at page 30:

> In 2006, the Law Council was advised that [litigation funding companies] usually charge between 15 and 40% of an award or settlement. In 2010, IMF, Quantum and Litigation Lending Services Pty Ltd (LLS) all typically charged commissions that ranged between 25 and 40% of net litigation proceeds; although IMF also charged 'project management fees', "calculated as 25% uplift on its actual out of pocket expenses." CLF typically charged a commission of between 25 and 35% of net litigation proceeds, but did not charge a project management fee. Currently, commissions appear to range between 20 and 45%.

(c) IMF stated in its "Submission to the Productivity Commission: Access to Justice Arrangements" (18 November 2013) at [1.10]:

> In return for IMF's promise of funding, claimants assign to IMF a share of any damages of settlement proceeds that are recovered from the opposing parties to their claims. The assignment includes reimbursement of all amounts IMF has paid, a project management fee (which is a percentage of the legal budget) and a percentage of the recoveries (typically in a range of 25 – 40% depending on claim size, resolution sum, expected duration to resolution and risks undertaken). IMF is paid nothing if the claims are unsuccessful (and, in fact, will likely have to pay a substantial adverse costs order).

United Kingdom

130 Comparisons between commission rates charged by litigation funders in the UK and those charged in Australia are difficult. There is a dearth of information regarding generally prevailing rates in the UK.

131 The Law Society of England and Wales publishes a quarterly magazine titled "Litigation Funding". That magazine's December 2016 issue provides a comparison of a number of litigation funders' offerings in that jurisdiction. A significant number of funders' commissions are calculated as a multiple of the funder's outlays, and most funders do not specify a range either for percentage commission or for the multiple of the funder's outlays. Claims Funding Europe Ltd (CFE) (which is a joint venture between ILFP and Claims Funding International Ltd, a vehicle whose economic interests are owned by Maurice Blackburn) specifies a range of between 25% and 40%. Acasta Europe Ltd / Sparkle Capital evidently charges 20% of net returns in some cases, and 1st Class Legal Litigation Funding says that it charges on the basis of a multiple, which is usually between 25% and 45% of the award.

132 Andrew Watson gave evidence before me that on a small number of occasions he had sought to negotiate funding terms with UK-based litigation funders for Australian class actions. In each instance the different funders initially sought funding terms (which they characterised as their standard terms) which ensured a return of whichever was the greater of a commission rate of 30% of the gross resolution sum, or three times the funder's investment (including legal costs and the costs of after-the-event insurance).

Canada

133 It is difficult to make any direct comparison between litigation funding commission rates charged in Australia and those charged in Canada primarily because of the following matters:

(a) First, in most forms of litigation in Canada (including class actions), lawyers are permitted to and invariably do, in class actions, charge contingency fees.

(b) Second and accordingly, there is little if any demand in class actions for litigation funding to pay for lawyers' fees. The only demand for litigation funding is, generally, to provide cover for adverse costs orders and in some instances disbursements.

134 In Ontario, for example, the *Solicitors Act* RSO 1990 c S.15 permits lawyers to charge a contingency fee, calculated as a percentage of the amount or value of the property recovered in an action or proceeding (s 28.1). In the context of class actions, that percentage is subject to the approval of the Superior Court of Justice under s 32(2) of the *Class Proceedings Act* SO 1992 c 6. The contingency fee charged by lawyers in class action proceedings in Ontario, and approved by the Court, is often 25% of the gross resolution sum, but in some cases can be higher. The Ontario Superior Court of Justice in *Cannon v Funds for Canada Foundation* 2013 ONSC 7686 considered contingency fee rates in class action proceedings in Ontario, and in that case approved a contingency fee of one-third of the gross settlement sum.

135 Further, there is a statutory fund in Ontario (established under the *Law Society Act* RSO 1990 c L.8 (ss 59.1 to 59.5)) named the "Class Proceedings Fund", which in selected class action cases provides, to some extent, funding for disbursements, and provides protection to a representative plaintiff for adverse costs liability. If the representative plaintiff receives a judgment award or a settlement sum, they must repay any amount of financial support that has been received from the fund and pay a 10% share of the amount of the judgment or settlement sum.

136 As a result of these matters, private litigation funding for class actions in Ontario is limited to those comparatively few cases where the litigation funder assesses the risks as warranting a commission rate less than that offered by the Class Proceedings Fund.

