IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE

Not Restricted

S ECI 2022 01039

DA Lynch Pty Limited — Plaintiff
v
The Star Entertainment Group Ltd — Defendant

S ECI 2022 04492

Travis Donald Drake — Plaintiff
v
The Star Entertainment Group Ltd — Defendant

S ECI 2023 00428

Ramon Huang — Plaintiff
v
The Star Entertainment Group Ltd — Defendant

S ECI 2023 00413

Jowene Pty Ltd — Plaintiff
v
The Star Entertainment Group Ltd — Defendant

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	27 and 28 June 2023, further application on the papers and submissions (24 July 2023, 7 August 2023, 8 August 2023 and 10 August 2023)
DATE OF RULING:	19 September 2023
CASE MAY BE CITED AS:	DA Lynch v Star Entertainment Group; Drake v Star Entertainment Group; Huang v Star Entertainment Group; Jowene v Star Entertainment Group
MEDIUM NEUTRAL CITATION:	[2023] VSC 561

GROUP PROCEEDINGS - PRACTICE AND PROCEDURE — Multiplicity — Four representative proceedings commenced against same defendant in relation to same controversy — Overlap between claims — Plaintiff in each proceeding seeks permanent stay of the other proceedings— *Wigmans v AMP Ltd* (2021) 270 CLR 623 — Application granted in three proceedings

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 — Judicial discretion in open-textured legislation *Supreme Court Act 1986* (Vic) s 33ZDA - *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 — Application granted in one proceeding.

PRACTICE AND PROCEDURE – Application to re-open to admit fresh evidence. Application refused.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff in the DA Lynch Proceeding	Kathleen Foley SC Raini Zambelli	Slater & Gordon
For the Plaintiff in the Drake Proceeding	William Edwards SC Rebecca Howe	Maurice Blackburn
For the Plaintiff in the Huang Proceeding	Melanie Szydzik SC Tim Chalke Owen Nanlohy	Shine Lawyers
For the Plaintiff in the Jowene Proceeding	Elizabeth Collins SC Alison Martyn	Phi Finney McDonald
For the Defendant	David Thomas SC Jennifer Findlay	King & Wood Mallesons
For the Contradictors	Nicholas De Young KC Kate Burke	

HER HONOUR:

Part A: Introduction and background

1 Four plaintiffs, represented by experienced law firms, have issued group proceedings against **Star** Entertainment Group, a company listed on the Australian Stock Exchange which owns and operates casinos. The proceedings are brought for investors in Star securities during overlapping periods between 19 March 2015 and mid-2022 and concern substantially the same factual matrix. There are differences between the claims alleged in the proceedings, however, they all include alleged failures to disclose material information to the market concerning compliance with anti-money laundering and counter-terrorism governance frameworks. The issue before the Court is how the multiplicity problem is to be solved.

2 Huang is represented by Shine Lawyers, Jowene by Phi Finney McDonald, Drake by Maurice Blackburn and DA **Lynch** by Slater & Gordon.

3 Each plaintiff seeks orders staying the other proceeding and granting sole carriage to the successful plaintiff. No plaintiff seeks consolidation with another.

4 The defendant, appropriately, made very limited submissions.

5 I appointed Contradictors to assist the Court on this application (Mr Nicholas De Young KC with Ms Kate Burke). The Contradictors had access to all material submitted by the parties.

6 The Jowene, Drake and Lynch plaintiffs each seek a Group Costs Order (**GCO**) pursuant to s 33ZDA of the ***Supreme Court Act*** *1986* for the purposes of funding the proceeding.

7 The issues arising in respect of the multiplicity contest and the applications for GCOs are inter-related. Each plaintiff, in their own way, says that his or its funding proposal is better than the other proposals and, taken together with all other relevant factors, his or its proceeding is to be preferred as more likely to advance the interests of group members. A related submission by those plaintiffs seeking GCOs was that the form

of funding has structural advantages when compared to traditional time-costing which is offered by Huang under its no-win, no-fee (**NWNF**) model. I have approached the analysis of the issues concerning carriage and whether there is basis to make a GCO (if a party seeking such an order ought be granted carriage), as for the most part raising the same considerations, meaning that the issues relevant to the exercise of power to grant a GCO are, by and large, a sub-set of the issues relevant to carriage.

8 I agree with the Contradictors' conclusion that the assessment of the relative merits of the respective proceedings is finely balanced. Each law-firm is experienced and capable, has briefed experienced and capable counsel and has devoted considerable thought and effort to the conduct of the proceedings to date. They have offered funding proposals that, assessed by any reasonable measure, would be regarded as competitive. Although I have weighed the evidence and arguments for myself, as it happens, I also agree with the Contradictors' recommendation concerning carriage.

9 For the reasons set out below:

(a) The Lynch proceeding will continue and the Drake, Huang and Jowene proceedings will be permanently stayed.

(b) I will make a GCO in the form sought by Lynch, namely:

1. The legal costs payable to the solicitors for the plaintiff and group members, Slater and Gordon Limited, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding;

2. Subject to further order, the percentage referred to in order 1 above be 14% inclusive of GST;

3. Liability for payment of the legal costs pursuant to orders 1 and 2 be shared between the plaintiff and all group members equally;

4. The solicitors for the plaintiff and group members, Slater and Gordon Limited, be liable to pay any costs payable to the defendants in the proceeding;

5. The solicitors for the plaintiff and group members, Slater and Gordon Limited, be liable to give any security for the costs of

the defendants in the proceeding that the Court may order to be given.

10 As indicated, some of the parties' evidence was subject to claims for confidentiality and was filed in redacted form, and was subsequently the subject of orders upholding some claims and rejecting others.[1] Some parts of these Reasons have been redacted to preserve that confidentiality and provided to the plaintiff parties but not to the defendant. The need to proceed in this way arises from the nature of the material and the issues in contest, as is apparent from the analysis below. The essential point is that the parties disclosed material for the purposes of their applications that, if openly described, may reasonably risk affording the defendant an unfair tactical advantage in the litigation. Despite claims for confidentiality, to sufficiently set out my reasoning it has been necessary to refer to some parts of the confidential evidence in these Reasons.

11 The parties relied upon evidence filed by their respective senior solicitors – Mr Andrew Watson for Drake, who is a Partner of Maurice Blackburn and Head of its National Class Action Practice, Mr Timothy Finney for Jowene, who is a Principal Lawyer and Director of Phi Finney McDonald, Mr Craig Allsopp for Huang who is a Joint Head of Class Actions at Shine Lawyers and Ms Emma Pelka-Caven for Lynch, who is the Head of Class Actions at Slater & Gordon.

Part B: Governing principles

Multiplicity

12 The principles governing applications of this kind are well settled.

13 There is no provision in Part 4A of the *Supreme Court Act* that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. A foundational element of the design of Part 4A is that a representative plaintiff has a choice as to whether to bring proceedings on behalf of *some or all person*s who have claims arising out of the same, similar or related

[1] Pursuant to *Supreme Court (General Civil Procedure) Rules 2015*, r 28A.06.

circumstances, and group members may opt-out of proceedings.[2] The result is that overlapping representative proceedings may be commenced against the same defendant.[3] The commencement of a subsequent *bona fide* class action against the same defendant on overlapping subject matter is not of itself, vexatious, oppressive or an abuse of process.[4]

14 That proposition must be understood in light of an equally foundational principle, which is that a multiplicity of proceedings is not to be encouraged. Competing representative proceedings may be inimical to the administration of justice.[5] Accordingly, while multiple representative proceedings against the same defendant on overlapping subject matter do not constitute an abuse of process, they present a "problem for courts to solve".[6] As the High Court said in *Wigmans*, the legislation poses, but does not answer, the multiplicity question.[7]

15 The Court is not required, come what may, to eliminate all consequences of the fact that multiple proceedings have been issued against the same defendant. As the Full Court of the Federal Court said in *Perera v GetSwift*,[8] the object of the legislation is facultative, not restrictive, and in permitting a more efficient dispute resolution through group proceedings, Part IVA "does not insist on the *most* efficient means of dispute resolution".[9] In this case, no party sought anything other than a permanent stay of each other's proceedings. It did not appear on the evidence that there was any basis to consider a solution other than staying three of the proceedings.

16 The Court's task is to ensure that justice is done in the proceedings, being astute to protect the interests of group members.[10] It is necessary for the court to determine

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2 *Supreme Court Act 1986* (Vic) s 33C.

3 *Perera v GetSwift Ltd* (2018) 263 FCR 92, 125–6 [146] (***GetSwift***); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, [34]–[36].

4 *Wigmans v AMP Ltd* (2021) 270 CLR 623 (***Wigmans***).

5 *Wigmans*, 666 [106].

6 *Wigmans*, 655–6 [77], 666 [106]; *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 68 [9]; *Fuller v Allianz Australia Insurance Ltd* (2021) 65 VR 78, 83 [12].

7 *Wigmans*, 655–6 [77].

8 *GetSwift*.

9 *GetSwift*, [148] (emphasis in original). Part IVA of the *Federal Court Act 1976* (Cth) is in almost identical terms to Part 4A of the *Supreme Court Act 1986* (Vic).

10 *Wigmans*, 667–8 [109], 670 [116]–[117].

which arrangement, including which proceeding should go ahead if one is to be stayed, would be in the best interests of group members.[11]

17 As the New South Wales Court of Appeal said in *Wigmans,* there is, and should be, an inherent flexibility as to how the vice of multiplicity should be handled.[12] Each solution may be unsatisfactory in one way or another. As the Full Court of the Federal Court has observed, there is no one right answer to questions that arise in this context and no "silver bullet" solution to a problem that may require weighing incommensurable and competing considerations, about which judges may take different views.[13]

18 The judicial task in this context has been described as applying a multifactorial analysis by reference to all relevant considerations.[14] Previous cases have identified a number of factors which may be relevant to a greater or lesser extent in resolving a multiplicity problem by comparing sets of competing proceedings, namely:

(a) the competing funding proposals, costs estimates and net hypothetical returns to group members;

(b) proposals for security;

(c) the nature and scope of the causes of action advanced (and the relevant case theories);

(d) the size of the respective classes;

(e) the extent of any book-build;

(f) the experience of legal practitioners (and funders) and the availability of resources;

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11 Wigmans, 649 [52].
12 *Wigmans v AMP Ltd* (2019) 103 NSWLR 543 (***Wigmans NSWCA***), 547 [8]–[9].
13 *GetSwift*, 151–2 [274].
14 *Wigmans*, 651 [60].

(g) the state of progress of the proceedings;

(h) the conduct of the representative plaintiffs to date;

(i) the degree of expedition with which the respective parties have approached the proceedings;

(j) the order of filing (although there is no rule or presumption that the proceeding filed first in time should necessarily be preferred, and this consideration is less relevant where the competing proceedings have been commenced within a short time of each other).[15]

19 The relevance of these factors in deciding between competing proceedings has long historical precedent. In a slightly different context, Jessel MR said in *McHenry v Lewis* (in a passage cited by the High Court in *Wigmans*):[16]

> You might have a hundred actions brought upon the same act or alleged breach of trust, and therefore of course the Court has power to stop all but one of the actions if they are all for exactly the same thing. But the course of the Court is well settled. The defendants take out a summons to stay the actions which have been previously transferred of course to the same Judge or Court, and then the Court decides which of the actions is to go on as a test action, and which are to be stayed. You cannot tell until you have all the plaintiffs before you the right course to be taken. The first action may be a collusive action, one action may embrace further relief than another, one action may be better framed than another to raise the questions in dispute, one action may be more perfect as to parties than another, in one action the plaintiff may be a solvent person, and able to answer costs, and in the other the plaintiff may be a pauper.

20 Lists such as this are useful tools for organising concepts and categories of information, provided they do not detract from the essential nature of the exercise for

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15 *Wigmans*, 667 [107]. In *Wigmans*, the carriage contest had been decided by the primary judge (who was upheld by the Court of Appeal) primarily by reference to the competing funding proposals, costs estimates and net hypothetical returns to group members. It had been assumed, given the position the parties had taken, that there was no real basis to distinguish between the ability and experience of the legal practitioners. The question before the High Court was whether a subsequently issued representative proceeding was *prima facie* vexatious and oppressive in circumstances where a representative proceeding was already pending in respect of the same controversy in which the same relief was available. A majority of the Court held that it was not, and that there was no error in applying a multifactorial analysis. In that context, the Court observed that no party had submitted that the factors considered by the primary judge (factors (a)–(i) above) were irrelevant save for the competing funding proposals: at [109]. See also *GetSwift*.

16 *Wigmans*,[101], quoting *McHenry v Lewis* (1882) 22 Ch D 397, 404.

which they are employed. The exercise is an evaluative one, in which all relevant considerations should be weighed. As the High Court emphasised in *Wigmans*, the factors that might be relevant to managing competing group proceedings cannot be exhaustively listed and will vary from case to case.[17] In some cases, a significant distinguishing feature might, by comparison, render some or all other factors irrelevant or insubstantial. In other cases, there will be little to distinguish between the proceedings. The inquiry in each case will be highly fact-sensitive. As Lee J said in ***Klemweb*** *Nominees*, fastening upon a remedial response to competing class actions involves "an evaluation, and not a calculus", and it is inevitable that different judges may weigh different considerations differently.[18]

21 In this case the parties gave significant emphasis to their competing funding proposals. On that subject, as the High Court said in *Wigmans*, funding arrangements are neither a mandatory consideration, nor irrelevant.[19] Importantly, as the High Court also said:[20]

> There is nothing foreign to the judicial process for a court to take into account likely success in proceedings or quantum of recovery. Those considerations, as well as preferences expressed by adult beneficiaries, are well established as potentially relevant matters when a court addresses whether bringing or defending litigation by trustees is proper or can be justified having regard to the best interests of those to whom fiduciary duties are owed. Similar principles apply to liquidators seeking advice or seeking approval to settle a proceeding or enter a funding agreement. Those principles also apply to attorneys. And they are centrally important when a court approves a compromise of a claim made by a person under disability. Litigation funding arrangements may affect the likely success of representative proceedings … They will directly affect the quantum of recovery.

22 The question of uncertainty attending the assessment of prospective financial outcomes was an issue in the appeal from the trial judge to the New South Wales Court of Appeal in *Wigmans*. There, the appellant contended that the assessment of comparative hypothetical returns by the trial judge was speculative and therefore

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17 *Wigmans*, 667 [109]. See also *CJMcG Pty Ltd (as trustee for the CJMcG Superannuation Fund) v Boral Limited (No 2)* (2021) 389 ALR 699 (***CJMcG***), 704 [14].

18 *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Ltd* (2019) 369 ALR 583, 593 [48]–[49].

19 *Wigmans*, [111].

20 *Wigmans*, [112].

erroneous. The Court of Appeal rejected that contention, accepting that such an assessment was valid, notwithstanding that it was necessarily imperfect and future-looking.[21]

23 Finally, where a proposal to resolve a multiplicity problem affects the defendant differentially, its interests are also relevant. The interests of funders and law firms acting in representative proceedings are not.[22]

24 The parties emphasised, and I agree, that the particular issues that present as possibly distinguishing between proceedings should be considered wholistically. Notwithstanding that it is convenient to address the issues raised in the submissions under the subject-matter headings set out below, I have considered the issues in that way.

Group Costs Orders

25 The principles governing the application of s 33ZDA were not in dispute. I refer to what is said in *Fox/Crawford,*[23] ***Allen*** *v G8 Education Ltd*[24] and in ***Bogan*** *v The Estate of Peter John Smedley (Deceased).*[25] For present purposes it is helpful to set out some aspects of those principles.

26 Section 33ZDA provides as follows:

> (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.

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21 *Wigmans NSWCA,* [27]-[32] ([87], [93]-[95] (Bell P), [108] (Meagher and Payne JJA).

22 See, eg, *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 68–9 [9]–[12], 72 [28]; *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1, 7–8 [14]–[18].

23 *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (***Fox/Crawford***).

24 [2022] VSC 32, [15]–[31] (***Allen***).

25 [2022] VSC 201, [6]–[14]; [101] (***Bogan***).

(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).

(4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).

(5) In this section —

group costs order means an order made under subsection (1);

legal costs has the same meaning as in the Legal Profession Uniform Law (Victoria).

27 The statutory criterion for the exercise of the power — *that the court be satisfied that it is appropriate or necessary to make such an order to ensure that justice is done in the proceeding* — is open-textured and provides the Court with a large measure of significantly unguided discretion.[26] For the reasons discussed in *Fox/Crawford*, a court should be satisfied, in order to make a GCO, that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding.[27] For that purpose, a broad, evaluative assessment is required, and the statutory criterion permits a range of meanings and is capable of satisfaction in a myriad of ways.[28] The evaluative assessment will of course be fact and context specific in each case.

28 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[29] of three parts: when a GCO 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

26 *Allen*, [24]; *Bogan*, [13(a)].
27 *Fox/Crawford*, [31].
28 *Fox/Crawford*, [30], [33]; *Allen*, [18], [20]; *Bogan*, [13], [19].
29 The descriptor is used for convenience, it does not appear in the text.

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 (sub-s (2)).[30] In that way, the provision addresses and links these things: first, how legal costs may be calculated when a proceeding is funded this way (as a percentage of the award or settlement recovered in the proceeding, as specified in the Court's order); secondly, 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).[31]

29 By incorporating the elements that it does, s 33ZDA implicitly permits the linking of risk and reward in the calculation of a GCO. It follows from the text that the calculation of legal costs in the manner permitted by s 33ZDA may properly take into account not only the value of legal services performed, but the assumption of financial risk by the law practice. A corollary of the statutory model is that it permits the legal practice to benefit from the upside as the damages recovered increase proportionally to the costs incurred.

30 When a Group Costs Order is made it guarantees that the plaintiff and group members will receive a fixed proportion of any award or settlement that is offered, subject only to variation by Court order. It does so by stipulating that the legal costs payable to the law practice representing the group be calculated as a percentage of the amount of any award or settlement recovered. A corollary of the statutory model is that it permits the legal practice to benefit from the upside as the damages recovered increase proportionally to the costs incurred. By fixing the calculation of costs in this way, it allows a plaintiff and group members to eradicate any risk that their compensation, if

30 *Fox/Crawford*, [12].

31 *Fox/Crawford*, [13].

recovered, will be eroded by costs whose proportion to that compensation exceeds the specified percentage. In this respect, the GCO statutory funding model may be generally compared with those forms of conditional funding in which the plaintiff and group members will not pay any costs unless they are successful but are otherwise liable to pay their solicitor's costs, meaning that the funding arrangement permits that moneys recovered for the represented class might still be substantially eroded by legal costs. It may also be generally compared with a litigation funding arrangement in which a funding commission is fixed as a proportion of moneys recovered (or spent) *in addition to* recovery by the funder of the legal costs expended.[32]

31 GCOs also offer simplicity and transparency in relation to funding arrangements, designating a simple and readily understandable method for calculating costs by a deduction from the plaintiff's recovered sum. In respect of this aspect of GCO's, it must be recognised that whatever form of funding is employed in a group proceeding, the Court retains control over communications to group members with a view to ensuring that they understand how costs are to be charged.

Part C – Distinguishing Features – Competing Proceedings

ORDER OF FILING AND CONDUCT OF LITIGATION

32 The order in which proceedings were filed and the progress of the proceedings to date were issues in contest. They are in some respects related and in others, distinct. It is convenient to address these points together.

33 Lynch submitted that because it had filed first and there were significant gaps in time between the commencement of its case and the other proceedings, that was a relevant consideration in favour of Lynch. Lynch said that the late filing of the other proceedings had caused delay. The Contradictors and the other parties said that those factors should be regarded as neutral, including because the investigations by all plaintiffs commenced at about the same time, and in each case work was occurring diligently, including to prepare statements of claim and to process significant amounts

[32] *Allen*, [33].

of information relevant to the potential proceedings published by ongoing public inquiries into Star or available by reason of other legal proceedings against Star.

34 Lynch also sought to distinguish itself by reference to the extent of the work it had done since commencement. The other parties and the Contradictor said that that should be regarded as a relevant factor. Drake, however, said that other parties (particularly Huang and Jowene) had framed their claims "taking inspiration" from the Drake claim, adding causes of action by "jockeying for position" in a carriage contest. By comparison, it was said that the Drake solicitors could (and did) explain why they had brought certain claims and not others, and were evidently focused on the interests of group members, rather than on winning carriage.

35 Lynch filed its proceeding on **29 March 2022**, Drake on **4 November 2022**, Jowene on **3 February 2023** and Huang on **6 February 2023**.

36 The chronology of events was as follows.

37 On 14 September 2021, Star Pty Ltd (a wholly owned subsidiary of Star) announced to the market that Adam Bell SC would conduct its next licence review (the **Bell Review**) required by the New South Wales Independent Liquor and Gaming Authority (**ILGA**).

38 On 8 October 2021, Star's shares closed at $4.28 per share. On 10 October 2021, allegations were made in *The Age* and *The Sydney Morning Herald* and broadcast that evening on *60 Minutes*, that Star had failed to have proper anti-money laundering controls, and that criminal activity had taken place at or via Star's casinos. The next day, 11 October 2023, Star shares opened at $3.61 and closed at $3.30, a decline of approximately 23 per cent from Friday's closing price of $4.28. Around this time, each of the plaintiff firms commenced investigating a securities class action against Star.

39 On 19 October 2021, Star announced to the market that the Bell Review would incorporate public hearings, commencing in March 2022. Public hearings in the Bell Review took place between 17 March 2022 and 24 June 2022.

