FEDERAL COURT OF AUSTRALIA

Farey v National Australia Bank Ltd [2016] FCA 340

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| File number: |  |
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| Judge: | **BEACH J** |
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| Date of judgment: | 6 April 2016 |
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| Catchwords: | **REPRESENTATIVE PROCEEDING** – approval of settlement by Court – s 33V of *Federal Court of Australia Act 1976* (Cth) – whether proposed settlement is fair and reasonable as between group members and respondent – whether proposed distribution scheme is fair and reasonable as between group members – authority of applicants to release on behalf of group members non-pleaded claims – implied statutory authority – authority established – claim of applicants for allowance for work done on behalf of group members – claim allowed – approval granted |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 33V, 33Z, 33ZB, 33ZF |
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| Cases cited: | *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468  *Farey v National Australia Bank Ltd* [2014] FCA 1242  *Foley v Gay* [2016] FCA 273  *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323  *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249; [2014] FCA 35  *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 321 ALR 584; [2015] FCAFC 50  *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 |
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| Date of hearing: | 6 April 2016 |
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| Category: | Catchwords |
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| Counsel for the Applicants: | Mr M B J Lee SC with Mr W A D Edwards |
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| Solicitor for the Applicants: | Maurice Blackburn |
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| Counsel for the Respondent: | Mr J H Karkar QC with Mr R F R Pintos-Lopez |
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| Solicitor for the Respondent: | National Australia Bank |

ORDERS

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|  | | VID 1459 of 2011 |
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| BETWEEN: | STEVEN HAROLD FRANCIS FAREY  First Applicant  SUSAN ANN FAREY  Second Applicant  FAREY ENTERPRISES PTY LTD (ACN 088 629 627)  Third Applicant | |
| AND: | NATIONAL AUSTRALIA BANK LTD (ACN 004 044 937)  Respondent | |

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| JUDGE: | BEACH J |
| DATE OF ORDER: | 6 april 2016 |

THE COURT ORDERS THAT:

1. Pursuant to ss 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (Act) the settlement of this proceeding between the Applicants and the Respondent (Proceeding) be and is approved on the terms set out in:

(a) the Settlement Deed executed by the Applicants, the Respondent, IMF Bentham Ltd (IMF) and Maurice Blackburn Pty Ltd (MBPL) on 17 and 18 March 2016 (Settlement Deed), being Annexure “AJW-1” to the affidavit of Andrew John Watson sworn on 18 March 2016; and

(b) the Settlement Distribution Scheme (SDS), being Annexure “AJW-12” to the confidential affidavit of Andrew John Watson sworn on 6 April 2016.

1. Pursuant to s 33ZF of the Act, the Applicants be authorised *nunc pro tunc* on behalf of the group members (as defined in the Further Amended Originating Application dated 19 November 2014) to enter into and give effect to the Settlement Deed and the transactions contemplated thereby for and on behalf of the group members.
2. The Proceeding be dismissed with no order as to costs, on the basis that the dismissal is a discharge, defence and absolute bar to any claim or proceeding by any Applicant or group member which arises out of or is related to the subject matter of the Proceeding.
3. Pursuant to s 33ZF of the Act, MBPL be appointed Settlement Administrator of the SDS and to act in accordance with the rules of the SDS, subject to any direction of the Court.
4. Pursuant to s 33ZF of the Act, the amounts of:

(a) $1,000.00, in respect of the First Applicant; and

(b) $1,000.00, in respect of the Second Applicant,

referred to in the affidavit of Andrew John Watson sworn on 4 April 2016 be approved as the amount to be paid to the Applicants for the purposes of para [6.3] of the SDS.

1. Pursuant to Rule 39.05(c) of the *Federal Court Rules 2011* (Cth), the orders made in the Proceeding by Jacobson J on 18 November 2014 be varied by:

(a) deleting from order [11] the words “, subject to further order,”; and

(b) deleting from order [21] the word “forthwith”, and replacing it with the words “subject to the terms of the Settlement Deed approved by the Court”.

