

FEDERAL COURT OF AUSTRALIA

Eckardt v Sims Ltd [2022] FCA 1609

File number: NSD 220 of 2019

Judgment of: **WIGNEY J**

Date of judgment: 23 December 2022

Catchwords: **REPRESENTATIVE PROCEEDINGS** – settlement approval application – whether Court should approve settlement approval application per s 33V(1) of *Federal Court of Australia Act 1976* (Cth) – consideration of applicable principles governing whether settlement approval application is fair and reasonable with regard to group members’ interests as a whole – funding equalisation – whether funding expenses should include applicant’s “after the event” insurance costs – proposed interim and final confidentiality regimes – settlement and confidentiality orders made

Legislation: *Federal Court of Australia Act 1976* (Cth) pt IVA, ss 33V, 33V(1), 33V(2), 33X(4), 37AF, 37AG(1)(a)

Cases cited: *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625; [2020] FCA 1885
BMW Australia Ltd v Brewster (2019) 269 CLR 574; [2019] HCA 45
Camilleri v Trust Company (Nominees) Ltd [2015] FCA 1468
Court v Spotless Group Holdings Ltd [2020] FCA 1730
Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2) (2006) 236 ALR 322; [2006] FCA 1388
Endeavour River Pty Ltd v MG Responsible Entity Ltd (No 2) [2020] FCA 968
Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia [2022] NSWSC 1076
Perera v GetSwift Ltd (2018) 263 FCR 1; [2018] FCA 732
Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Ltd [2021] FCA 475
Williamson v Sydney Olympic Park Authority [2022] NSWSC 1618

Division: General Division

Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	56
Date of hearing:	11 October 2022
Counsel for the Applicant:	Mr W Edwards SC with Mr A Edwards
Solicitor for the Applicant:	William Roberts Lawyers
Counsel for the Respondent:	Mr I Ahmed
Solicitor for the Respondent:	Herbert Smith Freehills

ORDERS

NSD 220 of 2019

BETWEEN: **PETER ECKARDT**
Applicant

AND: **SIMS LIMITED**
Respondent

ORDER MADE BY: **WIGNEY J**

DATE OF ORDER: **23 DECEMBER 2022**

THE COURT ORDERS THAT:

Approval of settlement

1. Pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (**Act**), the settlement of the proceeding is approved upon the terms set out in:
 - (a) the Deed of Settlement at pages 115 to 143 of Exhibit BP-10 to the affidavit of Bill Petrovski sworn on 1 October 2022, as varied by the Deed of Variation at pages 144 to 150 of Exhibit BP-10 (**Deed**); and
 - (b) the revised Settlement Distribution Scheme, in the form at pages 15 to 33 of Exhibit BP-13 of the affidavit of Blagoj (Bill) Petrovski sworn on 12 October 2022 (**Scheme**).
2. Pursuant to s 33ZF of the Act, the Applicant is authorised, *nunc pro tunc*, to enter into the Deed and to give effect to the settlement and all transactions contemplated by it for and on behalf of the group members as defined in paragraph 2 of the Second Further Amended Statement of Claim (save for any person who has opted out of the proceeding) (**Group Members**).
3. Pursuant to s 33ZB of the Act, the persons affected and bound by the settlement of the proceeding are the Applicant, Respondent, Group Members, William Roberts Pty Ltd and the Funder.

Referee's Reports

4. Pursuant to s 54A of the Act and r 28.67 of the *Federal Court Rules 2011 (Rules)*, the Court adopts in full the two reports of the Referee appointed pursuant to order 18 of the Court's orders made on 6 July 2022, being the reports from Ian Ramsey-Stewart dated 23 September 2022 and 28 September 2022, as provided by Mr Ramsey-Stewart to the Associate to Wigney J.

Appointment of Administrator

5. Pursuant to ss. 33ZF and 23 of the Act, William Roberts Pty Ltd is appointed Administrator of the Scheme, to act in accordance with the Scheme and have the powers and immunities contemplated by the Scheme.

Approval of amounts to be deducted pursuant to the Scheme

6. Pursuant to s 33V of the Act, the following amounts are approved for the purposes of the Scheme (utilising defined terms from it):
 - (a) the amount of \$6,259,515.64 for "Project Costs" to be paid to the Funder, comprising the sum of: (A) the amount of \$5,461,430.45 legal costs and disbursements in including the fees paid to the Referee in the amount of \$27,500, and (B) the amount of \$798,085.19 to be paid to the Funder in respect of after-the-event insurance premiums, including applicable tax;
 - (b) the amount of \$5,440,557.67 for "Funding Commission" to be paid to the Funder;
 - (c) the amount of \$3,022,684.49 for "Unpaid Legal Costs" to be paid to William Roberts;
 - (d) an amount up to \$241,123.95 for "Administration Costs"; and
 - (e) the amount of \$10,000 to be paid to the Applicant for the "Applicant's Reimbursement Payment".

Deemed Registrant

7. Further to Order 6 made on 6 July 2022, the person identified at paragraph 11(b) of the affidavit of Blagoj (Bill) Petrovski sworn on 12 October 2022 be treated as a "Registered Group Member" for the purposes of the Scheme.

