

# FEDERAL COURT OF AUSTRALIA

## McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd [2017] FCA 947

File numbers: VID 163 of 2017  
VID 213 of 2017

Judge: **BEACH J**

Date of judgment: 18 August 2017

Catchwords: **REPRESENTATIVE PROCEEDINGS** – two overlapping open class proceedings against the same respondent – substantially the same claims and substantially the same causes of action – application for a permanent stay of one of the proceedings – whether permanent stay is appropriate – whether two proceedings should be consolidated – whether a “declassing” order should be made under s 33N(1) of the *Federal Court of Australia Act 1976* (Cth) – whether closure of one class is appropriate – whether joint trial of both proceedings as open class proceedings is appropriate – application for a permanent stay of one of the proceedings refused – orders made to achieve closure of one class and to have a joint trial of both proceedings

Legislation: *Federal Court of Australia Act 1976* (Cth) ss 33N, 33ZF, 33ZG  
*Federal Court Rules 2011* (Cth) r 30.11

Cases cited: *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317  
*Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469  
*Giles v Westminster Savings Credit Union* [2002] BCJ No. 2567; 2002 BCSC 1583  
*Grasby v Merck Frosst Canada Ltd* (2007) 216 ManR (2d) 117  
*Hassid v Queensland Bulk Water Supply Authority* [2017] NSWSC 599  
*Joel v Menu Foods Genpar Ltd* (2007) 78 BCLR (4th) 112  
*Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR 41-679; [1999] FCA 56  
*Kirby v Centro Properties Ltd* (2008) 253 ALR 65; [2008] FCA 1505  
*Locking v Armtec Infrastructure Inc* 2013 ONSC 331

*Mancinelli v Barrick Gold Corporation* (2015) 126 OR (3d) 296  
*Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98  
*Nelson v Merck Frosst Canada Ltd* (2006) 61 BCLR (4th) 157  
*Ryan v Great Lakes Council* (1997) 78 FCR 309  
*Settingington v Merck Frosst Canada Ltd* [2006] OJ No. 376  
*Sharma v Timminco Ltd* (2009) 99 OR (3d) 260  
*Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd* [2016] NSWSC 17  
*Tiboni v Merck Frosst Canada Ltd* (2008) 295 DLR (4th) 32  
*Vitapharm Canada Ltd v F. Hoffmann-La Roche Ltd* [2000] OJ No. 4594

Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Thomson Reuters, 2002)

Morabito, V, “Clashing Classes Down Under – Evaluating Australia’s Competing Class Actions Through Empirical and Comparative Perspectives” (2012) 27 *Connecticut Journal of International Law* 245

Date of hearing:	16 June 2017
Registry:	Victoria
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	120
Counsel for the Applicant in VID 163 of 2017:	Ms RM Doyle SC with Mr JH Kirkwood
Solicitor for the Applicant in VID 163 of 2017:	Slater and Gordon
Counsel for the Applicant in VID 213 of 2017:	Mr JC Sheahan QC with Mr WAD Edwards and Mr DJ Fahey

Solicitor for the Applicant in  
VID 213 of 2017: Maurice Blackburn

Counsel for the Respondent  
in VID 163 of 2017 and VID  
213 of 2017: Mr MC Garner with Mr G Kozminsky

Solicitor for the Respondent  
in VID 163 of 2017 and VID  
213 of 2017: Herbert Smith Freehills

## ORDERS

VID 163 of 2017

**BETWEEN:**                    **MCKAY SUPER SOLUTIONS PTY LTD (ACN 110 853 024)**  
**(AS TRUSTEE FOR THE MCKAY SUPER SOLUTIONS**  
**FUND)**  
Applicant

**AND:**                         **BELLAMY'S AUSTRALIA LIMITED (ACN 124 272 108)**  
Respondent

**JUDGE:**                    **BEACH J**

**DATE OF ORDER:**    **18 AUGUST 2017**

### **THE COURT ORDERS THAT:**

1.     Within 7 days of the date of these orders, the parties file and serve minutes of orders and submissions (no more than ten pages) directed to implementing the following protocol to accord with the Court's reasons, being:
  - (a)    to close the class in the Basil proceedings (VID 213 of 2017);
  - (b)    to provide for notifications to group members in each of the proceedings of relevant class closure and opt out mechanisms such as to achieve the result of the McKay proceedings (VID 163 of 2017) continuing as open class proceedings and the Basil proceedings continuing as closed class proceedings.
2.     Within 14 days of the date of these orders, the parties file and serve submissions in response (no more than five pages) to any other party's proposed minutes of orders and submissions served in accordance with order 1 in either the Basil proceedings or the McKay proceedings.
3.     The proceedings be listed for a further case management hearing within 21 days on a date to be advised.
4.     Liberty to apply.

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

## ORDERS

VID 213 of 2017

**BETWEEN:**           **PETER ANTHONY BASIL**  
Applicant

**AND:**               **BELLAMY'S AUSTRALIA LIMITED (ACN 124 272 108)**  
Respondent

**JUDGE:**           **BEACH J**

**DATE OF ORDER:**   **18 AUGUST 2017**

### THE COURT ORDERS THAT:

1.     Within 7 days of the date of these orders, the parties file and serve minutes of orders and submissions (no more than ten pages) directed to implementing the following protocol to accord with the Court's reasons, being:
  - (a)    to close the class in the Basil proceedings (VID 213 of 2017);
  - (b)    to provide for notifications to group members in each of the proceedings of relevant class closure and opt out mechanisms such as to achieve the result of the McKay proceedings (VID 163 of 2017) continuing as open class proceedings and the Basil proceedings continuing as closed class proceedings.
2.     Within 14 days of the date of these orders, the parties file and serve submissions in response (no more than five pages) to any other party's proposed minutes of orders and submissions served in accordance with order 1 in either the Basil proceedings or the McKay proceedings.
3.     The proceedings be listed for a further case management hearing within 21 days on a date to be advised.
4.     Liberty to apply.

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

## REASONS FOR JUDGMENT

### BEACH J:

- 1 Two open class securities class actions have been brought against Bellamy's Australia Limited (the respondent) under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the Act) concerning the same subject matter and causes of action. They involve an almost complete overlap in the class memberships represented by the applicant in each case. Should either or both proceedings be allowed to continue? If one only, which one? And if both, as two open class proceedings or in some other configuration?
- 2 On 23 February 2017, McKay Super Solutions Pty Ltd (as trustee for the McKay Super Solutions Fund) (the McKay applicant) commenced its proceedings on behalf of persons who had acquired an interest in ordinary shares in the respondent during the period from 14 April 2016 to a trading halt in such shares on 12 December 2016 (the McKay proceedings). The respondent is said to have engaged in contraventions of ss 674 and 1041H of the *Corporations Act 2001* (Cth) and s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), causing the McKay applicant and McKay group members loss and damage. It is not necessary to detail the alleged non-disclosure breaches or the misleading or deceptive conduct. The legal firm representing the McKay applicant is Slater & Gordon Limited. The external litigation funder supporting the McKay proceedings is IMF Bentham Limited (IMF). Notwithstanding that the McKay proceedings are open class proceedings, currently over 1500 McKay group members have entered into litigation funding agreements with IMF and retainer agreements with Slater & Gordon.
- 3 Shortly after the commencement of the McKay proceedings, on 8 March 2017 Peter Basil (the Basil applicant) commenced his proceedings (the Basil proceedings) on behalf of persons who had acquired an interest in ordinary shares in the respondent during the period 14 April 2016 and 9 December 2016, but excluding the McKay applicant and persons who had signed litigation funding agreements with IMF or retainer agreements with Slater & Gordon to prosecute the McKay proceedings. Similar if not identical subject matter and causes of action have been alleged in the Basil proceedings as for the McKay proceedings. Subject to one matter, the same class description period has also been used; the difference between the end date of 9 December 2016 in the Basil proceedings and the 12 December 2016 date in the McKay proceedings is irrelevant given that the intervening two days were over a weekend. The legal firm representing the Basil applicant is Maurice Blackburn Pty Ltd. The external

litigation funder supporting the Basil proceedings is ICP Capital Pty Ltd (ICP Capital) with Investor Claim Partner Pty Ltd (ICP) providing support services. Notwithstanding that the Basil proceedings are open class proceedings, and subject to the carve out of signed up McKay group members in the Basil class description that I have just described, currently over 1000 group members have entered into litigation funding agreements with ICP Capital and ICP, together with retainers of Maurice Blackburn.

4 On 20 March 2017, the respondent in each of the McKay proceedings and the Basil proceedings filed an interlocutory application seeking orders pursuant to s 33ZF(1) of the Act, alternatively what has been described as the inherent jurisdiction (power) of the Court, to permanently stay either of the proceedings on the basis that it:

- (a) would be appropriate or necessary to ensure that justice was done; or
- (b) would be an abuse of process, vexatious or oppressive for both of the proceedings to be prosecuted.

5 These applications were heard on 16 June 2017, with numerous affidavits and annexures filed by the parties from their legal advisers and litigation funders. Most of this material is confidential, but in any event is unnecessary to set out.

6 Should I stay one of the proceedings? Should I consolidate both proceedings? Should I allow one of the proceedings to continue as open class proceedings but make a s 33N(1) order in relation to the other, in essence a declassing order? If so, which proceedings? Should I allow one of the proceedings to continue as open class proceedings but close the class in the other proceedings, and then proceed with a joint trial of both? If so, which class in which proceedings should be closed? Or should I do nothing at this time and permit both proceedings to remain as open class proceedings, with potentially a joint trial of both? These questions neither permit of easy answers nor are answered by utilising procedures favoured in foreign jurisdictions, although the approach entertained in the Canadian provinces of carriage motions is not unhelpful. Rather, the solution to these questions is to be found in applying commercial practical themes.

7 In summary, I have determined not to permanently stay one of the proceedings. Rather, I propose to close the class in the Basil proceedings, to allow the McKay proceedings to remain as open class proceedings, and to have a joint trial of both proceedings as then so reconstituted; in essence, one open class and one closed class. Group members in the closed

class proceedings will be excluded from the open class proceedings to avoid overlapping group membership (and by corollary, vice versa). I will discuss the precise steps to achieve this result later. I also propose to impose mechanisms to minimise any duplication of work and expense. Moreover, in the absence of cooperation between both applicants and between their advisers to achieve these objectives, this may include the appointment of an independent lawyer to liaise with both applicants' lawyers and funders, who can monitor the work done and resources deployed and report on a regular basis. Other mechanisms may also involve making orders to ultimately ensure that the respondent is only exposed to one set of legal costs vis-à-vis the applicants as if there had been only one set of proceedings.

