Supreme Court
New South Wales

Medium Neutral Citation:	**Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No 3) [2019] NSWSC 871**
Hearing dates:	27, 28, 31 May 2019; 22, 25 July 2019
Date of orders:	18 June 2019
Decision date:	30 July 2019
Jurisdiction:	Equity - Commercial List
Before:	Parker J
Decision:	Grant Thornton to bring in short minutes of order to give effect to this judgment.
Catchwords:	CIVIL PROCEDURE — Representative proceedings — Settlement or discontinuance – application for common fund order – where funder held leading role in devising the representative claim – whether commission ought to be capped by reference to a multiple of the costs advanced – whether enforceability of funding agreements open to question – need for respondent or contradictor. CIVIL PROCEDURE — Representative proceedings — Settlement or discontinuance – distribution of settlement proceeds among group members – legal costs – need for respondent or contradictor.
Legislation Cited:	Civil Procedure Act 2005 (NSW), Part 10, ss 173, 183, 184 Federal Court of Australia Act 1976 (Cth), s 33ZF(1) Legal Profession Uniform Law (NSW), Part 4.3, Division 7, ss 170(1)(a), 170(2)(b)(i), 178(1)(a), 187(1), 191, 194(1), 204(2)(a) Legal Profession Uniform Law Application Regulation 2015, r 34(2)(a) Personal Property Securities Act 2009 (Cth)
Cases Cited:	Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (2015) 108 ACSR 1; [2015] FCA 811 Botsman v Bolitho [2018] VSCA 278 Brewster v BMW Australia Ltd [2019] NSWCA 35

	Caason Investments Pty Limited v Cao (No 2) [2018] FCA 527 Hall v Slater & Gordon Ltd [2018] FCA 2071 Hodges v Sandhurst Trustees Ltd [2018] FCA 1346 Hopkins as Trustee of The David Hopkins Super Fund v Macmahon Holdings Limited [2018] FCA 2061 Kelly v Willmott Forests Ltd (in liquidation) (No 5) [2017] FCA 689 Lenthall v Westpac Life Insurance Services Ltd (2018) 130 ACSR 456; [2018] FCA 1422 Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York) [2018] FCA 379 Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc) [2018] FCA 1289 Modtech Engineering Pty Ltd v GPT Management Holdings Ltd [2013] FCA 626 Money Max Int Pty Ltd v QBE Insurance Group Ltd (2016) 245 FCR 191; [2016] FCAFC 148 P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4) [2010] FCA 1029 Perera v GetSwift Ltd (2018) 127 ACSR 1; [2018] FCA 732 Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3) (2018) 132 ACSR 258; [2018] FCA 1842 Westpac Banking Corporation v Lenthall [2019] FCAFC 34
Texts Cited:	Jeremy Kirk, “The Case for Contradictors in Approving Class Action Settlements” (2018) 92 ALJ 716
Category:	Principal judgment
Parties:	Edgar George Tredrea (Plaintiff)
Representation:	Counsel: J C Giles SC / T E O’Brien/E Ball (Plaintiff) N Hutley SC / J Williams / EAJ Hyde (LCM Operations Pty Ltd) CE Bannon (Grant Thornton Australia Ltd); 22 & 25 July 2019 Solicitors: Piper Alderman Maddocks; 22 & 25 July 2019
File Number(s):	2017/234966
Publication restriction:	None.

JUDGMENT - PUBLISHED IN REDACTED FORM

1 These are proceedings under Part 10 of the *Civil Procedure Act* 2005 (NSW). They were settled shortly before the hearing which was fixed to begin on 25 March this year. A more detailed description of the proceedings is found in the judgment I delivered when making orders on 28 May: *Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No. 2)* [2019] NSWSC 640.

2 The proceedings came before me on 27 May on an application to approve the terms of the settlement and the proposed scheme for distribution of the settlement proceeds among the group members. The proposed scheme involved a common fund order in favour of the funder, LCM Operations Pty Limited ("LCM"). I heard submissions from the plaintiff, the defendant and LCM. I also heard submissions from three objectors.

3 That afternoon, I began delivering an oral judgment. In that judgment I dealt with the objectors' submissions. I also considered whether, in the interests of the group members, the settlement as between the plaintiff and the defendant should be approved.

4 I then adjourned the delivery of the judgment intending to deal with the remaining issues orally the following day. But as a result of further consideration overnight, I decided that I wanted to consider in more depth the question of approval of the costs incurred by Piper Alderman, the solicitors for the plaintiff. At the resumption of the hearing on 28 May, I therefore made orders reflecting the reasons I gave orally on 27 May. Those orders resolved the objections and approved the settlement as between the plaintiff and the defendant. I offered the plaintiff's legal representatives an opportunity to present further submissions on Piper Alderman's costs. Counsel for the plaintiff took up this opportunity on 31 May.

5 This judgment now deals with the outstanding issues. Those issues concern two consequential aspects of the settlement. The first is the application for a common fund order. The second is the remaining elements of the scheme for distribution of the settlement proceeds, and in particular the approval of Piper Alderman's costs.

6 The judgment contains extracts from, and references to, evidence which was provided to the Court on a confidential basis, either on behalf of the plaintiff or LCM. Before publishing the judgment, I provided a draft to the legal representatives of the parties so that they could make any submissions they wished on the disclosure of this information.

7 The draft judgment was provided to the parties on 12 July. At LCM's request, publication of the judgment was deferred to allow LCM to present submissions on what, if anything, should be published. I heard submissions from LCM on this question on 22 and 25 July. I delivered another version of the judgment to the parties on 26 July but deferred publication at LCM's request to allow it to make further submissions on the redaction of material in it. This resulted in a supplementary written submission on 29 July.

8

LCM's submissions were directed to the Court's power to restrict the disclosure of evidence (and, in this case, the Court's decision itself). Counsel for LCM did not suggest that legal professional privilege was an obstacle to disclosure. As I understood it, LCM waived any privilege it would otherwise have had over the communications in evidence before me.

9 LCM submitted that some of the financial arrangements concerning the funding of the proceedings (and in particular the insurance arrangements) were commercially confidential. I have been able to address these concerns in the way I have worded the judgment, and by redaction.

10 LCM also put a broader submission. As will be seen, I concluded that I should not accede to the application for a common fund order, at least in its current form. The effect of my decision is that a person or persons will be appointed to represent the interests of the group members and the amount of LCM's commission (and the amount of Piper Alderman's costs) will be determined in an adversarial manner, either by negotiation or if necessary by a further application to the Court. I have taken this view because I considered that the evidence in submissions put before me did not compellingly demonstrate that the quantum of commission sought in the common fund order or the quantum of costs was necessarily reasonable; I thought that there were potential arguments which might qualify those claims.

11 Counsel for LCM submitted that I should not publish my reasoning on these questions. Counsel's primary submission was that I should not publish a judgment at all; in the alternative, counsel sought extensive redaction of the passages in my judgment setting out the relevant facts and my reasoning. As I understood counsel's submission, the contention was that the disclosure of my thinking, even on a tentative basis, would "set the cat among the pigeons" (my phrase) in circumstances where the points in question had not been fully canvassed in the evidence and submissions before me.

12 I have already dealt with the application so far as it concerned the approval of the terms of the settlement as between Mr Tredrea as representative plaintiff and KPMG as defendant. I have done so without disclosing either the quantum of the settlement or the terms of the advice from counsel concerning the merits of that settlement. No question of disclosure of these matters arises now. What I am being asked to keep secret is evidence of the funding arrangements between LCM, Piper Alderman and the Group Members who entered into funding agreements with LCM, together with my observations and conclusions based on that material.

13 The application before me was conducted on the basis that some of the evidence was confidential and some was open. The application was conducted in open Court although care was taken not to refer during the hearing to details of the confidential material.

14 While the steps taken to promote the claim against KPMG, and the funding arrangements for that claim, may be commercially sensitive from LCM's point of view, they do not approach the level of trade secrets. The fact is that they are directly

relevant to the application which is before the Court. As will be seen, there are many published judgments on applications concerning funders' commissions and the approval of costs in representative proceedings. The group members (whether they have signed funding agreements or not) have a direct financial interest in these questions and they may also be a matter of legitimate public interest: see, generally, *Liverpool* (below at [81]) at [102]-[108] per Lee J.

15 For these reasons, I think it would be wrong for me not to proceed with publishing a judgment on the application. Nor am I prepared to redact the judgment to the extent sought by LCM. I think it is important to explain why I considered that I should not accede to the application in its current form, as I was pressed to do. But there is one area of the draft judgment which, on reflection, I consider does not need publication in detail. I will identify this when I come to it.