Costs and security

8. Order 4 of the orders made on 13 August 2021 requiring the provision of security for costs is vacated and all deeds of indemnity executed and provided by ICP Capital Pty Ltd and AmTrust Europe Limited as security for the Respondent's costs, be returned by the Respondent to the Applicant by providing them to the Applicant's solicitors or destroyed by the Respondent within 56 days from the date of these orders.
9. Pursuant to r 2.43 of the Rules, the monies paid into Court on 7 December 2020 in the amount of \$40,000 pursuant order 5 of the orders made by the Court on 1 December 2020 as security for the Respondent's costs, be returned to the Applicant by deposit into the Applicant's solicitors' trust account. The Applicant's Solicitors are to pay the \$40,000 to the Funder within 5 business days of receipt as cleared funds into their trust account.
10. All costs orders made to date in the proceeding are vacated.
11. No order as to costs.

Dismissal after completion of distribution

12. The proceeding is dismissed 7 days after the Administrator (as that term is defined in the Scheme) notifies the Court and the parties in writing that the distribution under the Scheme is complete.
13. Upon the dismissal of the proceeding, the Respondent, and the Respondent's legal representatives are released from the undertaking to the Court noted in the Court's orders dated 21 August 2020.

Confidentiality orders

14. Until further order, pursuant to ss. 37AF and 37AG(1)(a) of the Act, and in order to prevent prejudice to the proper administration of justice, the material identified in **Annexure A** to these orders is:
 - (a) to be treated as confidential;
 - (b) not to be published or made available and any electronic version thereof is to be treated in an analogous fashion;
 - (c) not to be disclosed to any person other than:
 - (i) the Court;
 - (ii) the Applicant and his legal representatives; or

- (iii) ICP Capital Pty Ltd and Investor Claim Partner Pty Ltd (together, **ICP** or **Funder**) and their legal representatives; and
 - (d) not to be disclosed to the Respondent or its legal representatives, other than to the extent that the material identified in Annexure A has previously been disclosed to them during this proceeding.
- 15. Until 49 days from the date of any order approving the proposed settlement in these proceedings under s 33V of the Act, and in order to prevent prejudice to the proper administration of justice, the material identified in **Annexure B** to these orders is:
 - (a) to be treated as confidential;
 - (b) not to be published or made available and any electronic version thereof is to be treated in an analogous fashion;
 - (c) not to be disclosed to any person other than:
 - (i) the Court;
 - (ii) the Applicant and his legal representatives; or
 - (iii) ICP and its legal representatives; and
 - (d) not to be disclosed to the Respondent or its legal representatives, other than to the extent that the material identified in Annexure B has previously been disclosed to them during this proceeding.
- 16. Within 28 days from the date of these orders, the Applicant is to file with the Court redacted copies of each of the documents set out in Annexures A and B (except those documents filed by the Funder set out in order 17 below), with those redactions to be applied in accordance with the details set out in Annexures A and B.
- 17. Within 28 days from the date of these orders, the Funder is to file with the Court a redacted copy of the affidavit of John Walker affirmed 11 October 2022 (with Confidential Exhibit JW-2) with those redactions to be applied in accordance with the details set out in Annexure B.

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

REASONS FOR JUDGMENT

(Revised from transcript)

WIGNEY J:

- 1 In 2019, the applicant commenced a representative proceeding pursuant to pt IVA of the
2 *Federal Court of Australia Act 1976 (Cth) (FCA Act)* against **Sims** Limited. The applicant
claimed that Sims was liable to compensate persons who, like him, had purchased securities in
Sims during certain periods in circumstances where the value of those securities were allegedly
inflated as a result of alleged misleading and deceptive conduct by Sims and Sims' failure to
comply with its continuing disclosure obligations.
- 2 The trial of the action was listed to commence on 4 July 2022. On 17 May 2022, however, the
parties reached an "in-principle" settlement agreement during a mediation. A deed containing
the essential terms of that agreement was subsequently executed on 10 June 2022. Under the
terms of the settlement, Sims was required to pay the sum of \$29.5 million. After certain sums
of money were deducted from the settlement sum, the balance (together with any accrued
interest) was to be distributed to participating group members in accordance with an agreed
settlement scheme. The amounts to be deducted from the settlement sum, in general terms,
comprised the applicant's legal costs and disbursements, a small reimbursement payment to
the applicant, administration costs and commission payable to the funder, and expenses
incurred by the litigation funders. The litigation funders were Investor Claim Partner Pty Ltd
and ICP Capital Pty Ltd. As the litigation funders are most likely related or associated entities,
I will refer to them collectively as **the funder**.
- 3 While the parties agreed to settle the proceeding, a representative proceeding may not be settled
or discontinued without the approval of the Court: s 33V(1) of the FCA Act. If the Court
approves the settlement, it may make such orders as are just with respect to the distribution of
any money paid under the settlement: s 33V(2) of the FCA Act.
- 4 The current applicant has applied for the Court's approval of the settlement and the distribution
of moneys to be paid under it. The application is not opposed by Sims. There is accordingly
no contradictor. The Court must nevertheless determine whether the proposed settlement is a
fair and reasonable compromise of the claims made on behalf of the group members and ensure

that the settlement has been undertaken in the interests of the group members as a whole, not just in the interests of the applicant and the respondent.

APPLICABLE PRINCIPLES

5 The principles that are applicable to the approval of the settlement under s 33V of the FCA Act are well-settled, well-known, not in dispute on this application, and require no further recitation or explication in these reasons. They are accurately set out in the applicant's written submissions and largely reflected in the Court's Class Actions Practice Note (**GPN-CA**) issued on 20 December 2019. I have considered and applied the relevant principles in determining this approval application.