8 Now before continuing, I should observe that but for the fact that in *both* proceedings more than 1000 group members in each case have committed themselves to litigation funding agreements and retainer agreements with their respective litigation funders and solicitors, I would have permanently stayed one of the proceedings. The basis for this observation will become apparent later.

#### **WHAT ARE THE OPTIONS?**

9 As I have indicated, the following realistic options are available to deal with the potential overlap:

- (a) First, the two proceedings could be consolidated.
- (b) Second, there could be a permanent stay of one of the proceedings.
- (c) Third, an order could be made under s 33N(1) in respect of one of the proceedings, colloquially known as a declassing order.
- (d) Fourth, an order could be made closing the class in one of the proceedings but leaving the other proceedings as open class proceedings, with a joint trial of both. The option of closing *both* classes at this time is not in the frame and would be antithetical to the structure and objectives of Part IVA in precluding by court order the prosecution, at least at this time, of at least one open class proceeding.
- (e) Fifth, there could be a joint trial of both proceedings with each left as they are presently constituted as open class proceedings.



**(a) Options that can be readily eliminated**

10 Before proceeding further, I can put to one side the first option (consolidation), the third option (a s 33N(1) order) and the fifth option (in essence the “do nothing” scenario). Let me explain.

11 First, in relation to consolidation, there is no doubt that I have the power to so order. Section 33ZG(c)(iv) expressly reserves the operation of any law relating to the consolidation of “proceedings” and accordingly my inherent power or the power under r 30.11 of the *Federal Court Rules 2011* (Cth) to so consolidate, including to facilitate the objective enshrined in s 22 of the Act. In the context of s 33ZG(c)(iv), “proceedings” must encompass a representative proceeding. If otherwise, it has little place in Part IVA. It must embrace consolidation of a representative proceeding with another proceeding, which could either be an individual proceeding or another representative proceeding; see generally *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR 41-679; [1999] FCA 56, *Ryan v Great Lakes Council* (1997) 78 FCR 309 at 312 per Wilcox J, *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 at [200] and Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, 2002) at [9.240] et seq.

12 The difficulty in the present case is not so much the existence of the power but rather its exercise. Here, I have no agreement between all parties in both proceedings as to consolidation. Further, there are different lawyers for the applicants and different litigation funders in each of the proceedings. Absent agreement by both sets of lawyers and funders, there are a number of difficulties in relation to consolidation. For example, what uniform funding model would operate for the consolidated proceedings given the different sets of signed up group members in each of the proceedings, when considered from the perspective of signed up group members, the unsigned group members or the funders? And, what uniform legal representation for the applicants would be used, absent leave being given for separate representation for each of the applicants?

13 Now true it is that in *Johnson Tiles* separate applicant solicitors were allowed, but there was an agreement to engage the one set of counsel. But in the context with which I am presented, there is no such agreement. In any event, none of this deals with the problem of separate funders and how consolidation would operate in that scenario, particularly given that significant numbers of group members in each case have signed up to different funding arrangements. How would they be affected by consolidation? And what would be the

position for those who had not signed up? What funding model would apply? And what type of common fund order would be sought? And to reflect what proposed funding mechanism? A mechanism would need to be determined for resolving such issues including achieving equity as between the McKay group members and the Basil group members. Further, what would be the liability of the McKay interests for the costs of the proposed after-the-event adverse costs insurance intended to be put in place in respect of the Basil proceedings? Moreover, each litigation funder may require sufficient information to form a view as to the co-funder's financial position and in particular its capacity to meet any order for adverse costs. In the circumstance where the litigation funders may be jointly and severally liable (at least indirectly) for such costs, it may not be possible for consolidation to occur without assurances that each funder has adequate finances or insurance arrangements to meet any order which might be made in respect of the consolidated proceedings. It will be appreciated that these difficulties are not insignificant.

14 Generally, consolidation orders are unusual, if only because of the complexity involved in implementing such a mechanism. But in the present context, compounding the usual difficulties are the dimensions of different solicitors, different funders, different funding models and ultimately the circumstance that there is no agreement to this option. I have considered whether if I nevertheless made a consolidation order without first solving these difficulties, the parties would have the incentive if not the necessity to work through these difficult logistics. But I cannot rightly so assume. In the circumstances, the option of consolidation can be put to one side.

15 Second, as for the option of making a s 33N(1) order or "declassing" order in relation to one of the proceedings, I do not consider that this is an appropriate option either.

16 Section 33N(1) of the Act relevantly provides as follows:

(1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:

- (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
- (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
- (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

17 Before a s 33N(1) order can be made, it must be in the interests of justice to do so because one or more of the conditions in sub-sections (a) to (d) is satisfied.

18 Generally speaking, s 33N(1) requires consideration of the comparator of whether it is in the interests of justice that the proceeding be determined in numerous non-representative proceedings. One compares how the factors specified in ss 33N(1)(a) to 33N(1)(d) would apply to hypothetical non-representative proceedings. Such a comparison is expressed in ss 33N(1)(a) and 33N(1)(b) and implied by ss 33N(1)(c) and 33N(1)(d). The implicit focus in s 33N(1)(c) is on the commonality of issues and whether the representative proceedings are efficient and effective to resolve the common issues, rather than resolution by way of individual proceedings. Section 33N(1)(d) is concerned with whether representative proceedings are an appropriate vehicle to pursue the claims. Generally, the focus of ss 33N(1)(c) and 33N(1)(d) is on the efficiency or appropriateness of the group members' claims being pursued in representative proceedings.

19 It seems to me that the requirements of s 33N(1) are not satisfied in relation to either the McKay proceedings or the Basil proceedings. Sections 33N(1)(a) and 33N(1)(b) are not satisfied if each of the proceedings is compared to hypothetical non-representative proceedings and regard is had to the interests of justice. Similarly, s 33N(1)(c) is not satisfied. Each of the proceedings, by comparison to hypothetical *individual* actions, is an efficient and effective process to resolve common issues. Section 33N(1)(c) does not involve a comparison between *the* representative proceedings and another identical or hypothetical set of representative proceedings. The efficiencies referred to in s 33N(1)(c) are focussed upon whether the representative proceedings are an efficient mechanism to resolve the claims and common issues, which requires considering the representative applicant's case and a comparison between the representative proceedings and the hypothetical non-representative proceedings. The inquiry is not whether the common issues might be more efficiently resolved by way of some other *representative* proceedings. But I accept that the matter is not free from doubt. Section 33N(1)(c) uses the definite article "*the* representative proceeding[s]" rather than the indefinite article (cf ss 33N(1)(a) 33N(1)(b) and 33N(1)(d)), so that it is open to argue that it could be satisfied if another set of representative proceedings were available and could efficiently deal with group members' claims made in the hypothesised to be "declassified" proceedings. In other words, another available representative proceedings may

make it *less* efficient and *less* effective to pursue the proposed to be “declassified” proceedings. But I would note that s 33N(1)(c) is not focussed on *relative* efficiency and effectiveness but rather is expressed in more absolute terms. Generally, the better construction of s 33N(1)(c) is as I have indicated. Conceptual coherence dictates that I read s 33N(1)(c) through the general lens of s 33N(1) by comparing representative proceedings with non-representative proceedings. Moreover, s 33N(1)(d) is also not satisfied. The claims of the group members in either of the proceedings ought to be resolved by representative proceedings; it cannot be said that it is otherwise inappropriate that such claims be pursued by means of *a* set of representative proceedings.

20 But even if one of the s 33N(1)(a) to (d) conditions were to have been satisfied, I would still not make such an order. A declassing order does not stop an action as such, but rather results in the declassified proceedings becoming individual proceedings brought only by the named applicant. So, if the Basil proceedings were declassified by a s 33N(1) order, it would still continue as an individual action brought by the Basil applicant. But that might lead to a number of outcomes. For example, it might lead to other funded group members in the Basil proceedings opting out of the McKay proceedings and commencing their own individual proceedings, with each such individual proceedings being funded by ICP Capital. Perhaps a new closed class set of representative proceedings may even be commenced against the respondent by such Basil opting out members, and still funded by ICP Capital. In other words, a s 33N(1) order may provoke a multiplicity of proceedings against the respondent, negating the foundation for making the s 33N(1) order in the first place. Another possibility is that the declassing order may cause ICP Capital to terminate its funding agreements, which might have the practical effect of a stay. It is unlikely that any one Basil group member would fund their own action. But Basil group members who have already signed funding agreements should not be coerced into having to accept another funder in another set of representative proceedings absent very compelling reasons. A declassing order should not be made for the purposes of producing a stay or having an inappropriate coercive effect. In summary, there is no attraction to or advantage in making a s 33N(1) order in either of the proceedings and it would not be in the interests of justice to do so, whether from the perspective of group members, the respondent or both.

21 Third, as for the “do nothing” scenario, the Basil applicant made an alluring submission in the following terms (at [46]):

The recent practice of the Court, however, has been to use case management powers to manage the proceedings pending resolution of the overlap prior to ultimate resolution of the matter, as discussed above. In the Volkswagen class action proceedings for which Foster J is the docket judge, two overlapping representative proceedings are proceeding for the time being with a trial on certain separate questions fixed for later this year, but on the basis that the overlap will be resolved by one means or another in the meantime. Similarly, in the CIMIC class action, Jagot J recently declined to deal with an application by the respondent to stay the second open class action (which included a significant registered group), preferring to defer consideration of that issue until a later point in time, in circumstances where the first class action had been commenced in the Supreme Court of Victoria (by serial litigant, Melbourne City Investments Ltd) significantly earlier than the second. Should the Court wish to take this approach, an opportunity for Unknown Group Members to select whether they wish to be part of the Basil Proceeding or the McKay Proceeding can be afforded to them during the opt-out phase, and to manage the proceedings together in the meantime. (footnotes omitted)

22 Now there is considerable wisdom in a wait and see approach in some contexts. And I do not doubt that such an approach has been warranted by other docket judges in other cases. But in my context where there are two open class proceedings, numerous group members signed up in each of the proceedings to different funding arrangements, and the prospect of a common fund application being made in each of the proceedings, it is desirable that clarity be injected sooner rather than later as to the proceedings to go forward and their constitution. This is not only in the best interests of group members in each of the proceedings, whether signed up or otherwise, but also in the interests of the respondent, who should not be vexed or oppressed by duplicate classes prosecuting duplicate claims. Let me elaborate on one aspect justifying the need to resolve these issues sooner rather than later. The applicant in each of the proceedings is proposing to seek a common fund order. Whether I grant such an order and its terms will need to be dealt with at an early point. In those circumstances, it is necessary to resolve the appropriate constitution of each of the proceedings first before dealing with common fund questions. It is undesirable that a common fund order be made in *both* proceedings. That would create considerable uncertainty for group members. Moreover, the economics of determining whether such an order and its terms are appropriate and in which proceedings would be considerably complicated if I was to endeavour to address the question at the same time in both proceedings as presently constituted. In summary, I do not consider that I can just wait and see what happens.

