FEDERAL COURT OF AUSTRALIA

Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) [2015] FCA 811

Citation:	Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) [2015] FCA 811
Parties:	**BLAIRGOWRIE TRADING LTD and ANOR v ALLCO FINANCE GROUP LTD (RECEIVERS & MANAGERS APPOINTED) (IN LIQ) (ACN 077 721 129) and ORS**
File number:	NSD 1609 of 2013
Judge:	**WIGNEY J**
Date of judgment:	7 August 2015
Catchwords:	**PRACTICE AND PROCEDURE** – representative proceedings – where order is sought to approve litigation funding agreements between representative parties and the litigation funder – where the effect of the order is that all group members would be bound by the terms of the litigation funding agreements – whether the Court has power to make such an order – whether the order is in the best interests of group members – whether the order is consistent with the statutory scheme for representative proceedings - whether the Court should approve amounts payable under the terms of a litigation funding agreement at an early stage of the proceeding – whether the proposed order is appropriate or necessary to ensure that justice is done in the proceeding – consideration of the common fund doctrine applicable in class actions in the United States – *Federal Court of Australia Act 1976* (Cth), ss 23 and 33ZF
Legislation:	*Constitution*, s 51(xxxi) *Australian Securities and Investments Commission Act 2001* (Cth), s 12DA *Corporations Act 2001* (Cth), ss 674(2), 1041E, 1041H *Fair Trading Act 1987* (NSW), s 42 *Federal Court of Australia Act 1976* (Cth), Part IVA, ss 23, 33V, 33ZF *Federal Court Rules 2011* (Cth), r 1.32
Cases cited:	*Australian Securities and Investments Commission v Richards* [2013] FCAFC 89

Bray v F Hoffman-La Roche Ltd [2003] FCA 1505
Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386
Carnie v Esanda Finance Corporation Ltd (1995) 182 CLR 398
Cominos v Cominos (1972) 127 CLR 588
Courtney v Medtel Pty Ltd (2002) 122 FCR 168
Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2) (2006) 236 ALR 322
Dorajay Pty Ltd v Aristocrat Leisure Ltd [2009] FCA 19
Dugal v Manulife Financial Corporation 105 O.R. (3d) 364; 2011 ONSC 1785
Farey v National Australia Bank Ltd [2014] FCA 1242
Goldberger v Integrated Resources, Inc 209 F.3d 43 (2nd Cir. 2000)
IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq) (2009) 253 ALR 240
In re Universal Distributing Company Ltd (in liq) (1933) 48 CLR 171
Jackson v Sterling Industries Ltd (1987) 162 CLR 612
Johnson Tiles Pty Ltd v Esso Australia Ltd (1999) 94 FCR 167
Kirby v Centro Properties Ltd (2008) 253 ALR 65
Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672
McMullin v ICI Australia Operations Pty Ltd (1998) 84 FCR 1
Modtech Engineering Pty Limited v GPT Management Holdings Limited [2013] FCA 626
Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (2007) 164 FCR 275
Muswellbrook Shire Council v Royal Bank of Scotland NV [2013] FCA 616
P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 2) [2010] FCA 176
P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4) [2010] FCA 1029
Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3) [2012] VSC 625
Pharm-A-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6) [2011] FCA 277
Re HIH Casualty and General Insurance Ltd (2005) 215 ALR 562
Re Timbercorp Securities Ltd (in liq) (Application for the Approval of Compromises) [2012] VSC 590
Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307
The Boeing Company v Van Gemert 444 U.S. 472 (1980), 62 L.Ed.2d 676
The Owners of the Ship "Shin Kobe Maru" v Empire

Shipping Company Inc (1994) 181 CLR 404
Victor v Argent Classic Convertible Arbitrage Fund L.P. 623 F.3d 82 (2nd Cir. 2010)
Wong v Silkfield Pty Limited (1999) 199 CLR 255

Date of hearing:	15 and 17 December 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	230
Counsel for the Applicants:	Mr M B J Lee SC with Mr W A D Edwards
Solicitor for the Applicants:	Maurice Blackburn Lawyers
Counsel for the First Respondent:	Mr A J Payne SC with Mr R M Foreman
Solicitor for the First Respondent:	Watson Mangioni Lawyers Pty Limited
Counsel for the Second Respondent:	Mr G K J Rich SC with Mr S A Lawrence
Solicitor for the Second Respondent:	Arnold Bloch Leibler
Counsel for the Third Respondent:	Mr J K Kirk SC with Mr P D Herzfeld
Solicitor for the Third Respondent:	Ashurst Australia

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1609 of 2013**

BETWEEN:	**BLAIRGOWRIE TRADING LTD** **First Applicant**
	ALAN FLITCROFT AND CHRYSTINE FLITCROFT (AS TRUSTEES TO THE TE COCO TRUST) **Second Applicant**
AND:	**ALLCO FINANCE GROUP LTD (RECEIVERS & MANAGERS APPOINTED) (IN LIQ)** **(ACN 077 721 129)** **First Respondent**
	GARY JAMES JONES (AS ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE DAVID RAYMOND COE (DECEASED)) **Second Respondent**
	KPMG **Third Respondent**

JUDGE:	**WIGNEY J**
DATE OF ORDER:	**7 AUGUST 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application for the order referred to as "Primary Relief" in paragraph 1 of the interlocutory application dated 8 May 2014 be dismissed.
2. The Applicants pay the Respondents' costs of and associated with the interlocutory application.
3. The matter be listed for directions on 31 August 2015 at 9.30am.

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

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JUDGE:	**WIGNEY J**
DATE:	**7 AUGUST 2015**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 Blairgowrie Trading Ltd and Alan and Chrystine Flitcroft (as trustees of the Te Coco Trust) (collectively, **the Applicants**) have commenced a representative proceeding in the Court under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**the FCA Act**). They claim that Allco Finance Group Ltd (Receivers & Managers Appointed) (in liquidation) (**AFG**), Gary James Jones (as administrator *ad litem* of the estate of the late David Raymond Coe) and KPMG (collectively, **the Respondents**) are liable to compensate them and group members on whose behalf they have commenced the proceeding for loss or damage that they suffered as a result of alleged contraventions by the Respondents of various provisions of the *Corporations Act 2001* (Cth) (***Corporations Act***), the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***), and the *Fair Trading Act 1987* (NSW) (***Fair Trading Act***). The group members are defined as persons who acquired an interest in

ordinary shares in AFG between 21 August 2007 and 27 February 2008, and suffered loss or damage resulting from the alleged contravening conduct of the Respondents.

2 The proceeding is at an early stage. It has not progressed much beyond the filing and service of pleadings. It can confidently be predicted, even at this early stage, that if contested to final hearing, the proceeding will be complex, lengthy and very costly for all parties.

3 The present application arises from the representative nature of the proceeding and funding agreements that the Applicants have entered into with a litigation funder, International Litigation Funding Partners Pte Ltd (**ILFP**). The Applicants seek an order (**the proposed order**) which relates to amounts they have promised to pay ILFP in consideration of ILFP providing litigation funding and indemnifying them in respect of any adverse costs order in the proceeding. The proposed order has the effect of both approving the amounts payable to ILFP as reasonable consideration and of declaring that the Applicants are entitled to pay these amounts out of any amounts recovered from the Respondents. The amounts they have promised to pay ILFP have two components. First, they include the reimbursement of legal costs incurred by the Applicants pursuant to their retainer agreement with their solicitors. Under the funding agreements these costs will be paid, in the first instance, by ILFP. Second, they include commission calculated on the basis of a percentage (effectively between 32.5 percent and 35 percent) of any amount or amounts ultimately recovered from the Respondents in the proceeding. Critically, that includes not only amounts recovered in respect of the Applicants' claims, but also amounts recovered in respect of the claims of all group members.

4 The Applicants contend that the proposed order is appropriate or necessary to ensure that justice is done in the proceeding because, as persons exerting effort and incurring expense in getting in a fund for the benefit of others, they ought to be able to look to that fund to meet litigation expenses reasonably incurred in prosecuting the proceeding. That includes the amounts paid or payable to ILFP under the funding agreements.

5 The Respondents, whilst not directly affected by the proposed order, oppose the making of the order. They contend that, far from being appropriate or necessary to ensure that justice is done in the proceeding, the proposed order is unprecedented, unconventional, beyond power and unjust. The effect would be to unilaterally impose the terms of funding agreements that only the Applicants have entered into on group members as a whole at a stage where it is not possible to form any view about the reasonableness of the amounts involved.

6 The question whether the Court can and should make an order of the sort proposed by the Applicants is a question of some considerable importance. In simple terms, the question is whether the Court can and should, at the very beginning of a representative proceeding, not only effectively approve the terms of a litigation funding agreement struck between a commercial litigation funder and a representative party or parties, but also effectively impose the terms of that bargain on all group members, including those who have not entered into any such agreement. Whilst that question must be answered having regard to the particular facts and circumstances of this matter, the answer to it might have implications for how similar representative proceedings are commenced and prosecuted in the future.

7 For the reasons that follow, the proposed order should not be made. In short, the proposed order is neither appropriate nor necessary to ensure that justice is done in the proceeding. In particular, it would be premature and inconsistent with the statutory scheme in Pt IVA of the FCA Act to make the proposed order at this stage of the proceeding when the reasonableness of the amounts involved cannot be assessed. It also cannot be concluded at this stage that the proposed order would be beneficial to or in the best interests of the group members as a whole. Indeed, at this stage it would appear that the only clear beneficiaries of the proposed order would be the Applicants and ILFP.

THE SUBSTANTIVE PROCEEDING

8 AFG was, at all relevant times, a publicly listed company that carried on a financial services business specialising in structured asset finance, funds management, and debt and equity funding. Mr Coe was a director and executive chairman of AFG, and the chairman of the Risk Committee of AFG. KPMG was AFG's auditor.

9 The representative proceeding commenced by the Applicants concerns various alleged disclosures and non-disclosures by AFG of information in relation to its financial position in the context of the so-called "global financial crisis" in 2007 and 2008. The Applicants allege that on a number of occasions in the period between June 2007 to February 2008, AFG was required by the *Corporations Act* and the ASX listing rules to disclose to the ASX certain events or circumstances relevant to its financial position, but failed to do so. It is alleged that in failing to comply with its disclosure obligations, AFG contravened s 674(2) of the *Corporations Act*. It is also alleged that Mr Coe was involved in those contraventions.

10 The Applicants also allege that AFG and Mr Coe made a number of false or misleading representations concerning AFG's financial position to the ASX or the market generally

during the same period. In making those representations (or, in Mr Coe's case, in relation to some of the representations, being involved in the making of the representations), AFG and Mr Coe contravened (or, in Mr Coe's case, in relation to some representations, aided, abetted, counselled or procured, or was knowingly concerned in the contravention of) ss 674(2) and 1041H of the *Corporations Act*, s 12DA of the *ASIC Act* and s 42 of the *Fair Trading Act*.

11 In relation to KPMG, the Applicants' case concerns various representations allegedly made by KPMG in the context of its audit of AFG's 2007 financial statements. The Applicants allege that KPMG's audit was not in accordance with the Australian Auditing Standards, that KPMG did not exercise reasonable skill and care in undertaking the audit, and did not have reasonable grounds for expressing certain audit opinions in relation to AFG's financial statements and KPMG's audit of them. KPMG's representations to the contrary in respect of these matters are alleged by the Applicants to have been false or misleading in a material particular and to therefore amount to contraventions of ss 1041E and 1041H of the *Corporations Act*, s 12DA of the *ASIC Act* and s 42 of the *Fair Trading Act*.

12 During the period August 2007 to February 2008, the Applicants acquired interests in AFG's shares. So too did a large number of other people. There is, it appears, no precise figure for the number of people who purchased shares during this period. This is, of course, of considerable significance given that persons who acquired shares during the relevant period are likely to be group members in the representative proceeding if, as appears likely, they incurred losses arising from their acquisitions. The best indication is that there may be several thousand prospective group members.

13 The Applicants allege that, given the nature of the market for AFG shares, the contraventions by AFG, Mr Coe and KPMG caused the market price for AFG shares traded on the ASX to be substantially greater than either their "true value", and/or the market price that would have prevailed but for the contraventions. It is also alleged that the Applicants, and some group members, relied on the various false or misleading representations by AFG, Mr Coe and KPMG and would not have purchased AFG shares at the prevailing market price at the time of purchase had they been aware of the true state of affairs. It is alleged, on this basis, that the Applicants and other group members suffered loss or damage as a result of the Respondents' contraventions. The loss or damage is said to be either the difference between the price at which the AFG shares were purchased and their true value, or the market price

that would have prevailed but for the contraventions, or the amount, if any, realised upon the sale of the shares.

14 There is no reliable estimate of the losses that might have been incurred by people who acquired AFG shares during the relevant period. Given that approximately 400 million shares in AFG changed hands, and AFG's share price declined by approximately 88 percent, during the relevant period, the potential losses may be very large indeed.

15 The proceeding is a representative proceeding under Pt IVA of the FCA Act. The Applicants bring the proceeding as representative parties on behalf of all group members, being persons who acquired AFG shares during the relevant period and suffered loss or damage. As already indicated, there may be several thousand group members and the loss or damage allegedly suffered by them as a result of the alleged contraventions may be very large.

16 The questions of fact and law that are said to be common to the claims of the Applicants and group members include questions relevant to whether AFG, Mr Coe and KPMG contravened (or in Mr Coe's case, was involved in contraventions of) ss 674(2) and 1041H of the *Corporations Act*, s 12DA of the *ASIC Act* and/or s 42 of the *Fair Trading Act* and whether KPMG contravened s 1041E and/or s 1041H of the *Corporations Act*, s 12DA of the *ASIC Act* and/or s 42 of the *Fair Trading Act*. The common questions also include questions relevant to whether group members suffered any loss or damage as a result of the contraventions and, if so, how that loss should be calculated. The common questions do not include the calculation or quantification of either the total loss suffered by group members, or the losses suffered by the Applicants and individual group members.

17 This is no more than a simplified summary of the general nature of the proceeding. The pleadings are lengthy and complex. The questions of fact and law involved in the matter are, or are likely to be, difficult. Whilst no evidence has been filed to date, the likelihood is that the evidence will be voluminous and complex. There could be little doubt that the prosecution of the action will be time-consuming, costly and not without the significant risk that attends any complex commercial litigation.