1. Pursuant to s 37AF of the Act, the affidavits of:

(a) Andrew John Watson sworn on 4 April 2016 and marked “Confidential Affidavit”;

(b) Catherine Mary Dealehr sworn on 5 April 2016; and

(c) Andrew John Watson sworn on 6 April 2016 and marked “Confidential Affidavit”,

and each of the Annexures thereto, be treated as confidential and be sealed on the Court file in an envelope marked “NOT TO BE OPENED EXCEPT BY LEAVE OF THE COURT OR A JUDGE” and not be published or made available, and any electronic version thereof be treated in an analogous fashion.

1. Pursuant to s 37AG of the Act, the order in [7] above is made on the ground that the order is necessary to prevent prejudice to the proper administration of justice because the affidavit contains material subject to client legal privilege, which privilege has not been waived.
2. Pursuant to s 37AF of the Act, the exhibit marked “Confidential Exhibit DWL-1” to the affidavit of Daryl Wayne Letchford sworn on 4 April 2016 be treated as confidential and be sealed on the Court file in an envelope marked “NOT TO BE OPENED EXCEPT BY LEAVE OF THE COURT OR A JUDGE” and not be published or made available, and any electronic version thereof be treated in an analogous fashion.
3. Pursuant to s 37AG of the Act, the order in [9] above is made on the ground that the order is necessary to protect the safety of the persons identified in “Confidential Exhibit DWL-1”, because it contains personal and identifying information of those persons.
4. The period for which orders [7] and [9] above operate is 10 years from the date of this order, which may be varied and in respect of which there is liberty to apply generally.
5. By 4.00 pm on 22 April 2016 IMF provide to each group member, for whom it holds a current email or postal address, notification of the fact that the Court has today approved the settlement of the Proceeding.
6. MBPL and IMF have liberty to apply for directions in connection with the SDS and otherwise generally in relation to any matter concerning the SDS or the Proceeding.
7. The Applicants’ reasonable costs of the Interlocutory Application dated 18 March 2016 be permitted to be deducted from the Settlement Distribution Fund as defined in the SDS.

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

REASONS FOR JUDGMENT

BEACH J:

1. The applicants seek orders under s 33V of the *Federal Court of Australia Act 1976* (Cth) (the Act) (and ancillary orders) for approval of the settlement as recorded in a settlement deed between the applicants, NAB, IMF Bentham Ltd (IMF) and Maurice Blackburn which was executed in its various counterparts on 17 and 18 March 2016 by which the applicants have settled the proceeding on behalf of the applicants and all group members (settlement deed).
2. In relation to this s 33V application, I am satisfied that there has been appropriate compliance with the orders made on 18 March 2016 in terms of advertisements and notification to group members for the purposes of ss 33X and 33Y of the Act. In addition, relevant material has been made available on the website of Maurice Blackburn as required.
3. It is also appropriate to observe that Maurice Blackburn has not received from any group member any written or oral objection to the proposed settlement and IMF has not received any such written or oral objection.
4. The principal terms of the settlement deed are the following:
   1. First, NAB will pay a settlement sum of $6.6 million comprising, notionally, $6 million in settlement of the applicants’ and group members’ claims and a maximum of $600,000 for the applicants’ costs and disbursements (with any difference between the amount of $600,000 and any lesser amount allowed for the applicants’ costs and disbursements to remain as part of the settlement sum and be available for distribution to group members) (cll 2.4 and 3.3(b));
   2. Second, releases by the applicants and group members which will operate on the making of the approval order (cll 2.5 and 2.6);
   3. Third, the settlement sum will be administered by Maurice Blackburn in accordance with a settlement distribution scheme (cl 3); I should note that the settlement deed itself does not identify the form of that scheme;
   4. Fourth, the settlement deed will terminate and be of no force or effect if either the “approval order” or the “dismissal order” (as defined in the settlement deed) are not made by this Court before the High Court delivers judgment or publishes reasons in the ANZ Proceeding (cl 4.2).
5. The present approval application has arisen in and under what has been described as the “shadow” of judgment reserved by the High Court in the related bank fees proceeding of *Paciocco v Australia and New Zealand Banking Group Ltd* (also a class action against a bank for the recovery of late payment fees) (ANZ Proceeding), which was heard by the High Court on 4 and 5 February 2016.
6. In my opinion and for the reasons that I will now explain, it is appropriate to approve the settlement under s 33V and to make appropriate consequential orders under s 33ZF.