23 Now before proceeding further to discuss the realistic options, there is one other matter that can conveniently be dealt with at this point. I have considered the approach of US-style litigation committees and sealed bid auctions. But such mechanisms have not gained traction in any competing class actions scenario of which I am aware, save for being innovatively

suggested by Finkelstein J in the Centro litigation (*Kirby v Centro Properties Ltd* (2008) 253 ALR 65; [2008] FCA 1505). It is difficult for US mechanisms to be carried across. First, in the US, choosing the representative applicant or what has been described as the class representative takes place in the context of a certification regime where permission to proceed is necessary, which is not the Part IVA context. Competition for the right to proceed is not directly comparable to the scenario where there is a prima facie right to proceed. Second, in the US, generally there is no adverse costs exposure; contrastingly, in Australia any competition for the class action and the associated bid economics will be affected by different risk pricing reflecting different risk perceptions. Third, institutional investors play a different role in class actions in the US than they do in Australia; the utility and dynamics of US committees may not be comparable. Fourth, I am faced with substantial numbers of group members in each of the proceedings who are the subject of litigation funding agreements with *separate* external funders. No similar context operates in the US. Moreover, any sealed bid process could now have no meaningful utility given the existence, magnitude and exposure of such contractual arrangements. Fifth, US-style mechanisms proceed on the assumption that representative applicants are mere figureheads, a doubtful assumption on the evidence before me. Each of these matters demonstrates the difficulty of applying US mechanisms to the present problem. Finally, as Professor Vince Morabito has explained with his usual cogency in “Clashing Classes Down Under – Evaluating Australia’s Competing Class Actions Through Empirical and Comparative Perspectives” (2012) 27 *Connecticut Journal of International Law* 245 at 301, even in the US it has been perceived that sealed bid auctions do not necessarily hold the answer to solving the problem of competing class actions.

**(b) Realistic options left in the frame**

24 In my view, the two realistic options to consider are:

- (a) a permanent stay of one of the proceedings;
- (b) closing the class in one of the proceedings, leaving the other class open and having a joint trial of both proceedings.

25 As to the first option, it will be appreciated that such an option has an analogy with the Canadian form of carriage motion approach. And as to the second option, the question arises as to which proceedings’ class should remain open and which should be closed. It is

appropriate to discuss each option in turn, although they involve overlapping considerations and analysis.

### **A PERMANENT STAY?**

26 The respondent has contended that it is vexatious, oppressive and an abuse of process for the same applicant to bring two actions seeking the same relief against the same respondent with respect to the same subject matter. Similarly, it is said that it is vexatious, oppressive, an abuse of process and otherwise not in the interests of justice for two or more representative proceedings, with overlapping group members, to be brought against the same respondent in respect of the same subject matter. It is said that in such circumstances it is incumbent upon the Court to determine which proceedings should be permitted to proceed as representative proceedings. The respondent submits that a permanent stay should be ordered of one of the proceedings and relies upon the following matters.

27 First, it says that a stay of one of the proceedings is in the interests of group members of all proceedings. It says that I should permit the proceedings with the lowest legal costs and most attractive funding commissions to continue. It is said that this ensures that group members are afforded an opportunity to achieve the best financial return. Further, it is said that a permanent stay of one of the proceedings would ensure group members are not subjected to the additional and significant legal costs of prosecuting two representative proceedings. It is also said that a permanent stay of one of the proceedings will ensure that group members are not confused by multiple sources of information.

28 Second, it is said that a permanent stay will ensure that the respondent is not subjected to a manifest injustice, namely meeting multiple representative proceedings with overlapping group members in respect of the same factual matters, causes of action and losses. It is said that it will also ensure that the respondent is not exposed to two sets of adverse costs orders.

29 Third, it is said that a permanent stay of one of the proceedings will create efficiencies in terms of the Court's and the parties' time and resources.

30 Fourth, it is said that the only persons who will not benefit from a permanent stay are the solicitors and litigation funder in the proceedings which are to be stayed, who will not obtain the potential financial reward of prosecuting what the respondent has described as lawyer-driven litigation.

31 Fifth, it is said that if the two proceedings are allowed to go forward that the difficulty of potentially settling the actions will be exacerbated. I agree that this is a difficulty, but it is not insurmountable as the settlement of the Centro litigation demonstrates.

32 Finally, it is said that a permanent stay of one of the competing open class proceedings does not deny group members of those proceedings the right to select their legal representatives. Those group members can opt out of the proceedings that continue and engage any lawyer they want to prosecute their own case.

33 Let me begin with some general themes. There is no doubt that I have power to order a permanent stay, whether in the exercise of my inherent power or under the Rules of Court, including in furtherance of the objectives of s 22 of the Act. But it may be doubted whether s 33ZF(1) could be so utilised. It may be said to be antithetical to "... ensur[ing] that justice is done in *the proceeding*" (my emphasis) to in fact permanently stay it. I do not need to dwell on such questions. I do not propose to order a permanent stay of one of the proceedings. Let me explain why.

34 First, Part IVA contemplates that there may be more than one proceeding against the same respondent in respect of the same subject matter and the same cause(s) of action. A claimant has a choice whether to bring representative proceedings on behalf of "some or all" persons. If that choice is not made, one or more claimants may bring separate proceedings against the one respondent in respect of the same claims. Hence a multiplicity of proceedings. Moreover, even if group proceedings are brought, one or more group members may opt out and bring their own proceedings, resulting in multiple proceedings against the same respondent. Indeed, such group members who have opted out may bring their own separate representative proceedings. Nothing in Part IVA precludes such an option. And to do so would neither be invalid (the US' apparently contrary position notwithstanding) nor an abuse of process. In other words, the structure of Part IVA permits of multiple proceedings including multiple representative proceedings.

35 Second, although it is no doubt vexatious, oppressive and an abuse of process for the *same* applicant to bring multiple proceedings in respect of the same or similar claims against the same respondent, in form that is not the situation with which I am faced. The McKay applicant has brought its proceedings on behalf of its class using Slater & Gordon and IMF. The Basil applicant has brought his proceedings on behalf of his class using Maurice



Blackburn, ICP Capital and ICP. The group members in either of the proceedings are not formally parties.

36 Third, as discussed in *Johnson Tiles* by Merkel J at [11] to [17], the commencement of a second bona fide set of representative proceedings prior to the Court giving substantive directions in existing but overlapping representative proceedings (ie with overlapping group members), does not of itself establish any vexation, oppression or an abuse of process. Such is not established for the representative applicant in each of the proceedings, for they are different. And in respect of the group members in each of the proceedings in relation to the overlap, those overlapping group members are not *parties* as such. They have not engaged in any conduct with respect to their rights that could sensibly be characterised as amounting to vexation, oppression or an abuse of process. But no doubt at a later stage, such overlapping group members can be called upon to either opt out of both proceedings or opt out of one of the proceedings. Overlapping group members ultimately cannot remain in both proceedings. For completeness, I am also not dealing with the scenario of a group member who has *not* opted out, separately bringing its own proceedings.

37 Fourth, no authority cited to me persuasively supports the proposition that in circumstances where the *duplication* of class membership is eliminated in respect of two group proceedings involving the same subject matter against the same respondent, that nevertheless there is still vexation, oppression or an abuse of process in both such proceedings as so modified to eliminate the duplication going forward. For example, take the situation where one has two closed classes that do not overlap or one open class and a closed class, but where the closed class is excluded from the open class. Alternatively, assume that such results can be achieved by case management directions. It is difficult to see how it could be said that to then allow the two group proceedings to go forward would be vexatious, oppressive or an abuse of process. I will put to one side for the moment, the respondent's fall back position of "interests of justice".

38 Fifth and as I have already intimated, there is an enthymematic flaw in the respondent's approach. Compare the following two scenarios:

- (a) The first scenario being as I have described where you have two group proceedings with the duplication in group membership eliminated and both proceedings going forward;

- (b) The second scenario, which is the respondent's preferred option, where only one of the group proceedings is allowed to go forward with the other stayed.

39 The unstated premise of the respondent's preferred option is that it will only face one set of proceedings if there is a stay of one of the proceedings. But of course the group members in the stayed proceedings, who may otherwise have overlapped with the other group proceedings, may then opt out of the proceedings that are allowed to continue and bring their own proceedings. In such circumstances, the respondent may then be faced with many more proceedings than just the two group proceedings under the first scenario. In other words, the respondent may be more vexed or oppressed by the consequences flowing from the second scenario. And this scenario is not so unlikely in the present case. If I stay one of the proceedings, there will be over 1000 group members in those stayed proceedings who have entered into contractual relationships with their chosen funder and solicitors firm. They may not consider the funding arrangements and solicitors for the non-stayed proceedings attractive and instead choose to opt out of the non-stayed proceedings and run their own actions, perhaps as individual actions or with the joinder of over 1000 individual applicants in one proceeding or indeed new group proceedings. None of this would be satisfactory. Now the respondent says that if this occurred I could then lift the stay on the other proceedings, but this contention is against its primary argument for a *permanent* stay. In my view none of this would be a desirable outcome.

40 Let me turn to the question of the interests of justice and its scope where, ex hypothesi, no vexation, oppression or an abuse of process has otherwise been established. This can and should be looked at from the principal perspective of the interests of group members, although I accept that the respondent's interests should also be considered.