137 The Ontario Superior Court of Justice has approved the following commission rates payable to litigation funders in class actions:

(a) In *Dugal v Menulife Financial Corp* (2011) 105 OR (3d) 364; 2011 ONSC 1785, the Court approved a funding agreement in which the funder agreed to pay any adverse costs orders, plus an amount of $50,000 towards the plaintiffs' disbursements, in return for a commission of 7% of the net settlement sum after deduction of the lawyers' fees and disbursements and administration expenses (subject to a cap on the commission of $5 million if resolution occurred prior to the filing of the plaintiffs' pre-trial conference brief, and $10 million if resolution occurred after that time). This approval was subject to the funder paying security for the defendant's costs. The funder ultimately undertook to give security for costs and so the Court gave its approval in *Dugal v Menulife Financial Corp* 2011 ONSC 3147.

(b) In *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation* 2012 ONSC 2937, the funder agreed to pay any adverse costs orders, plus an amount of $50,000 towards the plaintiffs' disbursements, in return for a commission of:

(i) 5% of the net settlement sum after deduction of the lawyers' fees and disbursements and administration expenses (if resolution occurred prior to the filing of the plaintiffs' pre-trial conference brief, and subject to a cap on the commission of $5 million); or

(ii) 7% of the net settlement sum after deduction of the lawyers' fees and disbursements and administration expenses (if resolution occurred after the filing of the plaintiffs' pre-trial conference brief, and subject to a cap on the commission of $10 million).

(c) In *Rooney v ArcelorMittal S.A.* 2013 ONSC 7768, although the terms of the funding were not disclosed in the reasons for judgment, Mr Watson gave evidence that the funder agreed to provide funding on the same terms as set out in (a) above.

(d) In *Bayens v Kinross Gold Corporation* (2013) 117 OR (3d) 150; 2013 ONSC 4974, the funder agreed to pay any adverse costs orders in the amount of up to $1 million (for the motions for certification and leave) and $5 million thereafter, in return for a commission of

(i) 7.5% of the net settlement sum after deduction of the lawyers' fees and disbursements and administration expenses (if resolution occurred prior to certification); or

(ii) 10% of the net settlement sum after deduction of the lawyers' fees and disbursements and administration expenses (if resolution occurred after certification).

138 Accordingly, in broad terms, funded class actions in Ontario are generally conducted on the basis that the contingency fee charged by lawyers is around 25% to 30% of the gross resolution sum and the commission charged by the funder (for the more *limited* services) may be up to 10% of the gross resolution sum. If one is to make an appropriate comparison with the services that ILFP has provided, one must aggregate the two Canadian components. It is

a misconception to look only at one of the Canadian components, which in any event is affected by the existence of the statutory fund.

United States of America

139 It is even more difficult to make any direct comparison between litigation funding commission rates charged in Australia and those charged in the USA. In most forms of litigation in the USA (including class actions), lawyers are permitted to and invariably do, in class actions, charge contingency fees. Moreover, there are, generally speaking, no adverse costs orders in litigation in the USA (including in class actions). Consequently, there is little if any demand for private litigation funding for class actions.

140 In 2009, Theodore Eisenberg and Geoffrey P Miller published the results of a detailed study which they had undertaken of attorneys' fees approved by courts in class actions in the USA over the period from 1993 to 2008 (a sample comprising 689 "common fund cases"), entitled "Attorney Fees and Expenses in Class Action Settlements: 1993-2008" (2010) 7(2) *Journal of Empirical Legal Studies* 248-281. Relevantly for present purposes, Eisenberg and Miller concluded, inter alia, the following:

(a) The percent method is the overwhelmingly dominant method of computing attorneys' fees, either as the sole method or as the primary method with the lodestar (ie hours worked) as a check.

(b) The important determinant of the attorneys' fee in any given case was the amount of the recovery on behalf of class members. That is, the gross amount of the attorneys' fee increased as the amount of the class recovery increased, albeit that the amount of the attorneys' fee as a percentage of the amount of the class recovery decreased as the amount of the class recovery increased.

(c) Neither the hours claimed nor the age of a case were as strongly associated with the fee amount as was the class recovery amount.

(d) Overall, the mean fee to recovery ratio was 23% but as noted in (b) above, the percentage varied by recovery size.