# background

## (a) The nature of the present proceeding

1. The present proceeding is a representative proceeding under Part IVA of the Act which was commenced on 16 December 2011 against NAB by the applicants, being customers of NAB, in respect of sums paid to NAB by those customers in the course of their banker and customer relationship. It seeks recovery on behalf of the applicants and group members of categories of fees charged to customers conditional upon the occurrence of particular events. The particular fee categories, the accounts upon which they were charged, the events triggering the charging of such fees and the relevant paragraphs of the Further Amended Statement of Claim filed on 19 November 2014 (FASOC) are summarised in the following table.

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| **Fee Categories** | **Account** | **Triggering Event** | **FASOC** |
| Reference Fees | Personal Transaction Account | The account is overdrawn without an approved overdraft limit, or beyond the amount of any approved overdraft limit | 14, 35 |
| Dishonour Fees – Outward | Personal Transaction Account | A payment from the account (other than a periodical payment) is dishonoured | 14, 35 |
| Periodical Payment Dishonour Fees | Personal Transaction Account | A periodical payment from the account is dishonoured due to lack of funds in the account | 14, 35 |
| Late Payment Fees | Personal Credit Card Account | An amount due for payment on the account is 18 days past its due date | 22, 36 |
| Overlimit Fees | Personal Credit Card Account | The balance of the account exceeds its approved credit limit | 22, 36 |
| Reference Fees  Irregular Account Fees | Business Transaction Account | The account is overdrawn without an approved overdraft limit, or beyond the amount of any approved overdraft limit | 29, 37 |
| Dishonour Fees – Outward | Business Transaction Account | A payment from the account (other than a periodical payment) is dishonoured | 29, 37 |
| Periodical Payment Dishonour Fees | Business Transaction Account | A periodical payment from the account is dishonoured due to lack of funds in the account | 29, 37 |

1. The applicants’ principal complaint is that the quantum of each of the fees was excessive in comparison to the costs incurred by NAB upon the occurrence of a triggering event. The claims have sought to be justified under the heads that:

(a) the relevant contractual terms imposing liability for the fees are void as penalties;

(b) the imposition of the fees was unconscionable under statute;

(c) the relevant contractual terms imposing liability for the fees rendered the contracts unjust under the relevant credit code; and

(d) the relevant contractual terms imposing liability for the fees were unfair under the then *Fair Trading Act 1999* (Vic).

1. This proceeding is one of various representative proceedings which have been commenced by clients of Maurice Blackburn in this Court and in the Supreme Court of New South Wales against various banks seeking relief in relation to certain fees (commonly described as “exception fees”) previously charged by those banks (and, in the case of some banks, continuing to be charged) on the grounds that such fees and the contractual terms pursuant to which they were (and are) charged are variously:

(a) penalties at law and in equity;

(b) unconscionable in contravention of various statutes;

(c) unfair contract terms within the meaning of the then *Fair Trading Act 1999* (Vic); and

(d) unjust transactions under the relevant credit code.

1. This proceeding and the other proceedings (other than the ANZ Proceeding) have been stayed or otherwise adjourned pending the outcome of the ANZ Proceeding.