40 On **29 March 2022**, Slater & Gordon filed the Lynch proceeding in this Court.

41 On 30 June 2022, the Queensland Attorney-General announced terms of reference for an external review of the Queensland operations of Star, to be conducted by the Honourable Robert Gotterson AO (the **Gotterson Review**). The Gotterson Review held public hearings between 14 July 2022 and 29 August 2022.

42 On 31 August 2022, Commissioner Bell provided his findings (the **Bell Report**) to the IGLA. The Bell Report was publicly released on 13 September 2022.

43 On 30 September 2022, the Gotterson Review published its findings (the **Gotterson Report**), which made similar findings to those made by the Bell Review, albeit concerning the operations of the Queensland casinos.

44 On 17 October 2022, Star announced to the ASX that the ILGA would suspend Star Pty Ltd's licence indefinitely from 21 October 2022, and that a manager would be appointed for The Star Sydney.

45 On 25 October 2022, Star announced to the ASX that the Queensland Attorney-General had determined that the Star entities that operated casinos in Queensland were not a suitable person for the purposes of holding a license to operate the Queensland casinos.

46 On **4 November 2022**, Maurice Blackburn filed the Drake proceeding in this Court.

47 On 30 November 2022, the Australian Transaction Reports and Analysis Centre (AUSTRAC) filed proceedings in the Federal Court of Australia against subsidiary companies of Star, alleging that Star's licence holders of casinos in New South Wales and Queensland (which had been subject to the Bell Review and the Gotterson Review) contravened the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) and associated Rules.

48 On 9 December 2022, Star announced to the ASX that the Queensland Attorney-General had suspended its licences to operate the Queensland casinos for

90 days commencing on 1 December 2023, and that a special manager would be appointed.

49 On 12 December 2022, the Australian Securities and Investments Commission (**ASIC**) commenced proceedings in the Federal Court of Australia against 11 current and former directors and officers of Star for alleged breaches of directors' duties in connection with the matters the subject of the Bell Review, the Gotterson Review, and the AUSTRAC proceedings.

50 On **17 January 2023**, Slater & Gordon filed an Amended Statement of Claim (**ASOC**) in the Lynch proceeding.

51 On **3 February 2023**, Phi Finney McDonald filed the Jowene proceeding in this Court.

52 On **6 February 2023**, Shine filed the Huang proceeding in this Court.

DA Lynch's submissions

53 In *Wigmans* the High Court said that:

> …while a first-in-time rule or presumption has never been favoured as a means of resolving which of the competing proceedings should proceed at all, the order of filing has been and remains a relevant consideration, although less relevant in cases like this where the competing proceedings have been commenced within a short time of each other.[33]

54 Here, competing proceedings were not filed within a short time of one another. All firms commenced their investigations in October 2021. Lynch filed in late March 2022. Drake filed seven months later and about a year after his legal representatives commenced their investigations. Jowene and Huang each filed about 10 months after Lynch commenced, and about 16 months after their solicitors had commenced investigations. Lynch filed an amended statement of claim in mid-January 2023.

55 Lynch submitted that the filing of substantially similar and competing proceedings – particularly in the cases of Jowene and Huang – months after filing by two others – is

[33] *Wigmans*, 667 [107].

relevant because it has delayed the progression of the proceedings and undermined the facilitation of just, efficient, timely and cost-effective resolution in accordance with the parties' obligations under the ***Civil Procedure Act*** *2010* (Vic). Lynch said that the Jowene and Huang proceedings could have been filed around the same time as the Drake proceeding and the release of the Bell and Gotterson Reports should not be accepted as an adequate explanation for delay.

56 Lynch directed this criticism to all other plaintiff parties but primarily towards the Jowene and Huang proceedings. There is a significant gap between the commencement of the Jowene and Huang investigations, the release of the Bell and Gotterson Reports, and their filing dates.

57 Lynch said that if there had not been such a significant delay in the filing of competing proceedings the multiplicity dispute may have been resolved sooner, other significant procedural steps could have been taken and the proceeding would be "off and running". Ms Pelka-Caven's evidence was that she would have sought that a multiplicity application be timetabled swiftly in the event that a competing class action had commenced within two to three months of the Lynch proceeding and that, if granted carriage (or had Lynch been the only proceeding), she would have **[redacted]**. She referred to her experience in another case in that respect.

58 Lynch said that by issuing the proceeding when it did, it triggered the suspension of the limitation period pursuant to s 33ZE. This had a tangible effect for group members. The Drake, Jowene and Huang proceedings enjoy the extended claim period and greater protection for group members afforded by the suspension of the limitation period.

59 Lynch submitted that multiplicity should not be encouraged and this was an opportunity for the Court to "give a closer indication of *how late is too late* to file an overlapping proceeding as a deterrent to particularly late-coming plaintiffs".

60 Lynch filed an amended statement of claim on 23 January 2023. The amendments included claims that had not been previously advanced. The other plaintiff parties submitted that in light of the fact that Lynch filed an amended statement of claim in January 2023, Lynch's delay points were immaterial. Ms Pelka-Caven explained the reasons for the amendments to Lynch's claim in confidential evidence that I need not set out here.

61 Slater & Gordon became aware that Maurice Blackburn were investigating a potential oppression claim in about October to November 2021. Ms Pelka-Caven described communications between the Lynch and Drake camps in relation to consolidation prospects. In anticipation of the commencement of the Drake proceeding, Slater & Gordon was open to working with Maurice Blackburn in a consolidated proceedings. Ms Pelka-Caven was of the view that the two firms could work cooperatively based on her experience in other class actions. She made contact with a solicitor at Maurice Blackburn and opened up the dialogue on 8 May 2022 upon learning that the firm was contemplating filing a competing class action. On 13 May 2022, Ms Pelka-Caven had another call with another solicitor from Maurice Blackburn in relation to the anticipated multiplicity dispute. It was her evidence that Maurice Blackburn were amenable to discussions regarding consolidation of their two proceedings.

62 Apart from the delay point, Lynch submitted that its legal representatives had, comparatively, conducted the proceedings in the best interest of the group members and the Court should favour the Lynch proceeding on that basis. The evidence (which need not be set out here) supports the conclusion that detailed and extensive work was done in the six months before filing.

Drake's submissions

63 Mr Watson gave evidence in relation to the investigatory and preparatory work undertaken by solicitors at Maurice Blackburn which I need not set out here but which I accept was detailed and extensive. He said that Maurice Blackburn commenced investigations in early October 2021 following media reports of Star's non-compliance with its anti-money laundering obligations.

64 Mr Watson explained that he understood that the filing of the Lynch proceeding in March 2022 had the effect of suspending the limitation period for all group members under s 33ZE of the *Supreme Court Act*. Accordingly, it was his view that it was appropriate to defer the Drake proceeding in order to gather information that flowed from the Bell and Gotterson inquiries and the published reports. Mr Watson's judgment was that it was more advantageous to wait until the release of the material from those public investigations to draft the statement of claim rather than filing and inevitably needing to amend and re-file at a later stage. From previous experience, Mr Watson understood that the public hearings in each inquiry would yield facts and documents that would normally not be available to a plaintiff firm in the course of their preliminary investigations of a potential class action. Mr Watson said that another reason for delay was to avoid filing "becoming potentially confounding information" that may hinder Drake's later arguments for damages.

65 Further work has been done since the filing of the Drake proceeding, including retaining expert witnesses, collecting trade and holding data from registered group members, and preparing class-wide loss assessments.

66 It was Drake's submission that the status of preparation of each proceeding was not a material factor in the determination of carriage, but that Maurice Blackburn had nonetheless advanced the Drake proceeding considerably. The firm has undertaken extensive investigative and preliminary work and has retained expert witnesses. Maurice Blackburn had decided to defer filing of the Drake proceeding until after the release of the Bell Report given that time had been suspended by the Lynch claim. This was also a strategic decision to not "muddy the waters" as to damages arguments that it expected to run at trial.

67 Drake warned the Court against encouraging a "race to the palace" by taking a first-in-time approach. It was submitted that it was always contemplated that Lynch would need to amend its pleadings following the release of the Bell Report and that the Lynch proceeding is now in the same position as the other cases. Lynch did not

file its amended claim until January 2023 and it is fantasy to suggest that a defence would have been filed by this stage.

68 Separately, Drake submitted that the Jowene and Huang proceedings were commenced "very late" and "quite obviously took inspiration" from the Drake and Lynch pleadings. It was put that the Drake legal team had conducted a careful investigation with due care and attention paid to the nature of the claims brought against Star on behalf of group members. It can explain why certain strategic decisions were made in relation to the bringing of claims and the claim period. In contrast, the other plaintiff parties had been unable to provide adequate explanation for the amendment or calibration of their cases. Drake said that it was a case of the other parties "jockeying for position" in a carriage contest. The other plaintiff parties have not been group member-focused in their approach. Drake submitted that practitioners should be able to explain the purposes behind putting on their case in such a way and how it is in the best interest of group members.

69 Drake referred to *Wigmans*,[34] where it was remarked:

> A first-in-time approach of the kind for which Ms Wigmans contended would also be unworkable. To adopt and adapt what Lord Templeman said in *The Abidin Daver*, a concern with avoiding or limiting a multiplicity of representative proceedings ought not be replaced by a presumption – a first-in-time criterion – that leads to an "ugly rush" to the court door, including but not limited to the **framing of causes of action and claims for relief as broadly as possible to gain so-called "juridical advantages**".[35]

It was Drake's contention that this is in fact what had occurred here. It was the only plaintiff party that could explain the assessment behind the case put forward in its statement of claim.

70 Drake also focused on the oppression claims made in the Lynch and Jowene proceedings under Part 2F.1 of the ***Corporations Act*** *2001* (Cth), the claim period, and the inclusion of "equity swap" group members.

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34 *Wigmans*, [86].

35 Citations omitted and emphasis added.

71 In brief, Slater & Gordon amended its pleading in January 2023 to extend its claim period, add an oppression claim to and amend its group member definition to include equity swap holders. Drake submitted that Lynch failed to adequately explain the expansion of its claim and had amended its pleading after seeing the Drake statement of claim. It was submitted that the inclusion of both equity swap holders and oppression claims was done without appreciating that derivative holders are not members of a company and do not have standing to bring claims of oppression, demonstrating "basic conceptual errors" that subsequently "inspired Jowene" in the drafting of its own pleading. It was Drake's submission that this was the problematic result when practitioners "copy" the work of others without undertaking proper due diligence and investigatory work themselves, with "an eye to the competition". It showed **[redacted]**. This practice should not be encouraged.

72 Drake explained that the only alteration made to its own proposal for carriage was to its proposed GCO rate, which it did in order provide "additional protections" **[redacted]**.

Jowene's submissions

73 Mr Finney's evidence on that issue of commencement and conduct of the proceedings was brief, and was as follows. Phi Finney McDonald commenced its investigation and secured third-party litigation funding and experienced senior counsel within a month of Star's non-compliance becoming public. Phi Finney McDonald did not retain its lead plaintiff, Jowene, until 29 October 2022. It entered a funding agreement with Woodsford Litigation Funding 8 LLP (**Woodsford Funding**) which is a wholly owned subsidiary of Woodsford Group Limited (WGL; together, **Woodsford**) in early February 2023. It issued the proceeding following the Bell and Gotterson inquiries, and the commencement of the AUSTRAC and ASIC proceedings in the Federal Court of Australia. After filing Phi Finney McDonald has made inquiries of prospective experts.

74 Jowene cited the principle in *Wigmans* that there was no rule or presumption that the representative proceeding commenced first in time should prevail.

75 As to the state of preparation of each proceeding, Jowene submitted that no proceeding was more materially advanced than another. No defence had been filed. No discovery has been made. Phi Finney McDonald has taken steps to progress the Jowene proceeding as far as possible before the determination of its carriage application. The firm commenced its investigations "post-haste" in October 2021.

76 Lynch made substantial amendments to its pleaded allegations against Star, filing the ASOC only two weeks prior to Jowene commencing its case. In circumstances where there were ongoing public hearings and investigations, it was appropriate to wait for the conclusion of those inquiries. It was not necessary to commence sooner because the Lynch proceeding had effectively suspended the limitation period. It was explained that Phi Finney McDonald commenced the Jowene proceeding once it had the benefit of the findings of the Bell Review and that those findings were crucial to the approach of each claim as demonstrated by the filing of a substantially amended statement of claim by Lynch in January 2023. All four plaintiff parties rely on the outcome of those investigations.

77 In response to Drake's submission that Jowene's statement of claim was affected by technical inaccuracies, it was submitted that the pleadings were drafted in light of the material available to Jowene's legal representatives at the time. Critical documents are not yet available from the Bell inquiry. The pleadings, of all plaintiffs, are based on summaries of the underlying business records of Star. Jowene expects that a further refinement of the plaintiff's statement of claim, no matter which plaintiff is awarded carriage, is inevitable.

Huang' submissions

78 Mr Allsopp in his evidence explained that despite commencing investigations into a proceeding against Star in October 2022, he did not reach a view until sometime later, after further investigation, that there was a reasonable basis to commence a proceeding. Mr Allsopp gave an account of the work that was undertaken at the time which I need not set out here. Mr Allsopp was of the view that material that had become publicly available through the ASIC and AUSTRAC proceedings, included

information that was not available from the Bell and Gotterson Reviews. Consideration of that material led to the need to refine Huang's case theory which delayed the issue of proceedings. Huang's evidence set out that while it took a reasonable amount of time to file the proceeding because of the ongoing nature of the regulatory investigations into Star, Huang had wasted no time in commencing its investigations in October 2021 following public reports about Star's anti-money laundering controls. Huang submitted that the appropriateness of its course of action was exemplified by Slater & Gordon later substantially amending its statement of claim based on the Bell Report. Moreover, Lynch did not take any substantial steps in its proceeding prior to the commencement of the other proceedings.

79 Like Drake, Huang took the benefit of the s 33ZE suspension afforded by Lynch filing when it did. That meant that there was no genuine urgency for Huang to file sooner. Huang submitted that Lynch should not be rewarded carriage for simply suspending the operation of the limitation period under s 33ZE.

80 In response to Drake's "copycat" claim, Huang submitted that its claims were not calibrated for the purposes of winning carriage of the proceeding. Its statement of claim was formulated based on information made publicly available through the regulatory reviews conducted in 2022. It was said that it is clear that Huang did not draw inspiration from the Drake proceeding because it initially did not make a claim for oppressive conduct on behalf of the group members. Huang explained that it now seeks to pursue the oppression claim so group members may have the benefit of the suite of claims identified in all proceedings.

Contradictors' submissions

81 The Contradictors took a neutral position on this point, submitting that each proceeding was at the same stage of preparation and it was not suggested that any plaintiff or law firm had neglected to advance their cases where appropriate. It was noted that Lynch did not make the case that group members would be prejudiced if

another firm is chosen for carriage. This was not a case in which procedural steps would have to be repeated if one firm rather than another, was granted carriage.

82 The Contradictors submitted that once the limitation period was suspended by the filing of the Lynch proceeding, there was no utility in the Drake, Jowene and Huang parties filing before the publication of the Bell and Gotterson Reports. The proceedings could not have been meaningfully progressed before the release of the findings of those public inquiries. The progress of the Lynch proceeding itself was dependent on the publication of the reports as demonstrated by the filing of an ASOC on 17 January 2023, nearly 10 months after filing its indorsed writ.

83 The Contradictors did not give credence to Lynch's argument that the other plaintiff parties were "reaping the benefit" of the extended claim period due to the suspension of the limitation period effected by the filing of the Lynch proceeding. There was no evidence that group members would be prejudiced by awarding carriage to one firm or the other, and the consideration was immaterial. The High Court in *Wigmans* accepted that "the greater the gap in time between commencement of the sets of representative proceedings perhaps the stronger the case for a stay of the subsequent set of proceedings, *all other matters being equal*".[36] The Contradictors did not consider that all other matters were equal so as to bring this consideration into prominence.

Consideration

84 On the basis of issues and evidence set out above, I draw the following conclusions:

(a) The legal teams for each plaintiff party demonstrated that they had undertaken substantial work on the proceedings before issuing a claim.

(b) I cannot discount the possibility that the other plaintiffs were influenced by work done by Drake in articulating its claims, including the substantial amendments effected by Lynch's amended statement of claim. Nevertheless, I do not consider that the evidence demonstrates that Drake's attitude to the

36 *Wigmans*, [107] (emphasis added).

advancing of the group member's interests is in a class completely apart from the attitude of the other practitioners. Where a later issued claim is influenced by an earlier issued claim, the facts may demonstrate an unthinking "copying" by the later parties, or the prioritisation of breadth of coverage merely in order to win carriage and a lack of sufficient basis for the inclusion of claims. That was not this case, having regard to the evidence of the practitioners.

(c) I agree with the Contradictors that there was no evidence of a particular law firm neglecting to advance their cases where appropriate and that this was not a case in which procedural steps would have to be repeated if one firm, rather than another, was granted carriage.

(d) Lynch was right to draw attention to significant gaps in time between the issuing of the four sets of proceedings. This is not, however, a good case in which to pursue the broad point pressed by Lynch. That is because the ongoing publication of material and findings in public inquiries into Star is a particular feature of this case. I accept that, in deciding when to issue proceedings, the practitioners acting for Drake, Jowene and Huang made judgment calls about the significance of the material and findings from public inquires and other legal proceedings, which material would undoubtedly be relevant to the issues to be raised in proceedings.

(e) That said, I consider that, having determined to pursue claims against Star, Huang and Jowene could, and should, have issued sooner, albeit in circumstances where it would have been anticipated that it would be necessary to amend their pleadings – as Lynch has done. A somewhat earlier filing, around the time that Drake issued (after the publication of the Bell and Gotterson Reports) would have meant that the multiplicity issue could have been resolved sooner. Although I accept that both sets of practitioners were processing information from public sources, there was no real justification for waiting to issue for a further few months. In the final analysis though, this is

only a minor point of differentiation because it has not been demonstrated that the delay in filing has caused any real prejudice to group members. I accept that, as Jowene submitted, no proceeding is presently more materially advanced than another. No defence had been filed, no discovery has been made. In cases of this complexity, refinements to pleadings can be expected.

(f) Properly understood, Lynch's submission that it should be favoured because it obtained for group members the benefit of the suspension of limitation periods, is a submission that it should be favoured because it issued first. In the circumstances described (in particular the ongoing public inquiries) issuing first was a neutral consideration in my assessment.

PRACTITIONERS AND RESOURCES

85 The Contradictors, Lynch and Huang submitted that the experience and expertise of the respective legal teams was not material in the determination of the carriage and that this factor should be considered neutral.

86 Drake and Jowene each argued that their legal teams had superior experience and expertise, including with class action litigation under the AML/CTF Act.

87 Drake submitted that Maurice Blackburn was the pre-eminent class action law firm with a significant settlement success rate based on the number of settlements achieved and the aggregate amount of those settlements. Maurice Blackburn has particular experience in bringing claims for oppressive conduct under Part 2F.1 of the *Corporations Act*.

Drake's submissions

88 Drake submitted that his proceeding was the preferred vehicle for carriage based on the experience of Maurice Blackburn in prosecuting securities class actions within the AML/CTF arena, and the demonstration of that experience in the firm's approach to this carriage application.

89 Maurice Blackburn was the "market leader in securities class action litigation in Australia". The firm has particular experience with AML/CTF class actions. Maurice Blackburn had demonstrated "sophistication and expertise" in the bringing of the Drake claim.

90 Drake relied on evidence of Maurice Blackburn's "pre-eminent" track record as deposed to in the affidavit of Mr Watson. Drake submitted that the firm's past successes were relevant to the determination of what was in the best interest of group members. Maurice Blackburn has obtained 26 successful settlements in shareholder class actions for the aggregate amount of the gross settlement sum of $1.6 billion since 2003. It has particular experience in prosecuting two securities class actions under the AML/CTF Act against another casino, Crown Resorts.

91 Drake submitted that Maurice Blackburn had taken steps in the course of this application that demonstrated a level of unparalleled care and attention. The firm had taken care to estimate the losses of group members, including engaging an expert to estimate the total number of shares acquired during the relevant period. Mr Watson had a demonstrated understanding behind the mathematics of the loss calculation and took a realistic approach to it. It was submitted that, conversely, an unrealistic approach would devolve into strategic errors in the planning and resourcing of the proceeding. Separately, Maurice Blackburn had paid careful attention to the costing of the class action. Mr Watson made an assessment of the estimated legal costs by analysing the specific features of the claim.

Jowene's submissions

92 Jowene similarly submitted that Phi Finney McDonald had notable securities class action experience, particularly concerning the AML/CTF Act and the unique and complex issues it raises. The issues were described in the evidence of Mr Finney, but need not be set out here. Phi Finney McDonald's legal practitioners had gained first-hand experience of those issues through its work on class actions brought against the Commonwealth Bank of Australia and Westpac Bank, which concerned breaches of the banks obligations under the AML/CTF Act.

93 Jowene submitted that it had appropriate resources to take on carriage of the class action. Phi Finney McDonald has five legal practitioners dedicated to the Star proceeding. The firm has an in-house client engagement team and a subsidiary discovery service. It was submitted that the in-house client services would result in greater efficiencies and cost reduction for group members.

94 In response to Drake's submission that Maurice Blackburn has the pre-eminent settlement record, Jowene said that Drake's evidence did not provide for a helpful comparison. It did not take into account the fact that Maurice Blackburn's asserted settlement record was based on aggregate settlements. It did not reflect the comparably longer period of time over which those settlements were achieved, noting that Phi Finney McDonald was established much more recently, but still with very experienced practitioners and significant results.