Notice to the group members

6 Section 33X(4) of the FCA Act provides that, unless the Court is satisfied that it is just to do so, an application for approval of a settlement under s 33V must not be determined unless notice has been given to the group members. I am satisfied that the notice requirement in s 33X(4) has been met in this case. On 6 July 2022, I approved the form and distribution of a notice to group members concerning the proposed settlement and the group members' right to oppose the approval should they wish to do so. There is evidence that the notices were distributed to group members in accordance with the orders made on 6 July 2022.

7 No group member gave notice of any opposition to the settlement. No group member appeared at the hearing in opposition to the settlement approval. The fact that no group member opposed the settlement approval is not, however, determinative. Indeed, I am mindful that, given the nature of this proceeding being, in general terms, a securities class action with a relatively large number of group members with fairly modest claims, I should not give too much weight to the absence of any opposition to the settlement approval.

Fairness and reasonableness of the compromise

8 As is usually the case, counsel for the applicant in the proceeding furnished written opinions in respect of the fairness and reasonableness of the compromise and the terms of the settlement. Confidentiality orders were sought and will, in due course, be made in respect of those opinions. I have read and closely considered the opinions. For obvious reasons, I will not disclose or discuss the contents of the opinions in any detail. It suffices to note the following conclusions that I have reached after taking into account the opinions expressed by counsel.

- 9 First, I am satisfied that the settlement sum of \$29.5 million to be paid by Sims represents a fair and reasonable compromise in respect of the group members' claims as a whole. That is so having regard to the nature and complexity of the claims, the likely or probable maximum recovery by the group members on a best-case scenario and the risks and potential difficulties in establishing liability, causation, loss and damage in the particular circumstances of this case.
- 10 Second, I am satisfied that the releases in the settlement deed are fair and reasonable in all the circumstances.

Fairness of the proposed distribution scheme

- 11 The means and manner by which the settlement sum is to be distributed is set out in a document entitled 'Settlement Distribution Scheme' (SDS). It is necessary to determine whether the terms of the SDS are fair and reasonable from the perspective of the group members as a whole. The SDS deals with both the deductions from the settlement sum and the distribution of the balance after the deductions, including how the balance is to be distributed between the group members. I will deal with the fairness and reasonableness of the deductions separately.
- 12 The confidential opinions of counsel address the method and means by which individual group members' claims are to be calculated and how the balance of the settlement sum is to be distributed between the members. There is undoubtedly an element of complexity involved in calculating the individual claims of the group members. That is because they involve different quantities of securities which were acquired at different times and in different circumstances. The strengths and risks of each individual group member claim differs to a certain extent depending on when the securities in question were purchased.
- 13 The SDS applies a formula to the particulars of each group member's claim to determine their share in the balance of the settlement sum. It is unnecessary to describe the precise nature of the formula. It suffices to record that I am satisfied that the formula and its use to calculate group member claims and to distribute the balance of the settlement sum is fair and reasonable in all the circumstances. It may not be perfect, and it may be possible to conceive of other methods or procedures to distribute the funds amongst group members. That is, however, essentially beside the point, particularly if the other methods, though perhaps "more perfect", are also more expensive to apply and administer: see *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 at [43]. Importantly, I am satisfied that the formula treats group members whose relevant circumstances are the same or similar, or who fall within the same cohort, in

essentially the same way. It does not unfairly discriminate against any particular group members or any class or classes of group members.

Reasonableness of the proposed deductions from the settlement sum

- 14 The reasonableness of the proposed deductions from the settlement sum to persons or entities other than the group members is perhaps the most contentious or potentially contentious element of the proposed settlement. That is largely because of the size of some of the deductions. The deductions fall into the following broad categories: first, legal costs and disbursements; second, approval costs; third, administration costs; fourth, a reimbursement payment to the applicant; and fifth, payments to the litigation funder.
- 15 I will deal with the least contentious deductions first. I will also separately deal with what the applicant's counsel called the "fund equalisation order" or "**FEO**". That label is perhaps somewhat of a misnomer given that the orders sought by the applicant do not include any such order. Rather, the applicant utilised the label to describe the fact that the SDS involves the calculation of the amounts to be distributed to individual group members only after the deductions are paid out of the settlement sum. The effect of that approach is all group members pay an equal share of the deductions. That is particularly important in the case of the deductions comprising the applicant's legal fees and the litigation funding commission, those being the two largest deductions. The effect of deducting those amounts prior to calculating each group member's share of the settlement sum is that each group member will bear an equal share of the legal costs and the funder's commission, even if some of the group members were not contractually bound to do so given that they had not entered into any retainer agreement with the applicant's solicitors, or any funding agreement with the funder.

Applicant's reimbursement payment

- 16 The proposed amount to be paid to the applicant to reimburse him for the time and expense of acting as the applicant in the proceeding is \$10,000. It is generally considered to be reasonable for an applicant to be compensated for the time and expense in acting in that role: see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388 at [76].
- 17 The applicant has adduced evidence about the time he has spent dealing with the litigation in his capacity as applicant. I am satisfied that the applicant has adequately explained the basis

of the reimbursement amount. It is, in all the circumstances, a fairly modest claim and a very small payment, particularly in comparison to the other deductions.

Approval costs

18 An amount of \$142,980.89 is to be deducted from the settlement sum on account of the approval costs. That amount is to be paid to the applicant's solicitors and relates to the anticipated legal costs and disbursements relating to the approval application and settlement hearing. On 6 July 2022, I appointed a costs referee to determine whether, inter alia, the applicant's legal costs were fair and reasonable. The referee prepared a report in due course. That report is discussed in more detail later in these reasons in respect of the deductions referable to the legal costs and disbursements incurred in relation to the prosecution of the proceeding generally.