## (b) The ANZ Proceeding

1. The ANZ Proceeding was heard by Gordon J in December 2013. Her Honour’s reasons for judgment were handed down on 5 February 2014 (*Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249; [2014] FCA 35) in which her Honour found *inter alia* that:

(a) “late payment fees” charged by the ANZ to Mr Paciocco’s personal credit card accounts were penalties at law and in equity;

(b) none of the other “exception fees” that were charged by ANZ to the applicants in the ANZ Proceeding were penalties at law or in equity;

(c) none of the “exception fees” that were charged by ANZ to the applicants in the ANZ Proceeding were unconscionable, unfair or unjust under or for the purposes of the statutory regimes referred to above.

1. Appeals by both the applicants (VID 141 of 2014) and ANZ (VID 149 of 2014) from Gordon J’s decision were determined by the Full Court in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 321 ALR 584; [2015] FCAFC 50. The Full Court dismissed the applicants’ appeal and allowed ANZ’s appeal in respect of late payment fees. It found that the applicants were not entitled to any relief in respect of any ANZ exception fees.
2. On 11 September 2015, the applicants in the ANZ Proceeding obtained special leave to appeal from the decision of the Full Court. The grounds of appeal were limited to late payment fees only. In proceeding M219 of 2015 the applicants asserted that the Full Court erred in determining that late payment fees charged by ANZ were not unconscionable, unfair or unjust pursuant to the various statutory regimes. In proceeding M220 of 2015 the applicants asserted that the Full Court erred in determining that late payment fees charged by ANZ were not penalties. Both appeals were heard by the High Court on 4 and 5 February 2016 and judgment remains reserved.
3. Details of the fees claimed by the applicants in the ANZ Proceeding, the relevant contractual terms, and the wider framework in which they were imposed, were set out in Gordon J’s decision. A comparison between the fees and terms described therein and in the FASOC reveals a high degree of similarity between the questions of fact and law to be determined in each proceeding.
4. Specifically, each proceeding claims:

(a) recovery of fees charged by a bank to its customers due to:

* + 1. a transaction account (both business and personal) being overdrawn;
    2. the dishonour of a payment on a transaction account (both business and personal);
    3. late payment of an amount due on a credit card account; and
    4. the overdrawing of a credit card account;

(b) that those fees were excessive in comparison with the costs incurred by the bank upon the occurrence of an event triggering the charging of the relevant fee; and

(c) accordingly, that the fees were penalties at law or in equity, or were otherwise charged in contravention of the various statutes referred to above.

1. In my view there is little doubt that the outcome of the ANZ Proceeding would, absent any settlement, be highly determinative of the outcome of this proceeding if it were to proceed to trial and adjudication.
2. The present application has required me to consider whether I should predict the outcome of the High Court appeal in the ANZ Proceeding as part of the assessment of whether the present settlement is fair and reasonable as between the applicants and group members on the one hand and the NAB on the other.
3. I have considered whether I should postpone my decision on the approval application until after the High Court has handed down judgment, but I have rejected that course. To do so would crystallise a risk adverse to either the group or the NAB in a fashion that the parties have sought to avoid. Indeed, the settlement deed would also terminate under clause 4.2. Moreover, the applicants and the group members insist that I now rule on the s 33V question.
4. I have also considered whether it would be undesirable if not presumptuous to speculate on possible outcomes. It would be in one sense but not another. Of course, it would be inappropriate to apply the usual calculus for risk assessment of taking two competing scenarios and calculating for each scenario the product of the probability of its occurrence by the magnitude of the consequence and then deciding the matter by taking into account the various values of the various products. It would also be inappropriate to read the transcript of the argument before the High Court to attempt an exercise in juridical divination.
5. But I am able to assume that given that there has been a grant of special leave with the appeal heard but not determined, the appeal has reasonable prospects of success on one or more issues. But presently, the Full Court’s decision stands and I propose to proceed accordingly. The grant of special leave has only elevated the *relative* probability of it being set aside in whole or part but provides no forecast as to the *absolute* probability of any such result.