DA Lynch's submissions

95 Lynch took the position that there was no significant disparity in experience or expertise between the law firms involved in this application. Nevertheless, Lynch put on evidence as to the qualifications of its legal practitioners at Slater & Gordon. It was submitted that Slater & Gordon has a longstanding record of success in securities class action, obtaining $750 million in class action settlements. Lynch submitted that Slater & Gordon had a proven record for keeping its legal costs proportionate. The team is led by Emma Pelka-Caven, a solicitor with extensive experience. The rest of the instructing and counsel team have demonstrated experience in class action litigation. Junior counsel has particular experience with class actions in the AML/CTF arena. Slater & Gordon is appropriately resourced. The firm has available a dedicated client engagement team, litigation technology team and an outsourced agreement with a discovery provider.

96 In responding to the submissions of Drake and Jowene, Lynch submitted that any particular experience with class actions concerning the AML/CTF Act is not a distinguishing factor in circumstances where all plaintiff parties were represented by legal practitioners who had relevant experience. Lynch said that the quality of

practitioner could be determined with regard for the nature and scope of the claims and the state of preparation of each proceeding. On those issues, Lynch submitted that it should be the preferred vehicle for carriage.

Huang's submissions

97 Huang submitted that this issue was a neutral factor and was not material to the determination of carriage. It was not the case that the legal teams are starkly different in experience or expertise.

98 As to the shared contention between Drake and Jowene that AML/CTF experience is a defining factor, Huang submitted that the chosen proceeding will nevertheless need to establish contraventions of the AML/CTF Act based on the evidence adduced. Each law firm had the benefit of plentiful material publicly available through public hearings during the Bell Review, and the AUSTRAC and ASIC proceedings against Star. No firm would be starting blind. Huang submitted that Maurice Blackburn's experience with the Crown class actions was neutralised by that fact.

99 Huang submitted that outcomes for group members was the relevant touchstone in this application. It did not follow that Maurice Blackburn would be in the best position to achieve the best outcome due to its record of class action settlements; headline resolution sums in other cases should not have a bearing on the consideration of which plaintiff should proceed with carriage.

100 In response to Jowene's claim that it was in a better position to carry the proceeding because of Phi Finney McDonald's experience with the CBA and Westpac class actions, Huang said that those cases concerned banks and not casinos, and each institution faces different money laundering and counter terrorism risks. Further, Huang submitted that some of the issues that Mr Finney noted as being unique to AML/CTF matters were in fact common place to securities class actions.

Contradictors' submissions

101 The Contradictors submitted that it was difficult to conclude that there is any material difference between the law firms behind the plaintiff parties. There is no material

difference between the qualifications, experience or resources available to each firm. The factor should be considered neutral. In response to the submissions regarding experience with litigation under the AML/CTF Act, the Contradictors submitted that it could not be accepted that any particular experience with this type of litigation would deliver "greater efficiencies" to group members. The Court should assume that each firm has the requisite skills to carry on AML/CTF litigation. This is demonstrated by the drafting of comprehensive pleadings in each proceeding. Drake's submission that Maurice Blackburn had greater experience with oppression claims is similarly uncompelling. They submitted that skills of analysis are readily transferrable.

Consideration

102 I accept that, measured globally, Maurice Blackburn has achieved the greatest number of settlements and the greatest aggregate sum of damages in securities class actions. Whilst that point might carry sway in some comparisons, I am not persuaded that aggregate results are particularly telling in this case, given the experience of the other firms.

103 I also accept, as I have said, that Mr Watson in particular, gave the most helpful, considered evidence about the quantification of damages. I have addressed the criticisms made by Drake of the other practitioners in the context of the pleadings issues and as I have said, I ultimately could not conclude on all of the evidence that the advancing of the interests of group members in this proceeding to date by Drake's legal team, is in a class completely apart from the other practitioners.

104 I also accept that Phi Finney McDonald and Maurice Blackburne (and their respective Counsel) have particular experience in AML/CTF cases.

105 This case is somewhat unusual (although I doubt it is unique) in that each firm has the benefit of significant material published or produced by or in the course of public inquiries and other proceedings. All firms have applied their undoubted expertise to

the analysis of that material in the preparation of their cases to date. As discussed in the context of the pleadings issues, there was no sufficient basis on this application to draw sound conclusions about the criticisms levelled by one firm against another in respect of the composition and articulation of the claims. As the Contradictors submitted, there was no evidence of a particular law firm neglecting to advance their cases where appropriate. All have evidently devoted considerable and thoughtful effort to the preparation of their cases to date.

106 As I said in *Beach*, I do not think that a comparison between the capabilities of legal teams must be disregarded as irrelevant to the multifactorial assessment of all relevant factors when evaluating competing proceedings. It remains the case, however, that the appropriate weight to be given to such a comparison will depend upon the extent of disparity between each legal teams' respective experience. Where the apparent differences are slight, it may be difficult to identify rational and objective criteria and the criteria for assessing their weight and their application will become problematic.[37]

107 In each case the firms are undoubtedly well resourced and experienced and although there are differences between them, the differences are not pronounced, in this case.

CAUSES OF ACTION ADVANCED IN THE COMPETING PROCEEDINGS

108 On the question of causes of action and claim periods:

(a) Although there are differences in the claim periods and in some causes of action advanced, all parties accepted that the claims pleaded arise out of substantially the same factual substratum.

(b) Drake submitted that its proceeding was the only stable and consistent case, demonstrating that it had put forward claims upon considered reflection and not to win carriage. Drake made numerous criticisms of the pleadings of the other parties which were said to reflect poorly on those parties as preferred plaintiff.

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37 *Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424 (***Beach Energy***), [195].

(c) Lynch submitted that the longer claim period shared by it and Jowene was advantageous for group members, as was its inclusion of claims for "equity swap" group members. It was submitted other proceedings that omitted claims or adopted a shorter claim period, would lead to a "tail-risk" **[redacted]**. Lynch also launched criticisms of Huang's pleading in particular.

(d) Lynch and Huang submitted that Jowene's pleading was lacking in detail and comparatively superficial.

(e) The practitioners whose pleadings and decisions about the inclusion of causes of action or length of claim periods were criticised, responded in defence of their claims, and critiqued their opponents in reply.

(f) Jowene and Huang submitted that these issues ought regarded as neutral, drawing attention to criticism that might be made of the other parties' claims in order to illustrate that at this stage of proceedings, criticisms of that kind were not a reliable indicator of which proceeding should go forward.

(g) The Contradictors submitted that the issue should be regarded as neutral.

109 The analyses by the plaintiff parties of their competitors' pleadings was detailed. I have considered those submissions but describe the issues here only in broad terms. All plaintiffs accepted that it was not in the interests of group members to expose to the defendant asserted problems that it might later pursue.

110 There are three key points of difference between the statements of claim.

111 *First*, claim periods. The period for all claims starts on 29 March 2015. The Lynch and Jowene claims end on 13 June 2022. The Huang period ends on 25 May 2022 and Drake, on 16 March 2022.

112 *Second*, claims brought on behalf of equity swap investors, who did not acquire ordinary shares in Star but entered into financial contracts (equity swaps) to acquire derivative exposure to share movements. Drake does not bring a claim on behalf of

equity swap holders. Lynch did not originally, but now does. Jowene's claim includes equity swap investors. Huang's does not, but Huang intends to seek leave to amend the proceeding if granted carriage.

113 *Third*, claims brought under Part 2F.1 of the *Corporations Act* for oppressive conduct of company affairs. Drake, Lynch and Jowene all bring oppression claims. Huang submitted that he intends to seek leave to file an amended statement of claim including claims under s 232.

Drake's submissions

114 Drake submitted that his claim is the only "stable and consistent case" put forward.

115 Drake submitted that Lynch included *equity swap holders* without explanation and **[redacted]**. Drake set out specific reasons for its criticisms in this regard.

116 Drake submitted that the making of claims in respect of **[redacted]**, demonstrated that other plaintiff parties have attempted to prepare their cases for the purposes of winning a carriage dispute and **[redacted]**. Drake contended that Lynch had failed to explain **[redacted]**. In responsive evidence for Jowene, Mr Finney said that **[redacted]**.

DA Lynch's submissions

117 Lynch submitted that its extended *claim period* should be preferred over Drake and Huang. Lynch initially claimed for a shorter period between 29 March 2015 and 16 March 2022. Reasons were given in Ms Pelka-Caven's evidence for extending the claim period. It was submitted that it is significant that two experienced class action firms (Phi Finney McDonald and Slater & Gordon) have concluded that there is a proper basis for the extended claim period.

118 The "tail-risk" point was that the Drake and Huang proceedings would be incapable of recovering for investors that fall outside of their limited claim periods. Lynch accepted that the question whether those group members who had acquired shares between 16 March and 13 June 2022 had suffered loss and damage was a matter for trial. Lynch has submitted that a "tail-risk" arises for proceedings with a more

narrowly defined group membership. This relates to both the issue of shorter claim periods and the omission of equity swap holders.

119 The Huang and Drake proceedings, as they currently stand, expose the defendant to "tail-risk" if permitted to continue. Ms Pelka-Caven gave evidence in her experience as **[redacted]** Lynch submitted that the risk as foreshadowed is not mere speculation, noting that the defendant has identified it as a relevant matter.

120 Lynch brings claims for *equity swap investors*. It was submitted that its approach to include these types of investors was not unusual in securities class actions. Huang has instructed its legal representatives to seek leave to file an amended statement of claim to include equity swap holders in the event that he is awarded carriage. Drake **[redacted]**. Lynch submitted that in circumstances where all plaintiffs have had the benefit of material disclosed during the course of public hearings and inquiries, these inconclusive positions are not satisfactory. **[Redacted]**.

121 Both Lynch and Drake submitted that there were deficiencies in the pleadings of Huang and Jowene that rose above simple matters of judgment and were real defects that weakened the claim of group members. It was said that the claims were marred by forensic issues and in the case of Huang, Lynch submitted that the claim would have to be significantly re-cast and almost entirely re-written. The criticisms were re-buffed. Jowene and Huang said that those issues did not amount to a material factor for the Court's consideration in determining carriage, and that they are the result of different legal approaches by experienced and competent class action specialists. The Contradictors similarly submitted that this was a neutral point.

Jowene's submissions

122 Jowene's primary submission was that whichever plaintiff is awarded carriage will almost certainly amend its pleading in a substantial way. Many of the criticisms pertaining to the key differences will likely fall away once the evidence is in and the law firms continue to investigate and review the points of contention.

123 In respect of the claim period difference, Jowene submitted that a longer claim period is more advantageous as it would eliminate tail-risk for the defendant. Jowene says that it is a significant consideration because **[redacted]**.

124 As to the *oppression* claim, Jowene submitted that this factor should be considered neutral. Drake, Jowene and Lynch bring a claim for oppression and Huang has indicated that he will seek leave to amend his statement of claim to include such a claim.

125 Drake criticised Jowene for **[redacted]**. In response to the criticisms, Jowene submitted that **[redacted]**.

Huang's submissions

126 Huang submitted that the differences between the case theories are not material and ought be characterised as neutral in the carriage contest. There may be legitimate and reasonable differences in approaches taken by experienced class action practitioners that has led to the development of differences in pleadings.

127 Huang claims for the period between 29 March 2015 and 25 May 2022. It was submitted that the Court has been invited to partake in a speculative exercise, making an inquiry into a hypothetical matter of whether a certain proceeding should be preferred based on the claim period. That is not a relevant inquiry for the determination of carriage. There is no evidence before the Court of what Star or its insurers will do in settlement negotiations. Huang's evidence and submissions addressed the choices that his legal practitioners had made in respect of the claims and periods of time addressed in Huang's claim.

128 As to the criticisms of his pleading, Huang submitted that Drake had made conclusory assertions that ought not to be accepted.

129 Huang said that leave would be sought to amend his claim to include equity swap holders. It was said that **[redacted]**. Shine Lawyers have instructions to seek leave to file an amended statement of claim to pursue an oppression claim under s 232 of the

Corporations Act, if Huang is granted carriage. Huang therefore submits that this difference in the current pleadings should be considered neutral.

Defendant's submissions

130 The defendant submitted that, all other things being equal, it is in the interests of justice and efficiency for the claims of all persons in relation to the subject matter of the proceedings to be brought within the one proceeding. If only a sub-set of potential group members are represented in the proceeding, a "tail-risk" is created for the defendant that separate proceedings will be commenced on behalf of persons not represented in the case that proceeds.

Contradictors' submissions

131 The Contradictors said that this issue ought be regarded as neutral. The case theories of each plaintiff are substantially similar and the causes of action are broadly the same. In that respect, a comparison between pleadings is of limited use in determining carriage. The legal practitioners in each proceeding are of similar competence and experience.

132 In relation to claim periods, the Contradictors submitted that the Court must assess each pleaded case rather than having regard to exogenous factors such as the effect of settlement negotiations and that it is mere speculation that claimants that fall outside of the scope of a particular claim period may bring litigation in the future.

133 The Contradictors submitted that the Court should be satisfied that each plaintiff has given serious consideration to how they have defined their particular claim period. It is not necessary, for the purposes of this application to determine the merits of each of their decisions. Moreover, the Contradictors noted that, particularly in light of Drake undertaking further investigations in respect of the claim period, it was reasonable to expect that the plaintiff awarded carriage would embrace (and amend if necessary) extending its claim period if there are good reasons for doing so.

134 The Contradictors accepted Drake's submission that **[redacted]**. Nevertheless, it was submitted that it is difficult for the Court to reach a conclusion on the merits of this issue, particularly in circumstances where no party suggests that **[redacted]**.

135 All plaintiffs have brought, or intend to bring, oppression claims. Accordingly, the matter ought be regarded as neutral.

136 The Contradictors said that the submission was speculative and that the issue of competing claim periods should not be assessed by reference to exogenous factors.

Consideration

137 My view about the pleadings points can be shortly stated, despite the copious quantities of ink devoted to this issue in some of the submissions and evidence.

138 First, despite the criticism levelled by one party against the other, it was not established that any of the pleadings was manifestly deficient. The submissions advanced, in particular by Lynch against Huang and to a lesser extent against Jowene, were not capable of establishing that conclusion.

139 As other courts have said, it is a reasonable assumption that each legal team has made thoughtful forensic decisions with consideration for the interest of group members in the bringing of each of their claims, absent a real disparity in the quality of legal representation.[38] In this case, the decision making process of the practitioners was sufficiently exposed. As Lee J remarked in *Klemweb*, "leaving aside manifest deficiencies in a way a case is pleaded or conducted, often it will be difficult to tell whether a particular decision was sound until the end of the litigation".

140 As was observed in *Nelson v Beach Energy*, a comparison between pleadings has its limits, particularly where the case is at an early stage and competing claims traverse the same factual substratum and assert the same causes of action. I would add that unless a deficiency is manifest, it will often be unsatisfactory in the course of a carriage

[38] *CJMcG*, [31].

contest, where the issue is not being determined on an *inter-partes* basis between plaintiff and defendant, to soundly conclude that one form of pleading is to be preferred to the other.

141 I agree with Jowene's submission that, at this point in the proceedings it is reasonable to assume that whoever is awarded carriage, pleading amendments will almost certainly follow in a course of the proceeding and many of the criticisms pertaining to the key differences will likely fall away with continued investigation.

142 As to the Jowene pleading, I do not accept the criticism that its brevity evidenced superficiality. As the submissions by Jowene's Senior Counsel made pellucid, Jowene's pleading is the product of serious reflection and forensic judgment.

143 I have addressed the question of conduct of practitioners in respect of changes to pleadings earlier in these Reasons.

144 As to the defendant's point about tail-risk, it might be that if the proceeding that goes forward does not adopt the broadest of the group member definitions, separate proceedings might be commenced on behalf of persons not represented in that case. Three things may be said about that submission. First, the prospect that a further proceeding might be commenced is speculative. Second, as set out earlier, as a matter of principle the objective of the present exercise is not to eradicate multiplicity in all its manifestations. The corollary is that the Court's task is not focussed on guaranteeing to the defendant that all of its risk may be addressed in the one proceeding. Third, at this stage of proceedings, on this application, it is impossible in a case of this complexity, for the Court to form a view about the respective merits of the claim periods chosen by the different plaintiffs. In that context there is a danger in my view in adopting a "broadest case is better" approach, in the encouragement of the formulation of claims designed to win carriage.[39] Finally, in answer to Lynch's

[39] *Wigmans*, [86].

point on this subject, the extent to which the defendant's approach to the litigation might be affected by its assessment of tail-risk, is largely speculative.

FINANCIAL OUTCOMES

Introduction

145 The plaintiffs proposed these costs arrangements:

(a) Lynch sought a GCO under s 33ZDA of the *Supreme Court Act* at the rate of 14%.

(b) Jowene sought a GCO at the rate of 17%

(c) Drake sought a GCO incorporating an "upwards rachet" mechanism being 10% on *that portion* of any resolution sum up to $50 million; 20% on *that portion* of any resolution sum which exceeds $50 million and up to $100 million; and 25% on *that portion* of any resolution sum which exceeds $100 million.

(d) Huang proposed that his solicitors act on a no-win no-fee (**NWNF**) basis, charging for fees at its standard hourly rates with a 25% uplift on its total professional fees, and for disbursements in the usual way.

146 To allow the Court to sensibly compare the range of reasonably likely returns to group members under the various funding proposals the plaintiffs each modelled the potential net returns based on the estimated range of recovery sums (damages) and the point at which the proceedings may resolve, being early, late and trial settlement scenarios. The assumptions underpinning the modelling were largely standardised.

147 The modelling was informed by two principal inputs, namely:

(a) The proposed GCO rates and in the case of Huang, estimates of Shine's expected total legal costs. Although Shine was the only party who intended to calculate its costs on an hourly rate basis (the other parties seeking a percentage return via GCO), the quantum of the likely legal costs that would be incurred

and therefore charged to group members under the Shine NWNF proposal (in short hand, **the budget point**), was in issue.

(b) Estimated resolution sums.

148 The modelling was directed to three hypothetical resolution scenarios – an early settlement (following a mediation held after review of discovery); a late settlement (after exchange of expert evidence by immediately prior to trial preparation); and a "trial settlement" (resolution after the conclusion of trial). The third input (trial settlement) only impacted the Huang modelled outcomes. The costs to be charged under the GCO funding proposals did not change as a function of the point in the litigation at which the proceedings might resolve. The total costs incurred under the Huang NWNF proposal would vary, however, depending upon the proportion of the projected costs budget that would be expended in prosecuting the proceeding to conclusion, at whatever juncture in the litigation that might occur.

149 The parties accepted, as do I, that the question when a proceeding will be resolved or determined in the real world cannot be identified with any precision and that the broad demarcations between early, late and trial resolutions are analytical tools to allow comparisons between the plaintiffs' funding proposals.

150 The parties submitted several iterations of the modelling. In **Redacted Schedule A** costs and returns comparison tables depict the interaction of the key integers for certain scenarios. The tables reproduced there are only a sub-set of the modelling produced by the parties, but they are the versions that reflect my view about the most reasonable assumptions to adopt for the purposes of assessing group member interests (for the reasons discussed later). The modelling is in this form:

	Early Scenario	**Late Scenario**	**Trial scenario**

Resolution Sum	DA Lynch (GCO)	Drake (GCO)	Jowene (GCO)	Huang (NWNF)	DA Lynch (GCO)	Drake (GCO)	Jowene (GCO)	Huang (NWNF)	DA Lynch (GCO)	Drake (GCO)	Jowene (GCO)	Huang (NWNF)
$XX	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%
$XX	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%	XX%

INPUT TO MODELLING - PROJECTED SETTLEMENT OUTCOMES

151 The solicitors for each of the plaintiffs gave confidential opinions as to their estimated range of recoveries and provided reasons for adopting their respective conclusions. The solicitors for the plaintiff parties are experienced at making such estimates as a necessary part of their decision making about whether to invest in pursuing a case. There was no disagreement about the relevant inputs to the quantum estimates.

152 All parties rightly accepted that at the early stages of a proceeding of this kind, any estimate of recoveries is fraught with uncertainty. In this case (which is not unlike other shareholder class actions in this respect) quantification of the total damages pool requires a number of highly contestable factual inputs, evaluative judgments, assumptions and technical expertise. Estimates about the number of participating group members can only be very approximate, although the practitioners adopted very similar assumptions for that purpose. Discounts for litigation risk are evaluative and at this stage of the proceeding reflect only general judgments about litigation risk based on experience. Recovery risk in this case was also considered in light of some known facts and assumptions.

153 I have considered the evidence of the parties' solicitors on projected resolution sums, which was described in some detail in the case of Drake, Lynch and Huang, but need only be set out here in summary terms.

Drake

154 Andrew Watson gave evidence regarding the method used to calculate his "realistic" estimated settlement recovery range, being between **[redacted]** and to arrive at **[redacted]**.

155 Drake **[redacted]**. Alternative **[redacted]**. The output from the trading models was then combined with the estimated inflation in stock price to quantify the adjusted aggregate damages for acquiring group members, producing a range of **[redacted]**.

156 Mr Watson applied a series of adjustments to the theoretical aggregate loss sum to account for group member participation and also for **[redacted]**. He separately specified the percentage discounts applied, in his evidence. After adjustments, Mr Watson concluded that the **[redacted]** range would be between **[redacted]** for acquiring group members. In addition, he estimated the damages for **[redacted]** based on **[redacted]**, but said that **[redacted]**.

157 Mr Watson's evidence also addressed what he described as **[redacted]**. What was intended by that evidence was in contest. Drake submitted that properly understood, **[redacted]**. Those factors did not lend themselves readily to a computation but reflected **[redacted]**. Jowene and Huang submitted that Mr Watson's evidence should be construed as expressing only a view about the **[redacted]**. I accept Drake's submissions as to the proper reading of the evidence as a whole. The inputs to the **[redacted]** were clearly described as **[redacted]**. The discussion in the affidavit made sufficiently clear that **[redacted]**.