Litigation funding arrangements

16 LCM was introduced to the proposed claim by Mr Warren Jiear, then a partner in Piper Alderman's Brisbane office. Mr Jiear had previously approached another litigation funder to fund the claim, but the funder declined. Mr Jiear prepared a memorandum and a bundle of documents which he discussed at a meeting with representatives of LCM in March 2016. At LCM's request, and at its cost, Piper Alderman briefed senior counsel to advise on the potential claim. Over the next year or so, the claim was worked up, with the involvement of LCM, Piper Alderman and counsel. There was another conference with counsel in February 2017 at which favourable advice was received.

17 The formal funding arrangements for the proceedings go back to June 2017. The original representative plaintiff in the proceedings was Mr Alan Smith. Mr Smith signed two agreements with the funder early in June 2017.

18 The first agreement signed by Mr Smith was a "Member Agreement". By that Agreement, Mr Smith agreed to become a member of what was described as the "2017 DML Scheme". I will refer to this as the "Litigation Scheme". The Agreement was accompanied by a set of rules governing the relationship between LCM ("the Funder"), Mr Smith and other members who might sign the Member Agreement so as to join the Scheme. The Member Agreement between Mr Smith and LCM, and the attached rules (to which I will refer as the "Litigation Scheme Rules") are in evidence. I assume that the Member Agreement signed by other members of the Scheme were in the same terms.

19 The other agreement Mr Smith signed with LCM was a "Representative Agreement". By that Agreement, Mr Smith agreed to act as representative plaintiff ("Representative") in the proposed proceedings.

20 Representatives of LCM were first introduced to Mr Smith by Piper Alderman in May 2017. I infer that Piper Alderman were responsible for recruiting Mr Smith as the proposed representative plaintiff and as the foundation member, or one of the

foundation members, of the Litigation Scheme.

21 The Litigation Scheme Rules defined the "Lawyers" as the firm of lawyers retained by the Representative "to represent the Members collectively to prosecute their respective Claims by the Scheme". The Funder was to approve the identity of the firm and determine ("in its absolute discretion") the terms of the retainer agreement to which the Representative, the Funder and the Lawyers would be party. The Funder also had the right at any time to require the Representative to terminate the then retainer agreement and replace the firm with a new firm.

22 Piper Alderman was the firm named as the Lawyers for the purposes of the Scheme. A retainer agreement was signed between Mr Smith, LCM and Piper Alderman in June 2017, at or around the same time Mr Smith signed the funding agreements.

23 The Scheme Rules provided that the Funder would pay the costs of mounting the proceedings (defined as the "Action Costs") and any costs awarded against the plaintiff (defined as "Adverse Costs"). The Rules contemplated that the Funder might obtain insurance, known as "after-the-event" or "ATE" insurance, against the liability to meet Adverse Costs. They also contemplated that part of the premium for this insurance might be deferred until the end of the proceedings. The Rules provided that any premium actually paid by the Funder would be an Action Cost but any deferred premium would not be, and would be payable out of the proceeds of any recovery.

24 The Rules also contemplated that remuneration might be paid to any person who acted as Representative. The Representative Agreement provided that the Representative should be entitled to such remuneration and expenses as might be agreed between the Funder, the Lawyers and the Representative.

25 The Rules provided for a period of time during which the Funder might conduct an investigation into whether to proceed with funding the proposed claim. This was defined in the Rules (using the term "Due Diligence") as:

> due diligence investigations by the Funder and/or the Lawyers at the request of the Funder of:
>
> 2.13.1 The merits and quantum of the Claims;
>
> 2.13.2 The likely Action Costs (including cost of ATE Insurance);
>
> 2.13.3 The likely Adverse Costs;
>
> 2.13.4 The prospects of recovery of damages or other monetary compensation sufficiently exceeding Action Costs.

26 The Rules provided that the due diligence period began once a specified minimum number of Member Agreements had been executed. Simplifying for the purpose of this case, that period ended once the Funder was satisfied with the investigations and issued a Funding Confirmation Notice to the Lawyers, or originating process in the proceedings (subject to the Funder's prior written approval) was served on the defendant, whichever was the earlier.

27

The Rules provided that, once the due diligence period had passed, the Funder was obliged to fund the legal action. The Funder was, however, entitled, on various grounds, to withdraw from the Scheme and terminate its funding obligations for the future. These grounds included a discretionary entitlement to terminate on 15 days' notice.

28 The Member Agreement between LCM and Mr Smith provided that the minimum number of Member Agreements was only one. Accordingly, the due diligence period began when Mr Smith signed the Member Agreement which happened on 7 June 2017.

29 There was no evidence as to when (or if) LCM issued a formal Funding Confirmation Notice to Piper Alderman. On 15 June, LCM made a public announcement that it proposed to fund the proceedings "on a conditional basis". The announcement referred the reader to a website maintained by Piper Alderman. Presumably the claim was actively promoted from that point forward.

30 The Originating Process in the proceedings was issued on 2 August; I assume it would have been served on KPMG soon afterwards. Accordingly, the due diligence period must have ended on that date at the latest.

31 As contemplated by the Rules, LCM obtained ATE insurance for the claim. The policy is in evidence. It was ~~as~~ an Adverse Costs Insurance policy and was dated January 2018. The policy holder was LCM.

32 The insured liability under the policy was LCM's obligation to pay the Adverse Costs pursuant to the relevant litigation funding agreement, where no other funds were available. The premium consisted of two parts, one described as the Paid Premium and the other as the Contingent Premium. The Paid Premium was a fixed amount payable irrespective of the outcome. The Contingent Premium was payable only in the event of a successful outcome (as defined in the policy). It was calculated on a sliding scale, based on when the proceedings were resolved.

33 Owing to Mr Smith's ill-health, he was replaced as representative plaintiff by the present plaintiff, Mr Edgar George Tredrea. As a result of this Mr Tredrea (who had already signed a Member Agreement so as to become a member of the Litigation Scheme in early November 2017) signed a Representative Agreement in December 2017. Orders formally substituting Mr Tredrea for Mr Smith as plaintiff in the proceedings were made in February 2018.

34 The Scheme Rules provided that in the event of any money being received as a result of the resolution of the claim (whether by judgment or by settlement), the proceeds were to be applied in a defined order. Relevantly for present purposes, this was: (1) towards payment of any ATE insurance premium payable out of the settlement proceeds; (2) followed by reimbursement of Action Costs and any Adverse Costs paid by the Funder together with a percentage of the proceeds (defined as the "Funder's Interest"); with (3) the residue being divided among Litigation Scheme Members.

35

The Action Costs covered, broadly speaking, all of the Lawyers' costs and disbursements in the proceedings to purchase the claim. But the definition of Action Costs also included costs and expenses which fell outside the legal costs of the proceedings. These included:

(1) the Funder's costs of the Due Diligence;

(2) the paid portion of the ATE insurance premium;

(3) any remuneration or costs of the Representative;

(4) the Lawyers' costs in "identifying and recruiting members of the Litigation Scheme"; and

(5) the Funder's own costs with respect to the management both of the claim and of the Scheme itself.

36 This last category was defined as follows:

> 2.2.9 All costs and expenses (including legal fees, Counsel fees, expert or consultant fees, disbursement, travel and accommodation costs) incurred by the Funder with respect to the Claims and/or the Scheme, including but not limited to:
>
> (a) Identifying and recruiting Members;
>
> (b) Negotiating, preparing, administering or enforcing any Member Agreements or the Retainer Agreement;
>
> (c) Due Diligence;
>
> (d) Funding any security for Adverse Costs, including by way of a Deed of Indemnity;
>
> (e) Quantifying any Adverse Costs order;
>
> (f) Meetings with the Lawyers and other interested parties for the dominant purpose of preparing conducting and/or resolving prosecution of the Claims or in relation to the Scheme;

37 The Funder's commission was to be on a sliding scale, starting at XX% if the claim settled within the due diligence period; then increasing to XX%; and then an additional XX% if the claim was only resolved on appeal. It should be emphasised that this was expressed as a percentage of the gross recovery, not the net recovery after deduction of Action Costs and other expenses. A "floor" was provided for the amount of the commission, being three times the amount of the Action Costs and Adverse Costs paid by the Funder and not reimbursed by the time the claim was resolved.

38 The Scheme Rules contained provisions which sought to confer on the Funder a proprietary interest in the proceeds of any recovery, and to protect that interest. Rule 57 provided:

> Except as a Court may order otherwise without instigation by any Members, in the first instance any and all Recovery is to be paid or conveyed to the Lawyers on trust for the Members and the Funder.