THE FUNDING ARRANGEMENTS

18 Given the nature and complexity of the proceeding, it may readily be concluded that the value of the individual claims made by the Applicants is disproportionate to the costs the Applicants would be likely to be required to expend in prosecuting their claims. The

particulars provided by the Applicants in their pleading reveals that Blairgowrie Trading Ltd purchased approximately $190,000 worth of AFG shares during the relevant period and sold those shares for approximately $83,000. Mr and Mrs Flitcroft acquired approximately $250,000 worth of AFG shares during the relevant period and sold them for approximately $90,000. A rough estimate of the Applicants' losses, using one of the Applicants' alternative bases for calculating damages, would suggest that any damages would be somewhere in the order of $110,000 and $160,000 respectively. The costs likely to be incurred by the Applicants in prosecuting the proceeding could reasonably be expected to well eclipse those amounts.

19 It may be inferred that the same scenario is likely to apply in relation to most, if not all, other group members. The reality is, therefore, that neither the Applicants, nor any group members, were or are likely to prosecute their claims against the Respondents other than by way of a representative action under Pt IVA of the FCA Act.

20 It may equally be inferred that the Applicants would not have commenced this proceeding, and would be unlikely to continue to prosecute it, without some form of litigation funding. That inference is supported by the evidence led by the Applicants in support of this application. That evidence is primarily the evidence of Mr Andrew Watson, the Applicants' solicitor. Mr Watson, a principal of the well-known law firm, Maurice Blackburn, is a highly experienced commercial litigator who specialises in representative proceedings.

21 Mr Watson's evidence is that shareholder representative proceedings such as this proceeding rarely, if ever, proceed without the assistance of a litigation funder. That is largely a product not only of the cost and complexity of such proceedings, but also the risks involved, particularly the risk of adverse costs orders. Prospective representative applicants in such matters are highly unlikely to be willing to personally undertake the costs and risks involved in such proceedings, particularly given the often modest individual claims that are involved. Nor are law firms likely to assist without the involvement of a litigation funder. In Mr Watson's experience, very few law firms have the financial and operational resources, experience and risk-tolerance necessary to commence and prosecute such proceedings on a "no-win no-fee" basis.

22 The reality also is that commercial litigation funders are unlikely to agree to fund complex commercial representative actions unless it is commercially viable for them to do so. In crude terms, they are unlikely to agree to fund such litigation unless they can do so on terms

and in circumstances where the prospect of ensuring a profit or return outweighs the costs and risks associated with the litigation.

23 The involvement of litigation funding in complex representative proceedings under Pt IVA of the FCA Act has also led, at least in relatively recent times, to the phenomenon of "closed class" representative proceedings. In Mr Watson's experience, litigation funders are generally unwilling to agree to fund large representative proceedings unless one of the criteria defining the group members is that the person has entered into a funding agreement with the litigation funder. In *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 (***Multiplex Funds v P Dawson Nominees***), the Full Court held that there is nothing in the language of Pt IVA of the FCA Act which prevents the relevant group being defined in terms which include a requirement that a litigation funding agreement has been entered into.

24 Whilst this proceeding has been commenced as an open class proceeding, Mr Watson's evidence concerning the phenomenon of closed class proceedings provides relevant background to the funding agreements ultimately entered into in this matter. It is relevant to have regard to such matters in considering whether the order proposed by the Applicants is appropriate or necessary in all the circumstances.

25 In his evidence, Mr Watson describes what in his experience is the usual process involved in commencing such closed class representative proceedings. In some respects, the process described by Mr Watson tends to suggest a process driven as much by the commercial interests of litigation funders and lawyers as by the needs or interests of prospective litigants seeking to have their claims vindicated*: cf. Kirby v Centro Properties Ltd* (2008) 253 ALR 65 at [4]-[6]. That is not intended in any way to be a criticism. Still less is it intended to suggest that litigation funders and lawyers are in any sense acting improperly in seeking out prospective claims and claimants in the manner described by Mr Watson. The process may result in a substantial number of people who were previously ignorant of their rights becoming aware of potential claims they may have, as well as being able to prosecute claims, as part of a representative action, that they otherwise would not have been willing or able to prosecute. Any suggestion that the solicitation of class members by litigation funders was somehow inimical to the administration of justice was dispelled in *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. Nevertheless, the somewhat entrepreneurial nature of litigation commenced and prosecuted in such circumstances may be

a relevant consideration in relation to the exercise of some of the general supervisory powers of the Court under Pt IVA of the FCA Act.

26 The general process described by Mr Watson involves litigation funders and their lawyers identifying and investigating potential representative proceedings. If determined to be meritorious, the litigation funder, in conjunction with their lawyers, will then seek to identify and contact persons who might have a claim. Depending on the nature of the case, there may be difficulties involved in this process. It may also be a costly exercise. Once identified, potential claimants will be advised of their rights and their ability to participate in a representative proceeding by entering into a funding agreement. The litigation funder or the lawyers maintain a register of persons who have indicated a willingness to participate by signing a funding agreement.

27 The litigation funder will generally only fund the proceeding if the combined value of the claims of persons who indicate a willingness to participate by signing a funding agreement is sufficient to make the proceeding "economically worthwhile from the litigation funder's perspective".

28 Mr Watson also refers in his evidence to a procedure which, in his experience, is frequently followed when the settlement of a closed class proceeding is in prospect. The procedure is designed to give the respondent some certainty that the proposed settlement will bind all potential claimants, not just those involved in the closed (funded) class. The procedure involves the parties applying to the Court for orders permitting the class to be "opened" to include all potential claimants not just those who have signed funding agreements. Group members (other than the original funded group members) who wish to participate in the settlement are then required to register as a participating group member. The order also allows group members to opt out of the proceeding by a particular time. At the expiry of that time period, and if the settlement is approved by the Court, all group members, other than those who have opted out, are taken to have had their rights against the respondent in relation to the conduct in question disposed of finally, regardless of whether they have come forward to claim compensation as part of the settlement.

29 Importantly, when that procedure has taken place, the Court has on occasion made orders which are designed to deal with the fact that the group members to whom the settlement funds are to be paid may include persons who were not party to a funding agreement with the litigation funder. The orders are designed to ensure that the settlement funds are distributed

in an equitable way, that those who have funded the litigation are not disadvantaged, and that those who have not entered into funding agreements do not receive a disproportionate payout.

30 In his evidence, Mr Watson refers to orders made by Pagone J in a representative proceeding commenced in the Supreme Court of Victoria: *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* (S CI 2010 6249). The general effect of those orders, which were made by consent and in anticipation of a proposed settlement to be submitted for approval of the Court (*Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (***Pathway Investments***)), was that group members who had not entered into funding arrangements had an amount deducted from their payout and paid to the litigation funder which was equivalent to the amount that would have been deducted had they entered into the funding agreement with the litigation funder.

31 Mr Watson asserts that the orders made by Pagone J are analogous to the order sought by the Applicants in this application, albeit that they were made at a different stage of the proceeding. In their submissions on this application, the Applicants rely heavily on that supposed analogy.

32 For reasons that will be elaborated on later, that reliance is misplaced.

33 The history of the litigation funding in this matter revealed by Mr Watson's evidence shows that there have been issues from the outset about the commercial viability of this proceeding from the perspective of proposed litigation funders. Those issues, and the way that the litigation funders have attempted to deal with them, provide relevant background to the order now sought.

34 The possible commencement of this proceeding was first investigated by the Applicants' present lawyers, Maurice Blackburn, and litigation funders IMF (Australia) Ltd (**IMF**), in 2008. After assessing the merits of the proposed action, Maurice Blackburn and IMF undertook steps for the purpose of identifying, contacting and contracting with persons who might be group members in any proposed proceeding against AFG. Those potential group members were sent a proposed funding agreement with IMF. Approximately 1,400 persons entered into that funding agreement with IMF. Notwithstanding the apparent merits of the action and the number of people who signed funding agreements, no proceeding was commenced. One of reasons for this was that the combined value of the claims of those who

had entered into the funding agreements was not large. The proposed proceeding was apparently considered to be not "economically worthwhile from IMF's perspective."

35 In 2011, IMF proposed some changes to the original funding agreement and sent a further funding agreement to the group members who had signed the first funding agreement. By early 2012, only 75 percent of those registered group members had signed the second funding agreement with IMF. In early 2012, IMF decided that it was not viable to provide funding for the matter and terminated the funding agreements that had been entered into.

36 During 2012, Maurice Blackburn took some further steps to determine the merits and commercial viability of the proposed proceeding against AFG. Those steps included filing an application to obtain access to any relevant insurance policies held by AFG and an application to obtain documents relating to an investigation that had been conducted by the Australian Securities and Investments Commission into the affairs of AFG.

37 Following this, and prior to the commencement of this proceeding, the Applicants entered into funding agreements with ILFP and Claims Funding Australia Pty Ltd (**CFA**). CFA is the trustee of a discretionary trust, the primary beneficiaries of which are the principals of Maurice Blackburn. Because of possible complications arising from the connection between Maurice Blackburn, as solicitors for the Applicants, and CFA, as funders of the litigation, CFA decided to cease funding this and other proceedings where Maurice Blackburn were the solicitors on the record. The current funding agreements between the Applicants and ILFP were entered into to replace the earlier agreements to which CFA was also party.

38 Importantly, there is no indication that any group members other than the Applicants were invited or offered the opportunity to sign the funding agreements with ILFP. Indeed, various terms of the funding agreements, together with the fact that the proceeding was commenced as an open class representative proceeding, make it tolerably clear that it was only ever intended that the Applicants would be parties to funding agreements with ILFP. It is apparent that the intention was to take a different approach to dealing with the fact that no group members, other than the Applicants, had any binding contractual obligation to fund the proceeding.

39 The funding agreements between the Applicants and ILFP include, in summary, terms to the following effect:

- Maurice Blackburn is required to consult with ILFP with regard to any significant issue in the proceedings, to properly consider its views as to the conduct of the proceedings, and to promptly respond to any reasonable request by ILFP for information in relation to the proceedings. Nevertheless, Maurice Blackburn is retained and instructed by the Applicants, and "[ILFP] acknowledges that [Maurice Blackburn's] professional duties are owed to the [Applicants] and not to [ILFP]" (clauses 3.1, 5.1, 5.4, 11.5);
- The Applicants will give binding instructions to Maurice Blackburn and make binding decisions on behalf of the group members in relation to the claims of group members (clause 3.8);
- ILFP is entitled to participate in any settlement discussions, and to be consulted as to the terms of any proposed settlement, and in the event of a disagreement between the Applicants and ILFP as to the terms of any proposed settlement, the disagreement is to be resolved by senior counsel (clauses 3.9 to 3.11);
- ILFP will pay 75 percent of the legal fees, and a 100 percent of the disbursements incurred by the Applicants in conducting the proceedings (with a balance of the legal fees to be paid in the event of a successful outcome) (clauses 4.1 and 4.3);
- ILFP will pay any costs order which the Court makes in the proceedings against the Applicants (insofar as the costs were incurred during the term of the funding agreements), and will also provide any security for the Respondents' costs agreed or to be provided (clauses 4.2, 4.4 and 4.5);
- The obligations of ILFP in that regard will be secured by an appropriate form of security as required by Maurice Blackburn (clauses 4.6 to 4.8).

40 These terms of the funding agreements would appear to be fairly conventional for this type of litigation. The same cannot be said in respect of some other terms of the agreements.

41 The clauses of the funding agreements that are particularly important to consider in the context of the orders sought by the Applicants are clauses 7, 8 and 9. These clauses deal with the application of the "Resolution Sum" (as defined) and the payment of costs and commission to ILFP.

42 Clause 7.2 provides that the "Claimant" (in each case, Blairgowrie Trading Ltd and Mr and Mrs Flitcroft) acknowledges that it irrevocably authorises and directs the "Lawyers"

(Maurice Blackburn) to receive any "Resolution Sum" and to immediately pay that money into a trust account kept for that purpose.

43 The funding agreements define "Resolution Sum" in the following terms:

> **Resolution Sum** means the amount or amounts, or the value of goods or services, received on account of a Settlement, judgment or order in respect of the Claims and the corresponding claims of Group Members, including the value of any favourable terms of future supply of goods or services and including any interest and any amounts received on account of Costs. For the avoidance of doubt the Resolution Sum includes any amounts and the value of any goods and services for which the Claims and the corresponding claims of the Group Members are settled or for which judgment is given and which is paid or provided by or on behalf of any entity from whom some or all of the Respondents assert or could assert a claim for contribution or indemnity, including by way of a settlement scheme.

44 There are two important points to note about the Resolution Sum as defined. First, it is not limited to amounts received on account of a settlement. It includes amounts received on account of a judgment or order. Second, it includes not only amounts relating to any settlement, judgment or order concerning the Applicants' claims against the Respondents, the "Claims", but also amounts relating to the settlement, judgment or order in respect of "corresponding claims" of group members.

45 Clauses 8 and 9 relevantly provides as follows:

> **8. APPLICATION OF RESOLUTION SUM**
>
> 8.1 The Claimant acknowledges that it irrevocably authorises and directs the Lawyers forthwith to pay out of the account referred to in clause 7.2 above all payments referred to in clause 9.1.
>
> 8.2 Subject to any Court order, if a lump sum amount is received by way of Settlement, the balance, after firstly deducting all amounts as permitted by this Agreement, and secondly deducting any amounts as permitted by the Retainer entered into in connection with the Proceedings, will be distributed to Group Members on a pro rata basis by reference to the Gross Recovery of each Group Member.
>
> 8.3 …
>
> **9. COSTS AND COMMISSION**
>
> 9.1 Upon Resolution, the Claimant will pay to
>
> the Funder or its nominee, from the Resolution Sum, the following amounts:
>
> (a) an amount equal to the total monies paid by the Funder pursuant to clause 4 above;

(b) a percentage of the Resolution Sum determined as follows by reference to the amount of the Resolution Sum which is attributable to the claim of each Claimant and Group Member:

Number of Shares Held	Resolution on or by 30 June 2014	Resolution on or by 30 June 2015	Resolution after 30 June 2015
< 1,000,000	25%	30%	35%
> or = 1,000,000	22.5%	27.5%	32.5%

(c) if, pursuant to clause 6 above, the Funder funds an appeal of a final judgment, or the defence of an appeal from a final judgment, a further 5% of the Resolution Sum in respect of the appeal so funded.

9.2 …

9.3 …

9.4 No fees, commissions or other payments will become due or owing by the Claimant to the Funder unless and until Resolution and then will not exceed the Resolution Sum.