158 As to the broad factors pointing to a **[redacted]** settlement range **[redacted]**, the **[redacted]**.

159 Mr Watson's expectation, based on his experience, was that **[redacted]**. This was consistent with the opinions of Ms Pelka-Caven. **[Redacted]**.[40]

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40 See below.

160 Mr Watson reasoned that **[redacted]**.[41] He also said that the estimated resolution ranges must be considered in the context of **[redacted]**. **[Redacted]**. **[Redacted]**, Mr Watson's opinion was that a "realistic" assessment of the resolution range **[redacted]**. The Drake submissions went somewhat further and stated that for the purposes of the application, the Court ought accept that the proceeding would likely resolve for a sum **[redacted]**.

DA Lynch

161 Ms Pelka-Caven estimated that a negotiated settlement recovery range would be between **[redacted]**, setting out the considerations which were taken into account in reaching that range.

162 The solicitors for the Lynch plaintiff prepared an inflation series and global loss estimate. The global loss estimate was informed by a range of inputs with underlying assumptions and was broken down into sub-periods. On the basis of these inputs and assumptions, Ms Pelka-Caven provided an estimated theoretical judgment sum of **[redacted]**, to which adjustments had to be applied to account for litigation risk, recovery risk and for the inherent uncertainties in making an assessment of this kind at an early stage in the proceeding. Those factors were discussed in her evidence.

163 Ms Pelka-Caven gave detailed evidence about **[redacted]**. This evidence addressed **[redacted]**. Based on her experience, Ms Pelka-Caven's view was that **[redacted]**. Additionally, she said that **[redacted]**.

164 Like her colleagues, Ms Pelka-Caven identified that making an assessment of the estimated quantum at this stage of a proceeding relies on numerous variables that are subject to significant uncertainties, one of which was group member participation. Her view was that it was not possible to identify the likely number of group members.

[41] This analysis provided the high and low points for the **[redacted]**.

Ms Pelka-Caven also said that when assessed at an early stage in the proceeding, there was a genuine potential that **[redacted]**.

165 Like Mr Watson, Ms Pelka-Caven drew attention to **[redacted]**, including that **[redacted]** and provided her views about **[redacted]**.

166 Ms Pelka-Caven also said that it was **[redacted]**.

167 After taking these considerations into account, Ms Pelka-Caven considered that the likely negotiated settlement recovery range in the Lynch proceeding would be **[redacted]**. While Ms Pelka-Caven's evidence did not specify the separate discounts to account for each factor detailed above, upon basic analysis the overall discount applied could be approximated. That discount was applied to the initial theoretical judgment sum to obtain Ms Pelka-Caven's final settlement recovery range.

Huang

168 Mr Allsopp gave evidence as to his assessment of a reasonably likely settlement range and the relevant integers used to determine that result. The factors that Mr Allsopp took into account were, conceptually, the same as those considered by Ms Pelka-Caven and Mr Watson.

169 After applying these factors, Mr Allsopp assessed that the reasonable range of resolution sums in the proceeding was between **[redacted]**. Mr Allsopp said that such an assessment at this stage of the proceeding is inherently uncertain.

170 With respect to the first factor, Mr Allsopp gave evidence that approximately 5.984 billion shares were traded during the relevant period, which he employed as a proxy for the number of "damaged" shares purchased in the relevant period. Huang **[redacted]**. **[Redacted]**. He said the analysis was preliminary and all of the inquiries that would ordinarily have been undertaken could not be performed in the time available. The calculated inflation per share arrived at by Huang and Drake was different. Obviously, this application was no place to determine which of those

assessments (if either of them) was correct or more likely to be ultimately found correct.

171 Mr Allsopp multiplied the inflation figure of **[redacted]**. It was conceded, however, that such a calculation was "a crude analysis" as it does not account for the number of shares sold by group members at an inflated price, and therefore does not reflect the number of shares held in the event windows. That notwithstanding, it was Huang's position that it was still possible to reach an assessment of the reasonable range of resolution sums by applying appropriate discounts to the total claim value.

172 Mr Allsopp's figure of **[redacted]** was **[redacted]** than Mr Watson's adjusted aggregate damages range for acquiring group members, of **[redacted]** (**[redacted]**).

173 Lynch and Drake criticised Mr Allsopp's analysis of the total claim figure. **[Redacted]**. Mr Watson's opinion, which he set out with supportive reasoning and an explanation of the method that he said ought be adopted, was that the calculation employed by Mr Allsopp was liable to **[redacted]**. It did not appear that Mr Allsopp took a different view about the appropriate methodology that would ultimately be applied. The analysis set out by Mr Watson demonstrated the force of his point.

174 To be clear, to the extent that the criticism was directed to the care and competence evident in the Huang proposal, I do not accept that Mr Allsopp's approach to the damages quantification reflected any lack of understanding of the relevant principles, or any lack of competence. Mr Allsopp's evidence had to be explicit that the approximate estimate proffered had not been intended to substitute for the more sophisticated approach that may be required later in the proceeding, and he accepted that calculation was liable to over-estimate the number of affected shares.

175 Mr Allsopp applied several discount factors to the total claim value in order to determine a likely reasonable resolution range. Firstly, a specified discount was necessary to account for group member participation, said to be **[redacted]**.

176 In addition Mr Allsopp applied additional unspecified **[redacted]**. Overall, he applied a discount range of **[redacted]** to account for those factors to reach his final potential recovery range **[redacted]**. It was not possible to dissect the broad discount any further and ascertain the weighting accorded to particular factors.

177 The broad discount applied by Mr Allsopp was greater than, although broadly within the range applied by Ms Pelka-Caven, whose discounts were applied to a significantly lower undiscounted theoretical recovery sum.

178 Despite the uncertainties of predictive modelling, Huang emphasised that the "bottom line" numbers within the Drake, Huang and Lynch parties' estimated settlement ranges are within striking distance of each other. This was said to be of real significance because the parties individually approached the modelling assessments using different methodologies, and yet independently arrived at essentially the same position. As such it was said that the Court can take more comfort in the projections than might ordinarily be the case.

179 As to Drake's projected recovery sums, Huang submitted that there was nothing that qualified the **[redacted]** of the range.

Jowene

180 Jowene did not provide an estimated settlement range in its evidence. Jowene submitted that there was inherent difficulty in estimating the outcome of the proceeding at this early stage. However Mr Finney's evidence was that in his opinion, based on the defendant's market capitalisation and his understanding of normal commercial practice, he expected that the defendant would hold an insurance policy with **[redacted]**. Mr Finney concluded that he considered that the defendant would **[redacted]**.

Analysis – recovery estimates

181 The parties' quantum estimates can be compared so as to construct a range in which they overlapped. The combined range is between **[redacted]**. Given the multiplication of uncertainties, the construction of a common range, is capable of affording only a low degree of confidence about what will occur.

182 Huang's projection proceeds on an accepted over-estimation of the number of affected shares which I accept, is likely to be significant. There is a real possibility that the Huang upper range is subject to a higher degree of uncertainty than the upper end of the Drake and Lynch estimates, noting that Mr Allsopp did take that fact into account in applying a global discount, without disclosing the weight given to it. As far as methodology for loss estimates is concerned, Mr Watson's was the most clearly explained with all the inputs exposed, and from that perspective, more robust than the others.

183 While it is difficult to analyse the discounts provided for in detail as the individual discount factors have not been stated, it appears that Mr Allsopp's lower end discount was quite modest. If one takes into account the discounts applied by Mr Watson in the Drake calculations (which appears to be unexceptional), and considers that the Huang discount was intended to also account for the overestimation of affected shares, it is difficult to accept that it would provide an accurate adjustment to reach a realistic settlement range. Similar observations may also be made with respect to the Lynch discount range which was said to account for group participation. Mr Watson for the Drake plaintiff and Mr Allsopp for the Huang plaintiff, each independently applied a similar **[redacted]**. The Drake evidence did not quantify the individual components within its overall range. Applying Mr Watson's **[redacted]** discount to Lynch's **[redacted]** estimated claim value figure, this would bring the estimated resolution sum to approximately **[redacted]**. Given that Lynch's estimated resolution sum range was between **[redacted]** after all discounts were applied, it would suggest that Lynch's **[redacted]**.

184 Taking the evidence as a whole, having regard to the fact that it consists of opinions expressed by experienced practitioners and notwithstanding that those opinions do not point to the same result, in my view these considerations ought be taken into account:

(a) The inherent uncertainty of predictions about resolution sums at this point of a proceeding of this kind, that are complex, and where both liability and quantum depends upon a number of contestable inputs.

(b) Three of the four solicitors who gave an opinion about recovery range all considered that the proceeding *could* resolve within the band of **[redacted]**. Huang submitted that it was significant that the solicitors' estimates were, **[redacted]**, within striking distance of one another. While there is something to be said for the attraction of a common range as indicative of what might occur, the force of that submission is attenuated somewhat by the fact that one of the four contenders (Jowene) said that the circumstances were too uncertain to provide a meaningful range, Drake's submission about a **[redacted]**, and more fundamentally by the inherent uncertainties which mean that estimates at this stage have a low predictive power. Given what I have said about the discounts applied by Huang and Lynch, a range of about **[redacted]** is probably a better guide to what can be taken from the intersecting estimates.

(c) The prospect that the total pool of damages might be **[redacted]**. I do not consider that the indications **[redacted]** can be sensibly ignored. The **[redacted]** upon which that evidence was based **[redacted]**, but are one factor to be taken into account.

(d) The prospect that **[redacted]**. **[Redacted]**, if it applies (**[redacted])** has been placed at **[redacted]**.

(e) The possibility that the result could be considerably higher than the more conservative opinions predict.

185 The Contradictors, correctly in my view, considered the matter to be finely balanced.

186 Drake submitted that in this case the Court is in a position to form a view that within the ranges the practitioners have identified, some are more likely than others and that there is **[redacted]**. The *more v less evidence* analysis does not take the matter very far given the inherent uncertainties. Moreover, the evidence did not in my view establish the further proposition that *it is likely* that the proceeding will resolve for a sum **[redacted]**. It is a possibility, but the evidence does not support a finding of likelihood.

BUDGET – COSTS LIKELY TO BE INCURRED

187 Although the GCO-based costs proposals are not predicated on fee estimates, all parties were required to address the question of cost budgets to enable a comparison to be conducted.

188 Shine's estimated legal fees or budget, was a critical input to the produced modelling due to the Huang plaintiff's NWNF proposal. Huang provided the most detailed evidence. The initial Shine budget was prepared by Mr Allsopp on the basis of assumptions and judgments based on relevant experience that were explained in the evidence but are unnecessary to set out here.

189 Shine's budget was criticised in particular by Drake and Lynch as being unrealistic and too low. Mr Watson for Drake gave evidence critiquing Mr Allsopp's budget analysis and providing alternative estimates for a number of inputs to the estimate, with reasoning supporting his views. Huang's budget and the basis for it was also criticised for being unreliable.

190 Mr Allsopp provided responsive evidence which expanded upon the reasons which underpinned the initial Shine budget, made some revisions to certain items as a result of the matters raised by Mr Watson, and provided further modelling based on the adjusted estimated costs (the **Shine revised budget**). The Shine revised budget had increased to allow for **[redacted]**. The Shine revised budget was the estimate upon which Huang relied.

191 Drake and Lynch submitted that the revisions to the Huang budget were demonstrative of the inherent unreliability of the estimates and the opinion on which the budget rested. Huang was criticised for making material changes and filing three different versions of its budget within a short period of time.

192 Huang submitted that it was appropriate for Mr Allsopp to reflect on the opinions of Mr Watson and reconsider aspects of his position where changes were warranted. IT was said that that attitude was mature and sensible, and did not evidence the absence of a basis for the original budget. Furthermore, Shine's budget modelling was addressed to a series of alternative budgets – the Shine revised budget, a budget that adopted some of the cost figures estimated by Mr Watson, and one that assumed a midpoint between the first and second budget. The purpose of the second and third budgets was to provide a sensitivity analysis for the purpose of modelling, and to enable the Court to have an understanding of the implications for group members should Shine's professional costs "blow out". Huang had not in fact submitted three different budgets within a month, on this application. Finally, some adjustments were made to correct typographical and transposition errors that had resulted in some incorrect figures appearing in Mr Allsopp's second affidavit.

193 It was Huang's submission that many of the criticisms identified by Mr Watson were in truth, matters of judgement based upon the practitioner's experience, and so different views were reached. It was said that as with any budget which has been developed in the early stage of the proceeding, it is inevitable that there is uncertainty in the estimates. Further, different practitioners will reach different conclusions about what costs should be budgeted for at the various stages of the litigation, based on their experience and their views of the proceeding. However, it does not follow from the fact that there are different conclusions reached by separate practitioners regarding certain budget items or phases, that a particular practitioner's assessment is unreliable or wrong.

194 Huang submitted that his budget was reliable and supported by evidence. It was put that the only way to assess the reliability of any particular budget is by reference to the evidence that has been filed in support of it, and the assumptions that have been relied upon which underpin that budget. In that respect, Huang submitted that Mr Allsopp's evidence stood alone. The other plaintiff parties did not put forward evidence in support of their respective costs estimates, other than at a very high level of generality. Mr Watson did, however, provide evidence supporting his critique of Huang's budget.

195 Reference was made to the costs incurred in other cases. Lynch submitted that Huang's budgeted legal costs were lower than those incurred by Shine in other comparable class actions. Huang replied that none of the proceedings relied upon were securities class actions and were not appropriate comparators and that the outcome of other cases, stripped of their context, do not provide a basis by which to assess the reasonableness of Mr Allsopp's estimate as each case must turn on its own facts. Drake referred to other securities class actions in which the costs had been materially higher than those estimated by Huang in this case. Based on Huang's comparison of such cases, it was said that Mr Allsopp's assessment sat "neatly in the spectrum of such costs" and that in any event, the assessment of the reasonableness of anticipated costs depends on a close consideration of the facts in any case. I agree.

196 I accept Huang's submission that the changes made to Mr Allsopp's estimates did not disclose some fundamental flaw in the way that the budget estimates had been approached or an inherent unreliability. I accept that estimates are matters of judgment on which practitioners can and do take different views. Mr Allsopp is not to be criticised, for example, for revising his estimate of trial length.

197 The fact was, however, that it was increased **[redacted]** upon considering Mr Watson's opinion. Similarly, an **[redacted]** was added, (**[redacted]**), which increased Shine's budget by **[redacted]**. What the revisions do illustrate is the subjectivity and

uncertainty of cost estimates, no matter how carefully a practitioner has thought about the issue.

198 In addition to Drake's own estimated budget, Mr Watson's second affidavit provided responsive evidence to Huang's initial budget, which set out comparative modelling based on what he considered to be a "more realistic budget" for Huang. The "**realistic Huang budget**" reflects Maurice Blackburn's legal costs as calculated on a time basis, but with professional costs **[redacted]** to reflect the variation between Maurice Blackburn and Shine's hourly rates. Huang's estimated costs as posited by Mr Watson, were the highest in this budget at **[redacted]** in a trial settlement scenario, **[redacted]** in a late settlement scenario and **[redacted]** in an early settlement scenario. This budget is a **[redacted]** increase on Shine's revised budget.

199 Huang submitted that Mr Watson's evidence did not detail the adjustments made to the items within Shine's budget or provide a breakdown of the estimated costs to demonstrate how the final realistic Huang budget was reached. Specific reasoning was directed to significant items in the proposed budget including in relation to Shine's allowance for interlocutory applications, discovery, experts, registration/opt out and class management, and trial.

200 The plaintiff parties each estimated the total professional costs they were likely to incur during the proceeding, by reference to the firm's professional fees and disbursements. There were ambiguities about what was and was not included in the estimates and accordingly some difficulty in comparing the budgets. In order to facilitate a like-for-like comparison between the estimates, Huang set out the parties' estimated fees in each case including GST but excluding uplift on professional fees and any costs associated with procuring ATE insurance (on the assumption that each firm was charging on a non-GCO basis). A truncated version of that document appears in **Redacted Schedule A**. Accepting that the like for like comparison did not include all relevant items that would charged on a "NWNF" basis, it illustrated the relationships between the parties' costs estimates. It showed for example that Drake's

estimated costs are the highest as compared to the other plaintiffs. They are approximately **[redacted]** higher than Jowene's costs at a trial settlement scenario and significantly higher than Lynch and Huang's estimates. Huang and Lynch's estimated cost figures are reasonably close in a trial settlement scenario, however there is a material difference between their estimates as compared to Drake's. **[Redacted]**[42][43][44][45]. A comparison cannot be made with respect to Jowene at a late settlement scenario as the evidence did not provide a breakdown of the costs expected to be incurred at each phase. The budget comparisons were deployed to opposite ends by Huang on the one hand and Drake and Lynch on the other. In short, Drake submitted that Huang's budget was demonstrably too low by comparison with Drake's estimates (for itself and for Huang). Huang submitted that Drake's budget for itself was not a valid comparator because it was an outlier – it was too high.

Timeframe

201 The parties also provided their opinions, based on their experience, on the likely proportion of costs that may need to be expended to reach a resolution. The question for this purpose is more nuanced than simply, "when will the proceedings resolve?", but rather, what is a reasonable view about the proportion of budgeted costs which will need to be spent before a resolution is reached. The solicitors made educated judgments but emphasised as they must, that such assessments are inherently uncertain and involve a broad range of possibilities.[46]

202 Based on his experience, Mr Watson also said that **[redacted]**. Mr Watson's experience was that **[redacted]**. The Contradictors' submission was that one should focus on the costs within the trial settlement scenario. It was put that it is common experience that resources and money have to be spent to achieve an outcome, which is often very late in the litigation.

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42 **[redacted]**.
43 **[redacted].**
44 **[redacted].**
45 **[redacted].**
46 See *Lay v Nuix Ltd; Batchelor v Nuix Ltd; Bahtiyar v Nuix Ltd* [2022] VSC 479, [55] ***(Nuix)***.

203 Huang acknowledged Drake's submission that settlements tend not to happen early in a proceeding and tend to be after significant work has been undertaken, which encapsulate the late and trial settlement scenarios. Therefore it was said that the Court ought place "quite a bit of weight" on the late scenarios in the modelling. However, Huang highlighted that because of the information available to the plaintiffs in this proceeding arising from the public inquiries into Star, **[redacted]**.

204 Ms Pelka-Caven for Lynch considered that **[redacted]**. However, Ms Pelka-Caven also referred to **[redacted]**. She concluded that it is difficult to provide a meaningful view as to when and how the proceeding will resolve.

205 Taking the experience of the practitioners into account and the size and complexities of the proceedings, I consider that there is a real possibility that **[redacted]**. But on the evidence I consider it reasonable in protecting the interests of group members to pay particular attention to the cost and return implications in the late settlement and trial settlement scenarios. That is not to express a view about what will likely occur, rather to say that in exercising a protective jurisdiction in respect of group members, it is appropriate to take those risks into account.

206 The Contradictors cited Lee J who said in the *Blue Sky* carriage dispute, that, "*although there is a significant difference between the budgets, the prognostications of solicitors as to how much a case is likely to be worth at this stage are notoriously unreliable. I think I should take any estimate with a bucket full of salt*".[47] I would add that in this case at least, the mutability of the costs estimates now made, is inherent in the exercise; it is not attributable to want of care on the part of the practitioners.

207 It was the Contradictors' submission that it would be open to the Court to conclude that the costs of any plaintiff on a time spent basis, should the matter proceed to trial, may be in the vicinity of any of the estimates provided by the plaintiffs, however the

47 *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Carriage Application)* [2022] FCA 1444, [53] (***Blue Sky***).

significant risk of costs overruns had to be taken into account. That submission was apt. I accept both aspects of it.

208 Ultimately it was accepted by all parties that it is difficult to accurately estimate future legal costs and that estimates are a matter of judgment which may cause practitioners to reach different conclusions. Lynch submitted that there is an inherent difficulty of budgeting for lengthy and complex group proceedings at an early stage of litigation is well established in the evidence and recognised in the authorities.[48] Ms Pelka-Caven's opinion was that legal costs in a shareholder class action can exceed the initial budget by **[redacted]**, irrespective of the solicitors' diligence in preparing the estimate. She gave a number of examples of why that could be so.

209 Huang agreed that the risk of costs overruns must be accepted. In response to the Contradictors' submission **[redacted]**. Put another way, considered rationally, there has to be limit on the extent to which costs might "blow out".

210 Huang proposed that a costs monitor be appointed to ensure that there is scrutiny of costs throughout the proceeding which would "minimise the risk of costs overruns". The Contradictors submitted that a cost monitor would not safeguard against the risk of cost overruns, because costs may still be assessed to be fair and reasonable as they were rationally incurred during the proceeding, despite not having been foreseen. I accept the Contradictors' reasoning and do not consider that the appointment of a costs monitor would have a real prospect of containing the expenditure of costs within estimates made early in the proceedings.

211 Of Huang's submission that there is no evidence that would demonstrate what a costs blowout might look like, Lynch said costs blowouts are by their very nature unexpected, and are not therefore amenable to ready quantification. It is, however, known by experience that they can and do occur in this context. There was force in that submission.

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48 See *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, [92].

212 It can be concluded that Mr Allsopp's estimate is not inherently unreliable. However, the exercise of estimating costs is fraught with uncertainty, making it imperative that cost overruns are factored into the Court's consideration.

213 It was put by the Contradictors that one should focus on the modelling depicting the "realistic Huang budget" (as it was called) and in a trial settlement scenario because it is a reasonably likely scenario. I agree. It does not follow that Mr Watson's estimate is correct and Mr Allsopp's estimate is wrong. The realistic Huang budget is a **[redacted]** increase on the Shine revised budget. It falls within the range of potential costs overruns as described in Ms Pelka-Caven's evidence. I accept that "costs overruns" is a general description and that that budget may be taken as being at the high end. Focusing (although not exclusively) on the potential for costs to be more than estimated is appropriate in assessing the risks and opportunities to group members.