39 The term "Recovery" was defined by reference to monies received by the Members or to which they became entitled. It may be that this was done so as to avoid the situation in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers*

Appointed) (In Liq) [2015] FCA 811, where the funding agreement purported to give the funder an interest in the other (non-funded) group members' share of the amount recovered. Nevertheless rule 57 is a remarkable provision for at least two reasons.

40 First, it would have the effect of making the Lawyers the trustees for a third party of monies recovered for the benefit of the Lawyers' own clients. Second, while it acknowledged the paramount authority of the Court under the *Civil Procedure Act 2005* (NSW), s 173 over settlement proceeds, it purported to restrict the members of the Scheme from taking steps to have that jurisdiction exercised in their favour where that would conflict with the Funder's interests. It is, of course, clear that s 173 confers powers on the Court so that it can act in the interests of group members, including those who enter into litigation funding agreements.

41 The Scheme Rules went on to require the Lawyers, having received the monies, to distribute them in accordance with the order of distribution defined in the Rules; and that each Member gave an irrevocable direction to the Lawyers to do so "promptly". The Funder was also appointed as the attorney of each Member for this purpose. The Rules also provided for the Funder to be entitled to register a financing charge statement against any of the Members under the *Personal Property Securities Act 2009* (Cth) and obliged the Members to co-operate in effecting and maintaining that registration.

42 The Rules also contained detailed provisions as to confidentiality. Some of these were designed to ensure that legal professional privilege over communications between the Lawyers, the Members and the Funder was not lost, and the confidentiality of any settlement was maintained. But in addition there were further provisions designed to restrict disclosure of information about the claim. Rule 52.5 provided:

> A party must not disclose any information concerning a Claim or the Member Agreement to any third party (except the Lawyers) unless such disclosure is:
>
> 52.5.1 Required by law;
>
> 52.5.2 Authorised by the Member Agreement;
>
> 52.5.3 Made on a confidential basis with the Funder's prior written consent to the fact and contents of that confidential disclosure;
>
> 52.5.4 Made by the Funder for the purposes of obtaining legal or financial advice or assistance; or
>
> 52.5.5 Required by the rules of any financial market on which the Funder is listed.

This obligation survived the termination of the Member Agreement.

43 Again, this is a notable departure from the confidentiality regime which would ordinarily apply. Ordinarily a party's lawyers are required to keep that party's secrets. Under this rule, the Members (including the Representative) are required to keep the Lawyers' and the Funder's secrets.

44 Rule 52.1 recited that the Member Agreement was confidential and had to be protected from disclosure because disclosure would or might provide the Defendant with a strategic or tactical advantage in any action brought to pursue the claim. Whether or not

that is so, it is clear that the confidentiality restrictions on the Members (and in particular on the Representative, who was to be the actual client) had the effect of protecting the Funder's commercial interests. In particular, it would be difficult or impossible for Members to seek a second legal opinion, or a competing funding proposal, from someone else.

Proposed scheme of distribution

45 Under the settlement with KPMG which has now been approved, only "Settlement Group Members" are entitled to share in the Settlement Sum payable by the defendant. These are group members who did not opt out of the proceedings and who either registered to participate in a settlement in accordance with orders made by the Court in August 2018 or applied to participate in the settlement by notifying Piper Alderman or LCM. The cut-off date for notification was 22 March but some late registrations were permitted.

46 In the end there were about 1,300 Settlement Group Members who registered to participate in the settlement. Of these, 142 entered into funding agreements (presumably in the form of a Member Agreement under the Litigation Scheme with LCM). I will refer to these 142 group members as the "Scheme Group Members". They account for approximately 20% by value of the claims of the Settlement Group Members.

47 The proposed settlement distribution scheme before the Court was prepared by Piper Alderman. I will refer to it as the "Proposed Scheme".

48 The Proposed Scheme was designed to come into effect after the Court had made orders approving both the settlement of the proceedings as between the plaintiff and KPMG and the rules of the Scheme itself (defined as the "Approval Orders") and the period of time allowed for appeal from those Orders had expired. This date was identified in the Proposed Scheme as the "Approval Orders Date". In the event of appeal against the Approval Orders, the Approval Orders Date was to be extended until after determination of the appeal.

49 The Proposed Scheme provided for KPMG to pay the settlement sum under the Deed of Settlement into a controlled monies account operated by the Administrator of the Scheme. The Administrator was to hold the monies on trust for KPMG until the Approval Orders Date (which, of course, in the event of an appeal, could be some time after the original orders were made and the monies paid into the account). Thereafter, and unless returned to KPMG because the Court ultimately declined to make Approval Orders, the monies were to be held on trust for distribution to the Settlement Group Members on the terms set out in the Scheme Rules.

50 The plaintiff's legal representatives accepted that the Proposed Scheme should be administered by an accounting firm, and not Piper Alderman: cf *Lifeplan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379 at [52]-[54]. In that case, Lee J

seems to have been influenced mainly by questions of cost. As will be seen, I think that in this case there are conflicts which make it impossible for Piper Alderman to act in any event.

51 The accounting firm Grant Thornton Australia Limited ("Grant Thornton") was proposed. Grant Thornton has agreed to a fee for acting as Administrator of $132,000. This is a flat fee, although the Proposed Scheme provides that if additional administration costs are incurred, the Administrator may recoup or defray those costs from any interest which may be earned on the settlement monies. The $132,000 fee is defined in the Proposed Scheme as "Administration Costs".

52 The Proposed Scheme provided for the Administration Costs and for payments of remuneration to Mr Smith and Mr Tredrea to be made out of the settlement monies as an expense of the Scheme. It also provided for payments to be made to LCM as expenses of the Scheme. These payments were:

(1) LCM's commission (being the commission determined by the Court in LCM's common fund application);

(2) the "Action Costs" (as defined in the Litigation Scheme Rules);

(3) the deferred portion of the ATE insurance premium ("Contingent ATE Premium").

53 The application to the Court sought an order approving the terms of the Proposed Scheme. In effect the Scheme would take effect as orders of the Court. The application also sought an order appointing Grant Thornton as Administrator of the Scheme, together with specific approval of:

(1) the Administration Costs;

(2) the proposed remuneration of Mr Smith and Mr Tredrea;

(3) the Action Costs.

54 The common fund order sought in the application was for thirty per cent of the gross proceeds of the settlement. In form this was part of the plaintiff's application, but the evidence and submissions in support of it were presented by legal representatives acting separately for LCM.

55 Notice of the application was sent to the Settlement Group Members early in April this year following directions made by the Court. I have already dealt in my first judgment with the objections which were made. None of the objections concerned the reasonableness of the costs or the commission sought for LCM.

56 The application is made under the *Civil Procedure Act*, ss 173 and 183. Section 173 provides:

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

57 Section 183 provides:

> **General power of Court to make orders**
>
> In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

58 It has been held that the Federal Court equivalent of s 183 (*Federal Court of Australia Act 1976* (Cth), 33ZF(1)) can be used to make orders at an interlocutory stage of proceedings governing the distribution of any settlement proceeds, such as a common fund order: *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at 226; *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34. The same is so under s 183: *Brewster v BMW Australia Ltd* [2019] NSWCA 35 at [111], [115]. As the proceedings have now been settled, the specific power in s 173 is engaged. It is unnecessary to consider s 183 further.

59 So far as the Action Costs and other legal fees are concerned, s 184 is relevant. That section relevantly provides:

> **Reimbursement of representative party's costs**
>
> (1) If the Court has made an award of damages in representative proceedings, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.
>
> (2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceedings by the person making the application are likely to exceed the costs recoverable by the person from the defendant, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.
>
> (3) On an application under this section, the Court may also make any other order that it thinks just.

Appointment of Administrator

60 The thirty day period specified in the Proposed Scheme for payment of the settlement sum expired on 27 June, while this judgment was still reserved. In anticipation of this, I made an order in Chambers on 18 June appointing Grant Thornton as Administrator of the Proposed Scheme.

61 This order did not approve or adopt any of the substantive terms of the Proposed Scheme. Those terms remained to be decided by the Court. The order was made so as to keep the settlement process moving and, in particular, to ensure that there would be someone available to whom KPMG could pay the settlement monies and who could deal with those monies in the manner ultimately determined by the Court.