## (c) Funding

1. This proceeding and the other proceedings referred to above have all been funded by IMF. Prior to the commencement of each of these proceedings, potential group members were invited to register to participate as a group member in the proceedings via the website of Financial Redress Pty Ltd (a wholly-owned subsidiary of IMF) (FRPL). In the course of that registration process, each group member entered into a funding agreement with IMF to fund their participation in the proceedings.
2. When each of the proceedings referred to above were commenced, they were commenced as a “closed class” proceeding, with the group members being limited to those persons who prior to the commencement of the proceeding had registered to participate in the proceeding and had entered into a funding agreement with IMF (funding criterion).
3. However, as I will discuss in a moment, all registered group members in this proceeding are now in effect bound to the terms of the funding agreement, irrespective of whether they have entered into a funding agreement. In essence, a common fund type order has now appropriately been put in place (see [28] and [30] below).
4. The principal terms of the funding agreement are, assuming no termination in accordance with its terms, the following:

(a) IMF agrees to pay all of the costs of prosecuting the proceeding and to pay any adverse costs orders which are made against the applicant(s) and/or group members in the proceeding (cl 8);

(b) any amounts recovered by way of settlement or judgment (defined as the “resolution sum”) are to be received by Maurice Blackburn and paid immediately into an account kept for that purpose (cl 9);

(c) upon receipt of the resolution sum, each group member will pay to IMF from (and only from) the resolution sum:

(i) an amount equal to that group member’s share of the “project costs” paid by IMF and any applicable GST; plus

(ii) an amount equal to 25% of the resolution sum (cll 10, 12).

## (d) Some procedural issues

1. As I have said, this proceeding was commenced on 16 December 2011. It was constituted as a “closed class” proceeding in which registration, and execution of a funding agreement with IMF, was a precondition of membership of the group (i.e. the “funding criterion” referred to above).
2. In light of the context of this proceeding, and specifically the similarity between the matters to be determined in this proceeding and in the ANZ Proceeding as outlined above, this proceeding has, generally speaking, been stayed since 1 March 2012.
3. Pursuant to orders made on 1 February 2013, the applicants’ originating application and statement of claim were amended to permit the addition of further group members being persons who had, following the commencement of the proceeding, registered with FRPL to participate as a group member in the proceeding.
4. On 18 November 2014 orders were made by Jacobson J to, *inter alia*:

(a) “open” the class so as to remove the funding criterion (thereby opening the class of group members to all current and former customers of NAB who had been charged a relevant fee);

(b) require any group member who had not previously registered with FRPL to participate in the proceeding to do so by 27 January 2015, failing which they would remain a group member in the proceeding (and therefore bound by the outcome of the proceeding) but would (subject to any further order) be precluded from participating in any settlement of the proceeding;

(c) require any group member who wished to opt out of the proceeding to do so by 27 January 2015;

(d) require publication of notices to group members to inform them of the above matters; and

(e) put in place arrangements for the funding of the proceeding on behalf of previously unregistered group members which reflected the arrangements in place for the funding of the proceeding on behalf of registered group members (as set out in the funding agreements).

1. The reasons of Jacobson J for making such orders were published (*Farey v National Australia Bank Ltd* [2014] FCA 1242). Such orders were implemented in terms of relevant advertisements and notice to group members.
2. As noted, these orders, appropriately in my view, equalised the contribution each group member made towards the costs of the prosecution of the proceeding (including IMF’s funding commission), irrespective of whether or not that group member had entered into an agreement with IMF. In effect, what was put in place was a common fund type mechanism to ensure that there were no “free riders”.

# approval — principal terms

1. The principles to be applied are not in doubt. I refer to what I said in *Foley v Gay* [2016] FCA 273 at [7], incorporating what was said by Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5], [32], [53] and [54] and Goldberg J in *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at [19], and my further observations in *Foley* at [14] and [22] to [24].
2. I am satisfied as to:

(a) the fairness and reasonableness of the settlement *inter partes*; and

(b) its fairness and reasonableness as between the group members *inter se*.