41 Now s 33ZF(1) is not directly applicable. It uses the language "... to ensure that justice is done in the proceeding...". But a permanent stay of a group proceeding could hardly be said to ensure that justice is done "in *the* proceeding" (my emphasis). But as across multiple proceedings, the interests of justice may support a permanent stay of one of the proceedings. The power to stay on this broader basis does not derive from s 33ZF(1) but rather the Court's broader and inherent powers to be found elsewhere, which are more than adequate for the task.

42 If one considers the interests of group members and takes one of the proceedings, say the Basil proceedings, there are two groups to consider: (a) the signed up group members; and (b)

the unsigned group members. If one was to consider a permanent stay of the Basil proceedings, there are real difficulties in saying that the interests of justice would dictate a stay if one considers the position of the signed up group members. Over 1000 group members, including sophisticated institutions, investment managers, global asset managers, sovereign wealth funds and superannuation funds have chosen to enter into funding agreements and retainers with ICP Capital, ICP and Maurice Blackburn. They have chosen not to participate in the McKay arrangements. From the perspective of these signed up group members, it could hardly be said that it would be in the interests of justice to stay the Basil proceedings. As for the unsigned group members, there is not the same consideration as on any view, if I stay one of the proceedings, the other proceedings will be available for such unsigned group members to pursue their claims. Further, my analysis of the group members' interests in the Basil proceedings could equally be flipped over to the McKay proceedings if one was considering a permanent stay of the McKay proceedings.

43 Now the respondent, even in the absence of establishing vexation, oppression or an abuse of process, contends that it would be in the interests of justice to stay one of the proceedings to eliminate the duplication of costs and expenses. I accept that this is an important consideration and indeed I have considered this under all limbs said to justify a stay. But the duplication can be minimised by less draconian measures as I later discuss.

44 The following are examples of the type of *potential* duplicated costs and expenses that the respondent may be required to incur in the event that both the McKay proceedings and Basil proceedings continue (whether separately or case managed together) and in the absence of steps that I propose to take which would otherwise minimise such duplication:

- (a) Ongoing non-stage specific costs associated with the respondent's lawyers communicating with two sets of lawyers and counsel for the different applicants throughout the course of the proceedings.
- (b) Duplicated case management costs, including preparing and defending separate interlocutory issues in separate proceedings, proposing and negotiating case management timetables with two sets of legal representatives for the different applicants and otherwise having to prepare for issues that would not arise if only one proceeding were to continue.
- (c) Duplicated procedural costs, such as preparing two defences in response to the allegations raised in the separate statements of claim (even if the issues raised

in both pleadings are the same) and preparing for two common fund applications.

- (d) Duplicated discovery costs, including as to the preparation and negotiation of proposed categories of discovery and protocols for document exchange as well as costs associated with ensuring compliance with the respondent's continuing obligation to give discovery.
- (e) Duplicated costs associated with evidence preparation, including reviewing and responding to two sets of lay witness evidence, reviewing and engaging experts to address two sets of expert evidence and preparing for expert witness conclaves if ordered.
- (f) Duplicated costs associated with preparing for and attending a mediation involving two different applicants represented by two different firms of solicitors and counsel as well as two different litigation funders.
- (g) Duplicated costs associated with preparing for and attending the trial of two proceedings, including preparing witnesses for cross-examination called by two different applicants and their counsel, identifying evidentiary objections to two sets of lay and expert witness evidence, reviewing and preparing either two sets of written submissions and oral submissions or one set of submissions which address the issues raised in both proceedings and attending to the preparation of court books, tender bundles and lists of authorities relevant to each of the proceedings.
- (h) Duplicated costs associated with dealing with notices to be issued to group members in two different proceedings, rather than one set of proceedings.
- (i) Duplicated costs associated with negotiating and finalising settlement (if required) for each of the proceedings and seeking court approval.

45 The potential duplicated costs that the respondent may incur if both proceedings are allowed to continue (whether separately or case managed together), and absent any steps I might take to ameliorate such duplication, has been estimated by the respondent to run into "tens of thousands of dollars, or many hundreds of thousands of dollars".

46 Now I accept that there is likely to be some duplication and consequent additional expense. But I would make a number of other points. First, even if I permanently stay one of the proceedings, there may be multiple proceedings (with corresponding duplication) in any

event for the reasons that I have explained. Second, I propose to put in place case management procedures to reduce such duplication of the type that I discuss later, without needing the blunt instrument of a permanent stay to address this concern. Third, even if there is some duplication with consequent expense, this is only a matter to weigh in the balance. And in the circumstances, it does not outweigh the corresponding detriment to over 1000 signed up group members who may be denied their choice of funder and lawyers if I were to stay, for example, the Basil proceedings; likewise there would be an analogous detriment by staying the McKay proceedings given the over 1500 signed up group members in those proceedings.

47 Further and more generally, no Australian authority requires me to necessarily make the choice of choosing which proceedings are to be permitted to continue and which are to be permanently stayed in the circumstances where either there is no duplication of class membership or the duplication of class membership can be and is eliminated. None of *Johnson Tiles* at [14], *Kirby* at [37] to [41] and *Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd* [2016] NSWSC 17 at [21], [25], [29] and [47] dictate that I am required to make such a choice in those circumstances.

48 The respondent made other specific submissions against the option of class closure of one of the proceedings for the purposes of seeking to demonstrate that a permanent stay of one of the proceedings was the only option, but it is convenient to address these submissions when I discuss the class closure option later.

49 In some respects the respondent's application to stay one of the proceedings is analogous to the Canadian carriage motion. But there are differences. Class actions in Canada are usually filed in the provinces, in their provincial superior courts, rather than in the Federal Court of Canada. In a province that is a common law jurisdiction, one or more of the competing class representatives may bring a carriage motion seeking a stay of all the other present or future class actions relating to the same subject matter. As Professor Morabito explains (*Clashing Classes Down Under* at 282), the starting point is that there ought not to be two class actions for the same class asserting the same cause of action (*Vitapharm Canada Ltd v F. Hoffmann-La Roche Ltd* [2000] OJ No. 4594 at [14] per Cumming J, his Honour's decision being the genesis for carriage motions). But the carriage motion can only deal with competing class actions in the *one* province. A carriage motion cannot deal with competition between class actions in different provinces. Overlapping class actions filed in different provinces create

issues analogous to overlapping class actions in the Federal Court of Australia and say the Supreme Court of Victoria, with cross-vesting legislation being no adequate panacea. But in any event, *non-overlapping* class actions filed in different provinces are not perceived to give rise to any valid objection per se (*Tiboni v Merck Frosst Canada Ltd* (2008) 295 DLR (4th) 32 at [40] per Cullity J).

50 It is important to appreciate that in Canada one has certification procedures. A carriage motion (or its analogue, a stay application) may be agitated either before or after certification. There have been instances where before a carriage motion has been heard, the party resisting such a motion has raised a preliminary issue as to whether the provincial court has jurisdiction to grant or deny carriage before certification (see *Nelson v Merck Frosst Canada Ltd* (2006) 61 BCLR (4th) 157, *Joel v Menu Foods Genpar Ltd* (2007) 78 BCLR (4th) 112, *Grasby v Merck Frosst Canada Ltd* (2007) 216 ManR (2d) 117. It appears that a carriage motion sourced from provincial class proceedings legislation (for example, in Ontario ss 12 and 13 of the *Class Proceedings Act*, SO 1992, c 6, but s 13 having no direct Part IVA analogue) can be granted by a court only after certification (*Nelson* at [29]). Under provincial class proceedings legislation, a carriage motion is granted in respect of a “class proceeding”, that is, a proceeding that has been certified (*Nelson* at [20] to [22] and *Grasby* at [15] to [16]). As such, the source of the power to so grant derives from the relevant class proceedings legislation, but only after certification. But before certification, the court has the power to stay founded in its inherent jurisdiction (*Joel* at [38], *Nelson* at [29], *Grasby* at [25]); such inherent jurisdiction does not require certification as a pre-condition to its exercise. In substance, the court has the power to permanently stay competing potential or actual class proceedings before or after certification.

51 If a stay is granted prior to certification, the court’s reasons for doing so may be to avoid competing certification proceedings which may be lengthy and costly (see, for example, *Giles v Westminster Savings Credit Union* [2002] BCJ No. 2567; 2002 BCSC 1583 at [46]). Generally, the factors relevant to pre-certification stay applications and true carriage motions overlap.

52 Further, a carriage motion is usually brought by a representative applicant rather than the respondent.

53 Further, on a carriage motion, the predominant theme determining the choice of action is what is in the best interests of all class members, although fairness to the respondent is a

consideration (*Locking v Armtec Infrastructure Inc* 2013 ONSC 331 at [7] and [8] per Molloy J). The primary concern is to determine which of the competing actions is more likely to advance the interests of the class (*Mancinelli v Barrick Gold Corporation* (2015) 126 OR (3d) 296 at [18] per Harvison Young J). The relevant factors to be considered and balanced in a qualitative appraisal include (*Sharma v Timminco Ltd* (2009) 99 OR (3d) 260 at [17] per Perell J referring to *Vitapharm* at [49]):

- (a) the nature and scope of the causes of action advanced;
- (b) the theories advanced by counsel as being supportive of the claims advanced;
- (c) the state of each class action including preparation;
- (d) the number, size and extent of involvement of the proposed representative applicant;
- (e) the relative priority of commencing the class action;
- (f) the resources, experience and competence of counsel;
- (g) the presence of any conflict of interest.

54 I accept that the Canadian experience and analogue is informative in the present context. But there is an important distinction. Under Part IVA there is no certification process; representative proceedings can be issued as of right and continue, provided that the conditions in ss 33C and 33H are satisfied and subject to there later being no s 33N order. But in the Canadian provinces, there is no such entitlement or presumption. Accordingly, there is much greater freedom for a Canadian court in the *one* province pre-certification or during the certification process to choose which set of proceedings are to go forward and, accordingly, which others are to be precluded. This greater flexibility is a manifestation of the reality that there is no entitlement for *any* proceeding to go forward as a class action until certification. But in my context, both the Basil proceedings and the McKay proceedings are presumptively entitled to go forward, absent vexation, oppression or an abuse of power of which, as I have said, there is none. So, if one of the proceedings is to be stayed (ie something is to be taken away from, say, the Basil applicant and the Basil group members such that their otherwise entitlement to proceed is denied) some powerful and significant reason must be demonstrated. But in the Canadian provincial approach concerning carriage motions or pre-certification stay applications, no otherwise entitlement to proceed as a class action is being denied. There is no such entitlement until certification. That being the case, there is much greater freedom and flexibility under the Canadian model to make what has

been described as so-called “hard choices” and to engage in what judges of this Court have eschewed as “beauty parades”.