19 It suffices at this point to note that the referee separately addressed the prospective fees and costs associated with the approval application and hearing. He concluded that \$142,980.89 would be reasonable fees for the approval of the settlement. That figure was based on an estimate provided by the applicant's solicitors, plus a 15 per cent buffer to account for possible unforeseen complications. While this appears to be a fairly large amount for an unopposed approval application, I am satisfied, based on the referee's opinion, that it is not unreasonable. I should also note in this context that the applicant adduced, as would be expected, fairly voluminous evidence in support of the approval application. That evidence included the confidential opinions of counsel.

Administration costs

20 An amount of \$241,123.95 is to be deducted from the settlement sum on account of the anticipated costs of administering the settlement scheme. That sum is to be paid to the settlement administrator, who also happens to be the applicant's solicitors. The reasonableness of the proposed deduction for administration costs is also addressed in the referee's report. The work associated with settlement administration in a case such as this includes: the compilation of claims information; consultation with group members; the calculation of entitlements; the review of those calculations where necessary; and the distribution of payments. On the basis of 1450 participating group members, the administration cost per group member is just over \$165. The reasonableness of that amount is confirmed by the referee. There is no apparent

reason why the referee's opinion should be discounted or the reasonableness of the deduction doubted.

Legal fees and disbursements

- 21 The total amount referable to legal fees and disbursements which is proposed to be deducted from the settlement sum is \$8,484,114.94. That amount is made up of two sums of money: first, the sum of \$5,461,430.45, which is the amount of the legal fees and disbursements that has already been paid to the applicant's solicitors by the litigation funder and is a component of the "project costs" to be paid to the funder; and second, the sum of \$3,022,684.49, which is the amount of the legal fees and disbursements not yet paid to the applicant's solicitors. The latter figure includes the approval costs and is to be paid to the applicant's solicitors.
- 22 It is worth noting that of the almost \$8.5 million paid or payable in respect of legal fees and disbursements, approximately \$2.3 million is referable to fees paid or payable to experts retained by the applicant and about \$650,000 represents fees paid or payable to counsel.
- 23 The total amount paid or payable in respect of legal fees and disbursements referable to the conduct of the proceeding is, on just about any view, a staggeringly large amount. That is so even having regard to the nature and complexity of the proceeding, the length of time it was on foot, and the fact that it was settled fairly shortly before trial.
- 24 I initially expressed to the parties a sense of disquiet concerning the size of the deduction referable to legal fees and disbursements. I have, however, given close and careful consideration to the referee's report concerning the legal fees and disbursements. The referee is a highly qualified and experienced expert in respect of the quantification of legal costs. He performed a thorough and detailed review and analysis of the fees and disbursements by reference to spreadsheets and tax invoices which were provided to him. He gave detailed consideration to the allocation of work between solicitors of differing expertise and counsel, and the hourly rates charged. He ultimately expressed the view that fees and disbursements totalling \$8,488,033.38 would be reasonable in all the circumstances.
- 25 While the legal fees and disbursements are undoubtedly very high, I can see no reason why the referee's opinion should not be accepted. Accordingly, despite my initial disquiet, I am satisfied that the amount to be deducted from the settlement sum in respect of legal fees and disbursements is reasonable. I should perhaps reiterate here that the notice to group members

in relation to the settlement approval disclosed that the amount representing legal fees and disbursements that would be deducted from the settlement sum would likely be in the vicinity of the amount for legal fees and disbursements in respect of which approval is now sought. As already noted, no group member registered any objection to the proposed settlement.

26 I therefore propose to approve the amounts referable to legal fees and disbursements as part of the overall settlement approval.

Funder commission and expenses

27 The proposed settlement and the orders sought by the applicant involve two significant payments to be made to the litigation funder. The first is the payment of \$5,440,557.67 in respect of funding commission. The second is the payment of \$798,085.19 as part of the project costs in respect of “after the event” (ATE) insurance premiums paid or payable by the funder.

28 The commission payment of \$5,440,557.67 has been calculated by reference to the funder’s contractual entitlements pursuant to the terms of the funding agreements which were entered into by those group members who registered and signed retainer agreements with the applicant’s solicitors (**the funded group members**). The funding agreements provided, in summary, that the funder was entitled to commission totalling 25.3 per cent of the claim proceeds inclusive of GST. There was a contractual entitlement to have the commission calculated on a different basis which potentially would have given rise to a larger commission in the circumstances. The funder wisely elected not to seek that larger amount. It is highly unlikely I would have approved that larger sum as part of the settlement.

29 It is worth emphasising at this point that only the funded group members agreed to pay, and are contractually bound to pay, the funder a commission of 25.3 per cent of the settlement proceeds. As has already been noted, however, the settlement is structured in such a way that the funder’s commission is to be effectively equally borne by *all* group members, including those that never signed any funding agreement. That issue is discussed in more detail later. In any event, the mere fact that the funder is contractually entitled to recover a 25.3 per cent commission from the funded group members, which in this case totals almost \$5.5 million, does not mean that the Court must approve that payment as part of the settlement. The question ultimately is whether the amount of the commission payable to the funder is such that the settlement as a whole is fair and reasonable. The following points may be noted in respect of that issue.

