IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2023 01835

JUSTINE LIDGETT — First Plaintiff

CAMERON LIDGETT — Second Plaintiff

v

DOWNER EDI LIMITED (ACN 003 872 848) — Defendant

S ECI 2023 03645

KAJULA PTY LTD (ACN 065 474 713) — Plaintiff

v

DOWNER EDI LIMITED (ACN 003 872 848) — Defendant

S ECI 2023 03646

JOWENE PTY LIMITED (ACN 001 714 585) ATF BIRO CITER SOUVENIRS PTY LIMITED PENSION FUND — Plaintiff

v

DOWNER EDI LIMITED (ACN 003 872 848) — Defendant

S ECI 2023 03647

TIMOTHY HUI CHONG TEOH — First Plaintiff

PETER HERMANN ECKARDT — Second Plaintiff

V

DOWNER EDI LIMITED (ACN 003 872 848) — Defendant

JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	28 August 2023
DATE OF RULING:	27 September 2023
CASE MAY BE CITED AS:	Lidgett v Downer EDI Ltd; Kajula Pty Ltd v Downer EDI Ltd; Jowene Pty Ltd v Downer EDI Ltd; Teoh v Downer EDI Ltd
MEDIUM NEUTRAL CITATION:	[2023] VSC 574

PRACTICE AND PROCEDURE — Group proceedings — Multiplicity of proceedings — Where plaintiffs in three competing proceedings jointly seek consolidation — Consolidation consistent with overarching purpose in *Civil Procedure Act 2010* (Vic) and r 9.12 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) — Applications granted — *Traditional Values Management Ltd (in liq) v Taylor* [2012] VSC 299 applied.

PRACTICE AND PROCEDURE — Group proceedings — Multiplicity — Where four open class group proceedings commenced against same defendant — Three competing proceedings consolidated — Carriage dispute — Comparative experience of legal teams — Risk of duplicated costs where two law practices involved — Funding and available resources — Circumstances and characteristics of lead plaintiffs — Competing applications finely balanced — Demonstrated track record of practitioners and parties in consolidated proceeding gives greater confidence that best interests of group members will be advanced — Requirement to seek to give effect to the overarching purpose — Consolidated proceeding to be preferred — Kajula proceeding stayed — *Civil Procedure Act 2010* (Vic), ss 7, 8, 9, *Supreme Court Act 1986* (Vic), s 33ZF — *Lay v Nuix Ltd* [2022] VSC 479, *Perera v Getswift Ltd* (2018) 263 FCR 92, *Stallard v Treasury Wine Estates Ltd* [2020] VSC 679, *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150 considered.

GROUP PROCEEDINGS — Costs — Application for a Group Costs Order — Costs to be calculated as a percentage of the amount of any award or settlement recovered — Tender process between competing law firms — GCO at 21% granted — Reflects lowest market price available to fund proceedings — *Supreme Court Act 1986* (Vic), s 33ZDA — *Fox v Westpac* [2021] VSC 573, *Mumford v EML Payments Ltd* [2022] VSC 750 considered.

APPEARANCES:	Counsel	Solicitors
For the plaintiffs in S ECI 2023 01835 (Mr and Mrs Lidgett)	Ms R Doyle SC with Mr R May	Maurice Blackburn
For the plaintiff in S ECI 2023 03645 (Kajula Pty Ltd)	Mr C Withers SC with Ms R Zambelli and Ms S Scott	Quinn Emanuel
For the plaintiff in S ECI 2023 03646 (Jowene Pty Ltd)	Ms A Campbell	Piper Alderman
For the plaintiffs in S ECI 2023 03647 (Mr Teoh and Mr Eckardt)	Mr L Armstrong KC with Mr D Murphy	William Roberts Lawyers
For the Defendant (Downer EDI Limited)	Mr P Meagher	Gilbert + Tobin

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HIS HONOUR:

Introduction

1 These reasons concern a class action carriage dispute. Originally, the dispute involved four separate proceedings; one in this Court and three in the Federal Court. Following the transfer of the Federal Court class actions to this Court, two of those proceedings were consolidated with the proceeding initiated in this Court. The carriage dispute is between the consolidated class action and one of the class actions initiated in the Federal Court. In both cases an identical proposal for a Group Costs Order ('GCO') is advanced on behalf of the plaintiffs. For the reasons that follow, I have determined that a GCO should be made at a rate of 21% and that the consolidated proceeding should go forward and other proceeding should be stayed.

The competing proceedings

2 On 4 May 2023, Justine and Cameron Lidgett commenced proceeding S ECI 2023 01835, an open class action against Downer EDI Ltd ('Downer') in this Court ('Lidgett proceeding').

3 On 7 August 2023, Halley J ordered that three Federal Court class actions against Downer be transferred to this Court pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). His Honour's reasons for judgment identify the three Federal Court class actions and conveniently describe their subject matter which is common to the Lidgett proceeding:[1]

> 2. The three proceedings were respectively commenced by:
>
> (a) Jowene Pty Limited atf Biro Citer Souvenirs Pty Limited Pension Fund (NSD 293 of 2023) (**Jowene proceeding**);
>
> (b) Timothy Hui Chong Teoh and another (NSD 427 of 2023) (**Teoh proceeding**); and
>
> (c) Kajula Pty Ltd (NSD 520 of 2023) (**Kajula proceeding**),
>
> (together, the **Federal Court class actions**).
>
> 3. In each of the Federal Court class actions and in … [the Lidgett proceeding], the applicants allege that in the period from 1 April 2020

[1] *Jowene Pty Limited atf Biro Citer Souvenirs Pty Limited Pension Fund v Downer EDI Limited* [2023] FCA 924, [2]–[4]. The terms defined in this quote are adopted for the purpose of this ruling.

> until a final corrective disclosure on 27 February 2023, Downer, a listed company, variously contravened s 674, s 674A, s 1041E and s 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**), s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 18 of the *Australian Consumer Law* being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**). The conduct said to give rise to those breaches includes:
>
> (a) failures by Downer to disclose to the market that it had misapplied its revenue recognition policy to a contract executed with Ausnet Services in July 2019 which resulted in inflated revenue/earnings being reported for the 2020-2022 financial years;
>
> (b) publishing accounts (including *pro forma* accounts for a 1 July 2020 capital raising) that misrepresented its financial position, the robustness of its financial reporting systems, and the success of its "Urban Services Strategy"; and
>
> (c) issuing earnings guidance for the 2023 financial year prior to the conclusion of its investigation into its accounting error and without a reasonable basis.
>
> 4. The three proceedings in this Court and the Lidgett proceeding, give rise to what is typically referred to as a "multiplicity issue". The Federal Court class actions and Lidgett proceedings were each commenced against Downer, a common defendant, at the same or a similar time. Each of the proceedings also concern overlapping allegations of contraventions by Downer of provisions of the Corporations Act, ASIC Act and the ACL arising out of the same or similar conduct, as outlined above at [3].

4 Prior to the cross-vesting orders, the Federal Court class actions and the Lidgett proceeding were jointly case managed by the two courts. Halley J described the basis of that joint case management and steps that were taken prior to cross-vesting as follows:[2]

> 5. The Federal Court class actions together with the Lidgett proceeding have, to date, been jointly case managed by judges of this Court and the Supreme Court of Victoria pursuant to the "Protocol for Communication and Cooperation between the Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings" dated 5 June 2019 (**Protocol**).
>
> 6. The overarching objective of the Protocol is stated to be to facilitate the efficiency and effectiveness of class action proceedings in circumstances where multiple proceedings are brought in competing Courts across more than one jurisdiction. The Protocol provides that the Federal Court and the Supreme Court of Victoria should aim to:

[2] Ibid [5]–[9]. The terms defined in this quote are adopted for the purpose of this ruling.

> [P]romote the efficient and timely coordination and administration of competing class action proceedings in the most convenient and appropriate jurisdiction having regard to: the issues raised in the respective proceedings; the interests of the parties and group members in the respective proceedings; the minimisation of costs and inconvenience to the parties associated with the existence of competing class action proceedings; the management of the competing class action proceedings in ways that are proportionate to the size and nature of the respective classes, the complexity of the issues, the nature of the proceedings, and the number of jurisdictions involved. At all times, the interests of justice are paramount.

7. Orders were made in each proceeding on 12 July 2023 at a joint case management hearing. The orders provided for a timetable to serve evidence in relation to the various interlocutory applications that the parties had filed to address the multiplicity issue and listed the applications for a joint hearing before this Court and the Supreme Court of Victoria on 28 and 29 August and 6 September 2023.

8. As at 12 July 2023, the applicants in the Jowene proceeding and the Teoh proceeding had filed interlocutory applications seeking orders for (a) the transfer of those proceedings to the Supreme Court of Victoria pursuant to s 5(4) of the *Jurisdiction of Courts (Cross Vesting) Act 1987* (Cth) (**Cross Vesting Act**), or s 1337H(2) of the Corporations Act, (b) a consolidation of the proceedings with the Lidgett proceeding, and (c) a permanent stay of the Kajula proceeding. As at that date, the applicants in the Kajula proceeding had filed an interlocutory application seeking a permanent stay of the Jowene proceeding and the Teoh proceeding.

9. The applicants in the Kajula proceeding subsequently also filed an interlocutory application dated 28 July 2023 seeking an order that the proceeding be transferred to the Supreme Court of Victoria pursuant to s 1337H(2) of the Corporations Act and/or s 5(4) of the Cross Vesting Act.

5 In addition to the orders referred to by Halley J, on 7 June 2023, this Court and the Federal Court made orders directing the four parties involved in the multiplicity dispute to confer with one another with the aim of resolving the multiplicity issue. As reflected in the applications to consolidate the Jowene and Teoh proceedings with the Lidgett proceeding, the conferral process was largely, although not wholly, successful.