55 But the Canadian practice is informative as to the considerations to apply if a choice is to be made. Indeed, I have little difficulty in accepting a carriage motion analogue in a scenario where:

- (a) neither of the two proceedings have a substantial number of group members signed up to funding agreements; or
- (b) only *one* of the two proceedings has a substantial number of such signed up group members.

56 But the context before me does not involve either of these scenarios. I am loathe to permanently stay one of the proceedings, as to do so would substantially affect the contractual funding and retainer arrangements of over 1000 group members in whichever proceedings I stayed. As best I can tell, no Canadian carriage motion context has had to deal with such a scenario. Now by this observation I am not seeking to emphasise any exaltation of the sanctity of contract, as any contractual arrangements are subject to any exercise of judicial power under s 33V (for example) in any event. But rather, given that a very significant number of group members in either proceedings have made a choice as to their funding and other arrangements, including sophisticated investors (for example, institutions), I am not inclined, by the stay of their proceedings, to presently deny them their choice even if by the exercise of judicial power I can modify that choice at a later stage. Of course, as I have said, if I stayed their proceedings they could opt out of the non-stayed proceedings going forward and then reissue as new individual proceedings or new representative proceedings, but this would hardly be adequate.

57 Let me address two other matters in the context of the permanent stay option.

58 Given that the respondent has placed considerable reliance upon *Johnson Tiles*, I should say something further about it. First, it did not address the scenario of numerous group members in each of the proceedings having been signed up to funding agreements and retainers. Second, the concept of closed classes being permissible under Part IVA had not yet been accepted at the time of *Johnson Tiles*. Third, as *Johnson Tiles* at [6] makes plain, consolidation had been agreed to as between the two main proceedings. Fourth, Merkel J’s statement of general principle at [11] was unremarkable; but in my context we do not have



multiple actions between the “same parties”. Fifth, as the first sentence of [12] makes plain, the applications before his Honour proceeded on the basis of *concessions* made by senior counsel for the various applicants. Sixth, at [16] his Honour accepted that overlapping representative proceedings were not of themselves vexatious and oppressive. Seventh, there were some observations of his Honour suggesting that it was incumbent upon the Court to choose which representative proceedings were to continue (see [14], [16], [64] and [74]). But his Honour’s observations should not be decontextualised. His Honour at [64] contemplated that more than one such proceedings could proceed if it was in the interests of justice. Further, his Honour never envisaged closed classes and more recent techniques for eliminating duplication of group membership. Moreover, later authority such as *Kirby* and *Smith* indicates that no choice need necessarily be made if duplication of class membership can be eliminated. Finally, it must be said that the lens through which his Honour was *principally* addressing the questions before him concerned vexation and oppression to the respondent. Although there was reference to Part IVA and the interests of group members, considerable emphasis was placed on the interests of the respondent. But if one shifts the emphasis more to the best interests of group members (and also considers that in each of the proceedings before me the number of signed up group members is substantial), a different calculus is involved, particularly if group member duplication can be eliminated.

59 Finally and for completeness, I should note that it has not seriously been contended before me that from the perspective of either applicant (or the groups they represent), the continuance of one of the proceedings will seriously prejudice the continuance of the other proceedings; cf *Hassid v Queensland Bulk Water Supply Authority* [2017] NSWSC 599 at [31] and [32]. Problems of the type identified in *Hassid* at [37] to [41] and [47] to [49] are not present in my context. But I do accept that there are some difficulties, which are not insurmountable, concerning the uncertainty of group members receiving multiple notifications (and their informational content) in both proceedings. Moreover, there are increased difficulties with the prospects of settlement and mediation in two proceedings, although in the context before me it is not as serious given that the same causes of action are being pursued in both proceedings. But I do accept that the respondent is unlikely to settle one of the proceedings with the other still on foot. Now from the point of view of an applicant and associated group members in one of the proceedings, these difficulties would be removed if those proceedings were the only proceedings going forward. I have taken such matters into account but they do

not point against the course that I am proposing. Such matters certainly do not justify any permanent stay of one of the proceedings.

60 In summary, a permanent stay of either of the proceedings has not been justified. And as to the respondent's fall back position of a temporary stay, I do not consider that this is appropriate either. Considerable uncertainty would be caused. It is better to face up to the problem now by eliminating duplication of group membership and putting in place case management procedures to ensure that both proceedings are prepared and run efficiently. Let me now address the option of class closure.

### **SHOULD THERE BE CLASS CLOSURE?**

61 I have the power under s 33ZF(1) and also in the exercise of my inherent power to make a class closure order that eliminates the existence of overlapping group members in two competing class actions. At the least, s 33ZF(1) is adequate for the task (see *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at [33]). In my view, it is "appropriate ... to ensure that justice is done in the proceeding" (I do not need to discuss the expression "or necessary to ..." in s 33ZF(1)) to close the class in one of the proceedings. But which proceedings?

62 Before continuing further, I should make it clear that in the present context I am not dealing with the scenario where class closure orders, including the requirement for group members to register, are being made to facilitate settlement, which involve potentially extinguishing a class member's right to share in the fruits of a subsequent settlement or judgment (cf the scenario discussed in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98 at [71] to [80] per Jagot, Yates and Murphy JJ endorsing the exercise of discretion by the docket judge, Foster J). Under conventional class closure orders, group members who neither opt out nor register by a specified date remain group members for all purposes, but are precluded from participating in any settlement and, depending upon the form of the order, any judgment. But such an order would not overcome the problem in the present context of overlapping group members in the McKay proceedings and the Basil proceedings. I have an entirely different context. I am closing the class in one of the proceedings to eliminate the duplication in group membership over both proceedings. This will not involve barring orders as such. Signed up group members in each of the proceedings will have the choice of remaining as such. As for presently unsigned group members in both proceedings, they will (as I will explain shortly) be captured by the McKay proceedings and

can choose to maintain membership thereof or opt out. At this stage, there will be no registration protocol put in place, let alone barring orders superimposed on those who have not registered. Now the McKay applicant has stressed the cautionary advice of the Full Court in *Melbourne City Investments* (at [77]). But such advice should not be decontextualised. The matter is context dependent as to why class closure is being addressed and at what time. It may also be accepted that “[w]hether it is appropriate to order class closure is a question of balance and judicial intuition” (at [79]), but the context is all important. My context requires the application of a different calculus and it has some analogy with *Smith*, although there is one significant difference.

63 In *Smith*, there was an “open” class action (the Creighton proceeding) and a “closed” class action (the Smith proceeding) which were both brought against Australian Executor Trustees Limited (AETL). All of the group members of the Smith proceeding (who had entered into funding agreements with Litman Holdings Pty Ltd) were also group members of the Creighton proceeding. The differences in the two proceedings were substantial, such that it was possible that one proceeding could succeed and the other proceeding could fail. I would note at this point that that is not my context, but I would also note for completeness that the respondent before me sought to finesse too much out of this difference. Ball J had available to him an additional justification supporting both proceedings being allowed to continue, but its absence does not justify the reverse result in my context. AETL sought a permanent stay of one or other of the class actions. After considering various factors, Ball J accepted that “if only one proceeding is permitted to continue as a representative proceeding, that should be the Creighton Proceeding” (at [43]). It appears that the principal reason for this conclusion was that the effect of staying the Creighton proceeding would be to deprive a substantial number of debenture holders of the benefit of being members of a representative action. If the Creighton proceeding was stayed, only members of the “closed” class in the Smith proceeding would remain members of a representative action. Ball J then said that the choice was between staying the Smith proceeding or giving group members of the Smith proceeding an option to continue in the Smith proceeding alone or in the Creighton proceeding alone. His Honour said that he preferred the latter option. This was because “[t]he two proceedings offer true alternatives in the sense that they have different funding models and frame their cases in significantly different ways. The choice is not simply which legal advisors should be permitted to advance what is effectively the same proceeding” (at [47]). On this basis, rather than staying the Smith proceeding, Ball J considered that the appropriate course was to fix a

date by when class members were to opt out of the proceedings, and made an order that group members of the Smith proceeding who did not opt out of the Smith proceeding by a specified date would be taken to have opted out of the Creighton proceeding. Such an order was made on the basis that “members of the [closed] Smith Class [had] in a sense specifically chosen to opt into that class by signing a funding agreement” (at [45]).

64 It is open to me to make similar types of orders in the present case to eliminate the duplication, although I accept that I have a different context given that in both of the proceedings before me the same or very similar claims are being pursued. In other words, if one of the proceedings succeeds or fails, the result in the other is most likely to mirror that outcome on the common issues. I would first need to determine which of the McKay proceedings or the Basil proceedings were the preferable proceedings for group members based on an assessment of the relevant factors. A suitable mechanism for achieving this result might be the following. Assume that the McKay proceedings are the preferable proceedings for at least the unsigned group members. On that basis, I could fix a date by which class members could opt out of either or both proceedings after *first* modifying the group description in the Basil proceedings. I could make orders to the following effect:

- (a) The first step would be to modify the Basil group definition to close the class, so that it only includes signed up Basil group members. After that I could then implement an opt out mechanism in both proceedings.
- (b) Members of the McKay proceedings who had not signed a funding agreement with the funder in the Basil proceedings (ICP Capital) and who had not opted out of the McKay proceedings by the opt out date would be members of the McKay proceedings. By definition, such persons would not be members of the Basil proceedings by reason of step (a). Such persons could be signed (ie parties to IMF funding agreements) or unsigned McKay group members. If such members did opt out of the McKay proceedings, then they would not be members of *any* proceedings.
- (c) Members of the Basil proceedings who had signed a funding agreement with ICP Capital and who opt out of both the Basil proceedings and the McKay proceedings by the opt out date would no longer be members of *either* proceedings.

- (d) Members of the Basil proceedings who had signed a funding agreement with ICP Capital and who opt out of the Basil proceedings (but not the McKay proceedings) by the opt out date would no longer be members of the Basil proceedings but would be members of the McKay proceedings. This would give funded group members of the Basil proceedings the option of electing to be members of the McKay proceedings in circumstances where I had determined that the McKay proceedings were the preferable proceedings for group members and was to be the only open class action to go forward, notwithstanding that such Basil group members had signed funding agreements with ICP Capital. Any contractual restraint on opt out of the Basil proceedings would have no force or effect in the face of my orders or any statutory right to opt out.
- (e) Members of the Basil proceedings who had signed a funding agreement with ICP Capital and who opt out of the McKay proceedings (but not the Basil proceedings) by the opt out date would only be members of the Basil proceedings.
- (f) Members of the Basil proceedings who had signed a funding agreement with ICP Capital and who did not opt out of either of the proceedings by the opt out date would be taken to have opted out of the McKay proceedings and be members of the Basil proceedings.