62 The evidence before me showed that the application to have Grant Thornton appointed as Administrator followed a competitive process whereby Grant Thornton and another firm submitted fee proposals. Grant Thornton's fee tender was lower than that from the other firm. On this basis I considered that it was appropriate to appoint Grant Thornton to receive the monies pending the final determination of the terms upon which they are to be administered.

63

No doubt Grant Thornton's fee proposal was based on the terms of the Proposed Scheme as they were put forward by Piper Alderman. Under those terms, the Administrator's role would essentially be a custodial and mechanical one. The order I made did not fix Grant Thornton's remuneration and nothing in the order limited Grant Thornton, should a more active role be required, to the $132,000 fee proposal which had been put forward.

Common fund order

64 In support of the application for a common fund order, evidence was put before the Court from Ms Susanna Taylor. Ms Taylor is employed by LCM as a Senior Investment Manager and was the person at LCM with day-to-day responsibility for the claim.

65 Ms Taylor described in her evidence the process by which the claim was worked up over the year or so after it was brought to LCM in March 2016. Ms Taylor explained that initially a different type of claim was contemplated. As a result of work done by LCM, and, it appears, in which Ms Taylor herself played a leading role, KPMG was identified as a potential target. Advice was obtained from senior counsel and considerable effort was spent on developing that idea. This included preliminary advice from an expert which was paid for by LCM.

66 Ms Taylor's evidence was that this approach was unusual. Ordinarily, matters are simply brought to the funder who decides whether or not to fund them based on the case presented.

67 By late October 2016, Mr Simon Morris of Piper Alderman's Sydney office had taken over responsibility for the proposed claim from Mr Jiear. Piper Alderman had reached the point of identifying and recruiting potential claimants. This was described in the evidence as the "book build".

68 On 31 October Mr Morris wrote to Ms Taylor reporting that Piper Alderman had signed up a shareholder as a client and opened a file under that client's name. Mr Morris suggested signing the client up immediately to a conditional funding agreement, and that "the commercial viability floor" (presumably a reference to the minimum number of funded group members or some other condition on which LCM's obligation to proceed with funding the action would depend) be determined at a later point when the claim and the potential class were better understood. He also proposed to have something prepared for Piper Alderman's website in preparation for the book build.

69 Ms Taylor replied on 1 November. She confirmed LCM's agreement to fund an advice on prospects, including a draft pleading, from counsel. She said that she would shortly send draft member and representative agreements for funding purposes. It is clear that the potential for competition with other funders loomed large in LCM's calculations. Ms Taylor said:

> In relation to marketing the class action on Piper Alderman's website, we would like to give some thought to the effect of this week's decision in *Money Max Int Pty Ltd v BBE Insurance Group Limited* [2016] FCAFC 148. We understand the effect of this decision to be that if a class action is commenced as an open class, an application can be made

> for common fund orders which if granted have the effect that the funder of that class action is able to extract a percentage of the amount paid to all members of the class (not only those who have signed a litigation funding agreement). We want to understand the risk that should Piper Alderman advertise the potential class action on its website, another firm or funder will become aware of the claim and bring proceedings for a class action on an open basis (before our proceedings are commenced and seek a common fund order). We will come back to you about this shortly. It may be that it is something that we need [counsel] to also provide advice in respect to.

70 The evidence does not identify whether the Piper Alderman website was used as Mr Morris had suggested. It may not have been. LCM may have proceeded with the book build process by making private approaches to shareholders rather than by public advertisement. It will be recalled that Mr Smith was signed up in June 2017, and the proceedings were under way by early August. It seems likely that public promotion of the claim would not have begun until LCM made its funding announcement on 15 June.

Authorities

71 In *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 Gordon J (then of the Federal Court) had to consider a settlement approval application in a representative proceeding. In that case 92% of group members had signed a litigation funding agreement ("LFA") with the funder which entitled the funder to receive a commission of between 25% and 30% of the net recovery after reimbursement of litigation costs. The commission rate varied depending on the amount of shares acquired by the group member in the company which was the subject of the claim during what was defined as the "claim period".

72 The proposed settlement distribution scheme provided for a funding commission to be deducted from the individual entitlements of all group members (that is, both group members who had signed a litigation funding agreement and those who had not). Gordon J said (at [57]-[58]):

> [57] CLF, as a litigation funder, made a commercial decision to fund these proceedings on the terms and conditions set out in the various LFAs. Relevantly, it made a commercial decision to fund these proceedings by entering into a LFA with 92% of group members. Not 100% of the group members, just 92% of the group members. The question which arises is why should CLF be entitled to receive between 25% and 30% of the amount recovered by those group members who chose, for whatever reason, not to enter into a LFA (defined, erroneously, in the Settlement Distribution Scheme as "Informally Funded Registered Group Members")? The deduction of the funding commission was never part of a commercial bargain reached by CLF with these so called Informally Funded Registered Group Members. In fact, for whatever reason, the Informally Funded Registered Group Members decided to do the direct opposite and not enter into a LFA. What has changed? I can identify no reason why the LFA should now be imposed on the Informally Funded Registered Group Members. They have not agreed to it.
>
> [58] That does not mean that the Informally Funded Registered Group Members should get a windfall. On the contrary. The amount of the so called "funding commission" (calculated on the amount of shares in GPT acquired by the group member during the "Claim Period") should be deducted from each of their individual claims. However, instead of being paid to CLF, those amounts should be added back into the Settlement Sum and distributed pro rata to all group members. This approach may require an additional step or two in the calculation of an Individual's claim but the result is fair and reasonable to all.

73

The judgment records that the Court discussed these concerns with counsel for the representative applicant, Modtech. Counsel nevertheless submitted that the commission arrangements should be approved for a number of reasons. Those reasons included three in particular. First, Modtech had agreed to it. Second, notice had been given to all group members and no objection had been lodged and third, that orders in this form had been approved in a previous class action (*Pathway Investments Pty Ltd v National Australia Bank (No 3)* [2012] VSC 625).

74 Gordon J considered that none of these matters, individually or collectively, provided a basis for approving the deduction. Her Honour considered that the fact that no notice of objection had been lodged was relevant, but not a determinative consideration. But her Honour said that it was difficult to conceive other circumstances in which it would be appropriate to make such an order (at [59]-[60]).

75 An order of the type made by Gordon J has in subsequent cases been referred to as a "funding equalisation order" to distinguish it from a common fund order: see *Blairgowrie* (above at [39]) at [162]-[167].

76 In *Money Max* (above at [58]) the Full Court considered an application for the making of a common fund order at an interlocutory stage in the proceedings. The Full Court made a common fund order but did not determine the commission rate. The rate was to be determined by the Judge hearing the approval application.

77 The Full Court did not try to prescribe in advance the considerations which would apply in determining what the commission rate would ultimately be. But the Court did identify a number of potentially relevant factors at [79]-[83]. The Court of Appeal did something similar in *Brewster v BMW* (above at [58]) at [112]-[114], referring in particular to what the Full Court had said in *Money Max*. But the Court of Appeal emphasised that it was only deciding the question of power to make a common fund order at an interlocutory stage; whether such an order should be made, and its form, were matters for a separate determination in due course: see at [111].

78 In *Money Max* the Full Court rejected a submission that, if a funding commission order was to be made at an interlocutory stage, it should be a funding equalisation order rather than a common fund order. In doing so, the Court disagreed with Gordon J's statement that a common fund order would rarely, if ever, be appropriate. The Court's view was that it would all depend on the circumstances.

79 Following *Money Max*, common fund orders have been made in a number of first instance decisions at either interlocutory or final stage: see, e.g.: *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [165]; *Lenthall v Westpac Life Insurance Services Ltd* [2018] FCA 1422 at [3], *Westpac* (above at [58]) at [134]-[137]; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842 at [219]; and *Hall v Slater & Gordon Ltd* [2018] FCA 2071 at [97].

Submissions

80

In support of the application, counsel for LCM made three main points. I will deal with them one by one.

81 First, counsel submitted that the share of the settlement sought by LCM was objectively reasonable. Counsel pointed to the unusual extent to which LCM had contributed to the success of the claim. Counsel observed that higher rates of return were approved in other cases. Counsel referred to *Hopkins v Macmahon Holdings Ltd* [2018] FCA 2061; *Caason*; *Hodges v Sandhurst Trustees Ltd* [2018] FCA 1346; and *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289.

82 I accept that the claim is unlikely to have been brought to its successful conclusion without the ingenuity and drive which came from LCM. I see no reason to doubt Ms Taylor's evidence that this was unusual. But it does not take me very far in determining whether the return sought is objectively reasonable.