46 These clauses purport to operate broadly in the following way. First, by reason of clause 7.2, any amounts that fall within the broad definition of "Resolution Sum" will be received in a Maurice Blackburn trust account. That will include amounts received on account of a settlement, judgment or order in respect of claims by group members, other than the Applicants. Second, the Applicants authorise and direct Maurice Blackburn to pay out of that account any payments that the Applicants are required to make by reason of clause 9.1. Third, clause 9.1 requires the Applicants to pay (relevantly) two different amounts to ILFP: an amount in respect of costs paid or payable by ILFP to Maurice Blackburn in respect of costs incurred under or pursuant to the retainer agreement between the Applicants and Maurice Blackburn; and an amount representing ILFP's "commission" for funding the proceeding. That amount is calculated as a percentage of the Resolution Sum. Given that 30 June 2015 has now passed, the commission will be between 32.5 percent and 35 percent of the Resolution Sum.

47 The following critical points should be made. First, group members, other than the Applicants, are not a party to any retainer agreement with Maurice Blackburn. They are not presently obliged to pay any legal costs or disbursements incurred in the conduct of the proceeding. Second, group members, other than the Applicants, are not a party to any funding agreement with ILFP and are not otherwise liable to pay any commission (or any other amount) to ILFP. Third, the Resolution Sum includes, or may include, money received

on account of any settlement, judgment or order in respect of claims of group members other than the Applicants. That money is not the Applicants' money. In the absence of any order by the Court, it is not money that the Applicants can pay away, or agree to pay away, as they see fit. Fourth, that is exactly what the Applicants purport to do in clause 9.1. And fifth, the payments that the Applicants have promised to make to ILFP are referrable to amounts (legal costs and commission) that group members other than the Applicants have never agreed to pay and are not otherwise legally obliged to pay.

48 Perhaps in recognition of the somewhat extraordinary nature of the apparent operation of these clauses of the funding agreements, Mr Watson has deposed to the fact that a director of ILFP has informed him that ILFP does not consider or believe that the Applicants are obliged to pay anything under clause 9.1 unless the funds are received as part of a court-approved settlement. That belief is said to flow from clause 8.2 of the funding agreement. Likewise, the Applicants have informed Mr Watson that they do not consider that they have unconditionally promised to pay over to ILFP any money which is attributable to resolution of the claims of group members. This again appears to be based on the belief that only funds received as part of a court-approved settlement are payable under clause 9.1. Whatever may be the belief or understanding of ILFP and the Applicants, clause 9.1 plainly has a wider operation. Clause 8.2 only applies to a lump sum received by way of settlement. The definition of "Resolution Sum" extends well beyond lump sum settlement funds.

49 It would seem, in any event, that the proposed order is designed to overcome the inherent problem with clause 9.1 of the funding agreement. As will be seen, if made, the proposed order would effectively enable, or entitle, the Applicants to perform the contractual promise that they may not otherwise be able to legally perform. The proposed order would also otherwise legitimise the payments made pursuant to clause 9.1 by declaring them to be both approved by the Court and reasonable.

50 It is in this context that consideration should be given to another aspect of Mr Watson's evidence. Mr Watson deposes to the fact that the Applicants have informed him that if the Court does not make the proposed order "and indicates that it considers that no such order should ever be made in the proceedings", they will instruct Maurice Blackburn to apply to the Court to close the class to include only those persons who have entered into funding agreements with ILFP. An officer of ILFP has also advised Mr Watson that if the Court does not make the proposed order and indicates that it considers that no such order will ever be

made, it will enter into revised funding agreements with the Applicants and attempt to get other group members to sign revised finding agreements.

THE PROPOSED ORDER

51 The orders sought by the Applicants include an order in the following terms:

> (1) An order, pursuant to ss 23 and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA**) and Rule 1.32 of the *Federal Court Rules 2011* (Cth) (**FCR**) (or any of them), that:
>
> a. the amounts payable by the Applicants to International Litigation Funding Partners Pte Ltd (**ILFP**) pursuant to cl 9 of the Funding Agreements which are Annexures 'AJW-1' and 'AJW-2' to the Affidavit of Andrew John Watson sworn 8 May 2014 (**Funding Agreements**) and in consideration for ILFP providing funding to the Applicants and indemnifying the Applicants in respect of any adverse costs orders to be made against the Applicants in this proceeding, are approved as reasonable consideration payable to ILFP and expenditure incurred by the Applicants in prosecuting the proceeding (**Funding Expenses**); and
>
> b. for the purpose of satisfying the obligations under a., the Applicants are entitled to retain or be paid out of any Resolution Sum (as that term is defined in the Funding Agreements) in respect of any or all Group Member's or Members' claim(s), and as a first charge on the Resolution Sum, the Funding Expenses incurred by the Applicants in prosecuting that claim on behalf of that or those Group Member(s).

52 The relative simplicity of the wording of this proposed order belies its far-reaching operation and effect. There are at least three key elements to the proposed order.

53 First, the Court is asked to approve the amounts payable by the Applicants to ILFP pursuant to clause 9 of the funding agreements on the basis that they are "reasonable consideration payable to ILFP and expenditure incurred by the Applicants in prosecuting the proceeding". In effect, the Court is asked to declare the reasonableness of what are, at this stage, indeterminate or inestimable amounts.

54 At this stage of the proceeding, there are no amounts payable to ILFP. There are only contractual promises by the Applicants to pay certain amounts "upon Resolution". "Resolution" occurs when the Resolution Sum is received by Maurice Blackburn. That has not occurred. It may not occur for some considerable time, if ever.

55 At this stage of the proceeding, it is not possible to estimate, let alone ascertain, the amounts that may or will be payable to ILFP if the proposed order is made in the terms sought.

56 As already indicated, in clause 9 of the funding agreements the Applicants promise to pay two amounts to ILFP; first, the amounts paid by ILFP pursuant to clause 4 of the agreement, being amounts paid or payable to Maurice Blackburn pursuant to its retainer and costs agreements with the Applicants; and second, amounts calculated as a percentage of the Resolution Sum representing ILFP's commission for funding the proceeding.

57 In relation to the first amount, effectively nothing is known about the legal costs that the Applicants will or might incur. Whilst the retainer and costs agreement apparently contains some cost estimates, those estimates have been redacted from the copy of the agreement that is in evidence. In any event, a costs estimate given at such an early stage of the proceeding is hardly likely to be reliable.

58 In relation to the second amount, all that is known about the amount payable to ILFP in respect of commission is that it is to be calculated as a percentage of the Resolution Sum. No attempt has been made to provide any estimate of the likely Resolution Sum. Not even a "ballpark" figure. It is therefore impossible to estimate the amount that may be payable to ILFP as commission. It may be many millions of dollars. The only "cap" on the amount payable by the Applicants to ILFP under clause 9 is that the amount cannot exceed the Resolution Sum (clause 9.4).

59 Second, the Court is effectively asked to declare that the Applicants are entitled to retain or be paid out of the Resolution Sum amounts that they have contractually bound themselves to pay ILFP under the funding agreements. This belies the fact that, in the absence of the order, the Applicants would not be entitled to retain or be paid those amounts. That is because the Resolution Sum includes payments received on account of settlement of, or as a result of the determination of, claims other than the Applicants' own claims. In short, it includes money that is not the property of the Applicants. The effect of the proposed order is to effectively declare that the Applicants are entitled to fulfil a contractual promise that they may not otherwise be able to lawfully fulfil.

60 Third, the Court is effectively asked to create a security interest (a first charge) in favour of the Applicants over the Resolution Sum in respect of the amounts the Applicants have contractually bound themselves to pay to ILFP.

61 Because the proposed order affects, or has the capacity to affect, the rights and interests of group members, orders were made requiring the Applicants to give group members notice of

the application and the proposed order. The Applicants were directed pursuant to s 33X(5) of the FCA Act to publish an approved notice in a number of major newspapers, to email the notice to group members who had previously expressed interest in participating in the proceeding as a group member, and to display the notice on Maurice Blackburn's website. The approved notice described the general effect of the proposed order and invited any group member who wished to be heard in relation to the application to file a notice of address for service and any affidavit or written submissions that they wished to rely on.

62 No group member responded to the notice by filing any document or appearing at the hearing.

THE STATUTORY SCHEME AND RELEVANT PROVISIONS

63 The statutory scheme under Pt IVA of the FCA Act has been the subject of many judgments of the Court. It is unnecessary to substantially add to what has already been said by the Court in relation to the general operation of the scheme.

64 Section 33C(1) of the FCA Act provides that where seven or more persons have claims against the same person that arise out of the same, similar, or related circumstances and give rise to a substantial common issue of law or fact, any one of those persons may commence a proceeding representing some or all of those persons. The originating application must identify the group members (the group of persons on whose behalf a representative proceeding has been commenced), the nature of the claims made on behalf of the group members and the relief claimed, and the common issues of law or fact (s 33H of the FCA Act). The consent of a person to be a group member in a representative proceeding is not required, other than in the case of certain specified persons, none of whom are relevant to this proceeding (s 33E of the FCA Act).

65 It is unnecessary for a group member to opt into the representative proceeding. Rather, at some stage the Court is required to fix a date before which a group member may "opt out" of the representative proceeding. A group member may opt out by giving written notice before that date (s 33J of the FCA Act). Before that date, a group member is generally not required to do anything. Even after that time, the Pt IVA scheme is "designed to require little or no active involvement by group members": *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 2)* [2010] FCA 176 at [16].

66 The commencement of a representative proceeding operates to suspend the running of any limitation period against a group member (s 33ZE of the FCA Act). The limitation period starts to run again if the group member opts out.

67 A judgment given in a representative proceeding binds all group members who have not opted out of the proceeding (s 33ZB of the FCA Act).

68 The Court can, in certain circumstances, order that a proceeding not continue as a representative proceeding (ss 33L, 33M, and 33N of the FCA Act) in which case the proceeding may be continued by the representative party on his or her own behalf (s 33P of the FCA Act). The Court may also, in certain circumstances, substitute another group member as a representative party in lieu of the original representative party (s 33T of the FCA Act).

69 If the determination of the common issues does not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining issues (s 33Q(1) of the FCA Act). That may include the establishment of a sub-group and appointment of a sub-group representative party (s 33Q(2) of the FCA Act). The Court may also permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member (s 33R of the FCA Act).

70 Importantly, s 33V of the FCA Act provides as follows in relation to the settlement or discontinuance of a representative proceeding:

> (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

71 The Court has the power to award damages in a representative proceeding. The award of damages may consist of specific amounts, or amounts worked out in a specified manner in relation to group members, sub-group members or individual group members (s 33Z(1)(e) of the FCA Act), or may consist of an aggregate amount that does not specify amounts awarded in respect of individual group members (s 33Z(1)(f) of the FCA Act). The Court cannot award damages in an aggregate amount unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment (s 33Z(3) of the FCA Act).

72 In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled (s 33Z(2) of the FCA Act). In making such provision, the Court may provide for the constitution and administration of a fund consisting of the money to be distributed (s 33ZA(1)(a) of the FCA Act). If that course is taken, the costs of administering the fund are to be borne by the fund, or by the respondent in the representative proceeding, as the Court directs (s 33ZA(2) of the FCA Act).

73 If the Court makes an award of damages, the representative party may apply to the Court in respect of the costs reasonably incurred in relation to the proceeding (s 33ZJ(1) of the FCA Act). Section 33ZJ(2) of the FCA Act provides that if the representative party's costs are likely to exceed the costs recoverable from the respondent, the Court may order that the whole or part of any excess be paid out of the damages awarded.

74 The Court may not make a costs order against a group member, other than the representative party or sub-group representative party, except where s 33Q(3) applies or the group member appears in relation to an individual issue under s 33R (s 43(1A) of the FCA Act).

75 A general power is conferred on the Court to make orders in relation to representative proceedings. Section 33ZF of the FCA Act provides as follows:

> (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.
>
> (2) Subsection (1) does not limit the operation of section 22.

76 The Applicants primarily rely on s 33ZF as the source of the Court's power to make the orders sought in this application. Some reliance is also placed on the general power of the Court under s 23 of the FCA Act to make "orders of such kinds … as the Court thinks appropriate."

THE PARTIES' SUBMISSIONS

77 The Applicants' primary submission is that the Court has power to make the proposed order under the general power in s 33ZF of the FCA Act. They submit that s 33ZF is intended to confer a wide power and should be given a generous interpretation. It has previously been invoked in a broad range of circumstances, including circumstances which the Applicants submit are analogous to the circumstances of this application. For example, s 33ZF has been

invoked as a basis for supervising costs and fee arrangements (*Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167 at [35]-[37]); as a basis for the approval of settlements (pursuant to s 33V of the FCA Act) which involve allocations or adjustments designed to secure equality of treatment between funded and non-funded applications (*Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 (***Dorajay v Aristocrat Leisure***) at [14]-[17]; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029 (***P Dawson Nominees v Brookfield Multiplex (No 4)***) at [28]); and approval of the payment to the representative applicants of a sum of money out of a settlement fund (*Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322 at [76].

78 The Applicants also contend that the Court has power to make the proposed order under s 23 of the FCA Act and r 1.32 of the *Federal Court Rules 2011* (Cth). In the Applicants' submission, the proceeding properly invokes the Court's jurisdiction under Pt IVA of the FCA Act, and the orders sought are both appropriate or incidental to that jurisdiction. They submit that the order does not cut across any limitations provided elsewhere in the FCA Act.

79 The Applicants advance six reasons for why the Court should make the orders in the exercise of its discretion under either s 33ZF or s 23 of the FCA Act.

80 First, they submit that the order is analogous to the principles applied, and the approach taken, in other cases where a person has incurred expenses in recovering property for the ultimate benefit of others. In such cases, a person who has incurred costs and expenses in recovering property and creating a common fund for the benefit of others has been held to be entitled to recover their costs, expenses and fees out of the recovered fund. For example, a liquidator is entitled to recover, as a first charge or priority on a fund, the expenses incurred by the liquidator in the realisation of the fund: *In re Universal Distributing Company Ltd (in liq)* (1933) 48 CLR 171 (***Universal Distributing***). The expenses recoverable on this basis may include amounts paid to a litigation funder who funded proceedings commenced by the liquidator to recover or realise an asset: *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* (2009) 253 ALR 240 (***IMF v Meadow Springs***) at [73].