- 30 First, a relatively large proportion of the group members in this matter are funded group members who signed funding agreements and therefore agreed to pay the funder 25 per cent of the amount recovered. The registered group members are entitled to 72.9 per cent of the settlement sum having regard to the distribution formula. There is no basis to infer that the funded group members were not aware that the commission payable to the funder would be otherwise than a significant sum. Nor is there any basis for inferring that the funded group members, or a large proportion of them, were other than quite financially sophisticated and therefore readily able to comprehend the terms of the funding agreement relating to commission.
- 31 Second, the notice advising the group members of the proposed settlement included notification that, under the proposed settlement, the funder would receive commission of not more than \$7.375 million, which represented not more than 25 per cent of the settlement sum. As already noted, no group member opposed the proposed settlement, including that payment to the funder.
- 32 Third, I am aware that settlements involving funder commission rates of 25 per cent have been approved in several recent cases: see, for example, *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625; [2020] FCA 1885 at [27]-[28]; *Endeavour River Pty Ltd v MG Responsible Entity Ltd (No 2)* [2020] FCA 968 at [37], [38] and [47]; see also the discussion in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2022] NSWSC 1076 at [56]. I should emphasise, however, that each case must be considered on its own facts and circumstances, and it would be wrong to focus too much on what are said to be “market rates” or funding rates which have been approved in other cases.
- 33 Fourth, the nature and complexity of this case meant that the funder was exposed to considerable risk in funding the litigation. The proceeding was on foot for a number of years and only settled shortly prior to trial. The funder paid significant legal costs incurred by the applicant. Subject to the discussion later concerning the ATE insurance policy, the funder was also at risk of adverse costs orders should the applicant have failed at trial.
- 34 Fifth, the reasonableness of the commission payments to be made to the funder must be considered in the context of the settlement as a whole. In the present case, that includes consideration of other “project costs” payable to the funder – in particular, the ATE insurance premiums. Plainly, the fact that the proposed settlement also involved the payment of those

premiums is relevant to the reasonableness of the commission payable to the funder. That is because the ATE insurance policy aimed to protect the funder from some of the very risks involved in the funding of the litigation that the commission payable is intended to reward the funder for taking on.

35 Is it fair and reasonable in the context of this settlement for the funder to be paid not only a commission of 25.3 per cent of the settlement sum but also to be reimbursed in respect of the ATE insurance premiums? This was not an issue that was adverted to or addressed in the applicant’s submissions in support of the approval application. As already noted, the proposed settlement orders envisage that \$798,085.19 will be deducted from the settlement sum and paid to the funder in respect of ATE insurance premiums. The evidence reveals that the insurance covered the funder in respect of any liability to pay Sims’ costs up to a limit of \$3 million. The policy therefore did not entirely cover the funder in respect of the risks it took on in funding the litigation.

36 The funding agreements executed by the funded group members provided that the funder would pay for the “project costs”, which would include the costs of any adverse costs order, and that the funded group member would pay from the claim proceeds their share of the project costs paid by the funder. The notice advising the group members of the proposed settlement also disclosed that “after the event insurance premiums in the amount of \$732,188.25 plus any applicable tax payable (but not paid) by the funder” would be deducted from the settlement fund. As has already been noted, no group member opposed the settlement.

37 Some doubt has been cast on the reasonableness of a funder receiving, as part of a settlement, both a sizeable commission and a payment in respect of ATE insurance premiums: see *Perera v GetSwift Ltd* (2018) 263 FCR 1; [2018] FCA 732 at [193]; *Asirifi-Otchere* at [32]; *Court v Spotless Group Holdings Ltd* [2020] FCA 1730 at [96]. There are, however, some cases in which settlements have been approved in circumstances where funders received both commission and reimbursement of ATE insurance premiums: see *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Ltd* [2021] FCA 475 at [125]. None of these cases were drawn to my attention by counsel for the applicant.

38 This issue was recently addressed by Black J in *Williamson v Sydney Olympic Park Authority* [2022] NSWSC 1618. His Honour dealt with the issue at [83] in the following way:

... It seems to me that the question for the court is not whether the ATE costs in

isolation from the funder commission or the funder commission in isolation from the ATE costs are unduly high but whether the totality of the funder commission and ATE costs are so high that the settlement documented by the settlement deed and SDS (as distinct from the HOA, which does not provide for the payment) are not reasonable unless they reduced ...

39 Justice Black concluded that, in the circumstances of the case his Honour was considering, the deduction of both the funder's commission and the ATE insurance premiums would be unreasonable and that it would be appropriate to reduce the total amount payable. The question whether the Court had the power to vary the commission that was payable under the relevant funding agreements did not arise. That is because the parties ultimately consented to an amendment to the proposed settlement which had the effect of reducing the overall payment to the funder.

40 I respectfully agree with the approach taken by Black J in *Williamson*.

41 I have given anxious consideration to whether the total amount payable to the funder in the proposed settlement of this matter is reasonable. In particular, I have considered whether it is reasonable that the funder receive both funding commission totalling \$5,440,557.67 as well as a payment of \$798,085.19 to reimburse it in respect of ATE insurance premiums.

42 If I was of the view that the overall amount to be received by the funder was unreasonable, I would not have sought to vary the funder's contractual entitlements under its funding agreements. Rather, I would have refused to approve the settlement unless and until the parties and the funder agreed that the funder would accept a lesser amount. Ultimately, however, the matter has not come to that.