Consolidation of the Lidgett proceeding with two of the Federal Court class actions

6 Following the cross-vesting the Lidgett plaintiffs sought orders pursuant to r 9.12 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('the Rules') and s 33ZF of the *Supreme Court Act 1986* (Vic) ('the Act') consolidating the Lidgett proceeding with

the Jowene proceeding and further consolidating the Lidgett proceeding with the Teoh proceeding. Section 33ZF is in the following terms:

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

7 The consolidation of the three proceedings is not opposed by Downer. It seeks an order that its costs of the Lidgett, Teoh and Jowene proceedings become costs of the consolidated proceeding.

8 The identity of the lead plaintiffs in the proposed consolidated proceeding, the arrangements for funding and for legal representation altered between 30 June 2023 when consolidation was originally proposed and the evening of Friday, 25 August 2023.

9 In broad terms, the Lidgett plaintiffs and the Jowene and Teoh applicants (as they then were) proposed that:

(a) the Jowene and Teoh proceedings be transferred to this Court and consolidated with the Lidgett proceeding;

(b) the Lidgett plaintiffs together with the applicants in the Teoh proceeding be the joint representative plaintiffs in the consolidated proceeding;

(c) Maurice Blackburn Pty Ltd ('Maurice Blackburn'), the solicitors for the Lidgett plaintiffs, be the solicitors on the record for the joint plaintiffs, and William Roberts Pty Ltd ('William Roberts'), the solicitors for the applicants in the Teoh proceeding, act as agent for Maurice Blackburn, with the consolidated proceeding to be cooperatively conducted by those firms on the basis of the Litigation Protocol exhibited to an Affidavit of Andrew Watson sworn 31 July 2023 ('First Watson Affidavit'); and

(d) the consolidated proceeding be jointly funded by both Maurice Blackburn and CASL Funder Pty Ltd as trustee for CASL Fund 1 ('CASL') (the litigation

funder in the Teoh proceeding) on the terms set out in the Co-Funding Agreement exhibited to the First Watson Affidavit.

10 The Lidgett plaintiffs circulated proposed orders on 25 August 2023 to this effect. The executed Litigation Protocol was exhibited to an affidavit of Andrew Watson sworn 21 August 2023 ('Third Watson Affidavit'). Orders were sought that costs in the Lidgett, Jowene and Teoh proceedings be costs in the final consolidated proceeding.

11 Later in the evening of 25 August 2023, the Lidgett plaintiffs filed and served a further affidavit of Mr Watson sworn that day ('Fourth Watson Affidavit') and circulated a revised proposed order. The revised form of order:

(a) abandoned the proposal for the plaintiffs in the Teoh proceeding to be joint representative plaintiffs in the consolidated proceeding; and

(b) removed the reference to the consolidated proceeding being cooperatively conducted on the basis of the Litigation Protocol.

12 During the hearing, the Lidgett plaintiffs submitted that the amendments to the consolidated proceeding arose from what was described in the Fourth Watson Affidavit as 'an opportunity to rationalise and improve the proposed arrangements'.

13 Given the last-minute changes to the consolidation proposal, the Kajula plaintiff sought and the Lidgett plaintiffs did not oppose an order that they pay Kajula's costs thrown away by reason of the new proposal.

14 As I indicated during the hearing, it is appropriate to make an order that the Lidgett plaintiffs pay the costs thrown away by the Kajula plaintiff by reason of the late service of the Fourth Watson Affidavit and the revised proposed order.

15 The Kajula plaintiff submitted that, given that there was no proposal for the Jowene plaintiff and the Teoh plaintiffs to be plaintiffs in the consolidated proceeding, rather than consolidation of the three proceedings, the more appropriate course is for the

Jowene proceeding and the Teoh proceeding to be dismissed, and for the Lidgett plaintiffs to amend their pleading. I do not agree.

16 Rule 9.12(1) of the Rules provides as follows:

> Where two or more proceedings are pending in the Court, and—
>
> (a) some common question of law or fact arises in both or all of them;
>
> (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) for any other reason it is desirable to make an order under this Rule —
>
> the Court may order the proceedings to be consolidated, or to be tried at the same time or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them.

17 As identified by Ferguson J (as her Honour then was) in *Traditional Values Management Ltd (in liq) v Taylor*[3] matters to be taken into account in determining whether to order consolidation relevantly include:[4]

> (a) whether the proceedings are broadly of a similar nature;
>
> …
>
> (c) time savings or other efficiencies that might be achieved;
>
> …
>
> (f) the stage each proceeding has reached;
>
> (g) the number and nature of the issues that are not common to the proceedings;
>
> …
>
> (i) the effect on the prospects of non-judicial resolution of the dispute through negotiation or mediation.

18 Section 8(1) of the *Civil Procedure Act 2010* (Vic) (the 'CPA') requires that, in the exercise of any of its powers (including under the Rules), a court seek to give effect to the overarching purpose, namely 'to facilitate the just, efficient, timely and

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3 [2012] VSC 299.

4 Ibid [10] (citations omitted).

cost-effective resolution of the real issues in dispute'.[5] The CPA provides for overarching obligations which bind the parties and practitioners to cooperate in the conduct of civil proceedings (s 20), to use reasonable endeavours to resolve disputes (s 22), to narrow the issues in dispute (s 23), to ensure costs are reasonable and proportionate (s 24) and to minimise delay (s 25).

19 As foreshadowed during the hearing, I have made an order for consolidation of the three proceedings (the 'consolidated proceeding' or the 'Lidgett consolidated proceeding'). To order consolidation is consistent with the overarching purpose in the CPA and with r 9.12(1) of the Rules. The three proceedings concern the same subject matter, the causes of action alleged are very similar. Each proceeding has progressed to the same stage as a result of the joint management by this Court and the Federal Court pursuant to the Protocol. Significant efficiencies are achieved by providing for consolidation, and consolidation of three proceedings previously in competition with each other will enhance the prospects of non-judicial resolution through negotiation or mediation.

20 To adopt the language of r 9.12, consolidation of the three proceedings is 'desirable'. The consolidation of competing group proceedings is to be encouraged. It has the capacity to avoid or in this case to reduce the scope of multiplicity disputes, to prevent unnecessary costs being incurred and to reduce delays. To dismiss the Jowene and Teoh proceedings, rather than to make consolidation orders, as in Kajula's submission should be done, would send the wrong message to parties who in the future might be engaged in multiplicity disputes. To determine the consolidation applications in the way that Kajula contends is not 'desirable'. To do so may act as a deterrent to others in like situations to act in a manner consistent with their obligations in the CPA.

21 In this case the consolidation of the three proceedings is the product of conferral between the parties and legal practitioners following the orders made on 7 June 2023, which conferral I infer has been engaged in by those persons in good faith and in a

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5 CPA, s 7(1).

manner consistent with the overarching obligations to which I have referred. The consolidation orders contended for meet the criteria in r 9.12 and are appropriate.

22 The Kajula plaintiff submitted that it is not aware of a case that supports an order that the costs of plaintiffs who have elected not to contest a carriage application be costs in the consolidated proceeding. In response, the Lidgett plaintiffs submitted that the orders sought reflect the resolution or the bargain struck between competing parties, and that such orders are not unusual.

23 The Jowene plaintiff submitted that the Jowene proceeding was commenced first and that the Jowene plaintiff acted reasonably in both commencing and conferring with the plaintiffs in the competing proceedings. It was submitted that to order the costs of the Jowene proceeding be costs of the consolidated proceeding is an appropriate exercise of the costs discretion in the consolidation of multiple representative proceedings.

24 The Teoh plaintiffs submitted that the funding arrangements for the Teoh proceeding are being carried across into the consolidated proceeding and that orders should be made to carry across their costs.

25 The Court has a wide discretion in s 33ZF and in s 24(1) of the Act to make such orders as to costs as are appropriate. Section 24(1) provides:

> Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.

26 To make an order that costs incurred in the individual proceedings be costs in the Lidgett consolidated proceeding is an appropriate exercise of the broad discretion concerning costs. The Jowene and Teoh proceedings were bona fide class actions commenced and pursued in the Federal Court. Both are proceedings which, but for cooperation between the parties and their practitioners, may have continued in their own right, subject to the determination of multiplicity disputes. The Jowene and Teoh proceedings have been consolidated with the Lidgett proceeding following the

conferral process. It is consistent with the facilitation of the efficient and cost-effective resolution of issues in dispute to order that the costs of those who are the plaintiffs in each of the Lidgett, Jowene and Teoh proceedings be costs in the consolidated proceeding. To make such a costs order is also consistent with costs orders previously made upon consolidation of competing group proceedings in the Federal Court.[6]

27 It is also appropriate to order that Downer's costs of the individual proceedings be costs in the consolidated proceeding.

Group Costs Order

The legislation and the principles

28 Section 33ZDA(1) of the Act provides that, on an application by the plaintiff in a group proceeding, the Court may make a GCO. Section 33ZDA is relevantly in the following terms:

> **Group costs orders**
>
> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
>
> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
>
> (2) If a group costs order is made—
>
> (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
>
> (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.
>
> (3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

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6 See *Stack v AMP Financial Planning Pty Ltd* [2020] FCA 1839, [41] (Beach J).

29 In *Fox v Westpac*,[7] Nichols J made the following observations about the GCO scheme generally:[8]

> 12. As the statutory text makes clear, s 33ZDA facilitates the funding of group proceedings by introducing what might be described as a statutory common fund of three parts: when a group costs order is made the plaintiff's liability to pay its own legal costs is contingent on recovery of an award or settlement, and the quantum of the costs payable to the legal practice representing the plaintiff and group members is calculated as a percentage of that award or settlement (sub-s 1(a)). An order permitting the calculation of fees in this way must also require that liability for payment of legal costs be shared among all group members (sub-s 1(b)), and where such an order is made the statute shifts the plaintiff's risk of paying adverse costs and any requirement to give security for the defendant's costs to the law practice (ss (2)).
>
> 13. In that way, the provision addresses and links these things: first, when a proceeding is funded this way, how legal costs may be calculated (as a percentage of the award or settlement recovered in the proceeding, as specified in the Court's order); second, where a proceeding succeeds, who shares in the liability for the costs of having brought the proceeding (the plaintiff and all group members); third, who bears the financial risks of bringing a group proceeding (the law practice representing the plaintiff and group members).