65 Orders of this kind would have the consequence that after the opt out date in each of the proceedings:

- (a) the Basil proceedings would be a “closed” class action consisting of signed Basil group members only; and
- (b) the McKay proceedings would be the “default” open class action with both signed and unsigned McKay group members.

66 Mr Michael Garner, counsel for the respondent in both proceedings, submitted that I should not make a class closure order. The respondent’s preferred option was a permanent stay of one of the proceedings, which I have rejected. Mr Garner advanced the following contentions.

67 First, if one class is closed, then both proceedings will be heard in a joint trial. But that would result in duplication of work, including in respect of pleadings, discovery and interlocutory applications. There would be inefficiencies for the respondent (who would remain exposed to two sets of adverse costs orders) and inefficiencies for the Court. Moreover, the potential return for group members may well be reduced. It is said that such outcomes are not justified. Now I have addressed these matters earlier and there are steps that I propose to consider (as I discuss later) that will ameliorate these concerns. It is also said that the McKay proceedings and Basil proceedings are substantially the same and that the present context is not a scenario like *Smith*, where the two proceedings offered true alternatives such that one could succeed and one could fail. Rather, it is said that in the present context the choice is simply which legal advisors and funders should be permitted to advance what is effectively the same proceedings. Now that is true so far as it goes but it ignores the signed up group members' interests and the funding choices that they have made.

68 Second, it was contended that class closure of one of the proceedings would require there to be an opt out process in both proceedings conducted simultaneously, which would be expensive and confusing for group members. In addition, if a class closure order of the kind described above is made, there would inevitably be a need for a further conventional class closure mechanism at a later time in respect of the "default" open class, which would also occur at the expense of group members. Accordingly, it was contended that the class closure option for dealing with the problem of overlapping group members would likely result in two opt out regimes (one initially in each of the proceedings), followed at a later time by a third conventional class closure regime in the "default" open class action. It is said that this can be contrasted with a permanent stay of one of the proceedings, pursuant to which there would only be one opt out/class closure regime. In short, it is said that the stay option would be much less expensive and much less confusing for group members than the class closure option. These submissions are accurate to some extent but they do not compellingly support a case for a stay.

69 Third, it is said that if the Court adopts the class closure option, it would in any event be required to determine which of the McKay proceedings and the Basil proceedings is the preferable set of proceedings for group members so as to determine which of the two proceedings should be the "default" open class action. It is said that if that determination is made, the appropriate course is for the Court to allow the preferable proceedings to continue

as an open class action and to stay the other proceedings. But again this ignores the position of the signed up group members in the proceedings to be stayed.

70 Mr Garner's submissions have considerable force, although his second and third submissions travel beyond the interests of the respondent. But as I have indicated, I do not consider that a proper basis has been shown for staying one of the proceedings if I eliminate the overlap in group membership and have one open class and one closed class. The question that arises is which class should be closed: the McKay class or the Basil class? In answering that question, the principal and overriding consideration is the best interests of group members. But what does this mean precisely in the present context? On one analysis I have four classes of group members to consider being:

- (a) the signed up group members in the McKay proceedings (ie those that have entered into litigation funding agreements and retainer agreements with IMF and Slater & Gordon);
- (b) the balance of the group members in the McKay proceedings;
- (c) the signed up group members (with ICP Capital and Maurice Blackburn) in the Basil proceedings; and
- (d) the balance of the group members in the Basil proceedings.

71 Now theoretically I should consider the best interests of the four classes both separately and collectively. But two of these classes can be readily eliminated from further consideration if I allow both proceedings to go forward with one as an open class and the other as a closed class. In that scenario, the signed up classes referred to in [70(a)] and [70(c)] will have their interests protected whichever class I close. Therefore I need only further address the classes referred to in [70(b)] and [70(d)], ie the unsigned group members in each of the proceedings. But these two classes can be reduced to one class for the purposes of the analysis. Each may be separately formally stipulated, but in substance their boundaries and content are co-extensive; hence the duplication to be eliminated. So the question (assuming the duplication is to be eliminated) is: which are the preferable proceedings for unsigned group members in both proceedings? What considerations are relevant to answering this question? In my view, the following non-exhaustive considerations are relevant:

- (a) The experience of the practitioners seeking to bring the representative actions, although that factor may be confined to whether the practitioners have

sufficient experience and competence to be able to properly represent the interests of class members.

- (b) The costs the practitioners expect to charge for all work performed.
- (c) The funding terms in each of the proceedings including funding terms and conditions and percentages.
- (d) The resources made available by each firm of solicitors, and their accessibility to clients.
- (e) Generally, the fact that one of the proceedings was commenced first in time carries little weight, however that will not always be the case. It may be relevant if one case has been on foot for significantly longer than the other and is therefore more advanced. Accordingly, the state of preparation of the proceedings is relevant, but will not be determinative if both proceedings will be ready for trial at the same time.
- (f) The number of group members signed up to each of the proceedings.
- (g) Whether each of the proceedings would proceed without a common fund order, and the terms of any proposed common fund order that might be sought.
- (h) The position adopted by each funder on the question of security for costs and generally their resources to meet any adverse costs order.

72 In the present context as to a comparison between both proceedings, criteria (a), (d), (e), (f) and the first aspect of (g) are neutral.

73 First, as to criterion (h), there are no difficulties concerning the McKay proceedings, but there are unresolved questions concerning the Basil proceedings. Issues have been raised about the financial position of ICP Capital (the Basil funder), which are relevant to security for costs and the funding of adverse costs orders. ICP Capital was registered in December 2016. It has no financial accounts and has paid up capital of \$1 million, but has \$19 million said to be due and payable from its shareholders. But there is a lack of real detail (although there is some evidence) as to the financial capacity of those shareholders, some of whom are foreign corporations, to contribute a further \$19 million if required to do so. Further, ICP Capital has said that it will use the money due and payable from its shareholders to fund the Basil proceedings and up to two more class actions, conditional on book build. But it is not entirely clear to me how ICP Capital could fund and provide security in each of the Basil



proceedings and up to two more class actions. However, ICP Capital proposes to take out an adverse costs insurance policy in the Basil proceedings, which may or may not be adequate.

74 The McKay proceedings offer group members greater certainty in respect of the adequate provision of security for costs and an assurance that their returns will not be reduced by the expense of an adverse costs insurance policy. Contrastingly, there are some risks with respect to security for costs in relation to the Basil proceedings. In my view, there is a small risk that ICP Capital may not ultimately be able to provide adequate security for costs. Accordingly, it is not in the best interests of group members that the McKay proceedings' class be closed in circumstances where there exists uncertainty as to whether the Basil proceedings will ultimately proceed. If I were to close the class in the McKay proceedings but allow the Basil proceedings to go forward as an open class and the Basil proceedings were ultimately stayed for non-provision of security for costs, group members' interests (the unsigned members at least) in both proceedings would be significantly prejudiced. Of course, if that were to occur I could revisit any class closure of the McKay proceedings. But that would be an uncertain and unsatisfactory outcome.

75 Further and generally, in the McKay proceedings group members will not incur the costs of an application for security for costs. In addition, there is no risk that any relevant insurance premium in respect of adverse costs will be passed on to group members. Contrastingly, ICP Capital intends to pass on the cost of the relevant insurance premium to the Basil applicant (and group members), subject to an undocumented guarantee pursuant to which the extent of the "passing on" will be capped at a certain level. John Walker, CEO of ICP and ICP Capital, gave evidence of a "pricing assurance" styled as the "Net Benefits Warranty". Apparently, ICP and ICP Capital have now agreed that the sum of ICP's fee plus ICP Capital's fee plus any adverse costs order insurance premium will be no greater than IMF's fees; if the sum is greater, the difference will be deducted from the fees of ICP and ICP Capital. But as yet there is no evidence that the Net Benefits Warranty has been effected by way of amendment to the funding agreement signed by funded group members in the Basil proceedings. Its existence, terms and enforceability remain opaque to Basil group members.

76 Generally, there is a small risk that ICP Capital may not have sufficient resources to fund the Basil proceedings or be able to procure full insurance coverage for adverse costs orders. But I do accept that in the event ICP Capital is unable to continue funding, then Maurice

Blackburn would conduct these proceedings on an unfunded basis. On balance, on criterion (h) the McKay proceedings are favoured as the default open class.

77 Second, let me now elaborate on criterion (c) and the funding arrangements. The pricing model contained in the IMF funding agreement and the proposed McKay funding model is relatively clear. Contrastingly, the pricing model contained in the ICP Capital funding agreement is complex, uncertain and subject to various significant undocumented “riders”, creating a further source of uncertainty for group members in assessing their likely financial returns should the matter successfully resolve. On this point therefore, on balance the McKay proceedings are still favoured as the default open class.

78 The IMF funding agreement is in fairly standard terms. Varying commission rates are proposed to be charged on gross recoveries depending upon the timing of resolution; there is no charging of a multiple of IMF’s investment in the McKay proceedings. Further, a project management fee is not being charged. IMF’s commission rates and caps compare favourably with the rates and caps used in other group proceedings and approved by this Court. IMF and the McKay applicant have also agreed that the terms sought in any common fund application will be on more favourable terms than under the present funding agreements, with entitlements to additional commission under the latter not pursued.

79 Contrastingly, the ICP Capital funding arrangements operate on the basis of complicated formulae, including what has been described as the 3 x Multiple Model, which essentially allows a fee in respect of a particular claimant of three times the claimant’s share of project costs. But I should observe that the ICP Capital funding agreement relevantly provides for commission fees specified by the *greater* of various rates, which are in fact lower than IMF’s rates, and the application of the 3 x Multiple Model. Accordingly, given the operation of cll 6.1(c)(iii) and 6.1(c)(iv), a direct comparison of percentages between the two funders is superficial and incomplete. Further, despite the existence of apparently comprehensive documents comprising the ICP Capital funding agreement, these documents are to be read with or subject to various pricing assurances, described in the materials as the Net Benefits Warranty, which I have described, and what has been described as the Return Guarantee (or sometimes the Net Claim Proceeds Guarantee). The Return Guarantee provides for a cap on fees payable by a claimant such that the claimant receives at least 50% of what are defined to be the Net Claim Proceeds.