43 While I initially had some misgivings concerning the overall amount to be received by the funder and, in particular, the fact that the funder was to receive not only a substantial commission, but also the reimbursement of ATE insurance premiums, I am ultimately persuaded (though not by any submission made on the applicant's behalf) that the amount is not such that it can be concluded that the settlement overall is not fair and reasonable from the group members' perspective. I am ultimately satisfied that the large amount payable to the funder is not unfair or unreasonable in all the circumstances and should not stand in the way of approving what, on the whole, is a fair and reasonable settlement.

Funding equalisation

44 The proposed settlement is structured in such a way that the amounts payable by the funded group members in respect of legal fees and disbursements, including administration costs and funding costs (including commission and the ATE insurance premiums), are calculated and quantified and deducted from the settlement fund before the fund is distributed among the group members as a whole. This is a means by which the legal and funding costs incurred by the funded group members is ultimately borne by all group members. As noted earlier, counsel for the applicant called this aspect of the settlement the funding equalisation order or FEO, even though the orders proposed by the applicant did not include any specific or identifiable order which had the effect of spreading the litigation costs and expenses equally between the group members.

45 It has been accepted that the spreading of the litigation and funding costs between all group members, irrespective of whether they had entered into retainers or funding agreements, is fair and equitable and avoids what is referred to as “free riding”. In *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; [2019] HCA 45, Kiefel CJ and Bell and Keane JJ addressed the issue in the following way (at [88]-[90]):

A CFO [common fund order] is thus not the obvious solution to the problem of “free riding”. A CFO is apt to impose an additional cost on the group by requiring more money to be paid to the litigation funder than would otherwise be the case. The equitable spreading of the cost is, in fact, better achieved by the making of a FEO [funding equalisation order], which takes, as its starting point, the actual cost incurred in funding the litigation. While it must be accepted that the burden of the amounts that funded group members have agreed to pay to the funder under their agreements with the funder must be distributed fairly, a FEO is apt equitably to distribute those amounts whereas a CFO seeks to impose an additional cost by imposing new obligations on the unfunded group members.

A FEO is clearly available where a settlement is reached. A settlement must be approved by the court, and, in approving a settlement, the court must be satisfied that it is “fair and reasonable to all group members”. A settlement that allows some group members to ride for free would not be fair and reasonable to the other group members.

Secondly, where a matter runs to judgment (rather than being settled), a FEO may be made under s 33ZF or s 183. That is because justice would not be done in the proceeding if it resulted in unfunded group members gaining a windfall by avoiding costs which others bore for their benefit. A FEO prevents that outcome by redistributing those costs. It falls squarely within the terms of ss 33ZF and 183. The same cannot be said of a CFO.

46 I am satisfied that the means by which the litigation and funding costs are spread among all group members in the proposed settlement is fair and reasonable.

Proportionality of costs and funding charges overall

47 The final issue to consider in determining whether the settlement is fair and reasonable is the proportionality of the costs and funding charges as against group member recoveries.

48 To recap, the following sums are to be deducted from the settlement sum of \$29.5 million: \$6,259,515.64 to be paid to the funder in respect of the project costs paid by the funder (comprising legal costs and disbursements paid by the funder and \$798,085.19 paid or payable by the funder in respect of ATE insurance premiums); \$5,440,557.67 to be paid to the funder as funding commission; \$3,022,648.49 to be paid to the applicant's solicitors in respect of outstanding legal fees and disbursements; an amount of \$241,123.95 to be paid to the applicant's solicitors in their capacity as administrators of the settlement scheme for administration costs; and \$10,000 to be paid to the applicant by way of reimbursement for the time and expenses incurred in the litigation.

49 When those sums are deducted from the settlement sum, the balance to be distributed to group members in accordance with the distribution scheme is \$14,526,154.25. That is just over 50 per cent of the settlement sum.

50 In my view, the overall deductions are not disproportionate to the group member recoveries in all the circumstances. That is so given the difficult and complex nature of the litigation, the risks inherent in such litigation and the lateness of the proposed settlement.

CONCLUSION IN RESPECT OF THE FAIRNESS OF THE SETTLEMENT

51 Having considered the detailed evidence adduced by the applicant and the written and oral submissions advanced on the applicant's behalf, I am satisfied that the proposed settlement is fair and reasonable to the group members as a whole and should be approved. I propose to make the orders sought by the applicant to approve and give effect to the settlement.

CONFIDENTIALITY

52 The applicant has sought suppression or non-publication orders pursuant to s 37AF and s 37AG(1)(a) of the FCA Act in respect of certain documents on the basis that such orders are necessary to prevent prejudice to the proper administration of justice. There are two broad classes of documents in respect of which the orders are sought. As will be seen, the confidentiality orders applicable to the second category operate for only a limited period of time.