30 The transfer of the three Federal Court class actions to this Court was in the context of anticipated applications for GCOs. The legislation that governs group proceedings in the Federal Court does not expressly provide for the making of such orders and there is no Commonwealth legislative equivalent to s 33ZDA.

31 There have been a number of applications where this Court has been called upon to determine whether the making of GCO is 'appropriate or necessary to ensure that justice is done in the proceeding' and, if so, the appropriate rate to be specified in an order made pursuant to s 33ZDA(1). The principles to be applied were not in dispute on this application. They were helpfully summarised by Nichols J in *Gehrke v Noumi Ltd* ('*Noumi*').[9] It is unnecessary to produce that summary. Recent experience is that the availability of GCOs pursuant to s 33ZDA has had the effect of driving down the amount to be deducted from damages awards or settlement sums (by way of litigation

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7 [2021] VSC 573.
8 Ibid [12]–[13] (citations omitted).
9 [2022] VSC 672, [53].

funder's commission and legal costs), and thereby increasing the percentage available to group members.

32 All other things being equal, it is likely that to make a GCO will be in the best interests of group members. That is because it is likely that a GCO, rather than the previously conventional funding model involving a litigation funder and in addition the payment of legal costs, will result in a more favourable return to group members.

A GCO should be made

33 Both of the competing proceedings contend for a GCO which specifies a rate of 21% pursuant to s 33ZDA(1). The GCO now sought is the product of what was essentially a tender process between competing law firms.

34 The orders made on 7 June 2023 by this Court and the Federal Court directed that the parties each file a statement of position containing sufficient information to allow the reader to understand the essence of that party's carriage proposal. Orders were also made for the filing of revised statements of position following receipt of the other parties' respective statements of position. This process was designed to encourage each party to put forward their best proposal, the proposal that would best advance the interests of group members.

35 On 14 June 2023, each of the lead applicants/plaintiffs filed a statement of position. The Lidgett plaintiffs indicated that they would apply for a GCO at a rate of 22%. The Kajula applicant stated that, at the appropriate time, it would seek an order equivalent to a GCO under s 33ZF of the *Federal Court of Australia Act 1976* (Cth) at a rate of 22% (inclusive of all costs up to and including distribution of settlement or judgment amounts). On 30 June 2023, each of the parties filed a revised statement of position. The Lidgett plaintiffs maintained their proposal to apply for a GCO at a rate of 22%. Kajula amended its proposal to a rate of 21%. On 7 July 2023, the Lidgett plaintiffs revised their position to seek a GCO at a rate of 21%. On 28 July 2023, the Kajula applicant filed an application for the transfer of the Kajula proceeding to this Court, and foreshadowed that it would seek a GCO at a rate of 21%. On 21 August 2023, the

Third Watson Affidavit stated that the 21% sought by the Lidgett plaintiffs is inclusive of the costs of scheme administration.

36 The rate of 21% and the initial 'bid' rate of 22% reflect GCO rates that have been recently ordered in this Court in similar shareholder class actions.

37 In *Mumford v EML Payments Ltd*,[10] I made a GCO in a shareholder class action specifying a rate of 24.5%, noting that the percentage might later be revisited pursuant to s 33ZDA(3).[11] I referred to other recent GCO decisions in shareholder class actions:[12]

> In chronological order, the earlier cases are *Allen v G8 Education Ltd* (*Allen*), where the GCO percentage was fixed at 27.5% inclusive of GST; *Bogan v Estate of Peter John Smedley (dec'd)* (*Bogan*), where the percentage was fixed at 40%; and *Nelson v Beach Energy; Sanders v Beach Energy* (*Beach Energy*), where the percentage was fixed at 24.5%. In *Noumi*, decided after the hearing of this application, the percentage was fixed at 22%.

38 The rate of 21% proposed by both proceedings represents the lowest 'market' price that is available to fund the proceedings. 21% is a reasonable rate. Although it is above the rate of 14% recently determined by Nichols J in *DA Lynch Pty Ltd v Star Entertainment Group Ltd*,[13] 21% is a rate that otherwise sits just below the rate in the other recent shareholder class actions, including *Noumi*.

39 It is appropriate or necessary to ensure that justice is done to make a GCO at the rate of 21%, irrespective of which of the competing proceedings is to go forward to trial. The making of such an order provides transparency to group members in respect of funding and legal costs. It ensures a fair distribution of the burden of legal costs incurred for the benefit of group members across all group members.

40 The making of a GCO that specifies a rate of 21% provides certainty to the plaintiffs and group members that, subject to s 33ZDA(3), they will be guaranteed to receive 79% of any recovered amount. It is to be noted that s 33ZDA(3) allows the Court to

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10 [2022] VSC 750.
11 Ibid [96].
12 Ibid [64] (citations omitted).
13 [2023] VSC 561.

revisit the percentage during the course of the proceeding should it be appropriate to do so.

41 I am satisfied, for reasons which are set out below, that both Maurice Blackburn and Quinn Emanuel (the solicitors for Kajula) have the financial wherewithal to meet the obligations which arise under s 33ZDA(2) of the Act – namely, to meet any adverse costs order and to provide security for Downer's costs.

42 I proceed on the basis that, in whichever proceeding is selected to continue, an order will be made under s 33ZDA(1) of the Act that the legal costs payable to the relevant law practice inclusive of scheme administration be calculated as a percentage (21%) of the amount of any award of settlement that may be recovered in the proceeding. The percentage specified is inclusive of GST.

Multiplicity

The competing applications

43 The plaintiffs in the Lidgett consolidated proceeding seek an order pursuant to s 33ZF of the Act that the Kajula proceeding be permanently stayed. The plaintiff in the Kajula proceeding seeks orders that each of the other proceedings be permanently stayed.

44 In *National Australia Bank Ltd v Pathway Investments Pty Ltd*,[14] the Court of Appeal held that the power to make orders pursuant to s 33ZF of the Act must be exercised in accordance with the CPA. Bell AJA, with whom Bongiorno and Harper JJA agreed, stated:[15]

> 55. The powers of the Court to make orders under s 33ZF of the *Supreme Court Act* and r 32.07 of the *Supreme Court (General Civil Procedure) Rules* must now be exercised in accordance with the *Civil Procedure Act*. One purpose of the *Civil Procedure Act* is 'to reform and modernise the laws, practice, procedure and processes relating to civil proceedings in the Supreme Court' (s 1(1)(a)). Another is to provide for an overarching purpose in the conduct of civil proceedings (s 1(1)(c)), …

[14] [2012] VSCA 168; (2012) 265 FLR 247.
[15] Ibid 259 [55]–[56] (Bell AJA, Bongiorno JA agreeing at [1] and Harper AJA agreeing at [2]).

> 56. Section 8(1) of the *Civil Procedure Act* requires the Court to seek to give effect to this overarching purpose in the exercise and interpretation of 'any of its powers', including its inherent, implied or statutory jurisdiction (s 8(1)(a)) and its common law and procedural rules or practices (s 8(1)(c)). Under s 9(1), in making any order or giving any direction in a civil proceeding, the Court is required to further the overarching purpose by having regard to a number of specified objects. … Section 9(2) specifies relevant considerations and s 9(3) makes it clear that the provisions of this section are non-derogatory. These provisions apply to the exercise of the Court's power with respect to group proceedings in ch 4A of the *Supreme Court Act*.

45 The parties agree that, when determining which proceeding should be stayed and which proceeding should go forward, the Court must proceed on the basis of the best interests of group members.[16]

46 There is much that is common about the competing proceedings vying for carriage.

47 First, the group membership is the same. Both proceedings are open class representative proceedings, instituted on behalf of all shareholders who acquired an interest in ordinary shares in Downer in the period from 23 July 2019 to 27 February 2023.[17] Both proceedings are proposed to continue as open proceedings.

48 Second, the consolidated proceeding will (in its proposed harmonised consolidated statement of claim) advance the same causes of action as the Kajula proceeding, including a non-apportionable claim under s 1041E of the *Corporations Act 2001* (Cth) ('*Corporations Act*').

49 Third, in each of the cases, the plaintiffs are represented by firms or a combination of firms with experience in shareholder class actions.

50 Fourth, the firms in question have funded the costs of the respective proceedings to date on a no win – no fee basis.

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16 *Wigmans v AMP Ltd* [2021] HCA 7; (2021) 270 CLR 623, 649 [52], 667–8 [109], 670 [116]–[117] (Gageler, Gordon and Edelman JJ).

17 The claim period in the Kajula proceeding is 23 July 2019 to 27 February 2023. No proposed consolidated statement of claim was produced on the application, but the Lidgett plaintiffs submitted that the consolidated proceeding would advance the same claim period as the Kajula proceeding.

51 Fifth, in each proceeding, the lead plaintiffs seek a GCO fixed pursuant to s 33ZDA at 21%, inclusive of the costs of administration and GST.

52 Sixth, in each proceeding, proposals have been advanced for the provision of security for costs in favour of Downer. In its submissions dated 14 August 2023, Downer stated that it considered each of the proposals for security for costs to be acceptable.

53 Seventh, in both cases the lead plaintiffs are represented by experienced counsel teams.

54 In written submissions and during the hearing what were said to be differences between the proposed conduct of the competing proceedings were identified. In no particular order:

(a) First, there are said to be different levels of experience between the solicitors who will be involved in the conduct of the competing proceedings.

(b) Second, the Kajula proceeding involves one firm of solicitors having the conduct of the proceeding; the Lidgett consolidated proceeding involves two firms. Downer proposes that, if the Lidgett consolidated proceeding is to go forward, an order should be made limiting Downer's potential costs liability to what the costs would have been if the litigation were to be conducted by one firm.