81 Second, the Applicants contend that the proposed order ensures an equal and equitable outcome between all group members, regardless of whether or not they have entered into a funding agreement with ILFP. The Applicants contend that as they are the only group members who have entered into funding agreements with ILFP, if the proposed order is not made they will effectively subsidise the participation and recovery (assuming that the action

is successful or settles) of all the other group members. They submit that it is neither fair nor reasonable that unfunded group members may receive a better outcome as a result of their "freeriding".

82 It is acknowledged by the Applicants that there may be other ways to secure fair and equal outcomes as between funded and unfunded group members, particularly at the settlement stage if the proceeding is ultimately settled. They submit, however, that it is preferable to put in place a clearly identified scheme early in the proceeding, rather than towards its conclusion.

83 Third, the Applicants claim that the proposed order will secure a beneficial outcome for all group members. This submission appears to be based on the suggestion, in the evidence of Mr Watson, that if the order is not made it will not be commercially viable for ILFP to fund the proceeding. If the order is not made, and the Court indicates that no such order will ever be made, the Applicants have said that they will apply to the Court to amend the group member definition to include an additional criterion, being that the person has entered into a funding agreement with ILFP.

84 The Applicants submit that the "closing" of the class that may occur if the order is not made will effectively mean that erstwhile group members who do not enter into funding agreements with ILFP will be effectively shut out of the proceeding. That may ultimately result in group members losing their rights of action against the Respondents altogether. Mr Watson's evidence is that the proceeding was commenced only a matter of weeks before the expiry of the likely limitation period. The commencement of the representative proceeding suspended the running of the limitation period (s 33ZE of the FCA Act). If group members are excluded as a result of the closing of the class, time will again begin to run. The Applicants submit that it is highly unlikely that group members could commence their own proceedings before the expiry of the limitation period once it begins to run again. If group members excluded by the class closing are unable to commence their own proceedings before the expiry of the limitation period, they will lose their rights of action against the Respondents. The Applicants submit that the existing group members are better off with the prospect of recovering something (albeit reduced by the amounts payable to ILFP under the proposed order) than the certainty of receiving nothing if they lose their rights of action.

85 Fourth, the Applicants contend that the proposed order is consistent with the policy objectives of Pt IVA of the FCA Act. Those policy objectives are said to be to enhance access to

justice, reduce the costs of proceedings and promote the efficiency of court resources. The Applicants submit that those policies are best secured by encouraging open class representative proceedings, where proceedings are commenced on behalf of group members without them having to take any step, such as entering into a funding agreement. In the Applicants' submission the making of the proposed order facilitates or encourages open class rather than closed class proceedings.

86 In this context, the Applicants rely on the evidence of Mr Watson to the effect that litigation funders are typically unwilling to fund litigation on a pure "opt out" basis on behalf of an open class of group members. Rather, they will generally only fund proceedings where the class is closed by adding a litigation funding agreement criterion to the group member definition. The proposed order is said to provide a "practical solution" to this suggested disjunct between the policy of Pt IVA of the FCA Act and the realities of litigation funding.

87 Fifth, the Applicants contend that the proposed order appropriately protects the rights of group members. That is said to be the case because group members retain the right to opt out of the proceeding, because the amount that ILFP may receive is reasonable having regard to funding premiums paid in other representative proceedings, and because the Court will in any event retain control over any settlement because of the need to secure the approval of the Court under s 33V of the FCA Act.

88 In relation to the right to opt out, the Applicants' submission, put in blunt terms, is that if group members do not like the fact that under the proposed order any recovery by them will be reduced by amounts payable to ILFP, they can always opt out of the proceeding. If they then wish to recover anything from the Respondents, they can commence their own proceedings.

89 In relation to the reasonableness of the amounts payable to ILFP, the Applicants' submissions focus on the percentage of the Resolution Sum payable to ILFP. They submit that the "normal range" for commission in representative proceedings is 25 percent to 45 percent, so the commission payable to ILFP is within range and therefore reasonable.

90 In relation to the approval of a settlement under s 33V of the FCA Act, the Applicants' submissions proceed on the basis that the Court would be free to reconsider the amounts payable by group members to ILFP in the context of a settlement approval. They submit, on the other hand, that a group member who objected to a settlement on the basis of the fairness

and reasonableness of any amount payable to ILFP would likely find the objection to be "challenging" given the absence of any objection to the proposed order.

91 Sixth, the Applicants contend that the proposed order is consistent with orders made in similar proceedings in Australia, the United States and Canada. In relation to Australia, the Applicants rely on orders made by Pagone J in *Pathway Investments,* the consideration of similar orders in *Re Timbercorp Securities Ltd (in liq) (Application for the Approval of Compromises)* [2012] VSC 590 and orders made by Jacobson J in *Farey v National Australia Bank Ltd* [2014] FCA 1242 (***Farey v NAB***). These cases concern orders made in contemplation of, or so as to facilitate, settlement and the process of approval of a settlement under s 33V of the FCA Act.

92 In relation to the United States, the Applicants rely on the so-called "common fund doctrine" developed by courts in the United States which "permits attorneys whose work created a common fund for the benefit of a group of plaintiffs to receive reasonable attorneys' fees from the fund": *Victor v Argent Classic Convertible Arbitrage Fund L.P.* 623 F.3d 82 (2nd Cir. 2010) (***Victor v Argent***); *The Boeing Company v Van Gemert* 444 U.S. 472 (1980), 62 L.Ed.2d 676 (***Boeing Company v Van Gemert***).

93 In relation to Canada, the Applicants rely on the decision of the Ontario Superior Court of Justice in *Dugal v Manulife Financial Corporation* 105 O.R. (3d) 364; 2011 ONSC 1785 (***Dugal***).

94 The Applicants acknowledge that there are some differences between the regime in Pt IVA of the FCA Act and the statutory regimes in relation to representative proceedings in both the United States and Canada. They submit, however, that the approach taken by the courts in those jurisdictions nevertheless should be adopted in Australia. It should perhaps be noted in this context that the Applicants' characterisation of the proposed order as a common fund order, or as an order establishing a common fund, is not particularly helpful. Indeed, it tends to obscure, or at least minimise, the real reach and effect of the proposed order. It also tends to ignore the differences between the common fund doctrine, as it applies in the context of class actions in the United States, and the relative novelty of the proposed order having regard to the very different regime for representative proceedings in Pt IVA of the FCA Act.

95 It is unnecessary to rehearse, at least in any detail, the Respondents' submissions in opposition to the proposed order. Suffice it to say that the Respondents submit that the

proposed order is unconventional, unprecedented and contrary to the scheme of Pt IVA of the FCA Act. They contend that not only is the proposed order beyond power, but that even if the Court was empowered to make the order under either s 33ZF or s 23 of the FCA Act, the Court should nonetheless refuse to make it in the exercise of its discretion. The Respondents submit that none of the Applicants' reasons or justifications for making the order are valid or have any merit.

DOES THE COURT HAVE POWER TO MAKE THE PROPOSED ORDER?

96 There is no provision in the FCA Act, or any other Act, which specifically empowers the Court to make an order approving, or declaring as reasonable, amounts that a representative party has agreed to pay pursuant to a commercial litigation funding agreement. Still less is there a specific provision empowering the Court to make an order declaring that the representative party is "entitled" to retain or deduct amounts that they have agreed to pay to the litigation funder from amounts that would otherwise be recoverable by, and payable to, group members as a whole. The question is whether the Court has power to make the proposed order under either the general power in s 33ZF of the FCA Act to make appropriate or necessary orders in representative proceedings, or the more general power in s 23 of the FCA Act to make appropriate orders in any matter within the Court's original jurisdiction.

Section 33ZF of the FCA Act

97 Section 33ZF confers a broad power on the Court to make orders in relation to representative proceedings. It should not be given a narrow construction, but rather should be construed as liberally as its terms and context permit: *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 (***McMullin***) at 4; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 (***Courtney v Medtel***) at [48]-[49]. Contextual considerations suggest that s 33ZF was intended to give the Court a wide and general power to make orders to resolve any issues or difficulties that might arise in representative proceedings that are not otherwise covered by specific provisions in Pt IVA. In these circumstances, it is not surprising that s 33ZF has been relied upon in a number of previous cases to make a broad range of orders at various stages of representative proceedings.

98 A provision conferring a broad power on the Court should generally not be read down by making implications or imposing limitations which are not found in the express words: *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; *Wong v Silkfield Pty Limited* (1999) 199 CLR 255 at [11]. The only express

limitation or requirement in s 33ZF is that the Court thinks the order is appropriate or necessary to ensure that justice is done in the proceeding. No other limitation should be read into the section.

99 It is difficult to conceive of an order that the Court would be likely to think appropriate or necessary to ensure that justice is done in the proceeding, but which would nevertheless be beyond power. The suggestion that the Court would be powerless to make an order, despite having found that it was appropriate or necessary to make the order to avoid unfairness to a party or group members, or to prevent some other injustice in the proceeding, is difficult to accept.

100 Many, if not most, of the arguments advanced by the Respondents concerning the Court's power to make the proposed order under s 33ZF are, upon analysis, really arguments for why the Court should not exercise that power. Indeed, most of the arguments really go to the question whether the proposed order meets the express requirement in s 33ZF that the order be appropriate or necessary to ensure that justice is done in the proceeding. For example, the Respondents submit that the proposed order is inconsistent with the statutory scheme, or otherwise cuts across the operation of specific provisions in Pt IVA of the FCA Act. If that is so, that would be a good reason to find that the order is neither appropriate nor necessary. Section 33ZF should not become a vehicle for rewriting the legislation: *Courtney v Medtel* at [52].

101 If the order is not found to be appropriate or necessary to ensure that justice is done in the proceeding, the Court does not have power to make the order. But that is not because of some implied limitation in the operation of the section. It is because the express requirement in the section has not been met.

102 In these circumstances, the preferable course is to first consider whether the proposed order satisfies the express requirement or limitation in s 33ZF. If it does not, the question whether it might be beyond power for some other reason becomes somewhat academic.

103 For the reasons that follow, it cannot be concluded that the proposed order meets the express requirement in s 33ZF. It is neither appropriate nor necessary to ensure that justice is done in the proceeding. In these circumstances, it is unnecessary to consider whether, if that requirement was met, the order would nevertheless be beyond power because it exceeds some implied limitation or fails to meet some implied requirement in s 33ZF.

104 It should also be noted, in this context, that the power to make an order under s 33ZF is discretionary. Even if the express requirement that the order be appropriate or necessary to ensure that justice is done in the proceedings is satisfied, the Court retains a residual discretion whether or not to make the order. The parties made detailed submissions concerning whether, if the Court had the power to make the proposed order under s 33ZF, the Court should or should not make the order in the exercise of its discretion. Most of the arguments advanced by the parties in this respect also go directly to the question whether the express requirement in s 33ZF is met in the circumstances of this case. They are accordingly considered in that context.

Section 23 of the FCA Act

105 In circumstances where the proposed order has been found not to satisfy the specific limitation in s 33ZF, it is at least doubtful that it is open to the Applicants to rely on the more general power in s 23: *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678 (and the cases there cited). In any event, the orders that the Court is empowered to make under s 23 do not extend beyond orders that are "appropriate to the protection and enforcement of the right or subject-matter in issue" in the proceeding: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 621. An order which has been found not to be appropriate or necessary to ensure that justice is done in the proceeding for the purposes of s 33ZF is unlikely to be appropriate in the sense required to engage the Court's power under s 23 of the FCA Act.

106 The proposed order is not "appropriate", for the purposes of s 23, for essentially the same reasons that it is not appropriate or necessary to ensure that justice is done in the proceeding for the purposes of s 33ZF. It follows that it is unnecessary to consider the question of power beyond this.

The constitutional issue

107 In simple terms, the constitutional issue that is said to arise is that s 33ZF and s 23 of the FCA Act are invalid to the extent that they purport to authorise orders that would result in the acquisition of property otherwise than on just terms contrary to s 51(xxxi) of the *Constitution*, or to the extent that they authorise the exercise of non-judicial power contrary to Ch III of the *Constitution*.

108 It is unnecessary to resolve this potential constitutional issue on this application. That is because, for the reasons that follow, the proposed order is not appropriate or necessary to ensure that justice is done in the proceeding. It accordingly cannot be made under either ss 33ZF or 23 of the FCA Act. The question whether the making of the proposed order would amount to the acquisition of property on unjust terms, or involves the exercise by the Court of non-judicial power, does not arise.

109 It is necessary to make only two brief observations. First, it is highly unlikely that an order which resulted in the acquisition of property otherwise than on just terms could ever be appropriate or necessary to ensure that justice is done in a representative proceeding. It is therefore unlikely that ss 33ZF and 23 of the FCA Act could ever authorise an acquisition of property on unjust terms. The question of invalidity by reason of inconsistency with s 51(xxxi) is accordingly unlikely to ever arise.

110 Second, it must be considered to be highly doubtful that the discretionary exercise, by the Court, of the power to make an order that has been found to be appropriate or necessary to ensure that justice is done in a representative proceeding could ever be said to involve the exercise of non-judicial power. In *Cominos v Cominos* (1972) 127 CLR 588, Mason J said the following in relation to the power of a federal court to make a maintenance order in a matrimonial cause (at 608):

> To authorize a court to make an order where it is just and equitable to do so creates a judicial discretion exercisable after a consideration of all the circumstances relevant to the making of the order and in accordance with principle. The conferment of such an authority is not inconsistent with the exercise of judicial power.

111 Exactly the same may be said in relation to the power to make orders that are appropriate or necessary to ensure that justice is done in a proceeding under Pt IVA of the FCA Act. The exercise, by the Court, of a power to make an order which, having regard to all the circumstances, is appropriate or necessary to ensure that justice is done in a proceeding could not be said to involve the exercise of non-judicial power, or to be inconsistent with the exercise of judicial power. The Respondents' arguments for why the making of the proposed order would involve the exercise of non-judicial power are really arguments for why the order is not appropriate or necessary to ensure that justice is done in the proceeding.

IS THE ORDER APPROPRIATE OR NECESSARY TO ENSURE THAT JUSTICE IS DONE IN THE PROCEEDING?

112 The requirement in s 33ZF that the order be "appropriate or necessary" would ordinarily require, as a first step, the identification of a particular issue or problem in the proceeding that needs to be addressed. There would ordinarily have to be some specific reason or justification for making an order under s 33ZF. An order is unlikely to be either appropriate or necessary unless it is directed at resolving some issue or problem that has arisen or would, but for the order, arise.