(e) The Ninth Circuit and Eleventh Circuit of the United States Court of Appeals have a benchmark of 25%.

(f) In securities cases specifically (which represented by far the largest category of cases studied, being 268 out of 689, or approximately 39%), the mean fee to recovery ratio was 23%, and the median fee to recovery ratio was 25%.

(g) Across the entire sample of 689 cases, the mean fee to recovery ratio varied between 37.9% (for recoveries of US$1.1 million or less) and 12.0% (for recoveries over US$175.5 million).

(h) Lower fees were awarded in cases that were perceived to be "less risky" (eg in cases which had already been preceded by a successful regulatory prosecution). In securities cases specifically, the mean fee to recovery ratio was 22.7% in cases that were perceived to be low to medium risk, and 26.4% in cases that were perceived to be high risk.

(i) Costs and expenses (disbursements) were dealt with separately, and on average represented just under 3% of the class recovery, on top of the attorneys' fee.

141 In December 2016 the same authors, together with Roy Germano, published a follow-up paper, entitled "Attorneys' Fees in Class Actions: 2009-2013" (NYU Law and Economics Research Paper No. 17-02, December 2016), which included analysis of a further 458 class action settlements over the period from 2009 to 2013. They stated:

> Despite the financial crisis and its many effects on our national life, little has changed in class action attorneys' fees. Average percentage fees are in line with prior studies. The key determinant of the fee continues to be the size of the class recovery: the amazingly regular relationship between these variables continues in the present data. We continue to find a "scaling" effect, in the sense that fees as a percentage of the recovery decrease as the size of the recovery increases. As in the previous Eisenberg-Miller studies, we find that fees are a function of risk – larger fees in higher-risk cases – although in the most recent data the effect is only weakly statistically significant. We document an inverse relationship between the percentage fee and the lodestar multiplier: cases with lower percentage fees are associated with higher multipliers. Likewise lodestar multipliers tend to rise with the size of class recovery.

General

142 It will be appreciated that the 30% rate on the net settlement sum compares favourably with rates in other jurisdictions. But there are some other themes that can be drawn from the international experience. First, there is not a great depth in the market for litigation funders locally or globally. For example, in Canada and the USA they have a significantly reduced role, which is partly to be explained by the allowance of contingency fees; indeed if one reflects for a moment, contingency fees are pro-competitive against the fees of litigation

funders. Second, there is no direct evidence of any market failure in the setting of commission rates, although it may be said that the rates do appear to be a manifestation of conscious parallelism. Moreover, it is well apparent that the problem of natural monopolies does not arise. Third, funders who operate in the Australian market also operate internationally. Accordingly, where and how they invest their capital will depend upon the relative perceived risks and rewards in the various jurisdictions. Generally and taking into account all of these matters, any supervision by a Chapter III court of funding commissions in a particular case must be mindful of this contextual setting. But a Chapter III court is well suited to the task of bringing flexibility and nuance to that role in an individual case (including supervising funding terms generally and confirming capital adequacy), as compared with say regulation under idiosyncratic State legislation (and any consequent market distortion) informed only by and limited to local jurisdictional factors and, in any event, subject to the exercise of Federal judicial power under ss 33V and 33ZF.

(d) Analysis

143 Having regard to the funding commission rate of 30% for which the Settlement Distribution Scheme makes provision, in my view such a rate is reasonable in the following circumstances.

144 First, the funding agreement acceptance rate (ie those who entered into the Second ILFP Funding Agreements) was 53% of RGMs (who included a number of institutional investors) covering approximately 63% of the total "damaged" Allco shares of RGMs, indicating a substantial degree of acceptance by sophisticated class members.

145 Second, the funding commission rate is within the broad parameters of the funding commission rates available in the Australian market and compares favourably with rates in foreign jurisdictions. Relatedly, the rate compares favourably with rates charged by ILFP in other Australian cases. Further, ILFP is less diversified than some other funders such that the risk of a loss on any one case is magnified as compared with a funder with a larger "book" of cases.

146 Third and relatedly, I do not detect any suggestion that the percentage rates set by funders in their funding agreements to date have been higher because of any assumption that a funding equalisation mechanism would be applied, ie higher because of the assumption that the funder could not deduct a commission from *all* group members. That suggestion is not borne out by the above comparative analysis.