(c) Third, there are different funding arrangements and there are said to be differences in the financial resources available to fund the competing proceedings.

(d) Fourth, there are said to be relevantly different characteristics so far as the lead plaintiffs in the competing proceedings are concerned.

(e) Fifth, the timing of filing and service of the statement of claim; Kajula's statement of claim is 'ready to go', it requires no amendment; the plaintiffs in

the Lidgett consolidated proceeding seek four weeks to file and serve a consolidated writ and statement of claim.

The principles

55 The principles in the case of carriage disputes where there are multiple proceedings are not in dispute. It is convenient to set out in the following passages from the Lidgett submissions:

> 4. …The commencement of a subsequent representative proceeding against the same defendant with an overlapping subject matter is not of itself vexatious, oppressive, or an abuse of process[18]. However, a multiplicity of proceedings may be inimical to the administration of justice[19] and the Court has a range of tools for managing multiplicity of which consolidation is the most frequently used[20].
>
> 5. The task for the Court in resolving multiplicity is to determine which arrangement, including which proceeding should go ahead if one or more is stayed, would be in the best interests of group members[21]. The task is an inherently evaluative one[22] having regard to all of the relevant considerations[23]. Previous cases have identified factors that may be relevant to managing competing group proceedings, but those factors cannot be listed exhaustively, will vary from case to case, and cannot detract from the essential task of identify [sic] what is in the best interests of group members[24].

56 In addition, an extract from the Kajula submissions directed to the same subject matter:

> 9. … Which action was filed first in time is only one of the relevant considerations and is less relevant where, as occurred here, the proceedings were commenced within a short period of time.[25] A multifactorial analysis is to be applied. Factors which may be relevant to this analysis include, *inter alia*, the competing funding proposals, the proposals for security for the respondent's costs, the nature and scope of the cause of actions advanced and the conduct of the representative applicants to date,[26] the experience of the practitioners and the

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18 *Wigmans v AMP Ltd* (2021) 270 CLR 623.
19 *Wigmans v AMP Ltd* (2021) 270 CLR 623, [106].
20 *Lay v Nuix Ltd* [2022] VSC 479, [14].
21 *Wigmans v AMP Ltd* (2021) 270 CLR 623, [52].
22 *Klemweb Nominees Pty Ltd v BHP Group Ltd* (2019) 369 ALR 583, [48]–[49].
23 *Wigmans v AMP Ltd* (2021) 270 CLR 623, [60].
24 *Lay v Nuix Ltd* [2022] VSC 479, [19].
25 *Wigmans v AMP Ltd* [2019] NSWCA 243; 103 NSWLR 543; 373 ALR 323 at [59]–[62], [68]–[69].
26 *Nuix* at [18].

> availability of resources and the conduct of the representative applicants.[27]

Evaluating the competing considerations

57 The Lidgett plaintiffs submitted that many of the factors which usually distinguish competing class actions from one another are neutral on the present application. I agree.

A. Experience

58 The first distinguishing feature relied upon by the Lidgett plaintiffs and asserted to be significant is the relative experience of the respective law firms in shareholder class action proceedings. I agree that the experience and capability of competing law practices is a relevant consideration when determining a carriage dispute. In *Perera v Getswift Ltd* ('*Getswift*'),[28] the Full Federal Court observed that:[29]

> The Court should be astute to select the proceeding with the legal team that is most likely to achieve the largest settlement or judgment, ie the most experienced and capable. We accept that differentiating between legal firms or solicitors will often be difficult but the Court should not dodge that question if there is a basis for differentiation.

59 The question this case is whether there is a 'basis for differentiation' between the comparative experience of the legal teams; solicitors and barristers.

60 In their written submissions, the Lidgett plaintiffs contended that, as unedifying as such a comparison may be, the Kajula proceeding simply cannot compete with the combined experience and resources of Maurice Blackburn, William Roberts and their funder, CASL. They submitted that Maurice Blackburn has unparalleled expertise in conducting representative proceedings and securities class actions in particular. It has successfully settled 26 securities class actions with 8 of those proceedings settling for over $100 million. Further, that William Roberts also has extensive class actions experience. They submitted that, if the consolidated proceeding is given carriage, group members will have the benefit of two highly experienced and well-resourced

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27 *Wigmans v AMP Ltd* [2019] NSWSC 603 (at [121]–[126] per Ward CJ in Eq), *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (at [71] per Beach J), *Perera v GetSwift Ltd* [2018] FCA 732 at [169].

28 [2018] FCAFC 202; (2018) 263 FCR 92.

29 Ibid 152–153 [278] (Middleton, Murphy and Beach JJ).

law firms, on the same funding terms as the less experienced and less well-resourced Kajula proceeding.

61 The position was more subtly put during oral argument. The Lidgett plaintiffs identified two features which they submitted might be reflective of the relative lack of experience of the law practice in the Kajula proceeding: first, the fact that, unlike three of the four representative proceedings, Kajula was unable to reach agreement with the other parties as to carriage; second, Kajula commenced its proceeding in the Federal Court and was seeking a common fund order, but belatedly sought to transfer the proceeding from the Federal Court to this Court and seek a GCO.

62 In response to the issue of relative experience, Kajula relied on the experience of Quinn Emanuel's lead partner for the Kajula proceeding, Mr Scattini, and the well-resourced, experienced team assisting him in the proceeding. It submitted that the total quantum of settlements achieved by Maurice Blackburn does not support a conclusion that it is more likely to achieve a better outcome for group members.

63 During the hearing, Kajula identified various aspects of the conduct of the Lidgett proceeding as relevant when considering relative experience. It submitted first, that Maurice Blackburn either missed claims regarding Downer's July 2020 equity raising or formed the view that such a claim could not be brought by the Lidgetts, who acquired their shares at the end of the claim period. Second, unlike the Jowene, Teoh and Kajula proceedings, Maurice Blackburn did not include a claim under s 1041E of the *Corporations Act*. Third, there were difficulties with the original proposal of having multiple lead plaintiffs, law firms and funders which were identified by Kajula but, until the very last minute, waved away by Maurice Blackburn. The difficulties identified by Kajula included difficulties taking instructions from Mr Teoh and Mr Eckardt who were to be plaintiffs in the consolidated proceeding in circumstances where, under the original consolidation proposal, Maurice Blackburn would not have a retainer with Mr Teoh and Mr Eckardt and William Roberts would be acting as agent of Maurice Blackburn. It was not until the Friday evening prior to the hearing that the consolidation proposal was amended to remove Mr Teoh and Mr Eckardt, a change

which Kajula submitted occurred because there was such an 'obvious problem' with the proposal and the 'arrangement was unworkable'.

64 Kajula submitted that both Quinn Emanuel and Maurice Blackburn are suitably experienced in class actions, and both have briefed experienced counsel. Kajula did not ask the Court to find that Quinn Emanual and its barristers are more experienced than Maurice Blackburn and its barristers. Rather, that Maurice Blackburn has not established that it is more experienced and that relative experience is therefore a neutral factor.

65 I agree in substance with this submission. Maurice Blackburn may have been involved in several more shareholder class actions than Quinn Emanuel and it may have achieved a higher total quantum of settlements than Quinn Emanuel. However, involvement in a larger number of proceedings and in settlements with a higher overall quantum does not support a finding that, if Maurice Blackburn is chosen to have the carriage of the group proceedings, a better outcome for group members is more likely to be achieved.

66 I do not regard the difference between the experience of the two firms, both of whom have significant experience in group proceedings, as material. I also consider that it is important to look at the legal representation overall and to consider the relative experience of the two counsel teams as well as that of the solicitors involved. In the same way that I do not consider there is a material difference between the experience of the solicitors, I do not consider there to be a material difference between the experience of the two counsel teams. Both counsel teams are very capable and very experienced.

67 Returning to the language of the Full Federal Court in *Getswift*, I do not consider that there is a basis for differentiation between Maurice Blackburn and William Roberts and their counsel team on the one hand, and Quinn Emanuel and its counsel team on the other.

B. Two firms of solicitors or one

68 Kajula submitted that having multiple plaintiffs, funders and law practices gives rise to 'avoidable complexity' in circumstances where in Kajula's case there is a single firm with a single lead plaintiff and a single funder ready to conduct the proceeding.

69 The Lidgett consolidated proceeding now involves the Lidgett plaintiffs with Maurice Blackburn as the solicitor on record, with William Roberts to act as agent for Maurice Blackburn.

70 The arrangements between the two firms are contained in three documents: the existing retainer between the Lidgetts and Maurice Blackburn, a funding agreement (the Co-funding and Management Agreement ('CFMA')) and a revised form of agency retainer agreement between Maurice Blackburn and William Roberts (the 'Agency Retainer Agreement'). Pursuant to cl 3.1 of the Agency Retainer Agreement, Maurice Blackburn as principal retains William Roberts as agent to provide legal services in accordance with the instructions from the Lidgett plaintiffs in accordance with the CFMA. Pursuant to cl 4A(b)(i) of the CFMA, Maurice Blackburn and William Roberts will allocate legal work in the approximate proportion of 70% for Maurice Blackburn and 30% for William Roberts.

71 Although Kajula directed attention to the dispute resolution provisions within the Lidgetts' proposal and suggested this was a negative factor so far as the consolidated proceeding is concerned, there is nothing unusual about those dispute resolution provisions. The ultimate determination of disputes by the most senior of the counsel briefed is a familiar enough dispute resolution procedure in group proceedings in other contexts.

72 As a result of changes to the arrangements in the Lidgett consolidated proceeding between 30 June 2023 and the hearing, some of the complexities identified by Kajula have fallen away. There is, however, a remaining issue concerning the costs of the consolidated proceeding given the involvement of the two law practices.