SUBMISSIONS ON FINANCIAL OUTCOMES OF THE COMPETING FUNDING PROPOSALS

214 The parties made lengthy and detailed submissions addressing the four-way contest, which I have considered. I have set out here the more significant parts of the submissions.

Contradictors

215 As noted at the outset, the Contradictors' overarching submission on the carriage contest was that none of the proposals could be characterised as contrary to the interests of group members. As to funding specifically, they said that depending upon the view that the Court reached on the relative importance of the benefits and protections afforded by each model, it would be open to prefer any one of the four proceedings. They said that while the exercise in comparing the differences in funding arrangements requires weighing uncertainties, that exercise is not uninformed or unreasoned because certain inputs are factual. They agreed with Drake's submission

that the net return should only form part of the evaluative process undertaken by the Court. I accept that foundation as a proper basis on which to analyse the issues.

216 Within that rubric the Contradictors developed their analysis of the funding models. They submitted:

(a) When **comparing the GCO proposals**, it would be open to prefer the Lynch proceeding over the Jowene proceeding on the simple basis that 14% was lower than 17% and thus would provide a greater return to group members in every scenario.

(b) By contrast, the comparison between the Lynch GCO rate and the Drake proposal was *finely balanced*. While it can be accepted that Drake's model would protect group members against "downside risk" and that it would provide the greatest return to group members **[redacted]**.

(c) While not determinative, it would be open to conclude that a settlement would likely be achieved within **[redacted]** by reference to Mr Watson's evidence **[redacted]**. As such (and as I have discussed earlier), the modelling based on **[redacted]** may be said to be more instructive than **[redacted]**.

(d) It must be recalled that while the modelling appears to demonstrate precise outcomes, in reality no such precision actually occurs because there is a sliding scale with respect to when a settlement actually occurs, and consequently for the Huang plaintiff, what proportion of their legal costs will have been incurred.

(e) While the Court cannot conclude which outcome is more likely (nor does it need to) as such an enquiry is inherently uncertain, regard may be had to the outcomes modelled within the estimated settlement ranges submitted by the parties. Based on the reasonable settlement ranges and the provided modelling, the Lynch proposal would provide a better return than the Drake and Jowene plaintiffs at many points within the reasonably estimated

settlement ranges, but the Contradictors rejected Lynch's submission that it would be "more likely" to deliver the greatest return.

(f) The Contradictors drew attention to the modelling outcomes in a trial settlement scenario at estimated settlement ranges **[redacted]**. The modelling demonstrated that within this range, the highest return to group members was partly shared by two plaintiffs, **[redacted]**, and was reasonably finely balanced.

(g) At the same time, the modelling showed that, particularly at the lower end of the Contradictors' highlighted settlement range window, the outcomes between Lynch and Drake were also fairly indistinguishable.

(h) As to downside risk protection (protection against a low settlement being eroded by disproportionate legal costs), and upside risk protection (protection against the outcome being disproportionately taken up by a GCO rate) it was submitted that both are relevant and should be given equal weight on the proper construction of the statute or on the facts.

(i) The Contradictors highlighted that downside risk protection is afforded by the three GCO parties which provide significantly higher returns than the Huang plaintiff at lower resolution sums. Conversely, the Huang NWNF proposal provided greater upside risk protection. Both points were said to be relevant to the Court's decision as to carriage.

(j) The Contradictors said that if the Court was minded to give greater emphasis on downside risk protection on the facts then the Drake proposal would be prominent, however if the Court was to give greater emphasis to upside risk protection, then the Huang proposal would be prominent.

(k) In respect of the Huang plaintiff's NWNF proposal, the Contradictors stated that it was also open to the Court to prefer a GCO funding proposal over Huang's funding proposal to be in the best interest of group members. The Contradictors also submitted that the returns to group members under the

Huang proposal at many settlement ranges cannot be seen to be demonstrably superior in view of the significant risk of the Huang plaintiff incurring cost overruns, which is a risk factor present in litigation of this kind.

Huang

217 Huang submitted that his proposal is likely to result in a greater return to group members in the modelled scenarios that fall within the range of reasonable resolution sums contemplated by the parties' evidence and that the GCO proposals **[redacted]**.

218 Huang said that his proposed NWNF proposal presents a solid point of distinction, and a clear price difference compared with the other proceedings, if the proceeding were to resolve within the parties' estimated realistic settlement sums. This is a rational and attractive means of differentiation because it presents as relatively concrete and objective, even if the comparison must be made by making assumptions.

219 Based on the legal costs of prosecuting the proceeding as outlined in Shine's revised budget**,** Huang submitted that it is only in the event that any resolution sum is under **[redacted]** in an early settlement scenario; **[redacted]** in a late settlement scenario and **[redacted]** in a trial settlement scenario that the funding proposal advanced by any of the other plaintiffs presents the prospect of a greater return to group members than the proposal in the Huang proceeding.

220 Huang acknowledged the considerable uncertainty in the terms upon which the proceeding may resolve, and any constraints upon the amount in which the defendant may be willing to settle the proceeding. Nonetheless, it was submitted that the Court may be satisfied on the evidence that the more likely outcome in the proceeding, by a considerable margin, is one in which Huang's NWNF proposal will better advance the interests of group members. As noted earlier, Huang submitted that the Court could have a higher than normal degree of confidence in the settlement range projected by the practitioners.

221 It was submitted that that the Huang proceeding is the proper comparator for the purposes of considering whether it is appropriate or necessary to make a GCO to ensure that justice is done in the other proceedings. I accept (as has been observed in earlier cases) that in a multiplicity contest where one or more of the competing parties is seeking a GCO, it will not be shown to be appropriate or necessary to ensure that justice is done to make such an order in a proceeding if another of the proceedings in contest (however funded) would on a proper analysis, better advance the interests of group members.[49] As Huang put it (and I accept), in this context (where parties with different funding proposals are competing for carriage) the satisfaction of the statutory test under s 33ZDA(1), directs attention to the question of whether the particular proposed Group Costs Orders, taken together with all other considerations, better advance the interests of the plaintiff and group members in a proceeding. Huang said that the answer to that question for the other proceedings must be "no", because Huang's proceeding better advances group member's interests.

222 It was submitted that the considerations that might otherwise play a role in determining that a GCO is necessary or appropriate can be put to one side.

223 As Drake and Lynch submitted, those considerations are that a GCO, (a) might make funding arrangements for the proceeding certain and transparent; (b) would fairly distribute the burden of legal costs incurred in the pursuit of common questions among the group members; (c) would ensure the plaintiff is not exposed to significant and disproportionate financial risk; and (d) would be set at a rate proportional to the risk being incurred by the firm funding the proceeding.

224 Huang said that the second and third of those considerations were neutral because under Huang's proposal the Court would determine the reasonable legal costs to be deducted from a resolution sum, effectively fairly distributing the sum among the group members and because Shine agreed to indemnify Mr Huang against any adverse costs order. The final consideration was said to not arise because Shine was

[49] See also *Nuix*, [78].

content to be compensated by receiving the profit element of its reasonable professional costs and that the uplift fee is sufficient to account for the time in which Shine will not have its money. In respect to the first consideration, it was said that the price benefit enjoyed by group members under a NWNF proposal outweighs any benefit that may be derived from the certainty or transparency of a GCO.

225 In my view, the real contest lay in the interplay between the certainty afforded by a GCO and the price analysis of the comparative returns to group members.

226 While Huang acknowledged the structural benefits which are said to be afforded by GCOs and the benefits provided to group members, it was said that the significance of those benefits depend upon what the other factors show. I agree that the structural benefits that a GCO might confer have to be weighed in the balance with all other factors. Huang made a number of submissions about the Drake form of GCO, which are taken up below.

Drake

227 Drake submitted that the proposition that group members will be "better off" under one financial proposal or another is inherently uncertain because it involves forecasting a range of scenarios that may or may not occur, accepting assumptions on which those calculations are based. It was said that at this point whether or not those assumptions will eventuate during the life of the proceeding is "an unknown unknown".

228 By contrast, according to the modelling, **[redacted]**. Further, it was submitted that Drake's proposed model is the most protective and produces the best outcome for group members at **[redacted]** sums, being between **[redacted]**.

229 By way of illustration, comparing the GCO-funded proposals, Drake said that under the "trial settlement" scenario by which it says a significant amount of the budgeted legal costs are expected to have been spent, Drake would produce the best outcome for group members for sums **[redacted]**. At **[redacted]** there is an inflection point

where each of Drake and Lynch proceedings produce approximately the same returns with Jowene producing a worse result **[redacted]**. At **[redacted]** there is a marginal difference between Drake and Lynch **[redacted]**. At around **[redacted]** Drake and Jowene are equal and Lynch produces a somewhat higher return **[redacted]**. **[Redacted].** In comparison, Drake highlighted that Jowene's model is least advantageous at almost all realistic data points. Although Drake said that this point was not determinative, he submitted that the Court would need "special reason" to adopt a proposal which offers less protection to group members at the lower levels of return than Drake's proposal.

230 However, Drake submitted that this arithmetic analysis must proceed having regard to the realities of securities class action litigation. That is, a focus on a recovery by group members of one percentage of the total pool, especially where there is little real difference between the percentage, may be misplaced when one has regard to broader trends. Those trends were the subject of Mr Watson's evidence.

231 As to the prospect of a **[redacted]**, Drake acknowledged that as the modelling demonstrated, the better the recovery, the better the result for group members delivered by the Huang proposal. For example, on a trial settlement scenario **[redacted]**[50].

232 Addressing the higher end of the range, Drake's submission rested fundamentally on the proposition that the interest of group members in protection at the low end of recoveries is more important than the possibility of upside protection at the other end. It also sought to distinguish between "the *fact* of greater protection at the low end' and 'the *possibility* of greater benefit at the high end". It was submitted that the Contradictors erroneously accorded them equal weight as the fact of low-end protection must *count more* than the possibility of greater benefit. Drake submitted that it is at the lowest levels of returns (**[redacted]**) where group members require protection against unexpectedly poor outcomes and their returns being consumed by

50 **[redacted]**.

legal fees. The gravamen of the submission was that if there is a low end protection group members will not end up with nothing or very little, whereas at the higher end, one is distinguishing between good recovery and even better recovery.

233 That submission was supported by the second limb of the argument: that the risk of a disproportionate return is not one that will ultimately undermine group members' interests because if a GCO is awarded, the power under s 33ZDA(3) can be exercised to reconsider and reduce any percentage set by the terms of the GCO *downward.* That would occur (if it does) at the point of settlement or judgment when critical integers will become certain or capable of being known, such that the percentage in the GCO may be revised. The submission was then that Drake's model embodied protection against the erosion of returns to group members by a low rate where recovery was low, with the prospect of a review by the Court under s 33ZDA(3) where recoveries were high, and costs under the now proposed percentages turned out to be disproportionate. Drake said that, "*it is inconceivable that proportionality review … would result in a GCO rate going up*" and that it is "*only ever going to result in a downward modification given [the Court's] protective role*".

234 Drake submitted that even if the Court is not persuaded that it can form a view about likely outcomes, then the structure of s 33ZDA and its purpose supports the view that one needs to give more weight to protection than possibility, at least in a case where **[redacted]**. Properly understood, that submission went to the rationale for the fixing of the inflection points in Drake's proposed "ratchet" form of GCO, rather than a comparison between GCO and NWNF based funding proposals. Whatever might be said of the purpose of s 33ZDA, the legislation itself could not dictate that a GCO based funding proposal ought be preferred to a differently funded proposal. However, the submission was put on a broader basis, however. It was put that the Court, exercising what is undoubtedly a protective jurisdiction, must focus on *protection rather than on possibility*.

235 On that basis it was said that Drake's proposed funding model should be preferred as the model which is the *most protective* of the interests of group members.

236 As to the rationale for the particular ratchet form of GCO that Drake proposed, the submission was as follows. First, the low percentages at lower recovery sums afforded the protection discussed. The lowest point within the ratchet structure **[redacted]**. The mid-point is **[redacted]**. As to highest rate that would apply to sums above Drake's highest inflection point (**[redacted]**) it was submitted that the upwards ratchet structure creates an incentive to keep resourcing a case to achieve the highest possible outcome "because fixed costs do not then increasingly consume the percentage". The plaintiff, Mr Drake, gave evidence that he was concerned if Maurice Blackburn were not adequately compensated for its work this would potentially have the effect that its interest in investment of both time and resources might diminish. As Senior Counsel for Drake put it, "*clients worry about that to make sure their lawyers are actually going to put in the work. Human behaviour says that if you are going to be compensated for work you will put it in*." Here, a *specific incentive to push for higher sums* is adopted. It was submitted that Mr Watson has taken a sophisticated approach to the proposal and that price is not necessarily the same as group member interests, there are broader issues. Mr Watson's opinion was that the proposed rates on the sliding scale were reasonable and not disproportionate to the risk that the firm would undertake in the proceeding (for reasons set out in confidential evidence).

237 The outcomes of the tiered rate structure, stated explicitly, are as follows (using illustrative numbers only, to step out the arithmetic):

(a) At a settlement amount of $100m the total costs would be $15m, which is 15% of $100m (10% on the first $50m, being $5m, and 20% on the next $50m, being $10m);

(b) At a settlement amount of $120m the total costs would be $20m, which is 16.67% of $120m (10% on the first $50m, being $5m, 20% on the next $50m, being $10m, and 25% on the remaining $20m, being $5m);

(c) At a settlement amount of $150m the total costs would be $27.5m, which is 18.33% of $150m (10% on the first $50m, being $5m, 20% on the next $50m, being $10m, and 25% on the remaining $50m, being $12.5m); and

(d) At a settlement amount of $200m the total costs would be $40m, which is 20% of $200m (10% on the first $50m, being $5m, 20% on the next $50m, being $10m, and 25% on the remaining $100m, being $25m).

238 Drake submitted that in a case of this complexity and difficulty, that rate is not outsized, including compared with other GCO rates endorsed by the Court. The evidence was that if **[redacted]**.

239 On the ratchet issue, **Huang** submitted that the purpose of the proposal is evidently to make the GCO more attractive where the proceeding resolves for a sum under $50 million (the lowest inflection point in the proposed GCO). **[Redacted]**. On *Drake's own case* (as articulated against Lynch as it were) such an outcome would be contrary to the basis on which a GCO is said to rest. Relatedly, Huang criticised the proposal to **[redacted]** as undermining the justification for the proposed reverse rachet. It was submitted that because the return to the lawyers increases with the recovery sums, the return to the lawyers risks becoming disproportionate.

240 **Lynch** submitted that the calculation of legal costs under all proposed GCOs is such that each firm is incentivised to achieve the best possible result for their respective clients and group members. It is unnecessary to adopt a ratchet mechanism to provide such an incentive. Furthermore, it was put that Drake did not provide any real reasoning in support of the inflection points in the proposed rachet mechanism, other than in respect of **[redacted]**. Jowene and Huang also submitted that the particular inflection points chosen had not been justified or clearly explained.

DA Lynch

241 Lynch submitted that compared with the other GCO proposals, its proposal results in a better return to group members when compared with the Drake proceeding for all

modelled scenarios exceeding **[redacted]** and the Jowene proceeding for all modelled scenarios. The evidence of each solicitor was that they consider the reasonable range of resolution sums **[redacted]**. As such, Lynch submitted that the Court therefore ought to be satisfied that of the three proceedings in which a GCO is sought, the Lynch proceeding is the most likely to deliver the greatest net return to group members from any successful settlement or award recovered.

242 It was put that the analysis of the comparative funding proposals needs to take into account the inherent structural benefits of a GCO – certainty, transparency and simplicity as to the quantum of costs payable, and an increase in the alignment of interests between the plaintiff and the law practice, such that the law firm is incentivised to achieve the best possible return to group members in a timely and efficient manner. The Contradictors generally agreed with that proposition, however they said that it can be rationally assumed that all practitioners in the proceedings would act consistently with their professional duties to their clients, group members and the Court, irrespective of the funding proposal. Drake further submitted that departing from the typical time-costed basis of calculating legal costs, a GCO inherently disincentivises delay to the resolution of the proceeding, the creation of inefficiencies or increased costs.

243 It was submitted that, to the extent that the Drake plaintiff contends for the downside risk protection offered by the ratchet mechanism, Lynch's flat 14% GCO proposal provided better all round benefits. Based on the modelling, the difference in net returns between the Lynch proceeding and the Drake proceeding at resolution sums between **[redacted]**. Further, it was submitted that group members would still be guaranteed a **[redacted]** under the Lynch proposal irrespective of the resolution sum, which is a favourable outcome on any view, especially in respect of smaller settlements.

244 Lynch submitted that the Huang plaintiff's NWNF proposal does not offer the benefits to group members that are inherent in a GCO, which are important in this case. When

the estimates of legal costs proffered by Huang are applied to the resolution sums, the funding proposal offered by the Huang proceeding *appears to be* more favourable than that offered by the Lynch proceeding, at various resolution points. However, that conclusion is attenuated by the uncertainty of time-based legal cost estimates.[51]

245 Lynch embraced the Contradictors' submissions regarding their proposed GCO rate and emphasised that competition was a positive thing and would be in the interests of group members if it lead to a lower GCO rate.

Jowene

246 Jowene's submission on the subject of financial returns to group members was that its proposal was the most balanced and attractive package which comprised a relatively low rate (17%, which, upon the parties filing their statements of position had been the lowest rate), and no financial risk because the proposal was supported by an extremely well-resourced funder backed by an ATE insurance policy, by which disbursements will be funded and adverse costs indemnity provided. Jowene's proposal has the additional benefit of offering a form of security that is already acceptable to the defendant. None of the other proposals are as balanced or simple.

247 It was said in Mr Finney's evidence that the proposed 17% GCO rate was considered carefully by Phi Finney McDonald and the funder, Woodsford, with regard to the likely cost of conducting the proceeding and to ensure that the firm could finance and conduct the proceeding on an ongoing basis without compromising the interests of group members.

248 Jowene made these submissions in substance, about the financial modelling and a comparison with the other proceedings.

249 First, as discussed earlier, the other proceedings (in particular, Slater & Gordon) are attended by financial risk because of the means by which they proposed to be funded.

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51 See 'Budget' section above.

250 Second, there is inherent difficulty with estimating the outcome of the proceeding at this early stage of the matter, which is evident from the so-called "likely" resolution sums estimated by the other firms, that ranged from **[redacted]**. Jowene itself did not provide an estimated settlement range.

251 As to the question whether **[redacted]**.

252 Third, the Drake ratchet provision is comparatively complex and difficult to rationally assess at this early stage of the proceeding. Other than a reference to the ratcheting structure incentivising a resolution sum at the higher end, there is a lack of evidence regarding the basis, or necessity for the ratchet structure and the particular inflection points selected. The more straightforward structure should be preferred in the circumstances. Separately, the Drake proposal risks windfall gains in the event of a larger resolution sum. The return to the solicitors in the Drake proposal overtakes the Jowene proposal at resolution sums **[redacted]**. Drake's proposal will not provide a better return to group members **[redacted]**. On the basis that Drake's estimate of the resolution sums is between **[redacted]** (which is how Jowene submitted Mr Watson's evidence should be read) the ratchet structure with greater returns to group members at the lower end, is mere window dressing.[52]

ANALYSIS

What does the modelling show?

253 It is apparent that overall, the Huang NWNF funding model produces the greatest return to group members at a majority of resolution sums across the three hypothetical settlement stages (early, late and trial), based on Shine's *revised budget*, including within the "common range" as projected by Huang, Lynch and Drake (noting the limits of significance of that construction), including in the range that represents the intersection of the estimates, as discussed. However, the modelling submitted by the Drake plaintiff based on the *realistic Huang budget* **[redacted]** and a trial settlement

52 See *Beach Energy*, [103], [148].

scenario, demonstrates that the Huang NWNF model will not produce the highest return to group members unless a resolution sum **[redacted]** is achieved. Lynch provides the highest return to group members between **[redacted]** and **[redacted]**. Further, from **[redacted]** resolution sums, which sits within the 'overlapping' resolution ranges estimated by the parties, the Huang proposal only produces a marginally higher return to group members than the return under Lynch's proposed GCO by **[redacted]**.

254 The variations in the possible outcomes become more significant when the settlement sum is under **[redacted]**. For example, at an **[redacted]** settlement, the GCO models would deliver between **[redacted]** more of the settlement pool than under the NWNF model.

255 Comparing *only the GCO proposals between themselves*, Jowene will produce the lowest returns to group members at all settlement sums up to and including **[redacted]**. At between **[redacted]** the modelling 'tips' and Jowene then offers the second highest return (after Lynch). Drake has the lowest return for all settlement sums from **[redacted]** and above. Drake will offer the highest return for all settlement sums up to and including to **[redacted]** as against the GCO parties and all parties, then Lynch offers the highest return for all sums from **[redacted]** and above as between the GCO parties only.

256 Between settlement sums of **[redacted]**, Drake returns **[redacted]** more of the settlement pool than Lynch (**[redacted]**), however between **[redacted]** the variation narrows to Drake's proposal providing **[redacted]**. Jowene returns **[redacted]** less of the pool than Lynch and Drake at **[redacted]**.