147 Fourth, the funding commission rate to be paid to ILFP (ie 30% on the net settlement sum) is less than the rate to which it is entitled under the Second ILFP Funding Agreement (ie 32.5% / 35% of the gross settlement sum); both the rates and bases are different and the variation in each case is in favour of group members. The result is that under the common fund approach, the commission payable will be $8,850,000, which is less than the $8,999,221.43 sum payable in the absence of any common fund, funding equalisation or other similar orders.

148 Fifth, ILFP assumed the risks associated with these proceedings at a relatively early stage of the proceeding and after the original funder had withdrawn due to the continuing uncertainty as to prospects of recovery.

149 Sixth, ILFP assumed the risk of significant adverse costs orders and put up substantial amounts of funds by way of security for costs in the order of $7.25 million.

150 Seventh, ILFP has paid legal costs of approximately $2.4 million while bearing the risk associated with these proceedings.

151 Eighth, the aggregate commission of $8.85 million to be received by ILFP, in the event that the common fund mechanism in the Settlement Distribution Scheme is approved, is proportionate to the amount sought and recovered in the proceeding in the settlement, and the risks assumed by it. It represents only an approximate 22% premium on the amount ILFP stood to lose if adverse costs orders were made and the security for costs were accessed (not including the legal costs outlaid by ILFP that would also have been lost). Moreover, if the security was insufficient, one can readily see how the total costs exposure of ILFP might have equalled the amount of commission proposed.

152 Ninth, the opt-out notices approved by the Court on 6 September 2016 foreshadowed the common fund application. Accordingly, group members have had ample and fair opportunity to opt-out of the proceeding, or to notify their objection to, or concerns regarding, the common fund application and funding arrangements.

153 Tenth, there have been no substantial objections made by group members in relation to any litigation funding charges, notwithstanding the extensively distributed notices issued in relation to the proposed settlement. Having said that, I do not give such a circumstance (ie the non-objection per se) great weight.

154 Eleventh, the applicants and group members participating in the settlement will receive recovery of $20.6 million "in hand". And relevantly, the funding commission will not trigger the safeguard in the Settlement Distribution Scheme that I have referred to earlier, where the total costs and commission are precluded from exceeding more than 50% of the Settlement Sum(s): cl 8.2.

155 Twelfth, if a funding equalisation approach were adopted, the total commission payable to ILFP would be higher than the sum payable under the current proposal for a common funding order. This has the consequence that a lower net settlement sum would be available for distribution with the result that participating group members under a funding equalisation approach would receive a lesser monetary return for their claims than under the proposed Settlement Distribution Scheme.

156 Finally, I have reviewed *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2016] VSC 784, but the rate approved in the idiosyncratic context of that case, the nature of the funder and the leveraging off another case and another settlement justifies me giving it little weight in the present context.

157 I should emphasise some observations concerning the 30% rate, lest it be thought to have decontextualised precedential value in other proceedings.

158 First, that rate is set after the fact and on the net settlement sum. Moreover, as a percentage of the gross settlement sum, the rate is in reality around 22%.

159 Second, as I have said, the rate when applied to the net settlement sum gives an amount of about $8.85 million. This is proportionate in terms of the sums invested and the risk undertaken, which are of a similar order of magnitude.

160 Third, if the gross or net settlement sum had been substantially higher, I would have set a lower percentage rate so that the amount paid to the funder would have remained proportionate to the investment and risk undertaken by the funder. In other words, I would have applied a sliding scale. Clearly, to permit of a 30% rate on a *net* settlement sum of $30 million does not of itself justify rates of that magnitude applied to settlement sums of, say, $100 million or $300 million. I venture to suggest that a 30% rate would be difficult to justify on a net settlement sum above $50 million. But valuable services such as that which a funder provides have a commercial cost and if it can be justified, so be it. It would be short-sighted to chill investment by importing into the analysis some form of asymmetrical social

philosophy when to do so would be antithetical to the purpose of Part IVA which is to enhance access to justice, which is what litigation funders have objectively brought about, albeit motivated by self-interest. If any exercise of power under Part IVA is to be in the best interests of group members, it is not conducive to that objective to take a step that would unnecessarily chill a mechanism that group members may need to access the regime under Part IVA in the first place. To do so would be counterintuitive if not contradictory.