73 Downer submitted that the conduct of the proceeding by two firms rather than one 'undoubtedly presents a risk of duplication of work and unnecessary or excessive costs'.[30] It submitted that, if the Lidgett consolidated proceeding is permitted to go forward, Downer should not be exposed to any greater potential costs liability than would otherwise be the case if the proceeding was being conducted by one firm of solicitors rather than two. I agree.

74 Downer submitted that, if the Lidgett consolidated proceeding is to go ahead, there should be an order which provides that:

(a) the costs of any work performed by reason of there being two law practices rather than one shall not be recoverable from Downer (or from group members);

(b) an independent costs referee be appointed who is charged with conducting periodic inquiries and confidentially reporting to the Court in relation to whether there is any duplicated work being performed; and

(c) the costs of the referee be borne by the plaintiffs in the Lidgett consolidated proceeding and not be recoverable against Downer or group members.

75 Although the Lidgett plaintiffs indicated in their written reply submissions that they would not oppose such an order, during the hearing they submitted that such an order is not necessary for three reasons:

(a) first, this is not a case where there are two law firms on the record. Rather, Maurice Blackburn is the firm on the record and some work will be done by William Roberts pursuant to the Agency Retainer Agreement;

(b) second, what will be recoverable will be a matter for determination upon the resolution of the proceeding, at which point the firm on the record will have to justify any costs, whether performed as principal or whether by its agent, and

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30 Citing *Perera v Getswift Ltd* [2018] FCAFC 202; (2018) 263 FCR 92, [274(a)] (Middleton, Murphy and Beach JJ).

the usual protections and supervisory jurisdiction of the Court will apply. Reference was made to the decision in *Lay v Nuix Ltd* ('*Nuix*'),[31] and to the observation by Nichols J that '[w]hat will be recoverable will be a matter for determination upon the resolution of the proceeding, and in the case of a settlement, subject to the approval of the court under s 33V of the *Supreme Court Act*';[32] and

(c) third, the GCO provides adequate protection because the law practice bears the burden of the risk of duplicated work and also because the Court retains the capacity to revisit the GCO percentage.

76 In respect of those matters, Downer submitted:

(a) first, there is 'no sort of magic in the agency structure that eliminates the risk of duplicated work'. It is proposed that William Roberts will undertake 30% of the work by value. This is not a peripheral involvement. There is no good reason why an agency arrangement will not give rise to the costs of coordinating and administering the involvement of William Roberts of the kind that arises where there is joint representation;

(b) second, the comment by Nichols J in *Nuix* concerned the costs incurred prior to consolidation. It was submitted that the passages from *Nuix* do not say that there is no need to be concerned about duplicated costs if there is going to be an assessment of costs at the end of the case. Were that to be so, orders of the kind proposed would never be made because those ordinary procedures of taxation and assessment are always available; and

(c) third, a GCO only governs the liability of the plaintiffs and group members to their lawyers. It does not govern the liability of Downer to the plaintiffs in the event of any adverse costs order.

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31 [2022] VSC 479, [127]–[132].

32 Ibid [132].

77 Kajula submitted that a GCO is not an adequate answer to the risk to group members of an increase in legal fees as a consequence of there being two law firms:

> It is no answer to say that those costs will not be passed on to group members, because of the proposal to seek a GCO of 21%. Unnecessary legal costs have an indirect effect, because of their impact upon the economics of the case and commercial objectives of the funders. The greater the legal costs the greater the return the funders will seek on their investment, driving up the figure that is required to achieve a settlement, which may ultimately prejudice group members' interests.

78 The risk that Kajula identifies of the legal practitioners seeking a higher settlement sum implies that the legal practitioners may favour their own interests over the interests of group members in order to recover duplicated costs. I do not accept, in circumstances where the orders proposed to be made limit the costs to those applicable as if there was only one firm of solicitors acting, that a risk that the legal practitioners involved will act other than in the best interests of group members arises.

79 I accept that the risk of duplicated costs arises where there are two law practices acting: either jointly on the record or one acting as agent for the other and carrying out 30% of the work. The same risk does not arise where there is only one law practice acting. Nor does it arise in circumstances where the law practice is based interstate but uses a locally based firm to act as that firm's town agent as is the Quinn Emanuel proposal. The risk of costs duplication is not a risk that arises in respect of the Kajula proceeding. It is a complexity that would affect the conduct of the Lidgett consolidated proceeding and which may require the management of the Court to address.

80 If the Lidgett consolidated proceeding is selected to proceed, it would be appropriate to make an order of the type sought by Downer. That is so for the following reasons:

(a) First, I accept Downer's submission that the agency relationship does not eliminate the risk of duplicated work. Although I consider that risk to be lower than if there were joint representation, there is nevertheless a risk of duplicated work. First, because the two firms need to make joint decisions about the conduct of the litigation, including about the allocation work on the agreed

70/30 basis about which they may reasonably disagree and need to resolve. Second, because the two law practices will need to communicate to manage the joint process. As Nichols J observed in *Stallard v Treasury Wine Estates Ltd* ('*Treasury Wine*')[33] 'it is true that the very existence of the processes and mechanisms needed to allow a team comprised of the members of two firms to work together as one, will require work that would otherwise not occur'.[34]

(b) Second, I accept, as stated by Nichols J in *Treasury Wine*, that:[35]

> The purpose of the performance of assessments by an independent consultant during the course of the litigation, is to detect and record the existence of any duplicated work as it occurs, rather than deferring that exercise until the end of the proceeding when it may be more difficult to detect. Although created during the life of the proceeding, reports of the opinion of the costs referee would constitute a resource to which the Court might have regard when considering costs at the conclusion of the litigation.

(c) Third, I accept that a GCO only governs the liability of the plaintiffs and group members to their lawyers, and that it does not govern the liability of Downer to the plaintiffs in the event of any adverse costs order.

81 If orders of the type proposed by Downer which require an independent costs referee to report in the course of the proceedings are made, it is not appropriate that the costs burden of the costs referee be borne by the plaintiffs in the consolidated proceeding or by the group members. Those costs must be borne by the law firm or firms involved. Otherwise the appointment of a costs referee imposes an additional cost burden upon the lead plaintiffs and group members that they would not otherwise be required to bear.

82 As a matter of policy, noting the desirability of consolidation where there are multiplicity issues, it would be undesirable to treat the involvement of more than one firm following consolidation as a negative when compared to a competing proposal which relies on one firm only as the provider of the legal services. With appropriate

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33 [2020] VSC 679.

34 Ibid [60]; see also *Fuller v Allianz* [2021] VSC 581; (2021) 65 VR 78, 92 [47] (Nichols J).

35 *Stallard v Treasury Wine Estates Ltd* [2020] VSC 679, [72].

safeguards such as orders which involve the ongoing engagement of a costs referee at the expense of the plaintiffs' solicitors, the cost risk arising from the involvement of two firms is appropriately managed. With orders as proposed by Downer in place, the involvement of two firms rather than one is a neutral factor in the determination of the carriage dispute.

C. Funding arrangements and resources

83 Significant attention was devoted by both parties to attacking the financial position and the funders and funding arrangements involved in the proposals of the other. Having considered the evidence and the submissions on this issue, it is not a basis upon which to distinguish between the competing proposals. The primary reason that is the case is because of the terms of s 33ZDA(2) of the Act.

84 Section 33ZDA(2) imposes costs liability on the law practice representing the plaintiff and group members. When it is necessary to assess whether financial capacity is a relevant distinguishing factor between the two proposals, a consideration of the financial position of the law firms involved and, to the extent relevant, the financial position of those involved in providing funding is required.

85 The funding proposal for the Lidgett consolidated proceeding is as follows:

(a) Maurice Blackburn will fund its own professional fees;

(b) CASL will fund the provisional fees of William Roberts;

(c) CASL and Maurice Blackburn will each contribute to the funding of disbursements, with CASL paying 65% and Maurice Blackburn paying 35%; and

(d) CASL will procure an insurance policy for adverse costs; Maurice Blackburn and CASL will each pay half of the premium for the policy and, if the policy is insufficient to meet any adverse costs order, that liability will be shared equally by CASL and Maurice Blackburn.

86 The funding proposal for the Kajula proceeding relevantly states:

> 10. Quinn Emanuel is funding its legal fees and Regency VII Funding Pty Limited (**Regency**) is financing the disbursements in the proceeding. Quinn Emanuel's retainer does not propose any uplift.
>
> 11. Quinn Emanuel is a global law firm that has more than 1000 lawyers and generated revenue of approximately USD 1.6 billion for the calendar year ending December 2022. It has net assets in the order of USD 430 million.
>
> 12. Regency is a financier, or funder to eleven separate class action proceedings commenced by Quinn Emanuel – seven which have settled successfully and four of which remain on foot (at various stages). Regency has provided security totalling $13 million across those proceedings. In each case, security was provided by way of payment into court.
>
> 13. The financing arrangement between Kajula, Quinn Emanuel and Regency is the subject of a retainer, a Financing Commitment Agreement and Litigation Collaboration Agreement. …
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> …
>
> 16. Regency will provide an initial tranche of security for costs, by way of payment into court, within 10 days of any agreement with the Respondent, or order of the Court. In the event that agreement cannot be reached as to the amounts or timing of security, the Applicant will consent to that matter being dealt with by a referee.
>
> 17. Neither Quinn Emanuel, nor Regency intend to purchase after the event insurance (ATE insurance). Nonetheless, if a decision is made to purchase ATE insurance in the future, those costs will be recovered under the GCO and will not be visited on group members as a separate cost, or payment.

87 Kajula submitted that the funding of its proceeding is simple and straightforward; Quinn Emanuel and Regency are parties to a Financing Agreement and Litigation Collaboration Agreement which clearly sets out how the proceeding will be funded by Quinn Emanuel and Regency. The arrangement is backed by the financial resources of Regency's parent company, Dilpa Holdings LLC ('Dilpa'), and by Quinn Emanuel.