113 The particular issue or reason for making the order under s 33ZF must also be one that has arisen in, or relates to, "the proceeding". The section is not concerned with theoretical issues, or difficulties that may exist beyond the metes and bounds of the particular proceeding. It is not directed, for example, at resolving theoretical or practical problems concerning litigation funding that might occur in representative proceedings generally. Nor is it concerned with issues or problems concerning the rights or interests of third parties, such as litigation funders. Justice “in the proceeding” would not ordinarily involve any consideration of the commercial interests of a litigation funder unless they gave rise to some issue or problem that has, or is likely to have, some direct impact on the proceeding.

114 The criterion "justice is done" also suggests that the particular issue or problem must somehow relate to the just hearing and determination of the claims, or the enforcement of the rights or subject-matter in issue in the proceeding. That may involve a question of procedure, or it might involve a question involving the substantive rights and interests of the parties. A requirement that justice is done also suggests that the proposed order must be fair and equitable. That will ordinarily involve a consideration of the position of all parties: *McMullin* at 4E-F.

115 Given the nature of representative proceedings, it will also ordinarily involve close consideration being given to the rights and interests of group members as a whole. In the context of s 33ZF, “in the proceeding” includes the vindication of claims made on behalf of all group members. And as Sackville J pointed out in *Courtney v Medtel* (at [49]), it is appropriate, in construing s 33ZF, to recognise the unusual position of group members in a representative proceeding brought pursuant to Pt IVA. Consent is not required for a person to become a group member and, whilst group members may benefit from a representative proceeding, their rights might also be adversely affected since they are bound by any

judgment in the proceeding unless they have opted out. In these circumstances, in considering the exercise of the power in s 33ZF, the Court should be concerned to ensure that the interests of those who are absent, but represented, are not prejudiced by the conduct of the litigation on their behalf: *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 408 (Brennan J); *Muswellbrook Shire Council v Royal Bank of Scotland NV* [2013] FCA 616 at [24]. The role of the Court in this respect is protective: *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 (***ASIC v Richards***) at [8]. It is unlikely that an order would be appropriate or necessary to ensure that justice is done in a proceeding if the rights or interests of group members were not adequately protected, or were materially prejudiced or adversely affected by, the order.

116 The six reasons that the Applicants have put forward as the basis for making the proposed order all relate in one way or another to the fact that only the Applicants have entered into funding agreements with a litigation funder. The Applicants submit, in effect, that having regard to that circumstance, they should be entitled to recover costs and expenses incurred by them in recovering amounts for the benefit of group members as a whole, and that the proposed order ensures that group members are treated equally whether or not they have entered into funding agreements. They also submit, in that context, that the proposed order is beneficial to group members, that the rights of group members are adequately protected, and that the proposed order is consistent with the statutory scheme in Pt IVA.

117 The question is whether any of these reasons or justifications satisfy the requirement that the proposed order be appropriate or necessary to ensure that justice is done in the proceeding.

Is the proposed order appropriate or necessary to enable the Applicants to recover costs and expenses reasonably incurred by them in securing recoveries for the group members?

118 The Applicants contend that the proposed order is appropriate or necessary because, as persons who are responsible for getting in a "fund", they should be able to recover costs and expenses reasonably incurred by them in recovering the fund. They submit, in effect, that the amounts payable by them to ILFP are costs and expenses involved in getting in the fund and should therefore be recoverable by them from the fund. They submit, in this respect, that they are in an analogous position to a liquidator (and like officers) and rely on the principle in *Universal Distributing*. The principle in *Universal Distributing*, in simple terms, is that where a liquidator has realised property subject to security out of which the secured creditor can take payment, the liquidator's remuneration and expenses incurred in realising the

property can rank in priority to the rights of the secured creditor. Equity will create a charge over the fund in priority to that of the secured creditor: *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307 at [22].

119 There are at least four answers to the Applicants' submissions insofar as they rely on the principle in *Universal Distributing* and the supposed analogy between their position and that of a liquidator.

120 First, the position of a representative party in representative proceedings is not relevantly analogous to the position of a liquidator who recovers or realises the property of a company in the course of a winding up. Nor is any fund or property recovered in representative proceedings necessarily analogous to property or a fund realised by a liquidator in the course of winding up a company. Second, the question of the reimbursement of costs and expenses incurred in getting in a fund is a question that should be considered if and when the fund has been recovered, and after the costs and expenses have been incurred. Third, insofar as the proposed order operates to secure the recovery of legal costs from any fund, or any recoveries, obtained on behalf of group members, there is a specific provision in Pt IVA dealing with the recovery of legal costs from an award of damages. And fourth, insofar as the proposed order operates to secure the payment of commission payable to ILFP, there are questions concerning the Applicants' capacity to promise to pay ILFP a commission based on a percentage of recoveries that may be referable to claims other than their own.

121 The first problem for the Applicants is that there is no real analogy between the position of a liquidator and the position of a representative party. Upon appointment, a liquidator acquires a number of specific powers, duties and responsibilities by reason of that office. Those powers, duties and responsibilities arise primarily under, and are closely regulated by, specific provisions of the *Corporations Act*. A liquidator occupies a fiduciary position in relation to the company, its creditors and contributories. A liquidator's duties and responsibilities include preserving and realising the assets of the company being wound up. There are specific provisions in the *Corporations Act* concerning a liquidator's right to recover remuneration and expenses incurred in realising and getting in property of the company, including where the liquidator's claims for remuneration and expenses rank in priority to other claims and debts.

122 Given the specific powers, duties and responsibilities that a liquidator has by virtue of his or her office and specific provisions of the *Corporations Act*, there is no sound basis for

equating the position of a liquidator with the position of a representative party in representative proceedings. Nor is there any reason to extend the principles that apply to a liquidator's right to recover reasonable costs and expenses from property realised in a winding up, to the position of a representative party in respect of any recoveries made in representative proceedings.

123 A liquidator who recovers property and creates a fund in the course of the winding up of a company is entitled to use that fund to make payments and meet debts and claims, including expenses incurred by the liquidator in the course of the winding up, subject to specific provisions of the *Corporations Act* and questions of priority: see s 556 of the *Corporations Act* which deals with questions of priority. A representative party, on the other hand, may have standing to commence a representative proceeding on behalf of group members (s 33D of the FCA Act). A representative party does not, however, have any rights in relation to the use or distribution of any recoveries made on behalf of group members without further order of the Court. As discussed later, whether the representative proceedings are determined as a result of a settlement or by the award of damages, the distribution of any fund created or constituted as a result of the settlement or award of damages can only take place following Court approval of the settlement or an order under s 33Z(2) or s 33ZA.

124 This latter point reveals the second problem with the Applicants' arguments based on the analogy with a liquidator and the *Universal Distributing* principle. A liquidator's right to recover his or her reasonable costs and expenses incurred in realising a fund for the benefit of others does not rely or depend on a liquidator obtaining a prior order from the Court. There is no need for a liquidator to approach the Court for a declaration that they are entitled to recover their costs and expenses from any property or fund that they may recover. Nor is the principle in *Universal Distributing* directly concerned with the liquidator's right to recover reasonable expenses. Rather, it is concerned with the question of priorities when it comes to distributing a fund created upon the realisation of property of a company that is subject to security. The principle is also concerned with costs and expenses actually incurred, not costs and expenses that might be incurred in the future: *Re HIH Casualty and General Insurance Ltd* (2005) 215 ALR 562. The equitable charge or lien that arises under the *Universal Distributing* principle also only arises when the fund or other property has been realised.

125 The difference here is that without the proposed order, the Applicants have no right or entitlement to recover their costs and expenses from any fund recovered on behalf of group

members. The issue for the Applicants is not just one of priorities, but of the right or entitlement to deal with the fund in the first place. Further, the effect of the proposed order is to declare and secure the Applicants' right to recover costs and expenses from a fund before those costs and expenses have been incurred and before any fund has been recovered or realised. The principal in *Universal Distributing* provides no support for the making of such an order. The proposed order is premature.

126 A third difficulty with the Applicants' argument that the proposed order is appropriate or necessary to enable them to recover costs and expenses they will incur in recovering a fund for the benefit of group members is that there is, in any event, a specific provision in Pt IVA concerning a representative party's rights to recover legal expenses. Section 33ZJ(2) of the FCA Act provides as follows:

> If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.

127 The existence of this specific statutory right to recover costs from the damages awarded means that the proposed order is neither appropriate nor necessary insofar as it concerns the Applicants' entitlement to recover legal costs from any fund that might be realised. It is unnecessary because the Applicants already have the right to approach the Court for an order under s 33ZJ(2). Important also, is the fact that the right to approach the Court under s 33ZJ(2) only comes into existence once damages are recovered. It also occurs at a time when the legal costs have in fact been incurred and the Court is in a position to give some consideration to whether the costs incurred are in fact reasonable. This again points to the fact that the proposed order is premature. The fact that the Applicants already have the specific right, pursuant to s 33ZJ(2), to recover costs from any damages awarded also suggests that the proposed order is more about the commission payable to ILFP than reimbursement of legal costs incurred by the Applicants.

128 The fourth difficulty with the Applicants' submissions based on the recovery of costs and expenses concerns the Applicants' characterisation of the commission that may be payable to ILFP as an expense that is or will be incurred by them. The Applicants submit that the situation in relation to commission payable to ILFP is analogous to the situation where a liquidator enters into a litigation funding agreement to fund a recovery action for or on behalf

of the company. The Applicants rely on the decision of the Full Court in *IMF v Meadow Springs* as establishing that commission payable to the litigation funder in such circumstances may be a reasonable expense of the liquidator to which the *Universal Distributing* principle applies.

129 The problem for the Applicants is that their entry into litigation funding agreements with ILFP that provide for the payment of commission based on a percentage of the amounts recovered by group members is different in an important respect to the position of a liquidator who enters into a litigation funding agreement to fund litigation to recover money or property for or on behalf of a company. Subject to the requirement to obtain approval of the Court under s 477(2B) of the *Corporations Act*, a liquidator has the power and authority to enter into a funding agreement under which the litigation funder is entitled to a percentage of any amount recovered in the action. Representative parties, such as the Applicants, are able to enter into an agreement with a litigation funder to pay the litigation funder a percentage of any amount recovered by them in the representative proceeding. They have no authority, however, to promise to pay the litigation funder a commission based on a percentage of any amounts recovered on behalf of other group members. Whilst the representative party effectively represents other group members in the representative proceeding, the representative party has no right or entitlement to amounts recovered or recoverable by the other group members. Those amounts can only be distributed following an order of the Court.

130 Yet the Applicants here have purported to agree to pay ILFP a percentage of amounts that may be recovered by group members. What they effectively now seek is a retrospective approval of the agreement they have struck, and an order effectively declaring that they are entitled to perform that contractual promise. Without the proposed order, the Applicants could not lawfully fulfil their contractual promise, at least in the absence of some other order later in the proceeding. The effect of the proposed order is also to impose the commercial funding terms agreed to by the Applicants on all group members, despite the fact that they have not entered into, or even been invited to enter into, any such agreement.

131 Such an order is neither appropriate nor necessary to ensure that justice is done in the proceeding. That is so for a number of reasons.

132 First, as has already been explained, group representatives, such as the Applicants, are in a different position to a liquidator. The *Universal Distributing* principle does not assist them.

133 Second, it is neither appropriate nor necessary to impose the Applicants' commercial bargain in relation to the payment of commission on the group members as a whole, at least at this early stage of the proceeding. The fact that orders that have this effect have been made in the context of anticipated settlements, which require the approval of the Court under s 33V of the FCA Act, does not assist the Applicants. This issue is considered later in the context of the Applicants' arguments concerning equality of outcome. It is sufficient to say in this context that different considerations are likely to apply at the settlement stage. In particular, at that stage of the proceeding there is at least some degree of certainty in relation to how the proceeding is likely to be determined, including the likely amount of the settlement sum, and therefore the likely commission payable to the litigation funder.

134 That may be contrasted with the position here. There is, at this early stage of the proceeding, considerable uncertainty and a lack of information concerning the implications of making such an order. The Applicants' arguments presuppose the coming into existence of what they call a common fund. As will be explained later in the context of the Applicants' equality arguments, unless the proceeding settles, a common fund will not necessarily come into existence. If the proceeding does not settle, much will depend on how the common questions of fact and law are determined, the manner in which issues that are not common are determined and, if it comes to it, how damages are awarded. In any event, at this stage of the proceeding it is not possible to even estimate the size of any such fund, or the total amount that might be recoverable by group members. It is therefore not possible to estimate the size of any commission that might be payable to ILFP in the future. It could not be appropriate or necessary to make an order effectively approving and authorising the payment of commission to ILFP in circumstances where the amount payable cannot even be estimated.

135 Third, the fact that the proceeding appears to have been commenced on the basis that the Applicants were in a position to promise ILFP that it would be paid commission based on total recoveries, or that the Court would make an order that would enable them to perform such a promise, provides no basis for making the proposed order. Indeed, if anything, this reveals that the only real rationale for making the order at this stage is to ensure the commercial viability of the proceeding from the perspective of the litigation funder. That has nothing to do with ensuring that justice is done in the proceeding. The Applicants' arguments to the effect that ensuring the commercial viability of the proceeding from the litigation funder's perspective is beneficial to the group members as a whole and consistent with the statutory scheme are addressed later.

136 For all these reasons, the Applicants' submission that the proposed order is appropriate or necessary to ensure that justice is done in the proceeding because, like a liquidator, they should be able to recover their costs and expenses from the amounts recovered on behalf of group members, has no merit and is rejected. The Applicants are not in a position analogous to a liquidator, or any like officer, such as a receiver or manager. Nor is a fund recovered by a liquidator analogous to recoveries made on behalf of group members. The *Universal Distributing* principle also does not assist the Applicants. Indeed, if anything, it reveals that the proposed order is premature, given that no expenses have yet been incurred and no fund recovered.

Is the proposed order appropriate or necessary to ensure group members are treated equally?

137 The Applicants contend that the proposed order is appropriate or necessary to ensure that there is no inequality or unfairness arising from the fact that only they have entered into funding agreements with ILFP. There appears to be two aspects to the alleged inequality. First, the Applicants say that they are effectively subsidising the participation of the "unfunded" group members in the proceeding and any recovery by them. Second, the Applicants submit that there will be an unequal outcome if only they have to pay legal costs and ILFP's commission from any amounts recovered by them.

138 The Applicants' contention that there is some inequality arising from the funding agreements that needs to be resolved, by order, at this stage of the proceeding, needs to be considered against the background facts concerning the involvement of litigation funders in this matter.