UGMS – SECOND TIER SETTLEMENT SUM

161 Let me now turn to the problem concerning the UGMs and their unexpected and belated interest. It is partly to be explained by the use of Allco's share register late in the piece. But it is also to be explained, I have little doubt, by UGMs having taken little interest in the proceeding until there was money on the table. It stretches credulity, given the notoriety of the collapse of Allco, the publicity given to these proceedings over an extensive period and the numerous notifications to group members by advertisement or otherwise, that the problem I now have to solve is to be explained solely by the late use of the share register. Now there are at least seven options to deal with the problem that has arisen, which potential solutions I raised with the parties at the hearing.

162 First, I could allow the Settlement Deed and the Settlement Distribution Scheme to operate as intended such that the registrations of UGMs is taken to have closed on 9 January 2017, such that the Late Registrants are excluded (Option 1). But to do so would create inherent unfairness to them given that I accept that, with the benefit of hindsight, many of them would appear to have had insufficient notice that they had to register and the consequences of not registering.

163 Second, I could let such Late Registrants in so as to share in the Second Tier Settlement Sum so as to share pro rata with those who had registered on or before 9 January 2017 (Option 2). This is my preferred option as I will explain later.

164 Third, I could in essence approve the settlement, but as part thereof rewrite the Settlement Deed and the Settlement Distribution Scheme so as to collapse the First Tier Settlement Sum and Second Tier Settlement Sum structure so that in essence there was one overall pool and then allow the Late Registrants to prove therein equally with all other RGMs and UGMs (Option 3). I will explain later why I have not preferred this option, although I should say that in any relative ranking of the options this is my preference over all other options other than Option 2.

165 Fourth, I could allow the Settlement Deed and the Settlement Distribution Scheme to operate as intended to exclude the Late Registrants, but in essence either modify the group description to remove them as group members or allow them a further opportunity to opt out, thereby permitting them to pursue their own claims in separate proceedings if they so wished (Option 4). I have rejected Option 4. It would create inherent unfairness for the respondents and not achieve the goal of finality. Further, some surgery to the Settlement Deed would still be needed. Indeed, if Option 4 were to be seriously entertained, the respondents would have a strong case for saying that I ought not to approve the settlement at all. Finally, the group members so excluded would not in any event have a meaningful opportunity to pursue separate action. The present proceedings were instituted close to a time limitation bar. Although there has been a relevant suspension, once it is "lifted" at the time such group members are removed, there would be insufficient practical time to take informed new proceedings.

166 Fifth, and as a permutation of Option 2, I could let in to share in the Second Tier Settlement Sum only those Late Registrants who have expressly objected in the approval hearing before me to their exclusion (Option 5). I consider this option to be ad hoc. If I let in Late Registrants, it will be because of a systemic problem arising from the idiosyncratic events that have occurred. But if that be the case, a general solution for all Late Registrants is warranted (Option 2), rather than simply advantaging a limited class being the express objectors.

167 Sixth, and as yet a further permutation of Option 2, I could adopt Option 2 but deduct an appropriate sum otherwise payable to the litigation funder and add that back to the Second Tier Settlement Sum such that the pro rata distribution as between those group members sharing in that Settlement Sum will be as originally intended and will also achieve parity with those who are sharing in the First Tier Settlement Sum (Option 6). I have rejected this option. I see no reason at all why the litigation funder should in effect bear the financial consequences of what has occurred.

168 Seventh, I could not approve the settlement (Option 7). I consider this to be the least desirable option. The settlement is overwhelming in favour of the group members as a whole in terms of the overall amount to be paid by the respondents relative to the strengths of the causes of action and the risks inherent in pursuing the matter to judgment on all issues; there are little if any risks on enforcement given the insurance position of the respondents.

Moreover, not to approve would cause prejudice to the respondents, although this is not the paramount concern of s 33V.

169 Generally, I have no difficulty in adopting Option 2.

170 First, "fairness" does not entail all group members being treated equally in the sense of giving them the same outcome. The concept of "fairness" is addressing the settlement as a whole for all group members. The concept of "fairness" of the settlement entails like being treated with like, but relevant differences to be reflected in different outcomes.

171 Indeed, previous cases have recognised as much in terms, for example, of applying different loss methodologies depending upon subclass or individual differences, or allowing registered group members to prove in any settlement, but barring unregistered group members.