257 At **[redacted]** there is a tipping point at which Lynch offers the highest return over Drake and Jowene. Between **[redacted]** the difference between the GCO parties is very finely balanced as there is not more than a **[redacted]** difference (in the percentage of the pool returned to group members) between Lynch, Drake and Jowene. If one considers the difference between Lynch and Drake, who respectively

offer the highest and second highest returns at this range, the margin is narrower, with Lynch delivering **[redacted]** more of the pool, than Drake. The differences in the return produced by Lynch and Drake become more pronounced as the settlement sum increases. For example, at a settlement sum of **[redacted]**, where the difference between the GCO parties is the greatest, the margin between Drake and Lynch is **[redacted]** between Drake and Jowene. At large sums, those differences in the proportion of the settlement pool returned to group members, translate to significant dollar amounts on a gross resolution sum basis. It is impossible to say anything meaningful about what that would mean on a group member by group member basis, other than that the differences would be much less significant in monetary terms per group member for probably many group members, because of the potentially large number of group members.

258 At a range of **[redacted]** Lynch provides the highest return to group members of the three GCO proposals. This is followed by Jowene and then Drake, which offers the lowest returns. At **[redacted]**, the margin between Lynch and Drake is **[redacted]** of the pool, and **[redacted]** as between Drake and Jowene.

259 Bringing Huang into the analysis, between **[redacted]** there is a tipping point at which Huang moves from offering the lowest return of all parties at **[redacted]** to offering the second highest return (**[redacted]**) after Lynch **[redacted]** at **[redacted]**, with Drake and Jowene sitting below that, offering similar returns of **[redacted]**. At this point, there is a **[redacted]** difference (of the settlement pool returned to group members) between all parties. The same is true as between the GCO parties only. Those "rankings" continue until a point between **[redacted]** when Huang's proposal offers the highest return of all parties and Lynch becomes the second highest. That ranking continues for all sums from approximately **[redacted]** (tipping point is between **[redacted]**) and above, where Huang returns **[redacted]** more of the pool to group members, than Lynch, **[redacted]**.

260 Turning to a late settlement scenario based on the realistic Huang budget, the outcomes and therefore the observations made as between the GCO parties remain the same, as the point at which the proceeding may settle does not alter the return to group members.

261 In a late settlement scenario, Drake still provides the highest return up to **[redacted]**, however Lynch will only provide the greatest return from **[redacted]** (not up to **[redacted]** as in a trial scenario) and Huang will provide the greatest return at all sums from **[redacted]** and above. From a settlement sum of **[redacted]**, after Huang, Lynch offers the second highest return, followed by Jowene, and then Drake.

262 A different way of illustrating these numbers is to say for example, concentrating on a *trial stage* resolution (adopting the "Huang realistic budget") that:

(a) At results **[redacted]** the "ranking" between parties (with highest return to group members first), is Lynch (at **[redacted]** return) / Drake (at **[redacted]**) / Jowene (at **[redacted]**) then Huang (at **[redacted]**).

(b) At **[redacted]** the rankings are Lynch (**[redacted]**) / Drake (**[redacted]**) / Jowene (**[redacted]**) then Huang (**[redacted]**).

(c) At **[redacted]** the rankings are Lynch (**[redacted]**) / Huang (**[redacted]**) / Drake (**[redacted]**) then Jowene (**[redacted]**).

(d) At **[redacted]** the rankings are Lynch (**[redacted]**) / Huang (**[redacted]**) / Jowene (**[redacted]**) and Drake (**[redacted]**).

(e) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]** then Drake (**[redacted]**).

(f) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]**) then Drake (**[redacted]**).

(g) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]**) and Drake (**[redacted]**).

(h) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]**) and Drake (**[redacted]**).

263 At the "late resolution stage":

(a) At an **[redacted]** recovery the rankings are Drake (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]**) and Huang (**[redacted]**).

(b) At **[redacted]** Lynch and Drake fall within **[redacted]**/ Huang (**[redacted]**) and Jowene is at **[redacted]**.

(c) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Drake (**[redacted]**) and Jowene (**[redacted]**).

(d) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Drake (**[redacted]**) and Jowene (**[redacted]**);

(e) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]**) and Drake (**[redacted]**);

(f) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]**) and Drake (**[redacted]**);

(g) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]**) and Drake (**[redacted]**).

(h) At **[redacted]** the rankings are Huang (**[redacted]**) / Lynch (**[redacted]**) / Jowene (**[redacted]**) and Drake (**[redacted]**).

264 The selected analysis points are illustrative only.

What can be drawn from the modelled outcomes and the evidence about financial return?

265 The following conclusions can be drawn (without re-stating what is set out earlier).

266 Each funding proposal is in its own way, attractive. All of the funding proposals will deliver better returns to group members than the average returns delivered in securities class actions.[53] The GCO rates proposed by Lynch and Jowene are less than those ordered by this Court to date, in cases in which GCOs have been made.[54] As the Contradictors put it, it could not be said that any of the funding proposals are antithetical to group members' interests.

267 Outcomes prediction at this stage of a proceeding is fraught with uncertainty.

268 Budgeting (costs prediction) is also fraught with uncertainty.

269 That costs will exceed expectations is a sensible and reasonable consideration to take into account in the Court's assessment of group members' interests. The prospect that a significant proportion of budgeted costs will need to be spent to achieve an outcome cannot be discounted. It is not a certainty but it is a sensible and reasonable consideration to take into account. The proceeding might resolve on a different basis, but it is sensible to concentrate on the late and trial stage resolutions adopting the realistic Huang budget, when considering the modelling of returns.

270 The outcomes, on this basis, do not show the clear price difference between Huang and the other plaintiffs, to the extent that Huang contended, and do not show the clear price difference between Drake and the plaintiffs, to the extent that Drake contended.

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53 See the analysis in *Allen*, [67]-[75] and *Mumford v EML Payments Limited* [2022] VSC 750, [48], upon which reliance was placed on this application.

54 *Allen* (Nichols J) (**GCO 27.5%**); *Bogan* (John Dixon J) (**GCO 40%**); *Beach Energy* (Nichols J) (**GCO 24.5%**); *Gehrke v Noumi Ltd* [2022] VSC 672 (Nichols J) (**GCO 22%**); *Mumford v EML Payments Limited* [2022] VSC 750 (**GCO 24.5%)**; *Lieberman v Crown Resorts* [2022] VSC 787 (Stynes J) (**GCO 27.5% - 16.5% tiered rate)**; *Fox v Westpac Banking Corporation (No 2)* [2023] VSC 95 (Nichols J) (**GCO 24.5%**); *Anderson-Vaughan v AAI Limited* [2023] VSC 465 (Stynes J) (**GCO 25%**).

271 The proposition that the Huang funding proposal was clearly superior rested on the ability to be more certain about both budget and outcomes, than I consider the evidence permitted.

272 Similarly, the proposition that the Drake funding proposal was superior rested on the ability to be more certain about a particular kind of outcome, than I consider the evidence permitted.

273 There was force in the Drake submission that protection for group members against costs eroding returns where recovery was at the low end should be accorded weight – because without low end protection group members might end up with nothing or very little, whereas at the higher end, one is distinguishing between good recovery and even better recovery. Where a Group Costs Order is made (unless the proposed GCO percentage rate itself appears to provide for a disproportionately low return to group members) the statutory form of costs calculation means that lower end recoveries will not be consumed by costs.

274 I consider that on the whole of the evidence, the guarantee against group members' returns being eroded by legal costs that would be afforded by a GCO funding mechanism, to be a real benefit to group members and protective of their interests. It is not in my view outweighed by the prospect of higher outcomes. On the Drake, Lynch and Jowene offerings there is no prospect of group members' costs being subsumed by legal costs in any meaningful sense. Comparatively, with the Huang NWNF proposal the risk of materially lower returns to group members **[redacted]** is much greater.

275 However, it does not follow that the proposal that offers the lowest rates and the lowest outcomes and the highest rates and the highest outcomes should be preferred.

276 On the question of the Drake form of ratcheted GCO, these things can be said:

(a) It was not submitted that the structure of the GCO proposed by Drake meant that the order sought was outside the power conferred by s 33ZDA.[55]

(b) I accept that in a case of this complexity, that rate is not "outsized", including compared with other GCO rates endorsed by the Court.

(c) I accept that the ratchet structure and dollar values that it adopted were considered and tied to the analysis that Mr Watson had made, as set out earlier. It was not a proposal without a rationale.

(d) However, in respect of the highest of the three percentage rates, the justification was less than persuasive. The essential structure of a GCO aligns the interests of group members and solicitors in obtaining the best financial outcome possible. It was not shown why an additional incentive was needed.[56]

(e) There was force in some of the criticisms of the Drake GCO structure levelled by Huang, that at the lower end of recoveries there may be a risk that the solicitors would derive limited commercial benefit from running the proceeding and on *Drake's own case* (as articulated against Lynch as it were) such an outcome would be contrary to the basis on which a GCO is said to rest. I will infer that Drake's solicitors have balanced the risks and benefits of the element of the composite rate that they have proposed. The point of returning to that criticism is to say that it rather diminished the force of Drake's attack on Lynch.

(f) I accept that aspects of the composite rate are hard to evaluate at this stage of the proceeding (as Jowene submitted). However, at the end of the day, the

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55 See *Beach Energy*, [86]-[102]; *Lieberman v Crown Resorts Limited* [2022] VSC 787, [52]-[53]. Each in the context of a downwards ratchet where the percentage by which costs were to be calculated decreased as the recovery sum increased.

56 The defendant also made that submission.

tiered structure translates to a particular percentage rate for any given recovery sum, and it has been evaluated on that basis.

(g) The defendant submitted that the upwards ratchet structure might cause the solicitors to hold out for a settlement in a range that might delay or stymie attempts to resolve the proceeding within a reasonable range. I would not draw that inference in this case, with these solicitors, although I understand the point.

277 I agree with much of the Contradictors' analysis and also agree with the Contradictors that the issue is finely balanced.

278 Nevertheless, as the analysis set out above shows, the Lynch proposal was, across a wide range of outcomes, ranked best or second-best, on assumptions that I consider reasonable to take into account. I consider that in this case, the funding proposal that, on the available evidence, performs the best across a wide spread of possible outcomes, better serves group members' interests that one that is more closely tied to a view about how the proceeding will resolve.

279 That is not to say that the question of funding should be considered only by reference to comparative modelled returns. The modelled outcomes do not inexorably lead to one result or the other. Jowene's case, for example, was that its rates was still acceptably low but that it offered no financial risk, and its rate structure did not have the complexity of Drake's. I now turn to the question of the firm's ability to resource the proceedings.

ABILITY OF THE FIRMS AND FUNDERS TO CONDUCT THE PROCEEDINGS

280 On the question of funding **Jowene** put in issue the financial wherewithal of the other law firms to meet the obligations they would assume if granted carriage. Jowene's attack was predominantly focused on Slater & Gordon's bid to conduct the Lynch proceeding. The other parties did not pursue this point and said that it should be considered a neutral issue in the carriage contest.

Slater & Gordon – Lynch's Funding Proposal - the Issue and the Submissions

281 Lynch is seeking a GCO which will require Slater & Gordon to pay any security for costs and meet any adverse costs order. If granted carriage, Slater & Gordon will fund the proceeding from its working capital and will, in the first instance, seek to deal with security by executing a deed poll in favour of the defendant. The form in which any security must be given by the party awarded carriage is necessarily yet to be agreed by negotiation between plaintiff and defendant or determined by the Court.

282 The analysis of Slater & Gordon's balance sheet was given context by Jowene's overarching submission that because of the risks inherent in Lynch's funding proposal, it is *not as attractive or balanced* as the package advanced by Jowene which, it said, gives rise to no appreciable financial risk. The same criticism was made of the other firms, but with significantly less force.

283 As Jowene put it, Slater & Gordon requires recapitalisation. It is unable to pay its borrowings or interest from its operating cash flows and remains heavily geared relative to operating cash flows being generated by the business. Those facts are plain from Slater & Gordon's published financial statements. Slater & Gordon was, until 28 April 2023, ASX-listed. All of Slater & Gordon's shares were at that time acquired in an off-market takeover by a wholly owned subsidiary of **Allegro** Funds Pty Ltd. Allegro has stated an intention to re-capitalise Slater & Gordon and to support its business, but its statements are generalised, caveated and non-binding and there is no evidence before the Court that Slater & Gordon has in fact been recapitalised.

284 As discussed in *Lay v Nuix*,[57] in a comparative analysis directed to identifying which among competing funding proposals best protects and advances the interests of group members, the costs impost of each proposal is one part of the equation, but the wherewithal to fund and conduct the proceeding is also relevant. Litigation outcomes require not only the containment of costs, but the application of significant resources. Those resources include very significant financial outlays and legal personnel with

57 *Nuix*, [83].

appropriate skills and experience. In *Nuix*, where the capacity of one proposed plaintiff to fund the proceedings was genuinely in contest on the evidence, I concluded that it was for that plaintiff to demonstrate that the funders who sought to invest in the proceeding, and make a return they judged adequate, could sustain their end of the bargain by supplying adequate resources.[58] Those considerations are relevant to the question of carriage, given the interrelated nature of the GCO proposal with the multiplicity question.[59]

285 It was not submitted that Slater & Gordon was insolvent or that the firm could not pay its staff to do the work to run this case. Jowene's submission concentrated on the fact that Slater & Gordon would be required to pay disbursements and meet any order for security for costs. Jowene submitted that I should find that there is a risk of Slater & Gordon not being able to pay its disbursements and meet a request for security and progress the case in the way that it needs to be progressed in order to put the defendant to serious challenge. It said that the relevance of the risk is that the Court ought be satisfied *now*, that the funding and security arrangements will be adequate throughout the life of a proceeding of this magnitude and that Slater & Gordon have not established on the evidence that the costs required to be borne can be borne.

286 Jowene made a separate but somewhat related point, that the comparatively low GCO rate sought by Slater & Gordon risked making the proceeding uneconomic for the firm, which might invite pressure to settle the proceeding earlier or for a lesser amount than would otherwise have occurred. Jowene said that having regard to Slater & Gordon's level of indebtedness, its obligations to fund other proceedings and the fact that it is seeking a GCO rate (14%) which is significantly lower than the rate initially

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58 The issue having been sufficiently raised on the evidence by the party pressing the issue, proof the capacity of the relevant firm and funder to conduct the proceeding was within their to produce – see the discussion of the principle in *Blatch v Archer* (1774) 98 ER 969, 970 (Lord Mansfield) in *HQ Café Pty Ltd v Melbourne Café Pty Ltd* [2023] VSCA 200, [168]-[171].

59 On this issue, regard should be had to the discussion in *Nuix* and in *Bogan* about the relevance of the financial viability issue, including the proposition that a requirement that a proceeding in which a GCO is sought should be shown to be financially viable ought not be deployed as a bar to the continuation of the proceeding, preventing group members from vindicating their rights. As in *Nuix*, that issue does not arise in this case, where multiple plaintiffs are vying for the right to conduct the proceeding (see *Nuix*, [74]-[77]).

proposed (22%), Jowene's proposal is a more balanced and stable alternative that carries no financial risk for group members, and still offers an attractive GCO rate (17%).

287 **Lynch** submitted that the evidence does not support the findings for which Jowene contends and there is no basis for a concern about Slater & Gordon's financial capacity to fund the proceedings, for these reasons:

(a) Slater & Gordon has a long established history and reputation as a leading plaintiff law firm.

(b) Its most recent audited financial statements demonstrate that it has significant resources from which to conduct the proceeding and meet any financial obligations assumed by reason of a GCO being granted. The firm's balance sheet records that the firm has a positive net asset position of $200.74 million, including $13.8 million in cash and cash equivalents and has cash net asset or net debt positions that are roughly comparable to Shine and Maurice Blackburn.

(c) Slater & Gordon has been recently acquired by Allegro, who has assets under management in excess of $4 billion and has publicly stated that it intends to ensure that the firm has necessary cash and liquidity to sustain its core business and support an appropriate level of investment (to be determined in class actions). Allegro supports Slater & Gordon's intention to reduce the facility such that the whole of the debt is forgiven in the short term and is committed to Slater & Gordon's class action practice and has stated that it supports the funding and expansion of that part of the business. Significantly, Allegro has acquired an interest in a significant majority of Slater & Gordon's super senior facility such that it can effectively control any enforcement by lenders or compliance by Slater & Gordon under the terms of that facility.

(d) The evidence suggests that Allegro's acquisition of Slater & Gordon is likely to have a favourable impact on Slater & Gordon's day-to-day business operations, particularly in respect of its class actions practice.

(e) Ms Pelka-Caven has provided a detailed explanation of the firm's class actions portfolio plan, which operates within well-defined and disciplined parameters in respect to the funding of proceedings and attendant risks. It is Ms Pelka-Caven's opinion that **[redacted]** is sufficient to properly resource **[redacted]** the Lynch proceeding.

(f) Slater & Gordon is required to file publicly audited financial statements annually. The transparency of Slater & Gordon's future financial position ought to "satisfy the Court that it will be in a position to exercise its supervisory jurisdiction in favour of group members whether it be on its own motion or following any application by Star should any concern arise." It was unclear what was meant by that submission. I did not read it as suggesting that the Court should adopt an ongoing own-motion monitoring role throughout the life of the proceeding, to ensure that the appointed firm was not at risk of failing to fund the litigation. The question of transparency about financial arrangements is of particular relevance on a carriage dispute at the point in time at which the Court decides that dispute.

288 The Contradictors initially submitted that the financial resources question does not require the Court to embark upon on any estimate of future financial performance or prospects of the funder, because the future will always be uncertain, and that sort of enquiry is just not apt for purpose on an interlocutory hearing of a carriage dispute. The Contradictors ultimately accepted Jowene's submission that when considering financial means (where that issue is in contest) it is necessary to look into the future to some extent because a case of this kind may take four or five years to come to fruition. I accept that where the question of the financial viability of the funder (i.e. a law firm or litigation funder) is not merely asserted but genuinely put in contest on the

evidence, a forward-looking inquiry may be relevant and necessary. However, on an interlocutory application of this kind, raising the comparative evaluation between firms that it does, that inquiry must have its limits. To examine and draw conclusions about all possible or even foreseeable risks to a funder's prospects over the course of the proceeding would, at least in this case and in probably in most cases, drive the inquiry into speculation and wasted resources. The parameters of the inquiry, where it is relevant in a particular case, will necessarily be determined by what the evidence permits.

289 In this case, the gravamen of the financial risk point was that Slater & Gordon was unable to pay its borrowings or interest from its operating cash flows and the evidence about its restructuring is insufficient to answer the concern that there is a real risk that the firm will be able to carry the financial obligations it must assume if it conducts the proceeding. Jowene's submission was addressed to *risk*, but implicitly, risk in this context must be a real and not fanciful and founded in the evidence rather than merely asserted.

290 The Contradictors submitted that it is open for the court to find that each firm has the means to fulfil their obligations under the proposed funding models. In respect of Slater & Gordon they did so by pointing to the same facts on which Lynch relied, emphasising that on the evidence, it could not be concluded that there is some manifest problem or difficulty with Slater & Gordon recapitalising or refinancing its debt in due course.

Slater & Gordon – Lynch's Funding Proposal - the Evidence

291 No issue was taken with the long history of Slater & Gordon, an unqualified auditor's report and the director's belief that the business was a going concern. Jowene's point was directed to the debt problem disclosed in the accounts. As Jowene put it, whilst the financial statements make clear that Slater & Gordon has been meeting its debt obligations, it is significant that the notes to the accounts record the important

qualification that the group had significant debt facilities with *nothing undrawn* as at January 2023. The financial statements as at 31 December 2022 reported:

(a) Total current assets of $205.285m including $13.802m in cash or cash equivalents; current liabilities of $83.996m; net assets of $200.747m;

(b) Net profit after tax of $16.695m;

(c) That for the period the company produced only $756,000 net cash from operating activities;

(d) Non-current liabilities $184,516,000 of which "financing arrangements" accounted for $111.302m. Total borrowings at 31 December 2022 were $111.8m of which current liabilities were $0.5m. Covenants in respect of borrowings had been complied with. The directors' assessment of the appropriateness of the going concern assumption took into account the group's debt maturity profile (among other things).

(e) Financing arrangements comprised a super-senior debt facility of $65m and a term loan of $30m. At 31 December 2022 the balance of the super-senior facility, with capitalised interest, was $86.5m nothing left undrawn on the facility. The facility will terminate on 31 October 2024. The interest increased on 1 July 2022 and will increase every 6 months thereafter. Interest was payable in cash to 30 June 2023 but would thereafter be capitalised. The notes to the accounts stated that part repayments of the facility may be required based on cash holding at 31 December 2022 and 20 June 2023. The term loan will terminate on 10 December 2024. It is subject to a fixed interest rate with interest payable monthly in arrears. The term loan was completely drawn down by January 2023.

(f) Net assets of $13.8m were offset by net debt of $130.7m (including lease liabilities of $18.9m) resulting in net debt of $116.9m. The group's net debt

position had increased since 30 June 2022 by $2.7m, which was attributed to lower cash on hand and interest capitalised to the super senior facility.

292 In short, Slater & Gordon was, at 31 December 2022, heavily geared with no further borrowing capacity in its facilities. Jowene emphasised that while it was not submitting that Slater & Gordon was insolvent, its facilities were exhausted and its operating cashflows were insufficient to enable to it to pay borrowing and interest commitments. I agree that so much was established on the financial statements. The evidence was that since that time there has been no material adverse change to the company's net asset position.

293 The real question is what difference Slater & Gordon's recent restructuring made to its financial position.

294 Between 1 May 2007 and 28 April 2023 Slater & Gordon was listed on the ASX. On 24 February 2023 it published its financial report for the half year ending 31 December 2022. On 4 February 2023 Slater & Gordon entered into a bid implementation agreement with Allegro for a recommended off market takeover offer of Slater & Gordon by funds managed by Allegro. The bidder's statement prepared by Allegro indicates that Allegro, founded in 2004, has assets under management in excess of $4 billion. Allegro's substantial financial backing was not in contest. Slater & Gordon was removed from the official list of the ASX on 28 April 2023 following compulsory acquisition of all of its then remaining shares by Wright Nominee Co Pty Ltd, a wholly owned subsidiary of Allegro.