- 53 The first category, detailed in ‘Annexure A’ to the proposed orders, includes the confidential opinions of counsel in respect of the proceeding and the proposed settlement. I am satisfied that it is appropriate to make a non-publication order in respect of those opinions given that they contain confidential legal advice that would in any event be the subject of legal professional privilege. Confidentiality orders should generally be made in respect of documents of this nature so as to encourage candour in respect of settlement approval applications.
- 54 The other document in the first category of documents is the ATE insurance policy taken out by the funder. That policy contains a confidentiality clause. It is apparently on that basis that the non-publication order is sought. Despite that confidentiality clause, I am not persuaded that disclosure of the terms of the policy would cause prejudice to the proper administration of justice, other than perhaps in circumstances where the settlement was not approved. I will, however, include this document in the orders which relate to the second category of documents. If any person wishes for me to make an order specifically protecting this document from disclosure for a longer period, they may apply for such an order within 49 days after the approval of the settlement.
- 55 The second category of documents, detailed in ‘Annexure B’ to the proposed orders, are documents the disclosure of which would cause prejudice to the proper administration of justice if the settlement is not approved. The non-publication order sought in respect of those documents expires 49 days after the approval of the settlement. That is no doubt designed to take into account the possibility, remote as it may seem, that an appeal is filed in respect of the approval of the settlement. I am satisfied that it is appropriate to make the limited non-publication orders in respect of the second category of documents on the basis that they would prejudice the applicant and group members if the orders approving the settlement are the subject of a successful appeal and the matter does not ultimately settle.
- 56 I accordingly will make the orders provided to the Court in respect of both the settlement approval and the confidentiality of certain documents tendered as part of the approval process. As already noted, I propose to make some minor changes to the proposed confidentiality orders, some of which need not be addressed in these reasons for judgment.

I certify that the preceding fifty-six (56) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate: 

Dated: 28 February 2023

ANNEXURE A – Confidential until further order

No	Description of filed document	Court Book reference	Page(s) of document	Details concerning aspect of document over which the confidentiality order applies	Basis for confidentiality
1.	Exhibit BP-12 to the second affidavit of Blagoj (Bill) Petrovski sworn 1 October 2022	Vol 2 983-1040	All pages 1 – 58	Entire document.	Legal professional privilege (including legal advice privilege and/or litigation privilege) (Privilege) .
2.	Exhibit BP-15 to the fourth affidavit of Blagoj (Bill) Petrovski sworn 12 October 2022	Vol 2 1098A-1098J	All pages 1 – 9	Entire document.	Privilege.

ANNEXURE B – Confidential until 49 days after the date of the approval order

No	Description of filed document	Court Book (CB) reference	Page(s) of document	Details concerning aspect of document over which the confidentiality order applies	Basis for confidentiality
1.	Referee Report of Ian Ramsey-Stewart dated 23 September 2022	Vol 2 263-264	10 – 11	Entire paragraphs 36 (except the chapeau) and 37.	Provides the terms of settlement, which pursuant to clause 11(a) of the Deed of Settlement, are confidential until orders approving the settlement on the terms set out in the Deed of Settlement and the Settlement Scheme pursuant to section 33V of the Act are made (Confidential in accordance with Deed) .
2.		Vol 2 266	13	The figures contained in paragraph 51 and the first sentence of paragraph 55.	Provides information which has strategic value to the Respondent and may prejudice the Applicant and GMs should settlement not be approved (Prejudicial if no approval) .
3.		Vol 2 297 and 689 [Please note: where there is more than one CB reference for the same table item, the document appears	44	The figure contained in paragraph 14(a), the figure contained in paragraph 15 and the figures contained in paragraph 16.	Prejudicial if no approval.

		more than once in the CB and the same redactions have been applied.]			
4.		Vol 2 332-356 and 724-748	79 – 103	Entire pages.	Prejudicial if no approval. Contains Confidential Annexure B to the Referee Report dated 23 September 2022.
5.		Vol 2 369 and 650	116	Entire paragraphs 3 and 4.	Contains commercially sensitive information, which would be detrimental to ICP if competitors in the market had access to that information (Commercially Sensitive). Prejudicial if no approval.
6.		Vol 2 379 and 660	126	Entire clause 6.1 (except the chapeau).	Commercially sensitive. Prejudicial if no approval.
7.		Vol 2 380 and 661	127	The percentage figures in clauses 7.1, 7.2 and 7.3.	Commercially sensitive. Prejudicial if no approval.
8.		Vol 2 381 and 662	128	The percentage figure in clause 7.6.	Commercially sensitive. Prejudicial if no approval.
9.		Vol 2 383 and 664	130	Entire clause 10 except the heading “ <i>Termination</i> ”.	Prejudicial if no approval.
10.		Vol 2 388-389 and 669-670	135 – 136	Entire clauses 2.6, and 2.8. Also, the percentage figures in clauses 2.9 and 2.10.	Commercially sensitive.

11.		Vol 2 397 and 678	144	The figure contained in the second line of clause 4.5, the entire sub-paragraphs of clause 4.5(a)-(b) (including the chapeau) and the last sentence of clause 4.5.	Prejudicial if no approval.
12.		Vol 2 398-400 and 679-681	145 – 147	Entire clause 6.	Prejudicial if no approval.
13.		Vol 2 405 and 686	152	Entire page.	Prejudicial if no approval.
14.		Vol 2 407	154	Entire body of the letter (paragraphs 1 to 4).	Privilege.
15.		Vol 2 408	155	Entire body of the email (paragraphs 1 to 3 including headings).	Privilege.
16.	Appendix 5 of the Referee Report of Ian Ramsey-Stewart dated 23 September 2022	Excel spreadsheet saved on USB provided with Court Book	Tab “S2 – IRS Adjusted Fees”	Entire columns D (Description) and G (Units).	Prejudicial if no approval.
17.		Excel spreadsheet saved on USB provided with Court Book	Tab “S2A – IRS Cross-Check”	Entire columns D (Description) and G (Units).	Prejudicial if no approval.