1. The approval application has been supported by the careful and detailed opinion of senior counsel and junior counsel who have appeared before me this morning. That opinion usefully addresses the matters that I am required to consider. I would make various observations.
2. First, what I have portrayed as binary outcomes (see at [19]) in terms of the High Court’s decision is in truth more complex in terms of potential results. If one considers the algorithmically manipulated contingencies traversed by Mr Michael Lee SC, one can appreciate that the appropriate approach is to make the working assumption that I have set out earlier (see at [20]) but otherwise not to gainsay his and his junior’s conclusions as to the merits of the claims made in the present proceeding based upon the various possible High Court outcomes that they have identified.
3. Second, one perceived High Court outcome has to *some* extent been addressed in a Deed Poll from IMF. However, I discussed with counsel the true value of that aspect of the Deed Poll. It is not appropriate in these reasons to elaborate further.
4. Third, the settlement sum is fair and reasonable on an *inter partes* basis whatever the result from the High Court case. Moreover, I have considered the quantum of the settlement and compared it with the realistic maximum quantum figure that could be achieved taking into account not only the applicants’ filed material before me but also the confidential material provided by the NAB.
5. Fourth, as for the settlement distribution scheme, in my view it is fair and reasonable as between the group members *inter se*. The scheme does discriminate in one sense between different bands of group members, but only on a basis that is methodologically sound; in another sense there is equality because group members with different quantum claims are dealt with in a manner which generally reflects such differences. Undoubtedly a point must be reached where to further fine tune the method for settlement allocations delivers an incremental benefit that is outweighed by the incremental costs of the further refinement. That point has now been reached with this scheme such that further refinement would be counterproductive.
6. Fifth, there is one matter that I raised with counsel that is convenient to mention at this point. The orders of 18 November 2014 required group members to opt out or register by 27 January 2015. Such orders were made in order to facilitate the settlement process. But by definition the orders were made at a time before it was known what the settlement sum would be. After hearing from counsel, I am satisfied that I should not revisit that question or give group members now a further right to opt out. True it is that at that earlier time the settlement parameters were unknown. But if a group member was unhappy with that uncertainty at that time, that member should then have opted out. If they then chose not to do so, they took the risk. In any event, no group member has appeared before me to object to the settlement or to seek a further opportunity to opt out. Finally, the modification that I propose to make to order 11 deals with a different question and facilitates distribution occurring. I will also vary order 21 in the terms sought.

# APPLICANTS’ LEGAL COSTS

1. Mr Andrew Watson, a principal of Maurice Blackburn, has given evidence that given the history of this proceeding as set out above, the costs incurred in the conduct of this proceeding to date have been significantly less than the costs that might otherwise have been incurred in a case of similar size and complexity.
2. The applicants have also obtained and provided to me this morning a report from an expert costs consultant (Ms Catherine Dealehr) in relation to the legal costs and disbursements incurred by the applicants pertaining directly to this proceeding. She has expressed the opinion that the reasonable legal costs and disbursements have been assessed by her at $506,932.96, which is under the cap provided for in the settlement deed. I have no reason to question her expertise or judgment on that assessment. I should also say that the amount claimed is proportionate to the context under which the work was carried out (see my observations in *Foley v Gay* at [22] to [24]).

# APPLICANTS’ CLAIM FOR REIMBURSEMENT

1. The individual applicants have spent some time devoted to their role as lead applicants in the proceeding, albeit less time than might otherwise have been the case had the proceeding not been stayed. Apparently no precise records have been maintained in relation to the time spent, but Mr Watson estimates that each of the individual applicants would have spent in excess of 20 hours devoted to that role, in particular:

(a) in preliminary meetings with representatives of Maurice Blackburn to outline to them the role of a lead applicant and the obligations which it entails, and to ascertain their suitability and willingness to take on that role;

(b) in gathering together, for provision to Maurice Blackburn, all of their banking records with NAB over an extensive period of time together with those of the corporate applicant (Farey Enterprises Pty Ltd); and

(c) in written and oral communications with representatives of Maurice Blackburn to provide them with updates from time to time as to the status of the proceeding and the status of settlement negotiations with NAB, and to obtain their instructions.