295 In its target statement,[60] Slater & Gordon's board of directors unanimously recommended that its shareholders accept the bid offer. The content of the target statement (as with Allegro's bidder's statement) was expressed to be forward-looking and was caveated by warnings that shareholders should not place undue reliance on it. Nevertheless, the target statement was evidently intended to express and said to

60 Filed by Slater & Gordon under Part 6.5 Division 3 of the *Corporations Act 2001* (Cth) in response to the Allegro offer.

express the considered position of the Slater & Gordon board. It emphasised (among other considerations) that the offer could be assessed as fair and reasonable because of the then present risks to Slater & Gordon's financial position. The directors adopted a report of an independent expert to which reference was made in the target statement, which had concluded that an acquirer of Slater & Gordon would need to recapitalise the business to achieve a sustainable level of debt because Slater & Gordon was highly geared and operating cashflows were currently insufficient to enable it to repay borrowings and pay interest. The statement reported that there was significant refinancing risk in the current environment. Those factors made Allegro's offer compelling, the statement said, by reference to the expert report. The material established that a substantial reason for Slater & Gordon's board recommending the Allegro offer was the need to solve the debt problem and the opportunity to do so that the take-over offer presented.

296 Allegro's bidder's statement (delivered with the caveats I have mentioned above) set out Allegro's intentions in relation to Slater & Gordon which relevantly included reviewing its capital structure, anticipating a rectification of the existing super-senior facility to reduce its current and onerous servicing requirements, and ensuring that Slater & Gordon has necessary cash and liquidities to sustain its core business and supporting the business with a more efficient and stable capital. Allegro stated that it had entered into debt purchase deeds giving it the right to acquire debt interests from Slater & Gordon's super-senior facility lenders.

297 Ms Pelka-Caven gave evidence of matters about which she had been informed by the Chief Executive Officer of the Slater & Gordon (John **Somerville**, the CEO since February 2018) after the take-over. Relevantly, Allegro has entered into debt purchase deeds with certain lenders that make up more than 75% of debt value in respect of their holdings under the super senior facility. Ms Pelka-Caven was informed that "under the debt purchase deeds and related agreements governing the Super Senior Facility, Allegro's rights and interests are such that it can effectively control the exercise of a number of lenders' rights under or in connection with the Super Senior

Facility, including controlling the exercise of certain enforcement rights and remedies (including in cases of any default or review event); waiving compliance of certain obligations of Slater & Gordon under the terms of the relevant agreements governing the Super Senior Facility and agreeing to the amendment of certain terms of relevant agreements governing the Super Senior Facility." The relevant deeds and agreement were not in evidence.

298 Further, Mr Somerville informed Ms Pelka-Caven that, "Allegro has indicated to Slater & Gordon's management that it is supportive of Slater & Gordon's intended proposals to the lenders to drastically reduce the Super Senior Facility such that the whole or substantially the whole of the debt is forgiven in the short term, or to undertake some other form of restructuring that achieves a similar outcome" and that Allegro is committed to Slater & Gordon's class actions practice and had stated its support to funding and expanding that part of the business.

299 Lynch submitted that it is a fact that by the takeover, Slater & Gordon has been restructured. Next, the intention to recapitalise is not a bare intention or a statement to shareholders seeking to elicit their approval. Allegro has taken real, concrete steps toward the re-capitalisation of Slater & Gordon by entering into the debt purchase deeds with lenders representing more than 75% of the outstanding Super Senior Facility.

300 Lynch put in evidence a letter from Adrian Loader, the founding partner of Allegro addressed to Ms Pelka-Caven, dated 28 June 2023 (the second day of the hearing of the present application). The letter said relevantly that:

> Allegro confirms that, as at the date of this letter and subject to customary company board and Allegro investment committee approvals, Allegro has and will continue to have sufficient funds available to fund equity commitments required to support Slater and Gordon's operational and growth objectives in full from time to time under Allegro's ownership.

301 Mr Loader said that Allegro "fully understands" Slater & Gordon's class action practice, including the long-dated nature of certain class action proceedings, and considers that segment of the business to be materially favourable and attractive to it,

with other parts of the business providing a comparatively steadier and consistent source of revenue. He said that Allegro is aware that where a GCO is made Slater & Gordon will not receive any payment of legal costs unless and until there is a successful outcome in the proceeding and it is required to meet and carry the ongoing costs of the litigation. It understands that those costs include disbursements and labour costs that are significant, usually in the order of millions of dollars, and that the typical duration of a class action proceeding may be several years. Lynch accepted that the letter did not evidence a legal obligation on Allegro to provide financial support to Slater & Gordon or in respect of this or any other proceeding; rather, it is a statement of intention that is consistent with Allegro's public (also non-binding) statement of intention made in its bid-statement.

302 Jowene accepted, as did the Contradictors (and as do I), that the evidence establishes an intention on the part of Allegro to re-capitalise Slater & Gordon. Jowene submitted that evidence of present intention does not take the matter very far. It emphasised that Slater & Gordon elected not to call any witness on this issue, and that there was accordingly no opportunity to explore the statements in the Allegro letter that were ambiguous and heavily qualified. There remained a deficiency of evidence about what has occurred now that the takeover has been implemented.

303 The facts then are:

(a) Before the Allegro takeover Slater & Gordon could not service its debt; recapitalisation was required to reach a sustainable level of debt. That is the issue in play.

(b) Slater & Gordon has been restructured. 100% of its shares have been acquired by a wholly owned subsidiary of Allegro. Allegro has very significant assets.

(c) Allegro presently intends to recapitalise Slater & Gordon and has the financial means to do so.

(d) Allegro's intention is consistent with its acquisition of Slater & Gordon as a going concern and as a business that Allegro has publicly stated it intends to support.

(e) Allegro is not legally obliged to re-capitalise Slater & Gordon. It has not promised to do so.

(f) Lynch adduced admissible hearsay evidence on application that Allegro has, by debt purchase deeds (that were not themselves in evidence) acquired interests in debt by which it says that it can effectively control the exercise of certain enforcement rights and remedies including in cases of any default or review events, waive compliance with certain (unspecified) obligations of Slater & Gordon under the terms of the agreements governing the Super Senior facility and agree to the amendment of certain (unspecified) terms of relevant agreements governing the facility. That Allegro has entered into those deeds is consistent with its stated objectives in seeking to acquire Slater & Gordon, namely to ensure that Slater & Gordon has the necessary cash and liquidity to operate its business.

(g) Allegro has stated that it intends to ensure that Slater & Gordon is adequately capitalised and that it supports its class actions practice, understanding the long-tail nature of those investments and the risks inherent in proceedings of that kind. Its statements are not binding. In the letter that it had prepared for the purposes of this application, its statements of intention were given in qualified language – limited to present intention, subject to board and committee approvals.

304 This issue goes to the viability of Slater & Gordon as a whole. The risk to which it is addressed is that the company will not be able to fund its operations during the life of this proceeding.

305 Had the re-structure of Slater & Gordon not occurred, a realistic prospect of prejudice to group members' interests would arise were Lynch awarded carriage, meaning that the capacity of the firm to conduct the proceeding would be an appreciable risk. However, the circumstances of the re-structure and the evidence going to the intended recapitalisation of Slater & Gordon as set out above, are such that in my view, taking a commercial commonsense approach to the weighing of the evidence, it has not been shown that there is a real risk that the firm will not be able to pay disbursements and meet a request for security and progress the case in the way that it needs to be progressed in order to put the defendant to serious challenge.

306 Lynch was justifiably criticised for its approach to the evidence, which involved the late application to submit further evidence, that might have been given more directly. I have considered that issue, but it does not ultimately detract from the evaluation of the evidence that I have made.

307 Jowene submitted that the financial risk in awarding carriage to Slater & Gordon was also evident from the fact that the firm is already conducting a number of class actions on a GCO basis and others on a no-win no-fee basis. The accumulated burden of conducting those proceedings was, it submitted, liable to place financial stress on the firm. Elsewhere in these Reasons, reference is made to the budgets prepared by each of the firms. It suffices to say that as Jowene observed, it has been observed by other courts that it is not uncommon where the issues in a group proceeding are complex and heavily contested, for the disbursements bill to run into many millions of dollars.

308 As to the expenses associated with this proceeding itself, Ms Pelka-Caven's evidence was that Slater & Gordon has a considered plan developed by senior practitioners within the department and management, which includes parameters for the management and funding of its cases. The plan was more particularly described in the considered evidence of Ms Pelka-Caven. I am satisfied, on the evidence which I need not set out here, that Slater & Gordon has taken care to ensure that this case meets those parameters, and that the firm adopts a robust and sophisticated approach

to the management of risk on a case-by-case basis. The firm's budget is, on Ms Pelka-Caven's evidence, sufficient to properly resource this case and the cases of which the firm presently has conduct. I accept that evidence. It does not itself answer the broader point made by Jowene, because it assumes that the firm will be able to fund its operations and will have sufficient liquidity to conduct its matters in accordance with the assessments made by its practitioners about what resources are needed.

309 It is not possible to draw any particular conclusion from the point made about Slater & Gordon funding numerous cases. It was not demonstrated that any particular cashflow burden arising from the need to fund disbursements or security would have a particular result. The submission was allied to Jowene's primary proposition about the firm's overall financial risk and was directed to showing that by assuming conduct of this proceeding (and others) the firm was incurring and would incur real and substantial financial expenditure, for which it required adequate liquidity.

Lynch and Slater & Gordon – Loss Leading and Economic Viability?

310 Both Drake and Jowene submitted that Lynch's proposed rate of 14% was driven by competitive forces rather than **[redacted]**. This was an economic viability argument of a different kind. If the reward to the firm was too low, so the argument went, the firm might be disinclined to put the defendant to serious challenge; **[redacted]**. Drake put the submission this way:

> [Slater & Gordon's] GCO rate of 14% … is a loss-leading rate, which in turn suggests that what Slater and Gordon is doing in putting it forward is to buy market share by gaining carriage regardless of the cost. That alone is enough to disqualify it from serious consideration by the Court as an appropriate Group Costs Order rate. … **[redacted]**.

311 Under case management orders intended to contain the volume and complexity of the material submitted on this application and to require each party to put its best foot forward early in the process, the parties were directed to file short statements of position on the key issues likely to be in dispute, and afforded one opportunity to re-submit, having seen their competitors' statements. Slater & Gordon initially

proposed a rate of 22%. It was submitted that the substantial reduction in the GCO rate initially proposed supports the conclusion that the rate was driven by a desire to win the contest (loss-leading behaviour), and not by a view that the rate was sustainable.

312 Slater & Gordon modelled the net returns to the firm based on a range of different resolution sums and timeframes, employing notional hourly rates for each fee earner category reflective of the *actual cost* to the firm **[redacted]**. The modelling, then, quantified estimated **[redacted]** in conducting the Lynch proceeding. **[Redacted]**. As set out in the evidence (and to state the matter only very generally) any firm granted carriage **[redacted]**. Lynch submitted that across the range of modelled outcomes the proposed rate would **[redacted]**, the net return to Slater & Gordon **[redacted]**. Although the modelling did not address outcomes below **[redacted]**, depending upon the resolution sum, **[redacted]** would produce a return of **[redacted]**. To state the obvious, as a result of the method of calculating costs under the GCO, returns were significantly better, the higher the resolution sum.

313 Ms Pelka-Caven gave evidence in some detail about the basis on which the GCO rate was proposed by the firm, and how the firm's analysis and position evolved. Her evidence was that **[redacted]**. Significantly in my view, the evidence was that the firm considers issues of financial viability by reference to **[redacted]**. That means that **[redacted]**. It was not submitted that that was a commercially irrational or unusual approach for a litigation firm to adopt. On the evidence, that approach did not appear commercially unsound. The firm and its now owners evidently place a commercial value on the firm being able to conduct significant class actions including for shareholders and that value is assessed and pursued in a whole of its business context.

314 Lynch submitted, as did the Contradictors, that competition is a good thing and if it produces lower fees, that is in the interests of group members.

315 The question, in my view, is whether a fee proposal **[redacted]**, has been shown to be unsustainable from an economic perspective. That is so, because it would not be in

the interests of group members to award carriage to a firm who was demonstrably unable to sustain carriage. There might be cases in which that is demonstrated. In this case the evidence in respect of the 14% rate did not establish that conclusion. The **[redacted]** rate was carefully considered in the context of Slater & Gordon's practice as a whole and a reasoned decision was made to offer it. There were separate issues concerned with Slater & Gordon's recapitalisation, as discussed.

316 To return to the Drake submission, there were a number of difficulties with the argument advanced.

317 First, I do not accept that the offer of a particular rate that is expected to be lower than a competitor's rate, can be fairly characterised as "*employing the provision* [i.e. section 33ZDA] to buy market share". Lynch was proposing that the matter be funded under that section, and at a particular rate. The language, "buying market share" did not add to the analysis. It was asserted rather than demonstrated by reference to the language and context of s 33ZDA of the *Supreme Court Act*, that the legislation does not permit plaintiffs and legal practices to seek GCO rates that are intended to be competitive, where a contest between plaintiffs is to be decided.

318 Second, it was asserted rather than demonstrated, that the Court must exclude rates that appear "too low", so as to ensure that the law firm concerned is earning a return proportionate to its risk. As has been said in other cases, s 33ZDA implicitly permits the linking of risk and reward in the calculation of a GCO and that it follows from the text that the calculation of legal costs in the manner permitted by s 33ZDA may properly take into account not only the value of legal services performed, but the assumption of financial risk by the law practice. A corollary of the statutory model is that it permits the legal practice to benefit from the upside as the damages recovered increase proportionally to the costs incurred and, at the same time, allows a plaintiff and group members to mitigate any risk that their compensation, if recovered, will be eroded by costs calculated at a percentage greater than that specified in the GCO.[61] It

61 See *Nuix* at [70]-[73] and the cases cited therein.

does not follow, however, that s 33ZDA means to preclude a legal practice seeking a GCO deciding to moderate or even minimise its potential reward to increase the likelihood that it will win carriage of a proceeding. No substantial textual analysis was advanced in support of that proposition. Even if Drake's proposition were accepted, given the evidence about the manner in which Slater & Gordon did assess the rate to be offered and its commitments required for this proceeding, there was no proper basis on which to conclude that some other rate was necessary in order to ensure that the reward was *proportionate* to the risk being assumed. The argument failed at the evidence threshold.

319 The proposition that Drake advanced was not shown to derive from the statute itself. However, I should not be read as suggesting that the issues raised by Drake are irrelevant on an application of this kind. I agree, as I have said, that there may be cases where **[redacted]** would not be in the interests of group members. Furthermore, as a general proposition the attitude and behaviour of a party or law practice including on the question of funding, might inform the resolution of a carriage contest.

320 Third, I agree with Drake that one can imagine that a law practice that knows that one case is being run at a lower rate than others, might be incentivised to divert resources into more profitable areas of the practice. However, the evidence did not establish that risk in this case. It would be unsound to draw conclusions about future behaviour or by doing so, to entrench profit expectations, without a sufficient evidence base.

Maurice Blackburn and Drake

321 Jowene submitted that while the position is not as readily apparent as for Slater & Gordon, there is uncertainty regarding Maurice Blackburn's ability to meet liabilities that may arise in a proceeding. While Maurice Blackburn's balance sheet for the financial year ended 30 June 2022 reports net assets of $210.9m, approximately 90% of that amount was held work in progress (**WIP**) as a current asset with a further $89.6m in WIP as a non-current asset. Maurice Blackburn is acting in at least five proceedings conducted on a GCO basis. In at least seven class actions in which it is acting, Maurice

Blackburn is not sharing its financial risk with any other firm or third-party funder. Jowene acknowledged that Maurice Blackburn has a $30m undrawn facility and that the financial risk issue was of less potency in respect of Maurice Blackburn.

322 The evidence was that Maurice Blackburn's audited consolidated accounts for the financial year ended 30 June 2022 demonstrated net assets of approximately $211m, cash and cash equivalents of approximately $12m and an undrawn loan facility of approximately $30m. Mr Watson gave evidence concerning Maurice Blackburn's case selection process and **[redacted]**. Relevantly, Maurice Blackburn's business is not confined to its class action practice and it has other elements including its personal injuries practice and litigation funding business which provide the firm with additional streams of income.

323 It was not shown that the fact that a substantial proportion of the net assets of a litigation firm is held in WIP is of itself indicative of a lack of financial stability.

324 I was not persuaded on the evidence that there was any demonstrated risk that Maurice Blackburn would not be able to meet the obligations it would assume in conducting the proceedings if it is awarded carriage.

325 Drake's submission on financial standing was that the matter is neutral but that its balance sheet is comparable to Slater & Gordon's without the debt issue, that ultimately Maurice Blackburn and Shine have somewhat comparable balance sheets, and that Maurice Blackburn's balance sheet is "stronger even than Woodsford's" (Jowene's funder).

Huang and Shine Lawyers

326 Shine intends to fund the proceeding on a no-win no-fee basis, from Shine's balance sheet. It does not intend to enter into any agreement with another entity to fund the proceeding.

327 Shine is a wholly owned subsidiary of Shine Justice Limited (**SHJ**), whose shares are listed on the ASX. SHJ prepares consolidated financial accounts for it and its

subsidiaries including Shine. Its current audited accounts record that SHJ had net assets of $281.1m including $23.47m in cash or cash equivalents. By the deed of cross-guarantee to which both SHJ and Shine are parties, any liabilities that Shine might incur in the case are guaranteed by each other entity in the Shine group of companies. Shine proposes then to enter into a policy of "after the event" insurance in respect of the provision of security for costs, which would operate to reduce the risk to Shine's balance sheet. Shine has commenced negotiations to secure a policy and is experienced in obtaining insurance of that kind.

328 Jowene emphasised that SHJ's balance sheet as at 31 December 2022 reports net assets of $636.2m, 75% of which represents work in progress and unbilled disbursements, that cash and cash equivalent components of SHJ's net assets had decreased more than 30% compared with 30 June 2022, and that receipts from customers as a percentage of WIP had been continuously declining from 78.27% in FY15 to 47.79% in FY22. Those movements were explained in Huang's evidence. Shine is presently conducting six unfunded class actions, four of which are on a no-win no-fee basis and the remaining two on the basis of a proposed GCO.

329 Jowene submitted that SHJ has been accruing significant amounts of interest on a third party disbursement funding facility of which $40.5m, of a possible $57.5m had been drawn down at 31 December 2022 with accrued interest of $33.4m. Shine recently sought approval for an amount exceeding $26m to be paid out of a settlement funds to meet accrued interest on that facility.[62] I was informed that it is not Shine's intention to recover interests from group members. The costs and retainer agreement between Shine and the plaintiff in this proceeding does not make provision for the recovery of interest paid to fund disbursements.

330 I was not persuaded on the evidence that there was any demonstrated risk that Shine would not be able to meet the obligations it would assume in conducting the proceedings if it is awarded carriage. Huang submitted that the Court can be

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62 That application was in another proceeding *Gill v Ethicon Sàrl (No 10)* [2023] FCA 228. No party sought to make submissions about the subsequent determination in *Ethicon Sàrl*.

comfortably satisfied that Shine has sufficient assets to fund the proceeding to its conclusion. I agree.

331 Shine submitted that the question of financial viability ought be regarded as neutral, as between the competing plaintiffs.

Jowene, Woodsford and Phi Finney McDonald

332 Jowene seeks a GCO of 17%. Phi Finney McDonald is acting on a no-win no-fee basis in respect of its professional fees.[63] Pursuant to a litigation financial agreement with Woodsford which guarantees the obligations of its subsidiary under the funding agreement with Jowene. Woodsford will pay 100% of all disbursements and indemnify Jowene or Phi Finney McDonald against adverse costs, exposure and agrees to meet any order for security for costs. To facilitate meeting those obligations Woodsford has obtained an ATE policy from AmTrust Europe Limited to be incepted if carriage is awarded to Jowene. Woodsford is obliged to meet any order for security or adverse costs to the extent it exceeds the ATE policy limit. Woodsford Group Limited and AmTrust both have financial positions sufficient to meet Woodsford's obligation to indemnify Jowene and Phi Finney McDonald.

333 Jowene submitted that the effect of the funding arrangements is that Phi Finney McDonald is only required to meet the salary costs of its employees and its associated overheads. Mr Finney's evidence was that Phi Finney McDonald was readily able to meet those costs. Phi Finney McDonald's own financial position was not exposed in the evidence. It was not submitted that there was a financial difficulty in meeting employee costs and overheads. I accept that, as Jowene put it, its proposal is that it is supported by multiple balance sheets and that Phi Finney McDonald's own financial position is not central to its ability to fund the proceeding.

334 It was submitted that the coverage of disbursements, adverse cost and security for costs via a funder and backed by ATE Insurance, combined with a relatively low and

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63 Save that PFM has received $100,000 for facilitating the registration of a managed investment scheme in respect of the proceeding, from the Woodsford Funding (as defined above).

stable GCO rate was in the best interest of group members because it provides the *most balanced and simple* funding proposal.