83 There are at least two ways in which the reasonableness of the return could be judged. One would be by reference to the value of LCM's funding services from the point of view of the group members. Another would be to look at it from LCM's point of view and consider the reasonableness of the return by reference to the degree of LCM's risk.

84 The Court is not well equipped in this case to analyse the reasonableness of the return sought by LCM from either of these perspectives. In order to make a judgment about the commercial "value" of LCM's services, it would be necessary to have information about the litigation funding market. There was no evidence before me in this case which would allow me to make any judgment about whether the rates which LCM charged in its funding agreement are competitive with rates charged by other funders for litigation of the same type: cf *Money Max* at [80(c)].

85 As counsel acknowledged, the fact that comparable rates or even higher rates have been allowed in other litigation is of limited value. This is particularly so where market forces appear to be driving commission rates down: *Westpac* (above at [58]) at [7]. In any event, reference to other decisions could not make up for the lack of evidence of the present case.

86 There is some evidence of the level of financial risk LCM ran by funding the proceedings. The Court has evidence of the legal costs and the ATE premium. The Court also knows that it has taken approximately three years from when the claim was first proposed to resolution. The Court does not know how much time LCM's executives put into managing the claim, but putting a figure on that time (if it could be identified) is unlikely to alter the position much.

87 The Court can therefore make an educated guess about the amount invested by LCM in the litigation and compare that with the return sought in the common fund order. But the Court has no information as to how that rate of return would compare with other comparable forms of lending (if such exist). All one can say is the proposed return would be in the hundreds of per cent for a three year investment, which seems enormous.

88 In these circumstances, I have been troubled by the fact that LCM seeks a commission calculated on the gross value of the settlement, not the net value after deduction of expenses. Now that the claim has succeeded, virtually all of the costs will be passed back to the Settlement Group Members. LCM seems to be trying to have things both ways.

89 If LCM's application succeeds the only costs it will ultimately bear will be its management costs and the time value of money laid out in funding the litigation. Expressed as a percentage of these actual costs, LCM's return would be stratospheric, in the tens of thousands of per cent.

90 I imagine that when LCM did its sums when deciding to fund the claim, it calculated its return by reference to its likely net, rather than gross, return. The Settlement Group Members' interest in the outcome is properly measured in the same way. The costs incurred are relatively small compared with the settlement but they still run into millions of dollars and a funder's commission of 30% of the gross would still represent an appreciably higher percentage of the Group Members' net recovery. On the face of it, a commission based on gross recovery is arguably quite one-sided: *Westpac* (above at [58]) at [23]; *Petersen* (above at [79]) at [243].

91 I have also been troubled by the fact that the amount of commission which LCM seeks is uncapped. Of course LCM did not know that the claim would be successful and hindsight bias is to be avoided: *Money Max* (above at [58]) at [82]; *Brewster v BMW* (above at [58]) at [113]. There would have been a real element of risk in taking on the claim and funding it. But a return calculated by reference to the amount recovered (whether on a gross or a net basis) would bear no necessary relationship to that level of risk.

92 In *Brewster v BMW* the Court of Appeal said at [114]:

> There is also much to be said for imposing a further order capping the funder's share of the proceeds of litigation to an amount based upon a multiple of the total amount paid by the funder (being the cost of the provision of security, and the costs and disbursements paid), so as to prevent the order from yielding a benefit which is out of all proportion to the capital deployed and the risk. It is to be borne in mind that the power is to be exercised to ensure that justice is done in the proceedings, and it may be doubted that an interlocutory order such as that sought by Mr Brewster, whereby a funder becomes contingently entitled to a return which might be out of all proportion to the capital deployed and put at risk, is one which is appropriate or necessary to ensure that justice is done.

93 Similarly, I think there is much to be said for the view that the quantum for commission under any common fund order in this case in favour of LCM should be capped at an appropriate multiple of the costs funded by it. This is also the view which has been taken by Lee J in the Federal Court: *Perera v GetSwift Ltd* [2018] FCA 732 at [283]-[294]; *Lenthall* (above at [79]) at [59]-[61].

94 In summary, therefore, I am not satisfied that the commission rate which LCM seeks is objectively reasonable. I think it is arguably excessive.

95

Counsel's second argument was that the proposed common fund order reflected the terms of the funding agreement which had been entered into by Mr Smith and the other members of the Litigation Scheme. Counsel submitted that the members of the Scheme may be assumed to have included sophisticated investors. Counsel submitted that the authorities showed that the Court would not act so as to give a "windfall" to "free riders" who stood to benefit from the settlement without having become members of the Litigation Scheme: *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1 at 20-22; see also *Money Max* at [185]-[190] and *Perera* at [25].

96 These submissions too have their limitations. The only actual member of the Scheme who is represented before the Court is Mr Tredrea. The original representative plaintiff was Mr Smith. There is no evidence from them on this application. Nor is there any evidence from any of the other Litigation Scheme Members.

97 There is nothing to suggest that the process of launching the litigation involved disgruntled former shareholders forming a group and then looking around for a funder to support claims they might make. Rather, the process appears to have occurred in reverse. Piper Alderman identified the potential for a claim; this was taken up with LCM; and Mr Smith was then recruited to participate. If this is correct, then Mr Smith would have been put in the position of having a claim put before him for a loss which he had, presumably, written off. His response to the approach may well have been that any return was better than nothing. The other Litigation Scheme Members would probably have been in the same position. This is not necessarily a criticism of those involved but it does point up the entrepreneurial role played by Piper Alderman and LCM in the process, and the correspondingly passive role played by Mr Smith and the other Litigation Scheme Members.

98 At bottom, the idea that the "free rider" group members should be deprived of a "windfall", whether by way of a common fund order or a funding equalisation order, is based on the perception that it is inequitable that the group members who have entered into litigation funding agreements should be worse off than those who did not: see *Modtech* (above at [71]) at [24]; *Caason* (above at [81]) at [108]. But implicit in this is that those funding agreements would be enforceable.

99 On the limited material before me, I concluded that the enforceability of the funding agreements in this case, or some of them, may (and I emphasise the word "may") be questionable. I addressed this topic (on a tentative basis, not having heard argument or full evidence) in my draft judgment but there is no need to set that detail out in this published version of the judgment. It is sufficient to say that the funding agreements contain terms which are (or are arguably) in LCM's favour, and that this gives rise to questions about the application of consumer protection legislation (within which I would include the *Contracts Review Act* 1980 (NSW)). It may also raise questions of proper disclosure in equity, depending on the role Piper Alderman may have played in the process.

100

It is important to remember that, under s 173, the Court has complete power over the proceeds of the settlement. No doubt the Court will proceed on the basis that, in general, those who benefit from the success of the claim should share the burdens involved in bringing it: *Westpac* (above at [58]) at [11]*; Caason* at [161]; *Hall v Slater & Gordon* (above at [79]) at [97]. The terms of the arrangements of any funded group members are relevant to this, but they are not determinative. The Court, in my view, should not just mechanically apply those terms (or some derivative of them) to non-funded group members, especially if the enforceability of the funding agreements has not been fully considered.

101 Counsel's third point was that there was no objection by anyone to the proposed orders. Counsel pointed out that notice of the application had been given to the Settlement Group Members. Counsel suggested that the Settlement Group Members would have included many large scale share investors who were well resourced and could have objected had they wanted to.

102 Again, however, I think this consideration is of very limited force. There is nothing to suggest that the Settlement Group Members are experienced in the litigation funding market or would have any real idea of whether the commission sought by LCM is reasonable or not. The reality is likely to be that even the largest scale investors are in the same position as Mr Smith was in when he signed up for membership of the Litigation Scheme. They are hardly likely to look a gift horse in the mouth. Even if they were inclined to do so, the marginal benefit from reducing the commission that LCM seeks would scarcely justify the effort and expense (potentially involving a costs liability should their opposition fail) of resisting the application: *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 at [23] per Finkelstein J; see also the article by Mr Kirk SC (below at [105]) at 718.

103 Counsel for the plaintiff put forward no submissions in opposition to the common fund sought by LCM. The plaintiff's legal representatives took a position of neutrality on that part of the application. On analysis, they could hardly have done anything else. Effective representation of Mr Tredrea's interests would have had to begin by considering whether, having regard to the circumstances in which the funding agreements were entered into, they are enforceable at all. The same is so for Mr Smith and the other members of the Litigation Scheme. Piper Alderman are obviously disqualified from undertaking that task.