Quinn Emanuel and Regency

88 The thrust of the complaint by the Lidgett plaintiffs is the alleged absence of any evidence about the financial wherewithal of Regency or Dilpa to fund the Kajula proceeding. It was submitted that the Court can have no confidence about the

financial viability of the Kajula proceeding, and that the absence of this evidence should be dispositive of the carriage motion in favour of the Lidgett consolidated proceeding.

89 Although there is evidence from Mr Wolden, a director of Regency, about actions previously funded by Dilpa, a Delaware corporation, Regency is a special purpose vehicle incorporated on 21 April 2023 with an issued share capital of $100. There is no evidence of the financial position of Dilpa, who Mr Wolden states has agreed to fund the Kajula proceeding, just as Dilpa has funded other class actions. It is Mr Wolden's evidence that Regency will only continue to fund the proceeding if a GCO is made, but has no obligation to continue funding the proceeding if a GCO is not made.

90 In his 1 August 2023 affidavit (the 'First Scattini Affidavit'), Mr Scattini gives evidence that:

> 59. Regency is, and, or has been a financier, or funder to at least 11 other class action proceedings commenced by Quinn Emanuel seven of which have settled successfully, one is pending an appeal outcome and three are on foot (at various stages), including the Kajula Proceeding. …
>
> 60. Over those 11 proceedings. Regency has provided security in the total amount of $13 million, in each case by way of payment into court. It has also paid disbursements costs in excess of $20 million. A company extract for Regency is exhibited to this affidavit …
>
> 61. I understand on information from Mr Budd that he is Regency's founder, principal and provider of financial resources. He is also President and Managing Shareholder of Baron & Budd, P.C., one of the largest plaintiff law firms in the United States.

91 During the hearing, Kajula proffered an undertaking that, if carriage is decided in its favour, then, within 10 days, it will provide a letter of credit from the Bank of America guaranteeing the payment of each of the instalments of the $5.5 million that are required to be paid as security for costs.

92 The Lidgett plaintiffs submitted that Kajula has been on notice that Regency's financials are in issue, and that, like the circumstances in *Nuix*, the financial

wherewithal of the funder is a central issue. It was submitted that fundamental plank of evidence is missing and that it is 'extremely unsatisfactory for there to be an oral undertaking proffered just before lunch on the day that the carriage motion is listed for hearing'.

93 Kajula responded by submitting that the financial position of Regency is a 'non-issue' because, pursuant to s 33ZDA(2), if a GCO is made, Quinn Emanuel is liable to pay any costs payable to the defendant and must give any security that the Court may order the plaintiff to give. Having regard to s 33ZDA(2) and to the evidence concerning Quinn Emanuel's financial position, I agree that the financial position of Regency is a non-issue.

94 The First Scattini Affidavit states:

> 67. Quinn Emanuel is one partnership world-wide, with offices in 11 countries. It is ranked as the 31st highest grossing firm in the world.
>
> 68. Quinn Emanuel's FY2022 accounts record:
>
> (a) Quinn Emanuel's total fee receipts were USD $1,639,296,399 and total expenses were USD $491,826,227, giving a net profit of USD $1,133,589,628 (approximately AUD $1.65 billion); and
>
> (b) in 2022, the firm had an excess of capital over liabilities of USD $559,334,804.

95 While the Lidgett plaintiffs submitted during the hearing that no information has been provided as to the entitlement of Quinn Emanuel's Sydney office to draw on the resources of the global entity in order to self-fund the proceeding, Quinn Emanuel is a global partnership. I accept Kajula's submission that, if a GCO is made, there is a statutory obligation on the partnership to pay the costs; and that payment does not depend on a resolution of the partners.

96 For these reasons, I am not persuaded that Quinn Emanuel's and/or Regency's financial position is a factor that weighs against the Kajula proceeding.

Maurice Blackburn and CASL

97 Kajula submitted that the Maurice Blackburn funding proposal must be viewed through the prism of its broader financial exposure; spread across 14 on-going class actions, suggesting there was financial risk.

98 In the First Scattini Affidavit, Mr Scattini adopted Maurice Blackburn's initial cost estimate in the Lidgett plaintiffs' revised statement of position of $13.58 million as an average cost estimate of group proceedings. He rounded that figure down to $13 million and, ignoring the uplift fee, calculated Maurice Blackburn's fees and disbursements across the 14 representative proceedings at $182 million. He estimated 50% of this amount is attributable to fees and 50% to disbursements – being $91 million each. To this, Mr Scattini added $7 million for 'at-risk defence costs indemnities' to arrive at $98 million. On this basis, Mr Scattini estimated that Maurice Blackburn's exposure to disbursements is approximately $91 million, its at-risk fees are approximately $91 million, and its potential liability for adverse costs is approximately $98 million, for a total exposure of $280 million.

99 Kajula submitted that, based on information Mr Scattini obtained from non-confidential sources, in June 2022, Maurice Blackburn had an outstanding loan facility of about $115 million, of which about $85 million was drawn. Evidence by Mr Watson indicates that the amount of the facility has been increased by $17.5 million. Kajula submitted these borrowing facilities are both quite substantial and are substantially drawn. It submitted the existence and extent of those facilities is to be contrasted with public comments made by Mr Walker, director of CASL, on 7 August 2023 to the effect that he did not consider it appropriate to borrow money to fund litigation, in particular to incur 'hard edge debts' which have an obligation to be repaid at a certain time. Kajula submitted that Maurice Blackburn's loan facility which exceeds $100 million is a 'hard edge loan' because it has a date for repayment in June 2026.

100 Kajula submitted that the existence of the loan facility may have a subconscious effect on Maurice Blackburn's appetite for risk and that it may be appealing to settle a case if approaching the end of the loan period.

101 Separately Kajula submitted that there is no company search or financial statements in evidence for the funder of the Lidgett consolidated proceeding, CASL.

102 I do not accept the validity of Mr Scattini's analysis of Maurice Blackburn's financial exposure due to its involvement in 14 class actions. His analysis ignores the arrangements which Maurice Blackburn has with others, such as is proposed with CASL in respect of the Lidgett consolidated proceeding. Mr Watson has given evidence which I accept that, across the portfolio of class actions that Maurice Blackburn is currently conducting, it uses a variety of arrangements to fund proceedings and to defray the risks and potential financial consequences of doing so. The overall effect of those arrangements is that Maurice Blackburn is not at risk of adverse costs orders in all cases. It is not responsible for the payment of all disbursements in all cases and it receives payment for a proportion of its professional fees in many cases, providing it with regular cashflow. I do not accept that Maurice Blackburn's financial position is a factor weighing against the Lidgett consolidated proceeding. Maurice Blackburn's potential adverse financial exposure is significantly less than estimated by Mr Scattini.

103 Mr Scattini's analysis proceeds on the basis of an unqualified assumption that all 14 actions will be unsuccessful. It is also, understandably, not informed by confidential financial information concerning Maurice Blackburn the subject of Mr Watson's confidential second affidavit sworn 31 July 2023, confidential parts of the Third Watson Affidavit and confidential parts of the affidavit of Mr Petrovski dated 1 August 2023 concerning the financial circumstance of CASL.

104 In the 124 class actions commenced by Maurice Blackburn, there are only three instances in which adverse costs orders were made, each of which involved a litigation

funder. Maurice Blackburn itself has never become obliged to pay an adverse costs order.

105 Mr Watson gives evidence, which I accept, that in light of these matters, even if some of Maurice Blackburn's cases are ultimately unsuccessful, it is unrealistic to suggest that this would occur to such an extent that Maurice Blackburn would become incapable of meeting its obligations in other cases.

106 The Maurice Blackburn Consolidated Financial Report for the year ended 30 June 2022 discloses that it had total assets in excess of $535 million, net assets of approximately $211 million, cash and cash equivalents of approximately $12 million and an undrawn loan facility of approximately $30 million. Although Maurice Blackburn's audited financial statements for the year ended 30 June 2023 were not available at the time of the First Watson Affidavit, Mr Watson deposed that there had been an improvement in Maurice Blackburn's financial position since the previous financial year. Mr Watson stated in the Third Watson Affidavit that Maurice Blackburn has a consistent cashflow each year, which is used to fund its continuing operations, including the payment of disbursements and other expenses associated with its class actions practice. In the event that it requires access to additional cash, Maurice Blackburn has recourse to a number of facilities which can be drawn down. While the total amount available to Maurice Blackburn to draw down on is confidential; it is sufficient to say that the amount of available undrawn facilities is very significant.

107 Contrary to the Kajula submissions, I do not regard the existence of the drawn-down loan facility as a matter of significance. Loan facilities of this nature are not uncommon in large commercial businesses. I flatly reject the proposition that whether consciously or unconsciously the existence of a substantial loan facility would or might cause Maurice Blackburn to act other than in their clients' best interests. The loan facility in question is not repayable until 30 June 2026, and options would likely be available to Maurice Blackburn to refinance at that time, either with the same provider or elsewhere. In any case, Maurice Blackburn's current assets as at 30 June

2022 totalled over $314 million. There is not, in my view, any real question as to Maurice Blackburn's financial wherewithal.

108 Although Maurice Blackburn will be legally obliged to pay any adverse costs order made in the Lidgett consolidated proceeding due to the operation of s 33ZDA(2)(a) if a GCO is made, the obligation will be offset by the agreement between Maurice Blackburn and CASL such that Maurice Blackburn's prospective liability would, in practice, be significantly less than the amount of any adverse costs order.

109 While the financial statements of CASL are not exhibited, there is evidence concerning its financial position which confirms its financial ability to meet such obligations. The affidavit of Mr Petrovksi identifies a confidential amount of financial resources that CASL has to meet future financial obligations in respect of the Lidgett consolidated proceeding. A confidential amount which is substantial is reserved exclusively for the proceeding. CASL also has a confidential amount of available capital which is substantial and which is not yet committed. Mr Petrovski has given evidence that CASL does not have any debt, and can comfortably meet its funding obligations.