139 The evidence of Mr Watson reveals that the issues and difficulties in obtaining commercial litigation funding in relation to this proceeding goes back many years. The Applicants' present lawyers, in conjunction with various commercial litigation funders, have been investigating the commercial viability of this proceeding for over seven years. They managed to get 1,400 persons to enter into funding agreements with IMF in the latter part of 2008. No doubt it was intended to commence proceedings with a closed class limited to those who had signed those funding agreements. No such proceeding was commenced because, in part, the matter was considered not to be commercially viable from the litigation funder's perspective.

140 Further steps were taken in 2011 and 2012 to secure commercially viable funding for the proceeding. They too were unsuccessful. Again it would seem that a closed class proceeding

was envisaged, but the combined value of the claims of persons prepared to sign funding agreements was insufficient to make the proceeding commercially viable from the litigation funder's perspective.

141 Against this background, the Applicants, no doubt in consultation with their lawyers and ILFP, commenced the present proceeding. They did so, it may be inferred, conscious that ILFP had not attempted to have any other potential group members sign funding agreements with them. There is no suggestion that the approximately 1,400 persons who had previously signed funding agreements with the previous litigation funders were even invited to sign funding agreements with ILFP. The Applicants also commenced this proceeding conscious of the fact that the proceeding was an open class proceeding. They may be taken to have known that, of the potentially many thousands of group members, only they had agreed to fund the proceeding from potential recoveries.

142 It is, in these circumstances, difficult to accept the Applicants' protestations that there is some inconsistency or inequity, at least at this stage of the proceedings, arising from the fact that only they have entered into funding agreements. They knew that to be the case when they commenced the proceeding. They knew, to that extent, that they would subsidise the participation of the group members in the proceeding. It is, in any event, also somewhat of a misnomer to say that the group members are "participating" in the proceeding at this stage. Their consent was not required to become group members. Nor are they necessarily obliged to do anything in the proceeding, at least prior to the fixing of a date before which they must decide whether or not to opt out of the proceeding.

143 In relation to the Applicants' argument that the proposed order is appropriate or necessary to avoid an unequal or inequitable outcome, the question whether the amounts to be distributed to the Applicants and other group members are fair, or are likely to be fair, having regard to the fact that only the Applicants have entered into a funding agreement, is a question that arises, if at all, at the stage when any amounts recovered from the Respondents (either as a result of settlement or judgment) are to be distributed amongst group members. It is unclear if that stage will ever be reached. Or if it is reached, it is unclear how that stage will be reached and what amounts are likely to be involved. That raises the following question: why is it appropriate or necessary to make the order now?

144 Many, if not most, of the Applicants' arguments in support of the proposed order proceed on the basis that there will be a "common fund" created from which they should be entitled to

recover reasonable costs and expenses incurred by them in getting in that fund. That is not necessarily a valid assumption.

145 There are a number of possibilities. First, of course, is the possibility that the matter proceeds to hearing and the common questions are determined adversely to the Applicants. If that occurs, no question concerning the fair or equitable distribution of any common fund will arise.

146 Second, the parties may agree to settle the proceeding. That may lead to the creation of a settlement fund. But as the Applicants properly acknowledge, any such settlement must be approved by the Court under s 33V. If that occurs, the reasonableness of amounts payable to ILFP and how they are to be made, including the extent to which unfunded group members should contribute, will almost certainly be considered by the Court.

147 The Court has recognised, in the context of making orders facilitating or approving settlements, that fairness may require that group members who have entered into funding agreements should not end up in a worse position than group members who have not entered into funding agreements: *Dorajay v Aristocrat Leisure* at [17]; *P Dawson Nominees v Brookfield Multiplex (No 4)* at [28]; *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 (***Modtech***) at [58]. Different orders may be made at the settlement stage to ensure equality between funded and unfunded group members.

148 The Applicants rely in particular on orders made by Pagone J in *Pathway Investments* and contend that the orders are somehow analogous to the proposed orders here. The orders made in *Pathway Investments*, and the competing views of Gordon J in *Modtech*, are addressed later in the context of the debate concerning so-called "common fund" orders versus "funding equalisation formula" orders. In the present context, it is sufficient to note that the considerations that are likely to apply at the settlement approval stage, including at the stage where orders are made for the purposes of facilitating a settlement, are fundamentally different to the considerations that apply to the making of orders at this early stage of the proceeding.

149 Most importantly, at the settlement stage, a settlement fund of a certain amount is at least in contemplation. The amount of commission likely to be paid or payable to the litigation funder, or at least an estimate of that amount, is likely to be known. The legal costs actually incurred and paid by the litigation funder are also likely to be known, or at least are likely to

be able to be estimated. These are matters that the Court can and no doubt would consider in making orders for the purposes of facilitating a settlement, as well as approving the settlement under s 33V of the FCA Act.

150 Third, the matter may proceed to hearing and the common questions may be determined in favour of the Applicants. It would appear most unlikely that the common questions will finally determine the claims of all group members. In that case, the Court will give directions under s 33Q of the FCA Act in relation to the determination of the remaining issues. That may result in the establishment of sub-groups under s 33Q(2) of the FCA Act. It may result in individual group members appearing in the proceeding for the purpose of determining issues relating to their individual claims under s 33R of the FCA Act.

151 If sub-groups or individual members are successful in establishing their claims, there may be an award of damages. It is possible, but perhaps unlikely, that an award of damages is made in an aggregate amount under s 33Z(1)(f) of the FCA Act. More likely, there would be an award of damages for group members, sub-group members or individual group members under s 33Z(1)(e) of the FCA Act. In that case, the Court can work out the amounts payable in such manner as it specifies and must, by reason of s 33Z(2) of the FCA Act, make provision for the payment or distribution of the money to group members. In making provision for distribution, the Court may establish a fund under s 33ZA of the FCA Act. At this point, it is possible that the Court would give consideration to issues of equity in relation to the distribution of money arising from the fact that only the Applicants entered into funding agreements to fund the common questions stage of the proceeding.

152 The point is that a number of different outcomes are possible. Not all of them necessarily involve the creation or constitution of a fund, let alone a common fund of the sort envisaged by the Applicants. In the case of those outcomes that do lead to the creation or constitution of a fund, the Court is likely to be able to deal at that stage with any possible unfairness or inequity arising from the fact that only the Applicants entered into funding agreements. And at that time, the Court will consider any potential unfairness or inequity in relation to the distribution of the fund on the basis of actual or estimated amounts. The Court will be apprised of the size, or expected size of the fund, the amount of the costs and expenses actually incurred, and the amount of the commission payable to the litigation funder. This again reveals that it is premature to make any form of order dealing with payments that may be made from any so-called common fund at this stage of the proceeding.

153 In the present case, there may never be any settlement or settlement fund. There may never be a fund constituted under s 33ZA of the FCA Act. It is not possible to foresee how the proceeding will pan out. It is not possible to even estimate the size of any potential award or awards of damages or the size of any settlement fund. Given the estimate of the number of AFG shares traded during the relevant period, and the large fall in the share price during that period, the potential damages, on the Applicants' case, could run into several hundreds of millions of dollars. The amount of any commission payable to ILFP under the proposed order could therefore be extremely large. Yet the Court is being asked to approve the amount that may be payable as reasonable.

154 In these circumstances, it is difficult, if not impossible, to see how the Court could possibly make an order effectively declaring that amounts payable to ILFP in respect of commission "are approved as reasonable consideration". How can the Court declare an amount to be reasonable when that amount is not known and cannot even be estimated?

155 It is not to the point that the commission component is based on percentages that are said to be within the usual range of commission payable to litigation funders. That contention is based on the evidence of Mr Watson and on the fact that a number of previous Pt IVA cases have, in different contexts, involved funding agreements containing commissions or premiums of between 25 percent and 45 percent. The Applicants also rely on a number of cases where courts have given approval to liquidators to enter into litigation funding agreements pursuant to s 477(2B) of the *Corporations Act* where the agreements contain premiums within or above that range.

156 A proper consideration of the appropriateness or reasonableness of amounts to be paid to a litigation funder as commission or a premium for funding litigation would ordinarily involve more than simply considering the percentage commissions or premiums that funders have demanded, and litigants have agreed to pay, in other proceedings. Much will depend on the particular facts and circumstances of the case, including the potential recoveries to which the percentage figure is likely to be applied, the nature and complexity of the proceeding, and the risk taken on by the litigation funder. Little is known about these matters at this early stage of the proceeding.

157 The circumstances here are also fundamentally different to those cases where "sophisticated parties with substantial means" (cf. *Pathway Investments* at [20]) have entered into funding agreements. In such cases it may not be for the Court to express a view about the quantum

paid to the litigation funder. Here, there is little or no evidence about the status or circumstances of the group members. And none of them, other than the Applicants, have agreed to pay ILFP any commission or premium.

158 The Applicants' only real answer to why the proposed order should be made now is that, if it is not, they may need to amend the group member definition to include only those group members who have signed funding agreements with the litigation funder. The litigation funder may also have to go to the trouble and expense of getting other group members to sign funding agreements. The Applicants' arguments in this respect are considered later in the context of their submission that the proposed order is consistent with the statutory scheme.

159 It is sufficient, in the present context, to make two points. First, that is largely a problem of the Applicants' own making. As explained earlier, it may be inferred that the Applicants (in consultation with their lawyers and ILFP) commenced this proceeding in the hope or expectation that the Court would make the proposed order. It is difficult to see how else they could have expected to be able to perform their contractual obligations under clause 9.1 of the funding agreements. It is not appropriate nor necessary to make the order simply because the Applicants and their litigation funder hoped or expected that it would be made.

160 Second, and perhaps more fundamentally, this rationale or justification for the making of the proposed order at this stage reveals that it is the commercial interests of ILFP that really lies at the heart of this application. Like the Applicants, it would appear that ILFP has proceeded in the hope or expectation that the Court would make the proposed order. Understandably, ILFP wants or requires the commercial certainty at this early stage that the Applicants will be able to perform their contractual obligations under clause 9.1 of the funding agreement and that the Court will approve the commission payable to it. But the commercial interests of a litigation funder do not provide a proper basis for an order under s 33ZF of the sort proposed by the Applicants.

161 Nor is the supposed trouble and expense involved in seeking to have other group members sign funding agreements a proper justification for making the proposed order, at least in the circumstances here. It would appear that considerable work has already been undertaken by the Applicants' lawyers (in conjunction with previous litigation funders) to identify group members who might be prepared to sign funding agreements. It is unlikely that it would be necessary to replicate that work if, as suggested, the commercial interests of the litigation funder require it to procure more group members to sign funding agreements.

"Common fund" versus "funding equalisation formula" orders

162 The parties made detailed submissions concerning the respective merits of "common fund" orders as opposed to so-called "funding equalisation formula" orders. As indicated earlier, both types of orders have been made in conjunction with, or in contemplation of, applications to approve settlement under s 33V of the FCA Act.

163 The orders made by Pagone J in *Pathway Investments* are an example of common fund type orders. Similar orders were made by Jacobson J in *Farey v NAB* for the purpose of facilitating settlement negotiations which had not yet been bought to fruition. In simple terms, under the common fund approach, non-funded participating group members are effectively required to pay to the litigation funder, from the settlement proceeds otherwise payable to them, an amount in respect of costs and commission which is essentially the same as the amount that would have been payable by them if they had entered into the funding agreements that had been entered into by funded group members. In short, the terms of the litigation funding agreements entered into by funded members are effectively imposed on the non-funded members, even though they did not enter into any such agreements.

164 An example of the so-called "funding equalisation formula" approach is the approach taken in *P Dawson Nominees v Brookfield Multiplex (No 4)* at [28]; see too *Dorajay v Aristocrat Leisure*. The funding equalisation formula approach involves taking the amount that would have been paid to the litigation funder by non-funded group members if they had signed funding agreements and redistributing that amount pro rata amongst all group members. In this way equality of outcome is achieved as between the funded and unfunded members. The result of adjusting the distributions in this manner, however, is that group members as a whole are better off than under the common fund approach. The litigation funder, on the other hand, does not receive a windfall. Depending on the amounts and percentages involved, the differences between this approach and the common fund approach can be significant.

165 In *Modtech*, Gordon J compared the two approaches. Her Honour preferred the funding equalisation formula approach. In relation to the common fund approach, her Honour had regard to the fact that the unfunded group members had never entered into a commercial bargain with the litigation funder. Her Honour said that she could see no reason why the funding agreement that had been entered into by the funded group members should be imposed on the unfunded members. Whilst her Honour noted that the question whether such

orders should be made is a matter to be addressed in each case, she also observed (at [60]) that "it is difficult to conceive of a circumstance in which it [the common fund approach] would be appropriate."

166 It is unnecessary in the circumstances of this matter to express any view as to which approach is preferable. There does not appear to be anything in Pt IVA itself which would compel the Court to take one or other of these approaches. Much will depend on the circumstances of the case. It is neither necessary nor desirable to indicate one way or another whether a common fund order could or might be made in this matter if a settlement is contemplated, or a settlement approval is sought at some stage. Much will depend on matters such as the amount of the proposed settlement, the number of group members who are, or are likely to, participate in the settlement, the stage of the proceeding, and the costs and disbursements actually incurred. At this stage, the question is entirely hypothetical.

167 The more important point, made earlier, is that the considerations that may apply to settlement approvals, or orders made to facilitate settlement negotiations, are fundamentally different to the considerations relevant to the making of the proposed order at this early stage of the proceeding.

Is the proposed order of benefit to or in the interest of all group members?

168 As already indicated, in considering whether an order is appropriate or necessary to ensure that justice is done in the proceeding, some consideration must be given to the rights and interests of group members as a whole.

169 It is difficult to see how the proposed order could be seen to be beneficial to, or in the best interests of, group members as a whole at this stage of the proceeding. Group members, other than the Applicants, have not entered into funding agreements with ILFP. Yet the effect of the proposed order is to treat them as if they had. And that is to occur at a very early stage of the proceeding when the amount that group members may be able to recover, and the amounts that may be required to be paid to ILFP, are indeterminate and not even able to be estimated.

170 The Applicants' contention that the proposed order is beneficial to group members as a whole appears to be based on two propositions. The first is that the group members are better off because the alternative course open to the Applicants would have been to commence a closed class proceeding limited to group members who had signed funding agreements with ILFP.