Need for a respondent or contradictor

104 Counsel's argument about the lack of objection to the common fund order points up a more general concern. Even if the funding agreements are enforceable against the Litigation Scheme Members, the real applicant for the common fund order is LCM. It is the Settlement Group Members as a whole (including the Litigation Scheme Members if the funding agreements are unenforceable) whose interests are affected. They are not even represented in the proceedings.

105 In an article published in 2018, Jeremy Kirk SC argued that wider use of contradictors should be made in representative proceedings: Kirk, "The Case for Contradictors in Approving Class Action Settlements" (2018) 92 *ALJ* 716, 718. In particular, he instanced an application for a common fund order as one which would justify the appointment of a contradictor. This was apparently endorsed by the Victorian Court of Appeal in *Botsman v Bolitho* [2018] VSCA 278 at [329].

106 I respectfully agree. With the benefit of hindsight, there should have been someone before the Court to represent the interests of Settlement Group Members who are not bound by funding agreements. My experience in writing this judgment has confirmed me in this view. A number of aspects of the evidence and a number of the authorities which I have found relevant were not referred to me by counsel. This is not a criticism; it simply reflects the usual experience that adversarial argument usually results in a better exposition of the relevant facts and law.

Conclusions

107 Had I been of the view that the arguments in support of the application were, on the material before the Court, compelling, I would not have delayed the application further. But I do not find them compelling.

108 It is arguable that the Court should limit any common fund order to a share of the net recovery, rather than the gross, and that the Court should impose a ceiling calculated by reference to a multiple of the costs incurred. LCM's commission rate is contestable. In particular, there is room for argument about whether, and to what extent, the Court should be guided in fixing the rate by reference to the terms of the funding agreements LCM has made with the Litigation Group Members. And even if the Settlement Group Members not party to funding agreements with LCM should be seen as receiving a "windfall", it is arguable that the Court should deal with this by making a funding equalisation order of the type made by Gordon J rather than a common fund order for the benefit of LCM.

109 In these circumstances, I think the proper course is to decline the application for a common fund order in its present form, but allow the application to continue on the basis that there is an independent party representing the interests of Settlement Group Members who can contradict it.

110 Serendipitously, the mechanism for this is readily to hand. An independent Administrator is perfectly placed to fulfil the role. Such a role is analogous to that of a court-appointed receiver or trustee, or a liquidator. The Administrator can obtain independent legal advice on the relevant issues and the application can proceed adversarially with proper representation of the Settlement Group Members' interests.

111 When I circulated the draft judgment on 2 July, and made orders standing the proceedings over for further directions, I assumed that the role of defending the Settlement Group Members' interests on the common fund application would be played by the appointed Administrator, Grant Thornton. But on 22 July, counsel appeared for

Grant Thornton and identified some difficulties with this. The practitioner at Grant Thornton who had been approached by Piper Alderman (Mr Alex Bell) works in Grant Thornton's forensic accounting division. Grant Thornton apparently has had pre-existing dealings with both Piper Alderman and LCM. There was a concern about whether Grant Thornton could be independent. There were also potential difficulties with professional indemnity insurance. Mr Bell had not contemplated that the appointment as Administrator would involve Grant Thornton actively considering the interests of the Settlement Group Members *vis-a-vis* LCM and Piper Alderman.

112 These potential concerns have, however, been overcome. Another practitioner at Grant Thornton, Mr Said Jahani, is a registered liquidator. He will be able to deal with any dispute which arises out of the common fund application. (I should note that LCM is funding proceedings being brought by him as liquidator of a company in liquidation, but there is nothing to suggest that this gives rise to any conflict, or perception of conflict). Grant Thornton has already done preliminary work on the terms of the Proposed Scheme and undertaken preparatory steps towards distribution of the monies in due course. It is desirable for Grant Thornton to be retained so that the value of this work is not lost.

113 Accordingly, all that is necessary is to provide for further directions so as to give Mr Jahani, on behalf of Grant Thornton, an opportunity to take up the role of the respondent to the common fund application. LCM must, of course, have an opportunity to put on further evidence and submissions on the issues which I have identified.

114 It may be that the quantum of the commission can be agreed between the Administrator and LCM. If that is so, I will make orders giving effect to that agreement without the need for any further hearing.

115 It should not be forgotten, that, to the extent that its funding agreements with the Litigation Scheme Members are enforceable, LCM would have contractual entitlements to recoup the Action Costs and its commission from those Members' share of the settlement sum. Whether the Court has power under s 173 to vary the terms of those agreements as between LCM and Litigation Group Members is a matter for debate: see *Liverpool* (above at [81]) at [47]. It does not need to be considered now. But LCM's contractual rights, such as they may be, should be preserved. Any common fund order the Court may make (if made without agreement by LCM) should give LCM the option to decline to take the order up and instead to pursue such rights as it may have under the Member Agreements against the members of the Litigation Scheme.

Postscript: redaction of judgment

116 As I have mentioned, counsel for LCM contended that I should not publish the judgment at all but I rejected this contention, although I did remove some material concerning the question of enforceability of the funding agreements against the Litigation Scheme Members. Following the circulation of the 26 July version of the judgment, LCM maintained in its supplementary submissions that I should reconsider

my view and at least redact the material which appears at [85]-[87]; [90] and [94]. I have reconsidered the question but will not make the redactions. I was specifically asked, in this event, to give reasons, and now do so.

117 To my mind, the critical point is that I have not made any final decision on the application for a common fund order. The views I have expressed are as to what may be arguable. I have been over the judgment again and revised it so as to make that as clear as I can. If agreement can be reached between the Administrator and LCM, there may not even need to be a further hearing on the question. If such a hearing does take place, everything which I have said in this judgment will be open to reconsideration in the light of the evidence and submissions which are presented. That includes the paragraphs which LCM seeks to have redacted. In its supplementary submission, LCM repeated the submission earlier made by counsel that my analysis of the reasonableness of LCM's returns by reference to its management costs and the amount of capital invested in the proceedings was incomplete. Counsel had submitted that I should have taken more account of the fact that LCM was providing a non-recourse loan and that another funder had declined to fund the litigation at all.

118 I was not unaware of these submissions and did take them into account. There is no doubt that LCM should be properly remunerated for the risk it ran in financing the litigation. The question is what level of remuneration is appropriate. The point I am making, which I trust appears clearly enough from this final published version of my judgment, is that there is room for debate about this question. The factors referred to by counsel are relevant, but they do not necessarily compel the Court to accept, at this stage, that LCM should receive as much as 30% of the gross proceeds of the settlement.

119 In its supplementary submission, LCM also referred to counsel's earlier submission that these matters "had a degree of prominence in the reasoning process" in my judgment, and that had they been raised with counsel during the hearing, further submissions or if necessary, evidence, would have been put before the Court.

120 It is fair to say that, after I reserved my judgment following the argument on 27 May, my thinking developed. As I have already mentioned, I looked in more detail at the evidence, including evidence to which I have not been referred by counsel, and I undertook research which revealed authorities to which I have not been referred either. But this is something which may happen, to a greater or lesser extent, whenever a judgment is reserved. The application was presented to me on the basis that the evidence and submissions were sufficient to justify the common fund order which was sought. Upon further consideration, I concluded that they were not.

121 Of course, in an application where there is no respondent or contradictor, such as an application for judicial advice, if on reflection the Court considers that there is a difficulty not addressed in the evidence or submissions, the Court might seek clarification from the applicant before deciding the application. But, as I have explained, I do not see the application for a common fund order as being a "one party" application of this type. The

interests of the Settlement Group Members are affected and that is why I have concluded that the Administrator should be required to represent their interests. There is no prejudice to LCM's position because it will have a full opportunity, should there be any further hearing on the question, to present further evidence and submissions in an adversarial context.

122 The fact that the interests of the Settlement Group Members are involved is one of the reasons why I considered that I should deliver a formal judgment explaining what the Court has done. I think it is important that the process should be as transparent from their point of view as it can be. As I have already mentioned, there may also be legitimate public interest in an application of the present sort. In that context, I see no need to redact the paragraphs in question.

Legal costs

123 For the purposes of the plaintiff's application, the legal costs of the claim (paid, incurred and to be incurred up to the completion of the proceedings) were quantified at $3.311 million. This was made up of fees for Piper Alderman, counsel's fees and other disbursements. This is only marginally above the estimate of $3.3 million given in the notice of the proposed settlement sent to Settlement Group Members.

124 The application also included $XX in fees and charges from the ATE insurance which were covered by the definition of "Action Costs" in the Litigation Scheme Rules. I will deal with those costs and charges when I deal with the ATE premium.