110 The confidential parts of the affidavit of Mr Petrovski disclose that CASL has significant financial resources which are available to fund CASL's share of the costs of the proceeding.

111 For the reasons discussed, I do not regard the funding arrangements and resources associated with the competing proceedings as a factor in favour of one or other of the proceedings.

E. The circumstances and characteristics of the lead plaintiffs

Share purchases of the competing lead plaintiffs

112 Kajula submitted that its shareholding in Downer reinforces its suitability as lead plaintiff. Its share purchases relevant to claims in the proceeding total $272,545.13 and span a large part of the claim period. By comparison, the Lidgetts acquired approximately $15,000 in shares on 5 December 2022, near the end of the claim period.

113 Kajula submitted that whether the share price was inflated at a particular point in time, such as in July 2020 or in August 2021, is a very different determination to whether or not the share price was inflated when the Lidgett plaintiffs acquired their shares in December 2022 at the end of the claim period. There were a number of different publications of information over the claim period which are picked up in Kajula's statement of claim. The damages formulation in its statement of claim is the difference in price between what the shares would have traded for absent the misleading or deceptive information and what they did in fact trade for, and it was submitted that the Court would, in a trial of the Kajula proceeding, need to make a determination of what the share price should have been from time to time across the whole time period. It was submitted that, in the case of the Lidgett consolidated proceeding, Downer may and would be entitled to argue that the Court need only decide so much as is necessary to resolve the plaintiffs' claim and that this raises a question as to whether there is a need for the Court to determine the share price inflation for the three years prior to 5 December 2022 or whether the various representations made throughout the claim period were likely to induce persons to acquire shares in Downer. Kajula submitted that it would be a matter for the Lidgett plaintiffs to persuade the Court that there is sufficient commonality between the Lidgett plaintiffs' action and those of the balance of the group members who acquired their shares up to three years earlier.

114 In response, the Lidgett plaintiffs submitted that the lead plaintiff need not be a vehicle for every allegation and every facet and permutation of potential claims of loss. In *Dillon v RBS Group (Australia) Pty Ltd* ('*RBS Group*'),[36] Lee J observed that:[37]

> An individual claim of one or other group member may provide an efficient way of dealing with these issues of commonality. The acceleration of the claim of a group member might not be necessary, depending upon the circumstances. To use an example, in securities class actions, the Court is often asked to make factual determinations which do not squarely arise on the claim of the individual applicant but are plainly *issues of commonality*. One common context is where contravening conduct is alleged against a company during an extended period and yet the claim of the representative applicant may arise from a purchase of shares during the very early part of the relevant period.

36 [2017] FCA 896; (2017) 252 FCR 150.
37 Ibid 164–165 [67] (emphasis in original).

> Findings as to contravening conduct at later periods (which may be irrelevant to the applicant's liability or damages claim) are not abstract or hypothetical (and hence constitute an improper exercise of Ch III judicial power) *provided* the Court is satisfied that the relevant determination of an issue or finding of fact is material to a determination of claims of at least some identifiable group members. Accordingly, assuming the proviso exists, it is a question of utility, discretion and case management considerations (and not a question of power) as to whether the Court determines a particular issue or makes a relevant finding of fact at the initial trial.

115 The Lidgett plaintiffs referred to the potential if necessary to appoint one of the Teoh plaintiffs, Mr Teoh, as a sample group member for the determination of legal and factual issues associated with Downer's capital raise in July 2020. Kajula submitted such a proposal is problematic. First because it is unclear whether it will eventuate, and, second, it would have the result that a sample group member is appointed who is not a client of the firm and who is not giving instructions in relation to the conduct of the claim for that earlier time period.

116 The observations by Lee J in *RBS Group* indicate that the issues raised by Kajula concerning the date of purchase of shares by the Lidgetts are unlikely to raise issues of substance for the conduct of the proceeding. It will be a matter for the trial judge to decide whether to determine issues such as the share price inflation for the three years prior to 5 December 2022 and whether the various representations made throughout the claim period were likely to induce persons to acquire shares in Downer. The Lidgett plaintiffs may, as they have indicated, seek to have Mr Teoh appointed as a sample group member. Whether such an appointment is required and whether it should take place will also be a matter for the trial judge to determine.

117 It is in the interests of group members to have all issues determined. While I recognise that there is a risk that the trial judge may require the appointment of sample group members, I consider the risk identified by Kajula from the Lidgett plaintiffs' purchases not spanning the entire period as both a low risk and a risk commonly dealt with as part of case management of such proceedings. I do not consider that the difficulties identified by Kajula regarding the lack of retainer of Maurice Blackburn by Mr Teoh are substantive.

118 I accept that in a carriage contest as finely balanced as this one, the simplicity and the certainty regarding the determination of issues of the Kajula plaintiff whose own case covers the entire period is a factor that weighs in favour of the Kajula proceeding going forward. I do not however regard it as a material factor when weighing the competing proposals.

Qualifications of the competing lead plaintiffs

119 Kajula submitted that the individual qualifications of one of its directors, Dr Dev, is a factor that favours the Kajula proceeding going forward when compared to the Lidgett consolidated proceeding.

120 There are four directors of Kajula: Dr Priya Dev and her mother, father and brother. The directors have agreed that Dr Dev and her mother will provide the day-to-day instructions in the proceeding. Dr Dev is a lecturer at the Research School of Finance, Actuarial Studies & Statistics at Australian National University College of Business and Economics. She has previously lectured at Columbia University in New York and the University of New South Wales. Kajula submits that her qualifications and experience make her an ideal lead plaintiff who is highly qualified to represent the class.

121 Kajula submitted that class actions run best when the lead plaintiff is engaged and the solicitors running the case know that they are answerable to the person who is giving them instructions. It submitted that Dr Dev has a 'proven ability to absorb complex information' which would be valuable not only in settlement negotiations but in other strategic decisions that have to be made in the course of litigation. Kajula submitted that the point at which this knowledge and skill will come into play is at the point of settlement negotiations when the funder is seeking to justify what it sees as its necessary returns.

122 In response, the Lidgett plaintiffs submitted that Kajula has 'seriously overstated' the significance of the influence that Dr Dev is likely to have on the conduct of the proceeding and that, in any event, she is only one of four directors of Kajula. They submitted that relative levels of academic attainment say nothing about one's capacity

to follow proceedings, receive advice and give instructions. One does not, they submit, need an accounting qualification or an economics degree to know that more money is better for group members than less and that there can be risk attached to holding out for more. Mrs Lidgett is a retired business owner who can grapple with those matters. The Lidgett plaintiffs submitted that if the individual training, qualifications or circumstances of the lead plaintiffs be a relevant criterion, it can only be neutral in this case.

123 I consider that it is undesirable that the individual training, qualifications, experience or circumstances of lead plaintiffs or the directors of lead plaintiffs be regarded as a relevant factor in the resolution of a carriage dispute. Individuals involved in the role of lead plaintiff should not be exposed to scrutiny in relation to these matters. A comparison of the sort contended for is unhelpful. If individual characteristics and circumstances were to be relevant in the manner contended for by Kajula one could anticipate future psychological testing of lead plaintiffs to determine their capacity for decision making, their ability to absorb and process information and an assessment of their ability to receive and act on advice. To go down that path would be highly inappropriate.

124 If I am wrong about these matters being relevant, I accept that Dr Dev is a well-educated person who is qualified to provide instructions as to the conduct of the proceeding. She is however only one of four directors of Kajula. Equally I accept that Mrs Lidgett, a former business owner, is a person capable by reason of her background and experience of providing such instructions. She and her husband are both plaintiffs. On the information available concerning the individuals involved, if these matters are relevant and appropriate to take into account; which in my opinion they are not, I regard this factor as neutral.

F. Extent of any bookbuild

125 While Maurice Blackburn has not undertaken a proactive bookbuild, as at 31 July 2023 68 retail shareholders and two institutional shareholders had retained Maurice Blackburn. A further 20 retail shareholders had registered with Maurice Blackburn

without having completed all steps to retain Maurice Blackburn. In addition, Maurice Blackburn had received inquiries from 18 institutional shareholders, as well as two major aggregators, most of whom are 'repeat players' in Maurice Blackburn's securities class actions.

126 Quinn Emanuel has also not undertaken a bookbuild process. It has published information about the Kajula proceeding via a designated website. It has accepted registrations and responded to inquiries from potential group members. At the time of the First Scattini Affidavit, Quinn Emanuel had received expressions of interest and trade data from 15 institutional shareholders.

127 It is unclear whether any bookbuild was undertaken for the Jowene proceeding or the Teoh proceeding.

128 While the fact is that Maurice Blackburn has been retained by a greater number of retail and institutional shareholders than Quinn Emanuel and has had a greater number of inquiries from institutional shareholders, I do not regard the extent of bookbuild as material when seeking to compare the two carriage proposals.

G. Consolidation and track record

129 The Lidgett consolidated proceeding came about following the conferral process the subject of the orders made on 7 June 2023.

130 The Lidgett plaintiffs relied on the fact agreement was able to be reached to consolidate the proceedings as indicative of a greater level of experience on the part of Maurice Blackburn and William Roberts than on the part of Quinn Emanuel. I do not accept the validity of that submission. However, what the fact of the agreement to consolidate the three proceedings does indicate is that Maurice Blackburn and William Roberts, and their clients, have a proven track record in this litigation of being able to work cooperatively and in a manner consistent with the overarching obligations in the CPA. That is not to say that Quinn Emanuel and Kajula have not discharged their CPA obligations, or that they will or may not do so in the future.