172 Second, the real question is not whether some group members can be treated differently to other group members, but whether they should be treated as such in the particular case. Moreover, that question should only be answered after *all* group members have been given notice of the prospect of such differential treatment (cf *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [46] and [47] and the follow on *Richards v Macquarie Bank Ltd (No 5)* [2013] FCA 1442 at [33]) and then being afforded an opportunity to:

(a) opt out of the proceeding or settlement; and/or

(b) making submissions on any s 33V application as to why any proposed differential treatment is or is not justified.

173 Third, in the present case, the Late Registrants were given adequate notice of their differential treatment (albeit not fully to the level of differential that I am now imposing in order to solve the problem that has occurred) and the potentiality for preclusion. They were treated fairly in the sense of their entitlement, at most, being referable to and confined to the Second Tier Settlement Sum.

174 Fourth, there was much to be said for adopting the strictures of Option 1. But I have some sympathy for the Late Registrants in the sense that the proceedings and the settlement appear only to have come to many of their attention by notification through the use of the share register. Moreover, given the time of year when they were required to register, ie in part including the long summer vacation, it would appear that many of them may have had

inadequate time to appropriately react. Further, it may not have been fully understood by such group members the consequences of not acting expeditiously.

175 Fifth, I do not consider that Option 3 is preferable over Option 2. There are a number of reasons for this. The RGMs have acted appropriately and expeditiously. I do not consider that I should now prejudice their interests in favour of the Late Registrants, whatever excuse the Late Registrants have in terms of not acting expeditiously. Further, there is another difficulty with Option 3. The Settlement Deed and the Settlement Distribution Scheme enshrine distinctions between the First Tier Settlement Sum and the Second Tier Settlement Sum and the differing contributions of the respondents to the different Tiers. I would in essence be required to rewrite these provisions in order to achieve the outcome of Option 3. On the assumption that I have the power to do so, I would not find that task particularly challenging. Nevertheless, I suspect that all relevant parties would not be entirely pleased with any such redrafting effort on my part. In the circumstances, I consider it appropriate to refrain from doing so.

176 Sixth, if I adopt Option 2 and open up the availability of the Second Tier Settlement Sum to the Late Registrants, the UGMs who gave appropriate notification on or prior to 9 January 2017 and have a claim on the Second Tier Settlement Sum will see their "dividend" drop substantially once the Late Registrants prove in the Second Tier Settlement Sum. But I consider that it is appropriate to align the UGMs and the Late Registrants and to treat them equally. Both such classes are to be distinguished from the RGMs and their claims on the First Tier Settlement Sum. Moreover, there was always considerable uncertainty as to how many UGMs would ultimately seek to prove. I do not consider that I should greatly advantage the UGMs who moved the quickest when the Late Registrants have a reasonable excuse for not moving as quickly. In any event, even if all had moved expeditiously, with the benefit of hindsight the Second Tier Settlement Sum has proved to be inadequate. Now a mechanism was chosen by the parties after substantial negotiation and based upon the best estimates available. But with the benefit of hindsight, that mechanism has now been shown to be inadequate. Moreover, it is apparent to me that it was not feasible for the applicants and their lawyers to have successfully negotiated with the respondents an open ended mechanism for the Second Tier Settlement Sum to deal with the downside of substantially more UGMs seeking to prove than was anticipated; I would note that the negotiated mechanism had enshrined within it an implicit buffer (different to the express Buffer I referred to earlier) in any event, but this has been well exceeded. I am left to solve the problem in the best way that

I can. Option 2 is relatively speaking the preferable solution of all the solutions I have identified.

177 Finally, as an aside, the problem that has arisen in the present case may potentially be avoided by either or both of the following mechanisms:

(a) First, one option is to use the share register of a corporate respondent from the outset of the proceedings for all notifications to group members, so that the problem of the magnitude in number and value of the UGMs late notifying, as has occurred in the present case, is significantly ameliorated. There are many options available to avoid the strictures of s 177 of the *Corporations Act 2001* (Cth) through the use of a subpoena and/or orders under s 33ZF of the Act to the company or the holder of the share register to make the appropriate notification. Moreover, there is the arguable availability of the exclusion in s 177(1A)(a). Further, the Court could order the company to directly approve under s 177(1A)(b).