80 I would also note that the use of the 3 x Multiple Model to determine commission rates may not necessarily incentivise ICP Capital to keep litigation costs low or resolve the litigation at an early stage of the proceedings, notwithstanding other provisions drawn to my attention that may act as a counterbalance.

81 Now I accept that the ICP Capital funding agreement caps the sum of ICP's and ICP Capital's fees at no more than the fees proposed to be charged by any other funder that funds a filed claim against the respondent; this is now to be further modified as I have discussed earlier. In substance, the Basil funding arrangements have the effective cap that Basil group members will pay no more than if the alternative funding arrangements in the McKay proceedings applied. So, it was said that, *ceteris paribus*, this was an argument in favour of the Basil model over the McKay model. Simplistically this may be true in one sense, but two points. First, such a rider adds some complexity and uncertainty as to how the Basil funding arrangements are to apply. Second, what would happen if each competing funder had such a rider? The effect and operation of each rider would be circular and ineffectual. For my part, whilst such a rider has some appeal, I have not given it great weight in the balancing exercise in comparing funding models.

82 Finally on this aspect dealing with the comparison between funding terms, the Basil applicant says that under the ICP Capital funding agreement, if ICP (as the provider of management services) believes that circumstances have arisen such that ICP may be in a position of conflict with respect to any obligation owed to ICP Capital and the obligations owed to class members, ICP will act in the class members' interests to resolve that conflict. It is said that such protection afforded group members and prioritisation of their interests is possible, given the separate functions of ICP and ICP Capital, but is not possible under the IMF funding arrangements. In the overall scheme of things, I do not consider that this is a significant relevant difference in favour of the Basil arrangements.

83 Let me now deal with some of the modelling evidence relevant to potential outcomes. Each of the applicants has filed a form of accounting or financial modelling evidence seeking to justify how it is said that, in relation to the modelling of realistic scenarios, their funding arrangements ultimately lead to better returns for group members. One might appreciate that various scenarios required modelling depending upon the assumed recoveries, the point at which the proceedings were resolved and inputs involving estimates of legal costs and other

deductions that needed to be made from any gross recoveries. Some prediction was also necessary concerning how the terms of the competing funding arrangements were to work.

84 At the outset, I would note that the inherent complexity of the terms of the ICP Capital funding agreement, combined with the effect of various significant unwritten riders thereto render it difficult to assess the impact of the funding and cost arrangements on possible outcomes for group members.

85 Now the Basil applicant has contended that the most significant reason why the Basil proceedings are advantageous for group members is that ICP Capital's funding arrangements in the Basil proceedings offer considerable advantages to claimants over IMF's funding arrangements in the McKay proceedings. It is contended that "careful, extensive and detailed" modelling of potential returns to group members in the two class actions has been conducted by ICP Capital. Of the settlement scenarios that have been modelled:

- (a) more than 50% result in group members in the Basil proceedings receiving a higher return than those group members in the McKay proceedings, with an average increase in return to group members in the Basil proceedings of some significance;
- (b) less than 50% result in group members in the McKay proceedings receiving a higher return than those group members in the Basil proceedings, with an average increase in return to group members in the McKay proceedings of only a very modest difference.

86 Further, the Basil applicant says that by reason of:

- (a) the fact that ICP Capital's rates are lower than IMF's funding rate(s);
- (b) the existence of the various guarantees and warranties; and
- (c) the common fund order cap that will be applied for,

ICP Capital's funding arrangements provide at least an equal, and in many scenarios, a greater return to funded and unfunded group members than those proposed by IMF.

87 In my view, at this stage it is difficult to meaningfully compare the modelling undertaken by the parties. Each of the models worked through relies upon a number of assumptions concerning the funding models, key inputs and the stage at which, and amount for which, the matter is resolved. In my view, the modelling should be treated conservatively as offering no

more than a guide to the range of possible outcomes for group members. In so far as any such comparative analysis is able to be undertaken, one should have little regard to the scenarios which may be regarded as outliers. It is more meaningful to focus on the scenarios which depict more conservative outcomes in terms of claim proceeds and which are focussed on the more likely stage at which the proceedings might resolve. When one does so, in my view there is a reasonable basis for concluding that the McKay funding model *may* generate a more beneficial result for group members in the majority of those resolution scenarios which are more conservative. In summary, at the present time I cannot confidently form the view that the Basil funding model (even adjusted by the recent warranties and guarantees proffered) will always, or even most often, deliver the superior result.

88 I would make some additional general points on the question of funding. First, comparisons between funding models at this stage is in some respects an unsatisfactory exercise. I have not approved their terms or addressed any common fund order question. Accordingly, any comparison proceeds on an unstable foundation. It proceeds on the questionable assumption that either model is what will be approved by me at a later stage either directly or through the determination of any common fund order application. Second, notwithstanding the uncertain aspects of the Basil funding model, I see no difficulty in leaving Basil group members, who have been signed up, to the funding model that they have chosen in their proceedings, subject to any later approval question by me. That result can be achieved by allowing the Basil proceedings to go forward but to close its class so that it only includes those who have *presently* been signed up or ultimately a sub-set thereof (ie those who have signed up less those who have signed up but then opted out). I see little advantage in permitting unsigned group members (ie those who have not yet signed up in the Basil proceedings) to participate therein. Now the Basil applicant contends that McKay group members who have not presently been signed up in the McKay proceedings should be permitted to participate in the Basil proceedings to take advantage of the so-called advantages of the Basil funding model. I disagree for the reasons that I will later elaborate on. In essence, the assumption of the relative advantages of the Basil funding model is questionable. Further, there can be no certainty in that model being ultimately approved by me or being the basis for any common fund order in any event. Further, leaving such an option open will create considerable uncertainty for group members in terms of notification procedures. In my view, unsigned group members in either of the proceedings should only have a choice of staying in or opting out of the McKay proceedings. I will elaborate on this later.

89 Third, let me now address criterion (b) and the legal fees and evidence relevant to their  
projections. In summary, this criterion is neutral as between the two proceedings,  
notwithstanding the following matters.

90 Now I accept that the rates and the litigation budget for the McKay proceedings are both  
lower than those in the Basil proceedings. The lawyers' rates are higher in the Basil  
proceedings than in the McKay proceedings across all categories of personnel who might be  
involved. The differences range from 12% for a principal lawyer / consultant / special  
counsel, to 45% for a paralegal. The average difference between the rates proposed to be  
charged for equivalent legal staff is 27% higher in the Basil proceedings. Further, the  
litigation budget in the Basil proceedings is higher than that in the McKay proceedings.

91 Generally, on *current* projections it would appear that legal costs may be lower in the McKay  
proceedings than in the Basil proceedings, such that the returns to group members may be  
higher in the McKay proceedings.

92 But I do not consider it to be a useful discriminant at an early stage to compare solicitors'  
charge out rates or legal costs budgets for the purpose of selecting the proceedings to go  
forward with the lowest legal costs estimate, unless there is a very major discrepancy. I say  
this for a number of reasons:

- (a) First, charge out rate comparisons are in some respects invidious and tell you little about the quality of the service delivered and the experience and quality of the personnel who are to deliver the service. Indeed, a firm that has higher rates but is more efficient in terms of lower hours spent may be preferable.
- (b) Second, legal budgets at an early stage of proceedings have too many imponderables to be a useful base or comparator for costs estimates in lengthy and complex group proceedings.
- (c) Third, in any event if you use legal costs budgets as a comparator, one firm may be incentivised to give an unreasonably low initial estimate in order to gain approval for its action to go forward.
- (d) Fourth, in any event the Court's supervisory jurisdiction on costs can at all times be invoked to ensure that whatever budget is initially proffered, legal costs are kept at a reasonable and realistic level. In other words, the Court can in substance factor out at a later stage any notional and hypothetical difference

in costs estimates in relation to legal costs “charged” ultimately to group members.

93 Finally and as I have indicated, there are a number of other factors that seem to be equally balanced as between the two proceedings. First, in relation to size (number or financial stake) of group members, the signed up McKay group members number 1,586 compared with 1,008 Basil group members. But it appears that the loss estimates for the groups, based on the application of an inflation per share loss methodology calculated on a LIFO basis, are of a similar order of magnitude. Second, in relation to the extent of involvement of the proposed representative applicants, both representative applicants are highly engaged and each makes a reliance-based claim as well as a market-based causation claim. Third, as to the experience of the legal teams, both legal teams are comprised of solicitors and counsel who are appropriately experienced to conduct the proceedings. Fortunately, the parties before me have refrained from making “scandalous” submissions about their rival lawyers’ competency (or lack thereof) (cf *Settingington v Merck Frosst Canada Ltd* [2006] OJ No. 376 at [27] per Winkler J). Fourth, as to the nature and scope of the causes of action advanced in each action, the case theories and the stage each of the proceedings have reached, such factors are equally balanced.

94 On balance, and given my view that the duplication in group membership should be eliminated, it is appropriate to close the Basil class. First, the ICP Capital funding arrangements are more opaque and evolving than the IMF funding arrangements. Second, I have less confidence in the financial strength and capacity of ICP Capital than I do of IMF. Relatedly, there are some small risks concerning its ability to deal with adverse costs orders and the question of insurance. I am content to leave signed up Basil group members with the arrangements that they have chosen, but I do not consider that the Basil class should remain open.

95 Now before dealing with the precise class closure mechanism, it is appropriate at this point to make a number of other general observations.

96 First, if I had been faced with the scenario of two open class proceedings which substantially overlapped as to both class membership and causes of action, with neither involving a substantial number of group members signed up to litigation funding and retainer agreements, I would have had no hesitation in staying one of the proceedings, and in essence adopting a modified carriage motion model.