The approach taken by the Applicants in commencing an open class proceeding, together with the proposed order creating funding obligations on the part of all group members, is said to better facilitate the purposes and policy objectives of Pt IVA of the FCA Act.

171 The second contention, which is similar to the first, is that on the evidence, if the proposed order is not made, it will not be commercially viable for ILFP to continue to fund the proceeding as presently constituted. In these circumstances, it is said that it will be "necessary and appropriate" to amend the group member definition by "closing the class" to include only those group members who have signed funding agreements with ILFP. At this stage that would be the Applicants alone, though the evidence is that ILFP would endeavour to have more group members sign funding agreements. If the class is closed, the Applicants submit that the existing group members will effectively be shut out of the proceeding.

172 Neither contention has any merit as a justification for making the proposed order. Neither contention demonstrates that the proposed order is in the interests of group members as a whole. Indeed, they suggest again that the real motivation behind the application for the proposed order is to make the proceeding commercially viable from the litigation funder's perspective. The implicit threat in the second contention also reveals a potential conflict of interest which the Applicants may find themselves in should they take the course they have foreshadowed.

173 As for the first contention, the evidence of Mr Watson shows that, if it had been commercially viable to do so, the proceeding would have been commenced as a closed class proceeding. The available inference is that the commencement of the proceeding as an open class proceeding had nothing whatsoever to do with any intention to better facilitate the purposes and policy objectives of Pt IVA. The proceeding was commenced as it was because previous efforts to have sufficient potential group members sign funding agreements to make the proceeding commercially viable from the litigation funder's perspective were unsuccessful.

174 In any event, the fact is that the proceeding was commenced as an open class, rather than a closed class proceeding. The fact that a different approach may have been taken is immaterial. The fact that open class proceedings may better reflect the policy behind Pt IVA may generally be accepted. As Jacobson J put it in *Multiplex Funds v P Dawson Nominees* at [117], it is "difficult to see how" closed class proceedings "can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding

decision for the benefit of all aggrieved persons." It does not follow, however, that the proposed order is beneficial or in the best interests of all group members simply because the matter could have proceeded as a closed class proceeding.

175 In relation to the second contention, the evidence does not suggest that the Applicants will necessarily apply to amend the group definition and close the class if the proposed order is not made. They will only do so if the Court indicates that no such order will or should ever be made in the proceeding. For the reasons already given, it is neither necessary nor desirable to indicate what the Court will or will not do at later stages of the proceeding.

176 Perhaps more significantly, the Applicants cannot in any event close the class without the leave of the Court under s 33K(1). If, as the Applicants appear to submit, the closing of the class would effectively shut group members out of the proceeding to their potential detriment, they may have difficulty in securing leave. In *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, Merkel J made the following observations (at [15]) in the context of an application to narrow the definition of group members:

> However, special problems arise when an amendment is sought to be made on behalf of an applicant in a representative proceeding under Pt IVA of the Act which will adversely affect the interests of some group members. In the present case the applicant has been placed in a situation of potential conflict between her interest in procuring the amendment and her duty to the group members whose interests may be adversely affected by it. A similar problem arises for the legal representatives of the applicant who have an obligation to conduct the representative proceeding on behalf of the applicant in a way that is consistent with the interests of group members, irrespective of whether those persons are clients of the solicitors: see *King v AG Australia Holdings Ltd* (2002) 121 FCR 480 at 489 [27] per Moore J.

177 If it comes to it, the Applicants and their lawyers will no doubt give careful consideration to their duties and obligations, and any potential conflict of interest, before deciding to apply for any narrowing of the group member definition. In any event, any such application will be considered by the Court on its merits if and when it is made.

178 It is necessary to deal with two other issues that arise in the context of the question whether the proposed order is beneficial to, or in the interests of, group members as a whole. The first relates to the fact that notice of the application for the proposed order has been published pursuant to directions of the Court. The second relates to the fact that if the proposed order is made, group members retain the right to opt out of the proceeding.

179 The fact that notice of the application has been published and no group member has objected to the making of the proposed order is no doubt a relevant and significant factor in considering whether the proposed order is in the interests of group members. It is, however, not determinative: *Modtech* at [60]; *ASIC v Richards* at [54].

180 Given the size and nature of the class, the reality is that the notice may not have come to the attention of, or been fully appreciated by, all group members. The fact that there has been no response to the notices also does not, in any event, necessarily establish consent or agreement on the part of the group members. In *P Dawson Nominees v Brookfield Multiplex (No 4)*, Finkelstein J noted (at [23]) that "[g]enerally speaking, it is dangerous to assume that silence equals assent as class members with only a very small stake in the action have little incentive to object." Those observations were made in the context of an application for approval of a settlement under s 33V of the FCA Act. They perhaps have more relevance in respect of notices sent to group members at an early stage of the proceeding, before they have even been required to decide whether or not to opt out under s 33J of the FCA Act. Nevertheless, given the important role that the notice procedure plays in Pt IVA, the Court is obliged to proceed on the basis, and have regard to the fact, that group members have been notified of the application for the proposed order and no group member has communicated any objection.

181 The more important point is that the fact that no group member has opposed the proposed order does not relieve the Court of the obligation to consider whether it is in the interests of group members. Nor does it establish that the proposed order is in the best interests of group members.

182 Similar issues arise in relation to the Applicants' reliance on the fact that group members will in due course be given the opportunity to opt out of the proceeding. As the Applicants themselves acknowledge, albeit in the context of a potential class closure, the practical effect of a group member opting out of this proceeding is that the person will most likely lose their right of action against the Respondents. That arises because the suspension of the limitation period resulting from the operation of s 33ZE will be lifted, with the result that the limitation period will expire in a very short period of time. It is highly unlikely that opting out group members would be able to commence their own proceedings in such a short space of time. The fact that group members have the ability to opt out is accordingly of little benefit to them.

183 It follows that the Applicants' submission that the proposed order benefits group members as a whole has no merit and is rejected. The fact that the proceeding could have been commenced as a closed class proceeding is essentially beside the point. The fact that the Applicants may apply to close the proceeding is somewhat hypothetical and, in any event, closure will only occur with the leave of the Court.

184 As has already been explained, the only real benefit from the proposed order would appear to flow to the Applicants and the litigation funders. As for the Applicants, the position they currently find themselves in is that they have contractually promised to do something that, but for the proposed order, they may not be able to deliver. They have promised to pay ILFP amounts referable to claims or recoveries by group members other than themselves. The proposed order benefits the Applicants because it permits and facilitates their performance of this contractual promise. So much so is clear from the terms of the proposed order.

185 As for the litigation funder, the proposed order benefits ILFP because it provides commercial certainty. Amounts to be paid to it are approved and declared to be reasonable consideration, even though it is unclear what those amounts are likely to be. The litigation funder also receives the benefit of the Applicants' ability to perform its contractual obligations, as well as the effective benefit of the creation of a charge over the Resolution Sum to secure payments to be made to it.

Is the proposed order consistent with the statutory scheme?

186 The Applicants' submission that the proposed order is consistent with the statutory scheme again relies primarily on the fact that this proceeding has been commenced as an open class proceeding rather than a closed class proceeding. They submit that open class proceedings are more consistent with the opt out scheme in Pt IVA, and that the phenomenon of closed class proceedings has arisen largely as a result of practical problems that have been encountered in relation to litigation funding and the perceived problem of "free riders" (*cf.* *Courtney v Medtel* at 179-180).

187 So much so may be accepted. It does not follow that the proposed order is consistent with the statutory scheme.

188 Without necessarily endorsing the somewhat pejorative expression "free riders", as has already been indicated the Court has recognised that orders may need to be made to ensure equality between group members where only some group members have assumed the burden

of funding the proceeding. Such orders have in the past been made in the context of the approval of settlements under s 33V of the FCA Act. Consideration can also be given to the making of such orders at the stage that the Court makes provision for the distribution of money following the award of damages. For the reasons already given, it makes sense to deal with any issues concerning equality of outcome at a stage of the proceeding when the actual amounts involved are known or are able to be accurately estimated.

189 The proposed order essentially pre-empts the making of orders that may properly be made at later stages of the proceeding when the facts are fully known. To that extent the proposed order is inconsistent, not consistent, with the statutory scheme.

190 The Applicants submit that the proposed order does not pre-empt any order that may be made if the matter settles and approval is sought under s 33V of the FCA Act. That is because the proposed order is only interlocutory in nature. The Applicants also point out that clause 8.2 of the funding agreements, which deals with settlement, is expressed to be subject to any Court order. It follows, in the Applicants' submission, that despite the terms of the proposed order, the amount ultimately payable by group members to ILFP on any settlement would still be subject to approval under s 33V of the FCA Act.

191 It is no doubt correct that any settlement will need to be approved under s 33V of the FCA Act even if the proposed order is made. In *Pharm-A-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277, Flick J, in the context of approval of a settlement under s 33V, suggested, but did not decide, that s 33ZF might empower the Court to make an approval subject to a condition limiting the amount payable to a litigation funder. Even accepting that to be the case, if the proposed order is made how is the Court, at the s 33V stage, to deal with the fact that it has already approved the amounts provided for in the funding agreements and declared them to constitute reasonable consideration? It might reasonably be expected that the Applicants would submit at the s 33V stage that nothing has changed and there is therefore no reason to vary any amount otherwise payable pursuant to the terms of the order. As effectively foreshadowed in their submissions, it might also be expected that the Applicants would, at the s 33V stage, rely on the fact that group members did not oppose the making of the proposed order.

192 It may also be asked rhetorically, why it is appropriate or necessary to make the order now if the amounts payable at the s 33V stage can be reconsidered and varied in any event?

193 In relation to costs, the effect of the proposed order is that group members are required to pay ILFP amounts referable to legal costs incurred by the Applicants but paid to the Applicants' solicitors by ILFP pursuant to the terms of the funding agreements. In short, group members will be required to pay a portion of the Applicants' legal costs from any recoveries made by them. Far from being consistent with the statutory scheme, this would appear to cut across the operation of s 33ZJ, which makes specific provision for the representative party to apply to the Court for an order that any legal costs not recovered from a respondent be paid out of the damages awarded.

194 It follows that the Applicants' submission that the proposed order is consistent with the statutory scheme is rejected. If anything, the proposed order is inconsistent with the statutory scheme. An order that is inconsistent with the statutory scheme is not likely to be appropriate in the context of s 33ZF.

Do the overseas authorities assist?

195 Consideration has already been given to the Applicants' submissions relating to Australian authorities, both in relation to a liquidator's right to be paid from a recovered fund and in relation to orders made in representative proceedings in the context of the approval of settlements. It remains to consider the Applicants' submissions in relation to United States and Canadian authority.

The United States and the "common fund" doctrine

196 The Applicants rely on the "common fund" doctrine which has been developed by courts in the United States and recognised to apply in the context of class actions. The doctrine was explained in the United States Supreme Court decision in *Boeing Company v Van Gemert* in the following terms (at 478):

> Since the decisions in *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882), and *Central Railroad & Banking Co. v. Pettus*, 133 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. See *Mills v. Electric Auto-Lite Co*., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed.1184 (1939); cf. *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). The common-fund doctrine reflects the traditional practice in courts of equity, *Trustees v. Greenough*, *supra* 105 U.S., at 532-537, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S., at 257-258, 95 S.Ct., at 1621-1622. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit

> without contributing to its cost are unjustly enriched at the successful litigant's expense. See, *eg.*, *Mills v. Electric Auto-Lite Co*., 396 U.S., at 392, 90 S.Ct., at 625. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fess proportionately among those benefited by the suit.

197 More recently, in *Victor v Argent*, the Second Circuit said the following in relation to the doctrine:

> [i]t is well established that the common fund doctrine permits attorneys whose work created a common fund for the benefit of a group of plaintiffs to receive reasonable attorneys' fees from the fund. *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 128-29 (2d Cir.2010) (per curiam); *Goldberger*, 209 F.3d at 47. Class action lawsuits are the prototypical example of instances where the common fund doctrine can apply.

198 The common fund doctrine has developed in a legal system that differs in some important respects from the Australian legal system, and has been applied in a class action regime that has several different features to the Australian statutory regime. As revealed in the passage extracted from *Boeing Company v Van Gemert*, the general rule in the United States' legal system is that each litigant bears their own attorney's fees. Costs orders are not usually made in favour of a successful party. Another important difference in the United States is that attorneys are permitted to charge contingency fees. One apparent implication of this is that commercial litigation funders do not play a significant role in funding class actions in the United States: Jasminka Kalajdzic et al, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and US Third Party Litigation Funding' (2013) 61(1) *American Journal of Comparative Law* 93; Jarrah Hoffmann-Ekstein, 'Funding Open Classes Through Common Fund Applications' (2013) 87 *Australian Law Journal* 331 at 340.

199 Class actions in the United States involve a certification procedure which gives the court broad powers, including in relation to the appointment of class counsel and the terms upon which they are funded. In that context, the court can make directions from the outset about the fees that may eventually be awarded to class counsel. Importantly, however, the relevant rules (rr 23(g) and 23(h) of the United States Federal Rules of Civil Procedure) make it clear that the initial directions only establish a "framework" for an eventual fee award. The eventual fee award is made at the conclusion of the proceedings and is subject to close judicial scrutiny. In the context of securities class actions, the Private Securities Litigation Reform Act of 1996 provides (15 U.S.C. §78u-4(a)(6)) that total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable

percentage of the amount of any damages and prejudgment interest actually paid to the class: Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52. The reasonableness of a fee award in a common fund case involves a "searching assessment" by the court of a number of factors, including: the time and labour expended by counsel; the magnitude and complexities of the litigation; the risk of the litigation; the quality of representation; public policy consideration; and (in the case of settlement) the requested fee: *Goldberger v Integrated Resources, Inc* 209 F.3d 43 (2nd Cir. 2000) at 50 and 52. It is readily apparent that most, if not all, of these factors can only be considered at the conclusion of the proceeding.

200 When regard is had to both the differences between the systems in the United States and Australia, and the manner in which the common fund doctrine is in fact applied in class actions in the United States, the common fund doctrine provides no support for the proposed order. The proposed order goes well beyond establishing a framework for attorneys' fees. If made, it would approve amounts payable under the agreements with ILFP as reasonable and also permit the Applicants to make those payments to ILFP out of any amounts recovered by group members. Whilst the Applicants maintain that any amounts payable would still require the approval of the Court (at least in the context of a settlement), as previously explained, if anything that militates against making the proposed order. In those circumstances, there would seem to be no reason to make the proposed order at this stage other than to provide some commercial certainty for ILFP. The commercial interests of a litigation funder do not make an order appropriate or necessary to ensure that justice is done in the proceeding.