125 The costs figure includes fees from Piper Alderman, counsel and experts which were incurred as part of the process of working up the claim before the formal retainer was entered into between Mr Smith, LCM and Piper Alderman in June 2017. These costs did not include costs attributable to exploring a potential claim against the former directors which did not ultimately proceed. Those costs were written off by Piper Alderman and not billed. Piper Alderman's fees did include an amount to cover work on the book build between October 2016 and July 2017 which it had been agreed would only be invoiced to LCM if there was a recovery.

126 In support of the application that the whole of Piper Alderman's charges be approved as a deduction from the settlement sum, a report from Elizabeth Mary Harris was put into evidence. Ms Harris is a costs assessor based in Victoria with extensive experience of representative proceedings. Her report was dated 9 May 2019. She concluded that Piper Alderman's costs and disbursements were "well within the range which I would expect to be incurred in a class action involving the issues of fact and law in this matter". She also expressed the view that "the reasonable costs incurred" by Piper Alderman (which included an estimate for future costs) were $3.32 million.

127 The production of Ms Harris' report is a response to the problem identified in previous cases with the plaintiff's legal representatives making an application to the Court for the approval of their own costs. In *Modtech* (above at [71]) Gordon J said (at [27]):

> …The solicitor is acting for itself — it seeks an order that its *costs* be approved by the court and paid to it. There is no *contradictor*. The group members who are to share the liability for the fees and disbursements are unable to oppose the application. They are unable to oppose the application because although four group members obtained access, on a confidential basis, to the Settlement Distribution Scheme, that document did not record the amount of fees and disbursements the subject of the approval application or the how the sums were quantified…

128 In the Federal Court orders have been often made for a report by an independent cost consultant on the costs claimed by the plaintiff's legal representatives. But in some cases the report has not presented a sufficient basis for the Court to determine the reasonableness of legal costs incurred. In such cases, further orders have been made for a report on the costs to be furnished to the Court by: a Registrar of the Court: see *Modtech* (above at [71]) at [53]; or a referee: see *Caason* (above at [81]) at [122], *Petersen* (above at [79]) at [125]; or a contradictor: *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689 at [108]. In *Lifeplan* (above at [50]) Lee J suggested that the appointment of a referee should be the standard approach (at [41])**,** although his Honour was satisfied of the reasonableness of the costs incurred and did not need to appoint a referee in that case.

129 Counsel pointed out that there had been no complaint about the quantum of costs, either from the Settlement Group Members or from LCM. Counsel submitted that this reinforced the conclusion which the Court should otherwise draw that the costs were on the low side, or at least reasonable.

130 I have already considered a similar argument from counsel for LCM on the application for a common fund order. I do not think that the fact that there has been no objection from registered group members counts for anything very much.

131 That is particularly so where the subject matter of the application is the quantum of legal costs. All the Settlement Group Members have been provided with is a single figure in the form of an estimate. A group member, even were he or she to obtain his own legal advice on the question of costs, would have no realistic prospect even of determining whether the charges were correctly calculated having regard to the terms of the costs agreement, let alone assessing the reasonableness or otherwise of the costs.

132 Counsel suggested that the Settlement Group Members would include large and sophisticated share investors who would have extensive commercial experience. That may well be so, but I do not think it makes any difference. Commercial experience cannot make up for a lack of critical information. Some of the Settlement Group Members may indeed operate in a commercial environment where the level of costs and disbursements incurred in the proceedings would not be seen as large. But that cannot in any way be regarded as an informed or proper basis on which the Court should act.

133 Counsel for the plaintiff pointed out that LCM paid for all of the costs. LCM is a company with extensive experience in conducting litigation of this type. As counsel for the plaintiff observed, LCM was not acting altruistically. If the proceedings were

unsuccessful, LCM would have to bear the costs. And even if the proceedings were successful and the costs were ultimately recouped, there would still be a cost to LCM in the time value of money.

134 At least until it became clear that a substantial settlement would be achieved, LCM did have an incentive to keep the costs down. But it was a somewhat attenuated incentive. The major commercial benefit from funding the litigation for LCM was the prospect of receiving a commission on the eventual settlement amount. Given the figures involved in this case, an overrun in the legal costs in the plaintiff's case, even if it involved hundreds of thousands of dollars, is unlikely to have been of great concern.

135 There is another factor at work. It is well known that funders tend to develop relationships with solicitors who undertake these sorts of proceedings. That is commercially quite understandable. But in practice it must further blunt any incentive for the funder to question the firm's fees. Even if subconsciously, the funder may be influenced by the consideration that there is no point in disturbing the ongoing relationship by quibbling about costs which, if the proceedings are successful, will be paid back out of the settlement sum anyway.

136 This is not a criticism of funders or solicitors who act in such proceedings. But the plaintiff, who is the actual client, would rarely, if ever, have an ongoing relationship with the solicitors. Mr Tredrea's interest is in having his case decided to maximum financial advantage, that includes not paying any more costs than he is properly required to pay. The same applies to the other group members. It is their interests which the Court must consider when deciding whether to approve the deduction of Piper Alderman's costs from the settlement proceeds.

137 In any event, such incentive as LCM may have had to keep the costs down is no longer an operative factor. LCM has paid, or undertaken to pay, the costs. Its interest now lies in recouping them. Although in form the application for approval of the costs was made by the plaintiff, the real applicant is LCM. The Court's power under s 184 is not engaged (or, at least, would not be engaged unless the Court was satisfied that the funding agreements are enforceable and their enforcement will leave Mr Smith out of pocket).

138 What emerges is that there is no one in the process whose task has been to consider the costs critically and ask whether, from the perspective of a person who would be liable to pay them out of his or her own pocket, they are justified. As with the common fund application, the application to approve the costs suffers from the lack of a contradictor.

139 The evidence presented to the Court in this case in support of the approval application does not make up for this. Ms Harris' opinions are the only ones which have been presented to the Court. The Court has no means of knowing what other views may be held by other experts experienced in the field: cf *Caason* (above at [81]) at [116]. Nor, as we will see, has Ms Harris necessarily looked at the question in the right way.

140

If these were ordinary proceedings, brought by an individual, say, for personal injury, it would be open at this point for the successful plaintiff to require that the fees charged go through the assessment process under *Legal Profession Uniform Law* (NSW), Part 4.3, Division 7. One might ask why the Court should not simply allow that process to take place, or make directions which would have the same effect, rather than consider the quantum of the costs itself. All that would be required would be to appoint an independent lawyer, with experience in costs disputes, to advise the plaintiff on the quantum of the proposed charges and to act on the plaintiff's behalf in any formal assessment process which might ensue.

141 Counsel for the plaintiff urged me against taking any such course in the present case. Counsel acknowledged that the points I had made raised some theoretical force, or at least might do so. But counsel argued that an assessment process would impose additional and unnecessary time and cost. Counsel submitted that this was not a case for experimentation.

142 Where a question arises about the quantum of solicitor-client costs, the matter does not go immediately to an assessor. The solicitor cannot has no enforceable right to recover anything unless a formal bill has been served on the client: LPUL s 194(1). Then a period of time must elapse before the assessment process can begin. In practice, this period of time may be used for commercial negotiations. It may be possible to settle the quantum at this stage by reference to the bill, without the need for any further proceedings. If that is not possible, the next step is for the solicitor to file a bill in assessable form, whereupon objections are identified by the client: *Legal Profession Uniform Law Application Regulation 2015*, r 34(2)(a). It is only the parts of the bill which are objected to which then proceed to an assessment. The result is, or should be, that the assessment process is a targeted one.

143 All this of course does cost money and take time. But it need not be disproportionately expensive from the client's point of view. The client is entitled, in ordinary circumstances, to require a bill of costs: LPUL s 187(1). The solicitor is not entitled to charge for that: LPUL s 191. The law requires the solicitor to absorb it as an overhead. From the client's point of view there is no commercial reason not to insist on it.

144 Once the bill has been prepared, the solicitor acting for the client must consider it and provide advice. No doubt this requires some cost. But the commissioning of an expert report of the type provided to the Court in these proceedings does not come free either. As a matter of principle, it seems to me that if monies are to be spent out of the settlement proceeds so as to ensure that the costs are kept to a proper level (and that is essential), it is better to spend the money on a lawyer directly tasked with minimising the client's costs liability, rather than on some sort of generalised assessment of reasonableness.

145 I acknowledge, however, that in the present case the costs of the expert analysis have now been incurred. With the benefit of hindsight, it would have been better had the Court raised this question at an earlier stage of the approval application. The Court

should not now impose some different and additional process in this particular case if the costs are objectively reasonable.