PROVISION FOR SECURITY FOR COSTS

335 Jowene has obtained an indemnity from its third party funder and an ATE insurance policy from an "A-rated" insurer for coverage up to **[redacted]** (with the potential to extend its limit). That is the only proposal that has presently secured the defendant's acceptance. Huang intends to seek an irrevocable deed of indemnity and an ATE insurance policy with a top-rated insurer with a limit of **[redacted]**. Lynch proposed security by way of deed poll. Drake did not make any specific proposal but is prepared to put up security in any form – including the more onerous forms of a bank guarantee or payment into Court – as is ordered by the Court. Neither Lynch nor Drake proposed engaging an ATE insurance policy. Drake, Lynch and Huang each said that they would comply with any order of the Court as to the method or value of security, and were in a position to do so.

336 Jowene submitted that it was the best vehicle for carriage because there is more certainty to its security arrangement by comparison with the other parties. Jowene has the only security proposal that was acceptable to the defendant, conferring a material benefit on group members by negating the need for negotiations or further interlocutory litigation. The other plaintiffs were at risk of obtaining higher insurance premiums given they would be securing policies in later stages of the proceeding.

337 **Jowene** submitted that the competing proposals were subject to a number of difficulties. The defendant has made it clear that it will not accept a deed poll as proposed by Lynch. That will result in a further cost for the Lynch proceeding. The Lynch and Drake plaintiffs did not propose to secure ATE insurance at all. Huang proposed that its insurance premiums be paid out of the settlement sum or awarded damages, creating uncertainty for group members.

338 The **Defendant** said that the Jowene security arrangement was the only proposal acceptable to the defendant. It was the defendant's submission that agreement

between the carried plaintiff and the defendant as to security would save on protracted negotiations or applications, ultimately saving costs for both parties. The defendant had anticipated seeking a form of security (of either a bank guarantee or payment into Court in the amount of $6.5 million) but none of the plaintiff parties had made proposals in those terms.

339 It was **Lynch's** case that there is no material difference between each of the proposals made by Lynch, Jowene and Drake. Huang, on the other hand, could cost group members **[redacted]** by passing on the cost of ATE insurance.

340 **Drake** submitted that security was a factor of "little significance" to the determination of carriage. Maurice Blackburn would be capable of providing security based on its balance sheet. It did not presently seek to obtain ATE insurance but in the event that it did, Maurice Blackburn would *absorb* that cost.

341 As to the defendant's acceptance of the Jowene proposal, Drake submitted that the defendant should not be permitted to have an "indirect influence" over which party is chosen for carriage and it was not appropriate for parties to "collude" on the matter of security.

342 **Huang's** position was that security was a neutral factor and this issue should not be proxy for a security dispute. All plaintiff parties would provide security in any form as ordered. In response to criticism of its intention to deduct ATE insurance costs from the pool, Huang submitted that its modelling accounted for the deductions. **[redacted]**.

343 The **Contradictors** submitted that this factor should be treated as neutral in the Court's determination. The Contradictors did not accept that Jowene was distinguishable or that its proposal was "more liquid" than the other proposed security arrangements. They submitted that none of the plaintiff parties' proposals were materially different from each other, save for Huang's proposal that its insurance costs be deducted from the settlement sum or awarded damages. It was put that on one hand, it would be

desirable and more cost-effective for group members to not have a dispute over security with the defendant. On the other, it would not be in the group members' best interests to obtain ATE insurance if it were not necessary.

344 The Contradictors submitted that Lynch's submission that security was of little significance was cast too broadly. However, they distinguished this case from *Nuix* in which the potential financial impost of the provision of security was relevant in circumstances where one of the plaintiff parties had joined many more defendants than the other plaintiffs and its firm's financial position was opaque.

Consideration

345 On balance I consider security to be a largely neutral factor.

346 I accept that on the Jowene proposal the question is settled.

347 The costs of negotiating about, or litigating, the security question are absorbed into the parties' respective funding proposals. Accordingly, while Shine intends to recover the cost of an ATE policy from group members, that cost is factored into its proposed budget, which has been separately compared with the other proposals. Similarly, the cost of Drake or Lynch resolving the security question with the defendant (whether that occurs by negotiation or requires a court determination) will not be separately recovered against group members but will be remunerated by the overall fee to be calculated on a GCO basis. I accept that the Jowene proposal affords the advantage of not having to spend time negotiating in respect of security. I doubt that the need to resolve security will add materially to the overall lifespan of the proceeding and when it can be mediated, fixed for trial or both.

Part D: Conclusion

348 I return to the evaluative assessment required of the Court on this application.

349 For reasons that I need not re-state, despite the lengthy and detailed evidence given, a number of the qualities of the respective proceedings and their legal teams did not appear to me to be a sound basis on which to distinguish between the offerings.

350 The differences in experience and the formulation of claims might have weighed more heavily in other comparisons but as I have said, all legal teams are competent and experienced and all have devoted considerable time, effort and resources to conducting the proceedings to date. I could not confidently conclude that one legal team would do a materially better job than another, in serving group members' interests.

351 Lynch and Drake issued proceedings more expeditiously than Jowene and Huang but that is, in this particular context, a difference of minor significance.

352 The principal substantive difference between the proposals concerns funding. For the reasons given, I have not accepted Jowene's submission about Slater & Gordon's financial position. It was a relevant point to make, but it was sufficiently answered on the evidence. I have also concluded that the Lynch proposal was, across a wide range of financial outcomes, ranked best or second best (depending upon the resolution point at which the comparison was made), on assumptions that I consider reasonable to adopt. It also had the inbuilt structural advantages afforded by a GCO that I consider relevant in this case, for the reasons discussed.

353 The Contradictors submitted that it would be open to the Court to appoint any one of the four firms, but on balance their recommendation, which they said was a difficult one to make, was to appoint Slater & Gordon.

354 Like the Contradictors, I consider the issue to be finely balanced and, like the Contradictors, in the end it is my view that the more attractive funding proposal should carry weight in the evaluative exercise, having regard to the views I have reached about the other considerations, and weighing all factors together.

355 Although I have decided the issue this way, as the foregoing reasons ought demonstrate, the result has not been determined by the identification of the "best price" alone. Considered wholistically, the offerings are very close and all attractive in their own way, and the price difference has been accorded weight because it presents a balanced advantage which is material, albeit not one of great magnitude.

356 It is evident that competitive forces have delivered in this case, what presents as a very good deal for group members. I have rejected the arguments that the role that competition has played in this outcome should be deprecated. I have done so in circumstances in which detailed and considered evidence has been given by the solicitors about their funding of the proceeding, their accounting for risk and their provisioning for the proceeding. That is not to say that as a general rule the result of competition is an unalloyed good, or that less costly is by any means, always better. A unsustainable funding proposal, or one that advances a cheaper rate but with other substantive disadvantages, will be assessed accordingly.

Part E: Group Costs Order – DA Lynch Proceeding

357 Much of what is relevant to the exercise of the power to grant a GCO has been addressed in the consideration of the carriage dispute. It will suffice to enumerate my conclusions:

(a) The Lynch proceeding represents as an appropriate vehicle and, for the reasons given, the best vehicle for the progression of group members' interests in respect of the proceedings against Star.

(b) There are no established concerns that Slater & Gordon is not in a position to fund its obligations and properly resource the proceeding.

(c) In that proceeding, in which Slater & Gordon proposes to fund the proceeding by a GOC fixed at 14% of the recovered sum, the plaintiff is not the beneficiary of a contractual arrangement that would place it in a better position.

(d) The GCO rate is, *prima facie*, reasonable. It is in fact, by some measure, the lowest GCO rate that this Court has ordered to date and compares favourably to historical rates for third party funding.

(e) Evidence about the returns to the solicitors was given on a confidential basis. Aspects of that evidence are described above. At a later stage (at least, on any settlement approval application), further evidence about the returns to the solicitors will be required to ensure that the approved rate does not deliver a disproportionate return to the solicitors. The evidence to date does not suggest that there is a real likelihood of that occurring.

358 I consider that it is appropriate, in order to ensure that justice is done in the proceeding, to make the GCO sought by Lynch.

Part F: Huang's Re-Opening Application

359 Huang sought leave to reopen his case to adduce additional evidence that he said had emerged since the hearing of the multiplicity application and is relevant to the costs which may be reasonably expected to be incurred in the Huang Proceeding. In the event that Huang is granted leave to adduce this evidence, Huang relies on it to support the proposition that the costs he might incur in prosecuting this proceeding are unlikely to exceed the Further Amended Shine Budget, and if they do, are unlikely to do so in an amount that materially reduces the prospect that Huang's NWNF funding proposal will provide the greatest return to group members for resolution sums in the range of likely outcomes.

360 The proposed new evidence concerns the AUSTRAC proceeding. The evidence itself consists of statements made by Star's Senior Counsel[64] at a case management hearing in that matter on 14 July 2023 (as recorded in transcript), orders of the Federal Court of Australia in that matter dated 13 February 2023, summary of the allegations in the AUSTRAC proceeding prepared by Shine which are said to be similar to allegations

64 Different counsel are briefed for Star in this case and the AUSTRAC proceeding.

made in the class action and Mr Allsopp's opinion as to the consequences for the Huang class action if certain events transpire.

361 In the proposed new evidence, Huang advances three contentions:

(a) the progress of the AUSTRAC proceeding indicates that Star will make admissions or agree to certain facts underlying the alleged contraventions of the AML/CTF Act, concerning which there is overlap with the Huang proceeding;

(b) if those admissions are made in the AUSTRAC proceeding, they may also be made by the defendant in the Huang class action; and

(c) if such admissions are made in the Huang proceeding, "there would likely be a material reduction" in the costs Huang will incur in the class action.

362 Huang's ultimate submission was that the proposed new evidence supports the conclusion that the Huang proceeding is likely to offer the best return to group members, and the criticism of the reliability of the Huang funding proposal is unwarranted.

363 The application was made on the basis that the evidence was new. The recognised classes of case in which a Court may grant leave to re-open a case before judgment is entered include where fresh evidence has emerged.[65] As the High Court said in *Smith v New South Wales Bar Association*:[66]

> If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to inquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application.

364 In every case, the overriding principle to be applied is whether the interests of justice are better served by allowing or rejecting the application for leave to re-open.[67] Within

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65 *Owies v JJE Nominees Pty Ltd (in its capacity as the trustee of the Owies family trust)* [2021] VSC 14 (***Owies***), [14] and the authorities cited therein.

66 *Smith v New South Wales Bar Association (No 2)* (1992) 176 CLR 256, 266-7.

67 *Owies*, [14].

that consideration, the criteria for determining whether to exercise the discretion to grant leave to re-open the evidence where an application relies on fresh evidence have been expressed this way:[68]

(a) whether the further evidence is so material that the interests of justice require its admission;

(b) whether the further evidence, if accepted, would probably affect the result of the case;

(c) whether the further evidence could, by reasonable diligence, have been discovered earlier; and

(d) whether any prejudice would ensue to the other party by reason of the late admission of the further evidence.

Fresh Evidence?

365 Drake and Lynch submitted that the further evidence fails at the first hurdle because it does not constitute fresh evidence. The first stage of enquiry, then, is the explanation as to why the further evidence was not called at the hearing of the multiplicity applications on 27 and 28 June 2023. The explanation proffered by the Huang plaintiff is that it was not then available.

366 The "new" evidence comprised statements made by Senior Counsel for Star at a case management hearing in the AUSTRAC proceeding before Lee J on 14 July 2023, to be read in context of the fact that Lee J had ordered the parties to confer under the supervision of a Registrar and attempt to reach agreement as to the facts genuinely in contention and not in contention. The transcript of the hearing recorded the following, in substance:

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68 *Owies*, [14]; *Flash Lighting Company Ltd v Australia Kunqian International Energy Co Pty Ltd (No 4)* [2018] VSC 823, [123]; *Reid v Brett* [2005] VSC 18, [41].

(a) Senior Counsel for AUSTRAC said that the conferral process had been very productive, that the parties wished for it to continue and were seeking orders for a mediation. The parties expected to substantially narrow the issues, perhaps to the point where there remained no or very few disputes;

(b) Senior Counsel for Star said that Star had delivered AUSTRAC a proposed statement of agreed facts and admissions. The document at that stage remained "without prejudice". After the process including mediation was completed, the parties might have agreed everything, or substantially agreed all the facts going to contravention, or agreed most of the facts going to convention with some issues requiring determination. They expected to have reached a position by November 2023.

367 Huang described the proposed new evidence as concerning *the progress of the AUSTRAC Proceeding*, and specifically the "update" given to the Court that there was a "high likelihood" that the parties "would reach agreement of background facts that would leave a limited number of issues in dispute, if any" in respect of the alleged contraventions of the AML/CTF. Given the nature of the evidence – a report to the Court of what was occurring between the parties on a without prejudice basis – the proposition is more appropriately expressed this way: that *as at July 2023 Star and AUSTRAC considered that there was a real likelihood that they would reach agreement on the issues in the AUSTRAC proceeding including as to alleged contraventions, such that it was likely there would be a limited number of issues in contest, if any. However, they had not yet reached that agreement and the final form of the anticipated agreement was not known*. I note that Lee J described the view that everything would be agreed, as "panglossian".

368 Drake submitted, and I agree, that nothing in the transcript revealed with any specificity the content of the foreshadowed admissions or agreed facts, excepted that they were to be directed to "agreeing foundation of contraventions and circumstances fitting into the contraventions" (as was put by Star's Counsel).

369 Drake submitted that to the extent that there is a prospect of Star making admissions in the AUSTRAC proceeding that concern the underlying conduct giving rise to contraventions of the AML/CTF Act, that prospect had been present since the Bell Review. Drake set out a number of concessions and admissions made by the Star entities, through its senior counsel, in closing submissions to the Bell Review, taken from the transcript of the relevant hearings. Jowene made a similar submission by reference to the Bell Report. I need not set out the concessions to which Drake drew attention, but I agree that they traverse matters pleaded by the plaintiff parties in the present proceedings.

370 Lynch submitted that what occurred on 14 July 2023 did not constitute fresh evidence because the prospect that the AUSTRAC Proceeding would be the subject of an agreement between the parties has been known since at least 13 February 2023, when Senior Counsel for Star informed the Court that it was Star's goal to reach agreement on all facts, liability and penalty, and that he didn't see why the AUSTRAC Proceeding could not resolve in complete agreement between the parties, having regard to the manner in which other proceedings brought by the regulator had concluded. The transcript of the case management conference before Lee J on 13 February 2023 recorded that Star's Senior Counsel said the following:

> Given this is volume 1, your Honour will appreciate that our position is we haven't got across this case yet, and it will take us some while to do so. In all the cases that I have been in of this kind, the matter has resulted in complete agreement between the parties, that is to say, agreement on all facts and liability and penalty. It's early days with this one. I can't say that I have read to the end of the 2000 pages of the statement of claim, so anything I say about what might happen in the future is necessarily provisional. But given the nature of the proceedings and the experience that the applicant has had in the conduct of these proceedings, I don't see, in principle, any reason why this case, despite its massive size, could not have the same outcome as the others I've been involved in. It is the goal of my client and, I'm sure, of AUSTRAC to bring that outcome about, if at all we can… I think I can say join with AUSTRAC in asking to do is to give us more time to get our feet on the ground with this particular case before we come back and, in effect, have the first case management hearing in the way that your Honour envisages such an exercise, where we can talk to your Honour with more confidence about what the issues – where the issues in dispute are likely to be and how we best see them efficiently being managed by the court.

371 To summarise, the statement by Star's counsel on 13 February 2023 indicated that it was, in Counsel's view, a possibility in principle that the matter might resolve and that both parties were intending to bring about that outcome if possible, caveated by the fact that predictions about what might occur in the future were necessarily provisional.

372 The defendant submitted that the evidence was not fresh, for the reasons advanced by the other parties.

373 I accept that what occurred on 14 July 2023 was a development in the AUSTRAC proceeding in that the parties had, since the February hearing, engaged in productive work resulting in their forming the opinions set out earlier. The prospect of the parties agreeing facts and Star making admissions was, at the February hearing, discussed in only very provisional terms, whereas by July 2023, what the parties expected was discussed more explicitly and more definitely. However, the development in the case was a progression of something that was in prospect at an earlier time, and remained uncertain in the sense no admissions had by that time been made, or described in other than general terms.

374 Furthermore, given the making of concessions and admissions in the course of the Bell Review, and the fact that what was said on 14 July 2023 rose only as far as I have set out above, I am not satisfied that the prospect of resolution in the AUSTRAC proceedings has been demonstrated to be fresh evidence. Whether it is genuinely new cannot be ascertained with any certainty because of the uncertain nature of the progress actually reached and described in Counsel's statements made on 14 July 2023.

375 Even if the evidence were properly characterised as fresh, that is not the end of the matter. The Contradictors and all parties other than Huang went on to submit that the established criteria for consideration by the Court regarding the admission of fresh evidence weighed against the granting of leave to adduce the further evidence.

What are the proper inferences to be drawn from the evidence?

376 The question as to the inference that may be properly drawn from the new evidence is itself relevant to the admissibility of the evidence.[69]

377 Huang submitted that several of the allegations advanced in the AUSTRAC proceeding find equivalent allegations in this proceeding. It was submitted that there is significant and material equivalence between the AUSTRAC proceeding and the present proceedings with respect to the basis upon which it is alleged (in both proceedings) that Star's AML CTF program did not satisfy the requirements in s 81(1) AND 36(1) of the AML/CTF Act. It may be accepted that the allegations made in the proceedings have *some equivalence*.

378 The relevant period in the Huang allegations is between 29 March 2016 and 31 October 2019, whereas the allegations in the AUSTRAC proceeding concern the period from 30 November 2016. The Huang material is silent on the impact (if any) on the Huang funding proposal of the need to establish those matters alleged in the Huang statement of claim in the period 29 March 2016 to 29 November 2016, if the period from 30 November 2016 is conceded by Star. More significantly, as the parties submitted, the class action proceedings are different in nature to the AUSTRAC litigation. They include different parties, different causes of action and different forms of relief and arise for adjudication in different statutory contexts. The proposition that admissions by an entity in a regulatory prosecution will not of necessity translate to a wholescale resolution of the issues in contention in a related class action can illustrated by the course taken in the CBA class action[70] and the Centro class action.[71]

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69 *Owies*, [15].

70 The 'CBA class action' in the Federal Court of Australia is a shareholder class action against the Commonwealth Bank of Australia (**CBA**), relating to the CBA's share price fall following the institution of legal proceedings by AUSTRAC against the CBA. Maurice Blackburn is jointly conducting this proceeding. As Drake submitted, in the AUSTRAC proceeding against CBA, CBA admitted a number of contraventions of the AML/CTF Act but the class action concerning equivalent subject matter was vigorously defended and is currently reserved following an initial trial on liability.

71 The Centro class action proceeded to trial before Gordon J, notwithstanding the earlier judgment of Middleton J in *ASIC v Healy* (2011) 196 FCR 291 in which findings were made about a central issue in the class action.

379 Hung contends that if admissions are made by Star in the AUSTRAC proceeding, then there is a reasonable prospect that Star will make equivalent admissions in the Huang proceeding or be prepared to "significantly narrow the issues in dispute" in that proceeding. In effect, the submission relies on general experience that the same entity is unlikely to contest a factual matter in one jurisdiction that it has admitted in another.

380 While it is possible that some admissions might be made in this proceeding that mirror some admissions that might be made in the AUSTRAC proceeding (including because the defendant considers that it cannot properly maintain an inconsistent position in respect of the same facts) it cannot be inferred on the evidence on this application at what point in time that will occur and to what extent any admissions made will affect the scope of the factual controversy across all of the issues in this proceeding.

381 In my opinion, there is not a sufficient basis from which the Court can infer the likelihood that admissions of any particular facts will be made in the Huang proceeding, and if that were to occur, when it would occur. Drake submitted that the evidence on which Huang relies does not rationally support the inference that because there is a prospect of Star making admissions as to its conduct in the AUSTRAC proceeding it will likewise make equivalent admissions in the Huang proceeding, much less, equivalent admissions that *make a material difference to what is in dispute in the group proceeding*. I agree.

382 Huang's third contention was that if admissions are made in the Huang proceedings that are equivalent to admissions that may be made in the AUSTRAC proceeding then "there would likely be a material reduction" in the costs Huang will incur in prosecuting the class action. That submission relied on the opinion of Mr Allsopp. Most significantly for Huang's application, the evidence did not establish that contention.

383 The opinion (stated in a single paragraph in Mr Allsopp's affidavit) was expressed in conclusionary and unspecific terms. The basis of the asserted reduction in costs was entirely unquantified. Mr Allsopp said that Huang may not need to incur some, or

some proportion, of the costs currently estimated in his budget, "for example" with regard to certain expert evidence or discovery. However, the Huang material does not identify the items in the Huang proposed litigation budget which would be affected in the event of the posited admissions being made, in what respects and by how much. Nor does the material attempt to quantify the potential "material reduction" by reference to the proportion of the Huang proceeding that would be resolved if the hypothetical admissions were made.

384 Huang's submission was that Huang's **[redacted]** costs associated with the preparation of expert evidence would be reduced. The evidence did not support that submission. It did not go to explain what aspect of expert evidence would be curtailed by which expected admissions, what discipline of expert evidence might be limited or rendered unnecessary, or why the factual basis of particular expert evidence would be materially reduced.

385 I consider that the admission of the proposed new evidence would not have any material effect on the proper analysis of the relevant issues on this application. The proposed new evidence is of no real probative weight, because of what it leaves in the arena of speculation and guesswork. I cannot conclude that, if accepted, it would probably affect the result of the case.

386 The application is rejected.

Redacted Schedule A [NOTE the whole of this schedule is redacted]

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Cost Estimates [NOTE the whole of this schedule is redacted]

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CERTIFICATE

I certify that the 114 preceding pages are a true copy of the reasons for ruling of Nichols J of the Supreme Court of Victoria delivered on 19 September 2023.

DATED this nineteenth day of September 2023.

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Associate