97 Second, if I had been faced with the first scenario but with one of the proceedings involving a very substantial number of group members signed up to funding agreements and the other not, I would have, *ceteris paribus* in terms of the quality of the legal representation and the availability of resources, been inclined to stay the proceedings that did not have such a substantial number of signed up group members. But this observation should not be seen as an incentive to sign up group members before issue. It simply reflects the reality that displacing contractual arrangements made by significant numbers of group members should be avoided (if possible) where I can otherwise ensure that signed and unsigned group members' interests are properly protected in any event. Moreover, what I have said cannot be definitive in all cases, for example where the quality of the legal representation and the resources is substantially less in the proceedings with the signed up group members as compared with the other proceedings; but this is an unlikely scenario as experience shows that if anything the reverse is likely to be the case.

98 Now it will be appreciated that the present cases before me do not involve either scenario. Rather, I am dealing with a scenario where both proceedings have over 1000 signed up group members in each case. Even then, if I had been satisfied that the quality (experience) of the legal representation and the availability of resources in one case was substantially less than for the other, I would have stayed the former case. But as I have indicated, in the two cases before me there is no such significant disparity between the quality of the legal representation and the resources available in each case, subject to the small risks I have discussed earlier concerning the Basil proceedings.

99 Third, I do not consider it to be an appropriate discriminant in *most* cases, in terms of choosing at an *early* stage which proceedings to stay (or perhaps which class to close), to endeavour to compare (in terms of assessing what is in the best interests of group members):

- (a) the terms of possible competing common fund order scenarios; and
- (b) the ultimate net recoveries that may be available to group members under different common fund order scenarios.

100 In relation to (a), I say this because at an early stage the Court will not have approved the funding model(s), let alone made any common fund order. In other words, the comparison that (a) may entail would be based on an insecure foundation at an early stage of the proceedings. Various statements have been made by the Basil applicant / ICP Capital and the McKay applicant / IMF as to what position they would take concerning a common fund order



application if their related proceedings, namely, the Basil proceedings and the McKay proceedings respectively, were to proceed as open class proceedings. At this stage, and given that the terms of any such order (indeed whether I make one at all) are matters for later consideration by the Court, the position is too unclear to assess whether one set of proceedings should be favoured over the other (in terms of being the open class proceedings) by reason of this criterion.

101 In relation to (b), the problems are compounded. Not only would one have an insecure foundation in terms of assessing the terms of the funding models, but in terms of projections as to future recoveries based on these models there would be uncertainty as to the inputs into any calculations relating to gross recoveries, approved deductions (s 33V) and net recoveries.

102 But what I have said is subject to the rider that if in a particular case matters [99(a)] and [99(b)] can at an early stage be determined with a substantial degree of confidence, with one of the proceedings being clearly and significantly advantageous to unsigned group members over the other in terms of realistic funding arrangements and projected ultimate net recoveries, then that may favour staying the less favourable proceedings or closing its class. But in my view it would be an unusual case where this could be determined with confidence at an early stage. I could not so determine in the matters before me. I am, nevertheless, closing the Basil class for other reasons.

103 Fourth, I do not consider that any “first in time” criterion, even if it was a relevant consideration, has any weight in the present case. It is well established that a race to the palace ought not to be encouraged by adopting such a criterion. But where a second representative overlapping action has been instituted a significant time after the first such action, it may be relevant to consider the relative timing. But to do so would not be to prefer the first in time for just being first. Rather, it may simply reflect the fact that significant work may have already been done under the first action, such that the second action ought not be permitted to proceed because of the duplication in expense, inefficiencies and delay involved which may be antithetical to group members’ interests. But in the present context, I am not faced with such a scenario given that the Basil proceedings were instituted shortly after the McKay proceedings.

#### **WHAT TYPE OF CLASS CLOSURE?**

104 One issue that has troubled me in closing the class in the Basil proceedings concerns whether if I close that class I should allow before closure, say, *unsigned* group members in both

proceedings (perhaps indeed also signed McKay group members if the carve out in the current Basil class description was to be removed) to, in effect, opt out of the McKay proceedings and remain in the Basil proceedings by virtue of not opting out of the Basil proceedings. In other words, should such group members be given the choice of electing, in substance, for the ICP Capital type funding model over the IMF model? After all, the Basil applicant says that the ICP Capital model is the preferable model.

105 In terms of the mechanism to achieve that result, group members (unsigned and signed (if I remove the Basil class description carve out)) in the McKay proceedings could be given this choice if I were to do nothing more than adopt a plain vanilla opt out process running concurrently in each of the proceedings. The group members in the McKay proceedings could opt out of the McKay proceedings, not opt out of the Basil proceedings, and thereby achieve the result of remaining group members in the Basil proceedings only, with the benefit of the ICP Capital funding model with its virtues extolled by the Basil applicant.

106 But I could deny such a choice by the following mechanism. First and before any opt out mechanism being put in place for either of the proceedings, I could modify the group description in the Basil proceedings to in essence close it by limiting it to only those who are presently signed up group members in the Basil proceedings. Now one would not normally do this without proper notice and the unsigned Basil group members being heard, as it would usually prejudice their interests. But in this case it would not, because the foundational assumption is that they would also and in any event be members of the McKay proceedings which pursues the same claims and causes of action. They would lose the benefit of a common fund order mechanism following the ICP Capital model in the Basil proceedings, but that may be an illusory benefit in any event for there would be no certainty in the funding arrangements I would approve or make in the Basil proceedings. Moreover, it assumes that the ICP Capital model is preferable to the IMF model, which is a contestable proposition in any event. Second and following the modification of the Basil group description to close it, ie limiting its universe, I could then proceed to adopt an opt out protocol for *both* proceedings. That would achieve the result that the Basil class could then decrease, but it would not increase. I have set out greater detail in [64] of the dimensions of this mechanism.

107 Ultimately, I have decided to take this latter course. This option does not prejudice the signed Basil group members directly; perhaps it may be said that additional unsigned members could enable a spreading of the burden of fees and costs, but the signed members

chose to sign up without any such guarantee. Now this latter course does of course remove an option for McKay group members and the unsigned Basil group members including group members who have registered their interest, whatever that entails, but have not yet signed. But they can be members of the McKay proceedings. Moreover, if there are aspects of the Basil funding mechanism that are useful, these can be drawn to my attention as part of any common fund order application in the McKay proceedings.

108 This latter course in my view is desirable to avoid the considerable complexity and confusion that may otherwise result if I took the course of not modifying in the first instance the Basil group description. If I did not so modify, unsigned McKay group members (and signed if I was to remove the Basil class description carve out) would then be able to opt out of the McKay proceedings and remain in the Basil proceedings. Likewise, Basil unsigned group members could also remain in the Basil proceedings. But such group members may be unclear as to which is the preferable funding mechanism. Moreover, although notifications to group members under ss 33X and 33Y of the Act are to ensure that group members can make informed decisions concerning their rights, at the end of the day such notices must preference clarity and simplicity (*Melbourne City Investments* at [88]).

109 I do not propose to give advice in any notice to group members as to which proceedings are the better proceedings in terms of funding or returns. And in any event, if I close off the Basil class first to only those that have signed up, then McKay group members (and the unsigned Basil group members who overlap) will not be able to join (or remain in) the Basil proceedings. Accordingly, such group members will not need such comparative advice. Moreover, the signed up Basil group members who may opt out of the Basil proceedings can take their own advice on such questions, particularly given that they were sophisticated enough to make their own choice in the first place by signing up to the Basil proceedings.

110 In relation to the notification to McKay group members, it may be necessary to say that a common fund application may be made, but the terms of this will be too unclear to stipulate.

111 Finally, the notifications to group members in both proceedings will need to stipulate that individuals should take their own legal advice, if necessary.

#### **FUTURE CASE MANAGEMENT**

112 It is likely that in the case management of both proceedings I may give directions to achieve the following efficiencies after discussing the matter further with counsel.

113 First, the Basil applicant and the McKay applicant should have only one counsel team between them, subject to any direction to the contrary where a specific need is justified (for example, because of issues arising specifically from the different constitution of each of the proceedings in terms of group membership or funding).

114 Second, the Basil applicant and the McKay applicant should negotiate as one with the respondent on an electronic discovery protocol and categories for discovery.

115 Third, there should be a joint trial of both proceedings. Relatedly, the evidence in each of the proceedings should be treated as evidence in both.

116 Fourth, the lawyers for the Basil applicant and McKay applicant should:

- (a) use reasonable endeavours to agree on the areas of expertise required for expert evidence, the identity of particular experts to be briefed and the contents of any briefs and letters of instruction to the experts;
- (b) consult with each other before preparing, filing and serving any evidence;
- (c) use reasonable endeavours to progress each of the proceedings in a similar manner;
- (d) cooperate in the conduct of or response to any interlocutory application in either of the proceedings;
- (e) notify the other in the event that an interlocutory application is deemed prudent or necessary within a reasonable time before such application is filed; and
- (f) confer about key dates.

117 As an ancillary step to the foregoing directions and in the absence of cooperation between the applicants and their advisers in both proceedings in achieving these objectives, it may be appropriate for an independent lawyer to be appointed as an auditor to liaise with the lawyers and funders in each case to monitor at a high level the legal work done and resources deployed so as to be able to report to the Court, with such frequency as is directed, the steps taken or that could reasonably be taken to eliminate the duplication of work across both actions. But such an appointment would only be made where it was cost effective to do so and in circumstances where the Court was not able to monitor these matters directly.

118 The above steps are designed to reduce the overall costs that may ultimately be borne by group members across both proceedings in respect of the applicants' own costs in each action. But such steps may also reduce the potential overall adverse costs order burden of the respondent (and indeed its own costs) across both actions. Indeed, I expressed my view to counsel at the hearing of the stay applications that in relation to any potential exposure to an adverse costs order, I may consider making orders to achieve the result that the respondent be only exposed to one set of legal costs vis-à-vis the applicants as if there had been only one set of proceedings.

### CONCLUSION

119 In summary:

- (a) I refuse the stay applications in each of the proceedings.
- (b) I will give directions after hearing further from the parties concerning the steps necessary to close the class in the Basil proceedings, and to implement necessary notification and opt out mechanisms in both the McKay proceedings and the Basil proceedings in accordance with my reasons at [64], [106] and [107].
- (c) I will make case management directions for the joint management of both proceedings consistently with my reasons at [112] to [118], but only after hearing further from the parties.

120 As to the costs of the present applications, I would propose that all parties' costs be their costs in the cause. Each party has had some success. Moreover, it was necessary for the Court to address these matters in any event under Part IVA and at an early stage. But I will give any party the opportunity to address me further on costs if they so choose.

I certify that the preceding one hundred and twenty (120) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:



Dated: 18 August 2017