131 The practitioners and parties involved in the Lidgett consolidated proceeding have agreed to work cooperatively in the future conduct of that proceeding. That includes the provision of a consolidated statement of claim that picks up all of the claims and causes of action previously pleaded in the now consolidated individual proceedings. The practitioners and the lead plaintiffs across the three now consolidated proceedings have worked cooperatively to narrow the issues in dispute. The fact they have been able to do so and to agree on the identity of the plaintiffs in the consolidated proceeding, the arrangements for legal representation and for cooperative funding across the proceedings give confidence in the ability of those involved to act efficiently and cooperatively in the best interests of group members in the future conduct of the Lidgett consolidated proceeding and to do so in a manner consistent with their overarching obligations pursuant to the CPA and consistent with the overarching purpose for which the CPA provides.

132 As a result of the consolidation, the carriage applications which had been listed for hearing over three days and were to involve a joint sitting of this Court and the Federal Court were able to be heard within a single day in this Court. The number, scope and complexity of issues arising on the applications were drastically reduced. I recognise that Kajula's application for the proceeding to be transferred to this Court was also important in that result. However, that application was only made after applications had been filed in the Teoh and Jowene proceedings seeking their transfer to this Court and foreshadowing that applications would be made for their consolidation with the Lidgett proceeding.

133 It is clear that reducing the length and complexity of carriage applications and also reducing the costs of such applications is in the best interests of group members. It allows decisions to be made in a more timely manner, meaning the successful proceeding in the carriage dispute is able to proceed with its case sooner rather than later. I consider the proven track record of the parties and practitioners in the Lidgett consolidated proceeding of cooperation with one another and of the resolution of

multiplicity issues through negotiation and of compliance with their CPA obligations is a material factor that weighs in favour of the Lidgett consolidated proceeding.

H. Other neutral factors

134 Security for costs: Downer considers the proposals for security for costs advanced by the plaintiffs in the consolidated proceeding and by Kajula to be acceptable. It is unnecessary to say anything further about the competing security for costs proposals. This factor is neutral.

135 Respective cost estimates: Although I have determined to make a GCO at 21% in whichever proceeding goes ahead, the cost estimates of the competing law practices are still relevant as they may impact upon the Court's exercise of the discretion under s 33ZDA(3) to re-visit and vary the GCO percentage during the course of the proceeding. However, in this case there is no material difference between the confidential estimates of legal costs and disbursements. As a result, the cost estimates constitute yet another neutral factor.

136 ATE insurance cost: Kajula does not propose to take out ATE insurance to cover all or part of its exposure to adverse costs orders. The Lidgett plaintiffs propose to do so. However, both GCO proposals at 21% are identical. It is not contended that Maurice Blackburn would seek to separately recover the costs of ATE insurance over and above the 21%. ATE insurance is at the election of solicitors and funders. It represents a laying off of part of the risk those persons have agreed to assume. I do not regard the fact that the proposal by the Lidgett plaintiffs involves ATE insurance as a factor in the determination of the carriage dispute.

137 Readiness of the competing proceedings: Kajula's statement of claim requires no amendment. The plaintiffs in the Lidgett consolidated proceeding seek four weeks to file and serve a consolidated writ and statement of claim. I accept the Lidgett plaintiffs' submission that four weeks is a relatively short time. This factor is also neutral.

138 Order of filing: The Jowene proceeding was commenced on 30 March 2023, followed by the Lidgett proceeding on 4 May 2023, the Teoh proceeding on 15 May 2023, and the Kajula proceeding on 6 June 2023. There is no rule or presumption that the proceedings filed first should necessarily be preferred, especially where, as here, the proceedings were all commenced within a relatively short time of one another.[38] Although Kajula was the last to issue, I accept Mr Scattini's evidence that Quinn Emanuel had been investigating a claim against Downer since 8 December 2022, and that, by the time the Jowene proceeding was commenced in late March 2023, Quinn Emanuel had undertaken extensive investigative work.

139 Kajula submitted that the statement of claim filed in the Kajula proceeding, being the last pleading filed, was more comprehensive than those filed in some of the other proceedings. It was submitted that Kajula was the first to seek the lower GCO at 21%, was the first to include the costs of settlement administration within the GCO, and that it led the way with the security for costs proposal. Taking into account these matters and balancing them against the fact that Kajula issued its proceeding last, albeit within a relatively short time of the issue of the other proceedings, I regard the order of filing as a neutral factor.

Disposition

140 Section 8(1) of the CPA to which I have earlier referred requires a court to seek to give effect to the overarching purpose in the exercise of its powers or any interpretation of those powers including in the exercise of statutory jurisdiction. That includes where there are competing carriage applications pursuant to s 33ZF of the Act.

141 Earlier I identified several matters which might have provided a basis to differentiate between the competing carriage proposals but which did not do so in this instance. Evaluating the competing considerations relied on in argument I have found there is no basis for differentiation between relative experience of the solicitors and barristers making up the legal teams. I have found that, although there is a risk of duplication of costs where there are two law practices involved, including, as here, where one acts

[38] *Lay v Nuix Ltd* [2022] VSC 479, [18(j)].

as agent for the other, with appropriate orders for the independent monitoring of legal costs, the involvement two firms rather than one is a neutral factor. Although the plaintiffs in both competing proceedings asserted there was a basis to favour one over the other by reason of the respective financial positions of the law firms and funders involved, I am not persuaded that the financial standing of the firms and the funders associated with the competing proposals is a basis to differentiate between the two proceedings.

142 Turning to the circumstances and characteristics of the lead plaintiffs, I have accepted that the simplicity and certainty regarding the determination of issues in the Kajula proceeding where Kajula's own case covers the entire period is a factor, but not a material factor, that weighs in favour of the Kajula proceeding going forward. I have rejected the submission that the individual characteristics and circumstances of the lead plaintiffs or of one of the directors of the lead plaintiff is a relevant consideration. But if I am wrong about that, based on the information available, I regard the circumstances of the two relevant persons, one of whom is a highly qualified and experienced academic and the other of whom is a retired businessperson, neither of whom is the sole decision-maker for the competing lead plaintiffs, as a neutral consideration.

143 The extent of any bookbuild is a factor, but not a material factor, in this case to distinguish between the competing proposals. Other factors touched on, namely, the security for costs proposals put forward by the proponents of the competing proceedings, the respective cost estimates, the readiness of the competing proceedings and the order of filing are neutral when it comes to determine which of the competing proceedings should have carriage and which of the proceedings should be stayed.

144 Section 9(1) of the CPA provides that, in making any order or give any direction in a civil proceeding, a court shall further the overarching purpose, namely, the facilitation of the just, efficient, timely and cost-effective resolution of the real issues in dispute, by having regard to the following objects.

(a) the just determination of the civil proceeding;

(b) the public interest in the early settlement of disputes by agreement between parties;

(c) the efficient conduct of the business of the court;

(d) the efficient use of judicial and administrative resources;

(e) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for—

(i) the fair and just determination of the real issues in dispute; and

(ii) the preparation of the case for trial;

(f) the timely determination of the civil proceeding; …

145 The track record of the parties to the Lidgett consolidated proceeding is one which includes the early settlement of a significant part of the multiplicity dispute by agreement between three of the parties involved in that dispute, a factor specifically referred to in s 9(1)(b). That settlement has promoted the efficient conduct of the business of the Court, see s 9(1)(c). It has facilitated the efficient use of judicial resources, a matter to which reference is made in s 9(1)(d). It has also been instrumental in facilitating the timely determination of the civil proceeding because it has meant that it has not been necessary for this Court to sit together with the Federal Court to resolve the multiplicity dispute.

146 I consider the proven track record of the practitioners and the lead plaintiffs in the Lidgett consolidated proceeding of cooperating and resolving their differences leading to the Lidgett consolidated proceeding as a material factor giving confidence that in the future those involved will act in the best interests of group members, and will discharge their overarching obligations pursuant to the CPA, likely resulting in savings of time and costs and, as a result, increasing the prospect of a more favourable return to group members.

147 Section 9(2) of the CPA lists various matters to which the Court may have regard when making an order or giving a direction in a civil proceeding pursuant to s 9(1). The actions taken by the Lidgett plaintiffs and their advisers align favourably with three of the matters to which regard may be had:

(a) the extent to which the parties have complied with any mandatory or voluntary pre-litigation processes;

(b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;

(c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been timely in undertaking interlocutory steps in relation to the proceeding; …

148 When all of these matters are taken into account, the best interests of the group members dictate that it is appropriate to make an order pursuant to s 33ZF of the Act that the Kajula proceeding be stayed and that the Lidgett consolidated proceeding go forward to trial.

Costs

149 As a final matter, Downer submitted that its costs of the carriage applications should be paid by the unsuccessful plaintiff group. It submitted that, although it has taken a neutral position, it has been put to not inconsiderable expense in a contest between competing law firms and their funders in pursuing their own commercial interests, and that it is fair and just that the losing party pay its costs. Alternatively, it submits that the costs of carriage dispute be reserved costs in the proceeding selected to go forward.

150 I do not accept that the losing party should be required to pay Downer's costs of the carriage applications. As the Lidgett plaintiffs submitted, courts have long accepted that there is nothing vexatious about competing proceedings, and there is no rule that the losing party will be fixed with the defendant's costs. There was no inherent vice in any of the four proceedings. All proceedings were genuinely instigated and the claims were well thought through. It is appropriate that Downer's costs of the carriage applications be reserved costs in the Lidgett consolidated proceeding.

151 I will order that Kajula pay its own costs of the Kajula proceeding and of the carriage dispute, other than its costs thrown away by reason of the late service of the Fourth Watson Affidavit and the revised proposed order which, as I previously indicated, I will order be paid by the Lidgett plaintiffs.

Orders

152 I direct the solicitors for the Lidgett plaintiffs to, in consultation with the other parties, prepare draft orders that give effect to these reasons and provide them to my chambers by no later than 4:00pm on 4 October 2023.

CERTIFICATE

I certify that this and the 43 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Delany of the Supreme Court of Victoria delivered on 27 September 2023.

DATED this twenty-seventh day of September 2023.

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