Canada

201 There is no single class action regime in Canada. Legislation dealing with class actions has been introduced in most provinces and territories and there is also a federal class action regime. In general terms, however, class actions in Canada, like the United States, involve a certification system, including the certification of the class and class counsel. Also like the United States, contingency fees are permitted and most actions are funded by class counsel.

202 The Applicants rely on the decision of Strathy J in the Ontario Superior Court of Justice in *Dugal*. In Ontario, unlike some other provinces in Canada, an unsuccessful party in a class action can be ordered to pay the costs of the successful party or parties. As Strathy J observed (at [28]), this leads to the "grim reality" that "no person in their right mind would

accept the role of representative plaintiff if he or she were at risk of losing everything they own … over a modest claim." In these circumstances, indemnities given by class counsel are commonplace in Ontario. Importantly also, plaintiffs in class actions commenced in Ontario are able to apply to a statutory fund (the Class Proceedings Fund) for financial support for disbursements and an indemnity against costs. The fund receives a levy of 10 percent of any award or settlement in funded proceedings, together with repayment of any funded disbursements.

203 In *Dugal*, the plaintiffs in a proposed class proceeding had entered into a funding agreement with a commercial litigation funder. The action had not at that stage been certified as a class proceeding under the relevant legislation, the *Class Proceedings Act, 1992*, S.O. 1992, C.6 (**CPA**). The litigation funder agreed to pay $50,000 towards the plaintiffs' disbursements and to provide an indemnity against any adverse costs order. In return, the litigation funder was entitled to a commission of 7 percent of the amount of any settlement or judgment, after deduction of the fees and disbursements of class counsel and administration expenses, subject to a "cap" of $5 million if the matter settled at an early stage or $10 million otherwise. The agreement was subject to court approval. The plaintiffs applied to the Ontario Superior Court of Justice for approval of the agreement prior to the certification of the action.

204 Under s 12 of the CPA, the Ontario Superior Court of Justice has power to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate." The court is able to make an order under s 12 of the CPA prior to certification. The court also has power to make declaratory orders. The order sought in *Dugal* was an order declaring that the agreement entered into with the litigation funder was approved and binding on class members. The main question for Strathy J was whether the court could make an order in a class proceeding which had the effect of binding the class members before the proceeding had been certified and therefore before there was a class. There appears to have been no issue that the court had jurisdiction to make an order binding class members once the proceeding was certified.

205 Strathy J concluded that he had jurisdiction to approve the agreement as part of the court's inherent power to control its process. He also found that it was appropriate to exercise that jurisdiction prior to certification. At [16]-[17], Strathy J said:

> In this case, I am being asked to approve an agreement made between the

> representative plaintiff and a third party. That agreement has implications for the defendants, for proposed class counsel and for potential class members. It is an agreement that could affect the integrity of the litigation process and the due administration of justice. I am satisfied that I have jurisdiction to approve the agreement as part of the court's inherent jurisdiction to control its process. The question is whether I should exercise that jurisdiction at this time.
>
> While I recognize that the views of class members are important and deserve consideration in appropriate cases, a part of the court's responsibility in class actions is to protect the rights of prospective class members. One of the most important of those rights is the right to advance a class proceeding. To postpone the decision to post-certification, when the views of class members can be sought, could very well spell the end of this proceeding, because the plaintiffs cannot withstand an adverse costs award on certification. In my view, exercising the Court's supervisory jurisdiction over the proceeding, I am entitled to put myself in the shoes of prospective class members and ask whether the proposed agreement is fair and reasonable. For the reasons that follow, I find it is. The fact that it is acceptable to a reasonably representative and informed group of prospective class members is by no means determinative, but it is an important factor I have considered in coming to this conclusion.

206 In determining that he should make the order, Strathy J had regard to a number of considerations, including the fact that if the agreement was not approved at that stage the proceeding might be abandoned, and the fact that the commission payable under the agreement was less than the "inflexible" 10 percent charged by the statutory fund. At [32], Strathy J said:

> If class counsel is not prepared to accept the risk of an adverse costs award, then the plaintiff's only option is to either abandon the claim or apply to the Fund. The fund may or may not accept the application. If it accepts the application, its fee is an inflexible 10% of the recovery.

207 The decision in *Dugal* provides some support for the Applicants' case that the proposed order should be made. Some of Strathy J's reasoning mirrors the Applicants' submissions that the proposed order is consistent with the policy behind Pt IVA because it promotes access to justice. Strathy J appeared to have been particularly persuaded by the fact that if the agreement was not approved prior to certification, individuals with potentially meritorious claims would be unable to bring them because they would not be able to withstand the risk of loss.

208 Nevertheless, there are some important points of distinction between the class action system in Ontario and the regime for representative proceedings under Part IVA of the FCA Act.

209 First, the fact that class actions in Ontario involve a certification process is important. It appears to have been accepted that, upon certification, the court could make an order relating to funding that bound all members of the certified class. The only question was whether such an order could or should be made prior to certification.

210 Second, the existence of the statutory fund in Ontario is important. It would appear that if the approval was not given, the representative plaintiffs could in any event apply to the fund. If successful, the effect would be that all class members would in any event be liable to pay a levy of 10 percent of any settlement or judgment. In that respect, the likelihood was that class members would be bound to pay a commission irrespective of their views. The commission payable under the funding agreement was less than the 10 percent payable to the statutory fund.

211 Third, Strathy J appears also to have been influenced by the need or desirability of providing commercial certainty for a litigation funder. For example, in dealing with the concerns about fixing the percentage commission a litigation funder was entitled to receive at an early stage of the proceeding, Strathy J likened a litigation funder to an insurer (at [33]):

> While it is true that one may not be able to say, with absolute certainty, that there is no possibility that the funding agreement might result in a "windfall" recovery to CFI, the possibility of such a recovery, when balanced against the probability of protracted litigation and a somewhat speculative result, is a factor that a commercial risk-taker must take into account in determining the amount of its compensation. The assessment of the risk can always be defined with greater precision when more information is available, but the fact of the matter is that the plaintiff asks for a decision now. When an insurer sets a life insurance premium, it does not say to the assured, "We'll wait and see how you are doing in a couple of years." It fixes the premium based on the current state of knowledge, recognizing that the applicant may die the next day or live to be 101.

212 For the reasons already given, it is doubtful that the commercial interests of a third party litigation funder carry any, or any significant, weight, in considering whether a proposed order is appropriate or necessary to ensure that justice is done in a proceeding. Justice in a proceeding does not necessarily involve giving a third party litigation funder commercial certainty at the outset of representative proceedings.

213 Fourth, other circumstances in *Dugal* differ from the circumstances here. For example, unlike in *Dugal*, it does not appear likely that the proceedings will be abandoned if the proposed order is not made. All that is suggested is that the Applicants might approach the

Court to amend the definition of group members, an application that may not necessarily be successful even if it is made.

214 In all the circumstances, the decision and reasoning in *Dugal* does not provide a persuasive reason for concluding that the proposed order is appropriate or necessary to ensure that justice is done in the proceeding.

CONCLUSION

215 The Applicants have not demonstrated that the proposed order is appropriate or necessary to ensure that justice is done in the proceeding. It follows that the order cannot be made under s 33ZF of the FCA Act.

216 For essentially the same reasons, the proposed order is not appropriate for the purposes of s 23 of the FCA Act.

DISCRETIONARY CONSIDERATIONS

217 It remains to say something briefly about the fact that, as discussed earlier, the power to make an order under s 33ZF of the FCA Act is discretionary. The parties each made detailed submissions concerning the exercise of the discretion in the event that it was found that the Court had power to make the proposed order under s 33ZF. Those submissions have all been addressed earlier in the context of the question whether the proposed order is appropriate or necessary to ensure that justice is done in the proceeding.

218 In exercising the discretion to make an order under s 33ZF, the Court would no doubt be required to consider all the facts and circumstances of the particular proceeding, including the effect that the order under consideration would have on the rights and interests of the parties and group members. That said, if the Court, upon consideration of all the relevant facts and circumstances, thinks that an order is appropriate or necessary to ensure that justice is done in the proceeding, and the discretion is therefore enlivened, it is difficult to conceive of any additional discretionary considerations that would provide a basis for not making the order. There is not much scope for any residual discretionary considerations. On the other hand, if the Court concludes that the order under consideration is not appropriate or necessary to ensure that justice is done in the proceeding, the discretion is not enlivened.

219 Nevertheless, to avoid doubt, if the Court's discretion under s 33ZF was enlivened here in relation to the making of the proposed order, all of the considerations referred to earlier in the

context of the question whether the proposed order was appropriate or necessary would strongly militate against the making of the order in the exercise of the Court's discretion.

220 The main consideration in this context is the lack of available information, or the insufficiency of the Applicants' evidence on this application, to enable the Court to determine the implications of making the proposed order. There is no clear indication of the number of group members who would be affected by the making of the proposed order. There is no indication of the value or the potential claims of the group members and therefore no way of even estimating the total value of the damages claims in question. There is therefore no way of even estimating the amount of the commission that the Court is asked to approve as reasonable consideration payable to ILFP. It may fairly be inferred, however, that the potential commission payable to ILFP, if the proposed order is made, could run into the tens if not hundreds of millions of dollars, even if the matter settles at an early stage. There is no evidence as to the likely length and complexity of the trial, though it can fairly be inferred that the trial, if contested to its conclusion, will be lengthy, complex and costly. That said, there is no way of accurately estimating the legal costs that the Court is asked to approve as reasonable.

221 In all the circumstances, even if the Court's discretion to make an order under s 33ZF (or s 23) was enlivened, it would not be appropriate to exercise that discretion in favour of making the order at this stage of the proceeding.

IS THERE A CASE FOR REFORM?

222 The conclusion that, at this stage, the proposed order is not appropriate or necessary to ensure that justice is done in the proceeding does not mean that the Court will not make an order, at some later stage of the proceeding, which has the effect of ensuring that any proposed settlement fund, or any award or awards of damages, is distributed equitably having regard to the funding obligations of the Applicants. It may at some later stage become necessary to consider whether it is appropriate or necessary to make an order ensuring that the Applicants alone do not bear the burden of meeting, from amounts recovered by them, costs and expenses associated with the common questions component of this proceeding.

223 Nor should it be inferred that an order of the kind sought by the Applicants in this proceeding cannot, or will not, ever be made in any representative proceedings under Pt IVA of the FCA Act. The conclusion that has been reached in this matter is based on the particular facts and circumstances of this matter.

224 Many of the Applicants' submissions in support of the proposed order travelled well beyond the particular facts and circumstances of this proceeding and amounted, in effect, to a case for law reform. In some respects, the Applicants' submissions made out a fairly compelling case for reform.

225 As adverted to by Mr Watson in his evidence, and as pointed out by Strathy J in *Dugal*, the "grim reality" is that many modern-day representative proceedings would never be commenced but for the involvement of commercial litigation funders. This may or may not have been foreseen by the drafters of Pt IVA of the FCA Act. For whatever reason, there is no provision in Pt IVA that directly deals with this reality. The result is that many proceedings are commenced as closed class proceedings. As pointed out by Jacobson J in *Multiplex Funds v P Dawson Nominees*, it is difficult to see how that can be reconciled with the recognised goal of representative proceedings of enhancing access to justice and judicial efficiency.

226 It has clearly been recognised, at least in the context of proposed settlements, that where only some group members have entered into litigation funding agreements, fairness or equity may require adjustments to be made to the amounts distributed to funded and unfunded group members upon resolution of the matter. There is, however, no specific provision in Pt IVA of the FCA Act dealing with this issue. That may not necessarily be a problem, because judges can fashion orders to meet the particular circumstances of each case utilising general provisions, such as ss 33V and 33ZF of the FCA Act. There is, however, a risk of inconsistency of approach, demonstrated perhaps by the debate concerning the respective merits of the so-called "common fund" approach of Pagone J in *Pathway Investments* and the so-called "funding equalisation formula" approach taken by Gordon J in *Modtech*. And it remains to be seen how that equality can be achieved in matters that do not settle. It would appear that the Court's powers in ss 33Z and 33ZA of the FCA Act are sufficiently broad to enable this to occur, though the circumstances may be more complicated than the circumstances that are likely to exist when a matter settles.

227 There is something to be said for the proposition that some form of common fund approach, similar to the common fund doctrine in the United States, should be adopted in Australia to deal with the reality of commercial litigation funding in representative proceedings. It would, however, perhaps be preferable for that to occur as a result of legislative reform, rather than

by way of the piecemeal utilisation by judges of general discretionary powers such as ss 23 and 33ZF of the FCA Act.

228 Given the differences between the legal systems and class action regimes in the United States and Australia, other changes may need to be made to the Part IVA regime if some form of common fund approach were to be adopted. For example, if there was to be some provision allowing the Court to approve, at an early stage of the proceedings, the terms of a litigation funding agreement that was to bind all group members, some provision may also need to be made for the close judicial supervision and scrutiny of the involvement of the litigation funder in the proceeding. In particular, there would need to be specific provision for scrutiny and court approval of the amounts payable to the litigation funder at the determination of the proceeding. That is essentially the position in the United States. Needless to say, no provision in Pt IVA directly empowers the Court to scrutinise the fees payable to a litigation funder. It would appear that New Zealand is moving towards a class action regime that both recognises the role of commercial litigation funders and provides for close judicial scrutiny of funding agreements throughout the class action proceedings: see Vince Morabito and Vicki Waye, 'Reining in Litigation Entrepreneurs: A New Zealand Proposal' (2011) (2) *New Zealand Law Review* 323. There may be a similar case for legislative reform in Australia.

229 In any event, and irrespective of whether law reform in this area is necessary or desirable, the point remains that, in the present matter, the facts and circumstances do not warrant the making of the proposed order. The circumstances at this stage of the proceeding are not such that it is appropriate or necessary to make the proposed order to ensure that justice is done in the proceeding. Nor are the circumstances such as to make it appropriate to exercise the Court's discretion to make the proposed order, even if enlivened, under either s 23 or s 33ZF of the FCA Act.

DISPOSITION

230 The application for the order referred to as "Primary Relief" in paragraph 1 of the interlocutory application dated 8 May 2014 should be dismissed. The Applicants should pay the Respondents' costs of and associated with the interlocutory application.

I certify that the preceding two hundred and thirty (230) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 7 August 2015