(b) Second, another option that can be potentially used is to close the class before mediation, but with no bar order. If there is no settlement, the class can be re-opened. If there is a settlement, the Court can consider, in the context of a s 33V application, a bar order as a corollary of giving approval to the settlement. Indeed, a respondent might negotiate a provision in the settlement deed that it is conditional on the Court not only approving the settlement but making a bar order as well at the time of Court approval. If the bar order is not made at the time of Court approval, say because the Court has opposition from late notifying UGMs who satisfy the Court that they should not be excluded, then the settlement condition will not be satisfied, leading to a renegotiation if that is necessary. In any event, in most cases the late UGMs may be of modest proportions and may not fundamentally change the overall economics of the settlement from the perspective of the respondent, such that they can be let in with the bar order then being made. Generally, the respondent does not need the bar order prior to mediation. It can negotiate at a mediation with some certainty if it is a condition of any settlement that the bar order is to be made at the time of Court approval.

LEGAL COSTS

178 In my view, it is fair and reasonable that the applicants' legal costs should be paid out of the settlement sum(s) prior to any distribution. This has the effect that the liability for those costs will be shared by all those who benefited from those legal costs being incurred, ie the group members as a whole. The applicants do not seek recovery of the costs actually incurred, but rather an amount identified in the costs report as reflecting only such costs and disbursements that, in the cost consultant's opinion, were fair and reasonable. The costs report has been prepared by an experienced costs consultant and is framed in a manner that is not discordant with Sackville J's observations in *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311; [2004] FCA 1406 at [61]. The methodology is set out in the costs report and Ms Catherine Dealehr has had regard to:

(a) relevant authorities considering approvals under s 33V(1) that address the assessment of costs to be deducted from settlements;

(b) the fact that the task is not a taxation;

(c) the need for an appropriate balance in relation to the level of disclosure of information available to the Court to reach a conclusion regarding the reasonableness of the fees sought, having regard to the costs associated with the provision of such information; and

(d) a variety of methodologies available in assessing the reasonableness of the costs claimed.

179 In my view, on the basis of the matters set out in the costs report it is fair and reasonable to approve an amount of $10,513,833.95 (including GST) to be deducted from the settlement sum and applied towards the applicants' legal costs for the work identified in that report. These costs are, and were at the time they were incurred, proportionate to any realistic expectation of the potential return.

180 Generally, let me say that my role is not that of a taxing registrar or master. Further, subject to the question of proportionality, if unchallenged expert opinion is put before the Court which sets out a commercial and reasonable methodology consistent with the terms of any retainer and which demonstrates that it has been accurately and thoroughly applied to sufficient and probative source records of the solicitors, then it is no part of my function to:

(a) reject that evidence as to whole or part without very good reason; or

(b) apply one's own subjective view of what the legal work is "really worth", divorced from the reality of the commercial context within which the work was carried out and the expenses incurred.

181 But 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.

182 I also repeat similar observations that I made in *Foley v Gay* [2016] FCA 273 at [24].

183 Now it may be suggested that the concept of avoiding hindsight bias has no part to play in considering the "fairness" of the legal costs. The concept of "fairness" is the overarching theme for judicial approval of *settlements* under s 33V, albeit not the statutory language as such. But fairness is a broad concept. And the integers feeding into that overall assessment need to be assessed, qualitatively and quantitatively, and then balanced overall to consider whether the settlement and net recoveries to group members are fair. But let me assume for the moment that *each* integer of the settlement needs to be "fair" to group members (as distinct from some only being "fair", but nevertheless the overall settlement being "fair"). And let me assume for the moment that one is addressing one integer, being legal costs, and its fairness. Feeding into the question of fairness of legal costs are many factors. It is difficult to see why you would not consider the fairness and reasonableness of the work at the

time it was performed and in the context of the returns *then* expected. It is difficult to see why the applicant or group member would perceive that to be anything other than fair. No doubt the actual outcome of a case may also feed into the question of fairness. But in a case where the applicant and lawyer are not co-venturers, and with contingency fees not being allowed under the Australian model, it is difficult to see why the lawyer's fees should be artificially taxed down by the actual outcome; the actual outcome is a risk borne by the applicant and group members (and the litigation funder), but not the independent lawyer who is not sharing in the returns of the enterprise.

CONCLUSION

184 I will approve the settlement. Subject to hearing further from counsel, I would propose to make orders in the terms appearing at the outset of my judgment.

I certify that the preceding one hundred and eighty-four (184) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:

Dated: 31 March 2017