18.		Excel spreadsheet saved on USB provided with Court Book	Tab "S3 – WIP 02.06.22 to 02.09.22"	Entire columns B (Description) and E (Units).	Prejudicial if no approval.
19.		Excel spreadsheet saved on USB provided with Court Book	Tab "S5 – Rate Comparison Analysis"	Entire columns G (Sum of Units) and J (Sum of Units).	Prejudicial if no approval.
20.		Excel spreadsheet saved on USB provided with Court Book	Tab "S11 – WRL Estimate to 13.10.22"	Entire worksheet.	Prejudicial if no approval.
21.		Excel spreadsheet saved on USB provided with Court Book	Tab "S12 – WRL Estimate for SDS"	Entire worksheet.	Prejudicial if no approval.
22.		Excel spreadsheet saved on USB provided with Court Book	Tab "S13 – Hours worked from S2"	Entire columns B (Units), G (S2 units) and H (S3 units).	Prejudicial if no approval.
23.		Excel spreadsheet saved on USB	Tab "S14 – Hours worked from S3"	Entire column B (Units).	Prejudicial if no approval.

		provided with Court Book			
24.	Appendix 8 of the Supplementary Referee Report of Ian Ramsey-Stewart dated 28 September 2022	Excel spreadsheet saved on USB provided with Court Book	Tab "Revised S11 – WRL Est 13.10.22"	Entire worksheet.	Prejudicial if no approval.
25.	Confidential Exhibit CEJ-2 to the affidavit of Carlos Jaramillo sworn 1 July 2022	Vol 2 491-605	3 – 117	Entire document.	Confidential in accordance with Deed.
26.	First Affidavit of Blagoj (Bill) Petrovski sworn 1 October 2022	Vol 2 626	21	The figures contained in the tables at paragraphs 75(a)-(c).	Prejudicial if no approval.
27.		Vol 2 626-627	21 – 22	The entire first paragraph 75(d) except for the words " <i>The SDS contemplates</i> " and the words " <i>I am informed by Mr Lei that this is correct and is a feature of the application to the trade data of the loss assessment formula, which is a confidential</i> "	Prejudicial if no approval.

				<p><i>schedule to the SDS (Loss Assessment Formula)."</i></p> <p>The figures and headings contained in the table at paragraph 75(d).</p>	
28.		Vol 2 628-629	23 – 24	<p>Third sentence in paragraph 79 which begins with “<i>Further, the Loss Assessment Formula applies a weighting...</i>”.</p>	Prejudicial if no approval.
29.		Vol 2 638	33	<p>Entire paragraph 107 except for the words “<i>Further, Clause 6.1 of the Funding Agreement states:</i>”</p>	<p>Commercially sensitive.</p> <p>Prejudicial if no approval.</p>
30.		Vol 2 639	34	<p>Entire paragraph 109(g).</p>	<p>Commercially sensitive.</p> <p>Prejudicial if no approval.</p>
31.		Vol 2 641-642	36 – 37	<p>The figure contained in paragraph 121(b).</p> <p>The figure contained in paragraph 121(c).</p> <p>Entire</p>	<p>Paragraph 121(b): Prejudicial if no approval.</p> <p>Paragraph 121(c): Prejudicial if no approval.</p> <p>Paragraph 121(d): Privilege.</p>

				paragraph 121(d).	
32.	Exhibit BP-10 to the first affidavit of Blagoj (Bill) Petrovski sworn 1 October 2022	Vol 2 756-794	112 – 150	Entire pages.	Contains the Heads of Agreement, Deed of Settlement and Deed of Variation. Confidential in accordance with Deed.
33.		Vol 2 807	163	Entire page except the heading “ <i>Schedule Loss Assessment Formula</i> ”.	Prejudicial if no approval.
34.		Vol 2 808-812	164 – 168	Entire pages.	Prejudicial if no approval.
35.		Vol 2 917	273	Entire body of email.	Prejudicial if no approval.
36.		Vol 2 952-955	308 – 311	Entire column under the heading “ <i>Work Done</i> ” (third column from left).	Privilege.
37.		Vol 2 980	336	All the figures contained in the table.	Prejudicial if no approval.
38.	Third Affidavit of Blagoj (Bill) Petrovski sworn 12 October 2022	Vol 2 1041E-1041F	5-6	The figures contained in the tables at paragraphs 12(a)-(d) and the entire first paragraph 12(d) except for the words “ <i>The SDS contemplates</i> ” and the words “ <i>I am informed by</i>	Prejudicial if no approval.

				<i>Mr Lei that this is correct and is a feature of the application to the trade data of the Loss Assessment Formula."</i>	
39.	Exhibit BP-13 to the Third Affidavit of Blagoj (Bill) Petrovski sworn on 12 October 2022	Vol 2 1042AC- 1042AH	28-33	Entire pages except for the heading words " <i>Schedule</i> " and " <i>Loss Assessment Formula</i> " on page 28.	Prejudicial if no approval.
40.	Affidavit of John Walker affirmed 11 October 2022	Vol 2 1057-1058	14-15	Subparagraphs 65(a) and 65(b); in paragraph 66, the words after " <i>commission at</i> " and before " <i>the ICP Entities</i> " and the words after " <i>this circumstance is</i> ".	Commercially sensitive. Prejudicial if no approval.
41.		Vol 2 1059	16	Paragraph 75(a) - the words after " <i>the total</i> " and before the words " <i>as set out</i> ".	Prejudicial if no approval.
42.	Confidential Exhibit JW-2 to the affidavit of John Walker affirmed 11 October 2022	Vol 2 1073-1096	30-53	Entire document.	Confidential based on the non-disclosure clause in the AmTrust policy (clause 4.13).