146 Counsel strongly contended that they are. Counsel stressed that the opinion of Ms Harris was that the level of costs was “well” within the range in similar cases. Counsel submitted, as I understood it, that the Court could be satisfied that the level of costs in this case was actually on the low side. Counsel emphasised that the case was fixed for three weeks hearing and was settled very late after two mediations. Counsel pointed to decisions in other representative proceedings where the costs were a much higher proportion of the settlement figure or much higher in absolute terms or both.

147 Counsel put these points forcefully. But an observation that Ms Harris made in her report caused me to reserve my decision and to invite further submissions. Ms Harris noted that the eventual costs of the proceedings greatly exceeded the initial estimate given by Piper Alderman. It appears that Piper Alderman never updated their costs disclosure with an updated estimate of costs. As a result, Piper Alderman breached one of their disclosure obligations and as a result the costs agreement they made with Mr Smith is void: LPUL s 178(1)(a).

148 In her report, Ms Harris argued that this made no difference. She observed the costs had been paid by LCM which would be unable, as a public company subsidiary, to obtain an assessment: LPUL, ss 170(1)(a); 170(2)(b)(i). She appeared to take the view that the costs were reasonable anyway.

149 Counsel for the plaintiff, in their supplementary submissions, sought to support this conclusion. Counsel observed that the increase in costs appeared to have resulted largely from higher than expected expert fees, rather than solicitors’ costs. Counsel emphasised again Ms Harris’ ultimate conclusion that the costs were “well within” the range.

150 On reflection, I do not accept Ms Harris’ arguments. In the first place, I do not think the fact that LCM paid the costs is relevant for present purposes. The client is Mr Tredrea, not LCM. More broadly, what is at issue in the present application is whether the costs should be deducted from the proceeds of the recovery from Mr Tredrea and the other Settlement Group Members. The focus should be on whether the costs in question would be recoverable from them as individual clients.

151 Nor am I satisfied that Piper Alderman’s failure to comply with their disclosure agreements is a mere formality. Of course it does not matter whether the increase in costs resulted from Piper Alderman’s own fees or from disbursements. The point is that the contravention left Piper Alderman unable to rely on the terms of their costs agreement. The only way in which Piper Alderman could have enforced the costs against Mr Tredrea would have been by first conducting an assessment, and the assessment would have been at Piper Alderman’s cost: LPUL s 204(2)(a). In the circumstances there would seem to be no good reason from the Settlement Group Members’ point of view not to require an assessment (unless the issue of quantum could be favourably settled without one).

152 There are two further specific aspects of Ms Harris' report which have given me concern. The first arises out of the funding agreements. It will be recalled that the funding agreements, and the retainer agreement, were not entered into until June 2017. There is nothing in the funding agreements or in the retainer agreement which allows for costs which pre-dated that agreement to be charged to Mr Smith.

153 It is clear that there were costs which pre-dated June 2017. As I have mentioned, counsel was briefed as early as 2016. One of counsel's fee notes, from 2016, was paid by LCM. Another, from early 2017, was paid by Piper Alderman. In addition, a specific agreement was reached between Piper Alderman and LCM that the "book build" costs incurred from December 2016 onwards would not be paid by LCM immediately, but would be paid out of the settlement. On the face of it, none of these costs were "Action Costs" which were chargeable to Mr Smith.

154 It appears that Ms Harris may not have taken this into account. Her report stated that Action Costs were defined in the funding agreements as including due diligence costs and the costs of the book build. She did not refer to any time limitation on those costs. And the two fee notes from counsel to which I have referred and which pre-dated June 2017 were included in the costs which Ms Harris approved. She also apparently included the "book build" costs which pre-dated June 2017.

155 My second concern is with the "book build" costs and the other administrative costs of establishing and maintaining the Litigation Scheme. These are certainly not costs of the conduct of the litigation in any normal sense. Arguably the costs of "recruiting" members of the Litigation Scheme are not incurred for the benefit of Piper Alderman's client, Mr Tredrea, but for the benefit of LCM. It is unclear to me whether Ms Harris was alive to this point. She certainly did not refer to it in her report.

156 In making these observations, I am not predetermining any issues which may ultimately fall for decision. Costs incurred prior to June 2017 are not Action Costs and LCM has no right of reimbursement of those costs from anyone, but the Court may ultimately consider it appropriate to reimburse the costs to LCM to the extent that they contributed to the ultimately successful outcome. And the Court may ultimately be persuaded that costs associated with the Litigation Scheme and the "recruitment" of group members for the purpose of LCM funding agreements should be charged to the Settlement Group Members as a whole. On the other hand, other possible areas of objection could arise.

157 I was left with the impression that Ms Harris may not have seen her role as involving an assessment-type of review of the costs. Her report simply referred to a summary of costs provided to her by Piper Alderman and she did not even say she had reviewed the bills and considered what objections might be made to them. The reference to the costs being "well within the range" suggests she may have based her conclusion on the nature and scale of the litigation rather than asking whether the costs actually charged properly reflected the work actually done. These and other uncertainties, of course, only underline the practical difficulty in trying to deal with the application without a contradictor.

158 In the end, I think the Court needs to be satisfied that the costs to be charged to the Settlement Group Members do not exceed the reasonable and proper costs of prosecuting the claims against KPMG. I am not sure that this is the question which Ms Harris asked herself, and even if it is, I do not find the response compelling.

159 The Court thus faces the same difficulty that it faces with the common fund application. The application suffers from the lack of a contradictor, and the evidence and submissions put forward in support of it are not compelling.

160 I think the Court's reaction should be the same as for the common fund application. It is not necessary for the Court to appoint a lawyer to provide an independent advice on the quantum of the costs. This is something which can suitably be done by Mr Jahani of Grant Thornton. If the quantum cannot be settled by negotiation, then Grant Thornton can be empowered to take the necessary steps to require an assessment. For this purpose, orders may need to be made subrogating Grant Thornton as Administrator to the plaintiff's rights under the Legal Profession Uniform Law. If for some reason that is not possible then directions will need to be made having the same effect.

ATE insurance costs and remuneration of representative plaintiffs

161 The total cost of the ATE insurance, including the taxes and fees I have already referred to, was $XX. On the face of it, while not strictly speaking being a legal cost of the conduct of the proceedings, this expense was reasonably incurred in advancing the claims.

162 It is proposed to pay Mr Tredrea $10,000 and Mr Smith $2,000 by way of compensation for the time spent by them in acting as the representative plaintiff. It is notable that, although it could have done so, LCM did not apparently agree to make any payments of remuneration to Mr Smith or Mr Tredrea in the course of the litigation. But the amounts are so small in the scheme of things that there may be no one concerned about that.

163 As Grant Thornton will need to consider what to do about the common fund order application and the quantum of the legal costs, I will not make any order about these categories at this point. If having taken advice Grant Thornton considers that the payments are justified then they can be provided for in any short minutes of order which are brought in.

Conclusions and orders

164 For these reasons, I have concluded that:

(1) neither the application for a common fund order nor the application for the approval of the quantum of legal costs incurred in the proceedings should, in its current form, be acceded to by the Court;

(2) having appointed Grant Thornton as Administrator of the funds received from the settlement, the Court should require Grant Thornton to act as respondent (and thus contradictor) to those applications.

165

There will need to be directions for the issues of LCM's commission and the quantum of legal costs to be resolved on a contested basis if agreement cannot be reached. I think that for practical purposes the existing application, which has been brought in the name of the plaintiff, has been spent; any further application should be made in LCM's name as it is really LCM's application. Grant Thornton should be named as the respondent. The directions should provide for Grant Thornton, upon giving appropriate confidentiality undertakings, to be provided with the draft judgment. Grant Thornton should also be provided with the evidence in the existing application, both open and confidential, to the extent relevant.

166 It will also be necessary for the Court to give directions to Grant Thornton on the administration of the settlement monies. These will include matters which were the subject of the Proposed Rules. In particular there may be directions as to the manner in which the monies are to be distributed, the procedures to be adopted, confidentiality and the like.

167 Finally, in answer to a question from the Court, Grant Thornton indicated that an interim distribution could be made to Settlement Group Members and the process could be set in train while the contentious, or potentially contentious, issues concerning LCM's commission and the legal costs are resolved. There also seems to be no reason why payments could not be made to LCM on account of costs which it has paid. Should any directions be required from the Court to allow this to happen, they also should be reflected in short minutes of order.

168 The order of the Court is:

1. Direct that Grant Thornton bring in short minutes of order to give effect to this judgment.

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Decision last updated: 30 July 2019