1. In the circumstances, in my view it would be fair and reasonable to the individual applicants, and to the group members as a whole, for the individual applicants to receive an additional payment from the settlement sum in the relatively modest amount sought to compensate them for their time so spent.
2. Professor Vince Morabito has undertaken empirical analysis of the justification for and the quantum of reimbursement payments to applicants (V Morabito, “An Empirical and Comparative Study of Reimbursement Payments to Australia’s Class Representatives and Active Class Members” (2014) 33 *CJQ* 175). On any view, the amount to be deducted for the applicants for the time expended is very modest when one considers the ranges reported by Professor Morabito. It is also to be noted that I am not approving any deductions for time spent on their individual claims. Moreover, the deductions are not some proxy for any incentivisation award; I am using “incentivisation” to refer here to reward rather than restitution in the sense of reasonable recompense for the time and effort expended. The deductions are just and there is adequate power to approve them as part of approving the settlement (ss 33V(2) and 33ZF(1)). But to say that the present proposed payments are not incentivisation payments should not be taken to indicate that such reward style payments cannot ever be authorised or justified. There is adequate statutory power (ss 33V(2) and 33ZF(1)) to approve incentive reward payments and their deduction from the settlement proceeds. But if such incentive mechanisms are to be invoked, in the usual case they should be approved at least in a preliminary or contingent way (subject to further order) at or close to the inception of the proceedings and then unconditionally approved (if appropriate) in the subsequent formal s 33V process. Of course, where there is an external litigation funder who has taken on the costs risk, including any exposure to an adverse costs order, it may be difficult to see how any such incentivisation award could ever be justified in addition to reasonably remunerating the applicant for the time spent in pursuing the proceeding for the *benefit* of the group members and any out of pocket expenses. I do not need to discuss the position where the applicant is a funder. Interestingly, and finally on this point, I note that Professor Morabito has reported on statistics that in one sense might seem to be counterintuitive. The Australian mean and median awards per class representative based upon a “restitution-only” approach have been substantially greater than the US awards that have been based upon the “reward/incentive” philosophy.

# Authority — releases

1. An order that has been sought relates to the authority of the applicants to enter into and bind group members in respect of *inter alia* releases given in favour of the NAB and related entities that in one sense may be perceived to be broader than the claims made in the proceeding.
2. First, in my view I have clear statutory power to make such an order. Sections 33ZF and 33Z(1)(g) are sufficiently broad. Moreover, in terms of s 33ZB, any order made under s 33Z(1)(g) can bind accordingly. Such powers are not limited to the pleaded claims.
3. Second, there is little doubting the statutory authority of an applicant in a representative capacity under Part IVA taking action which binds group members. If it be accepted that an applicant has statutory authority on behalf of group members to negotiate and enter into a settlement agreement subject to Court approval, then it seems to me that such an applicant has implied statutory authority to negotiate and agree to ancillary and reasonably tailored and proportionate terms and conditions, such as broader releases, to achieve the primary aim.
4. Third, there may be doubt as to how far any such releases could extend beyond the pleaded case but still be within such authority. But there are several practical answers that can be given. If the releases deal with non-pleaded claims which if brought within separate later proceedings could be the subject of an issue estoppel or *Anshun* estoppel if the first proceeding had been litigated to judgment, then there would be such authority. It would be counterintuitive to suggest otherwise. Not to permit of the authority to give such a broader release would condone of a situation (the bringing of a later proceeding) which by definition would be an exercise in futility. But more fundamentally, if an applicant had authority to apply to amend the proceeding to bring such a new claim on behalf of group members, why wouldn’t the applicant have the authority to release the new claim without going through unnecessary formalities in the context of a s 33V process?
5. Fourth, in those cases (not the present) where a group member has opted in to or registered in respect of a settlement (or at the least has chosen not to opt out) with notice of its terms including broader releases, such conduct in a particular case may separately constitute implied authority. But that is not the present case given the effect of the orders made on 18 November 2014.
6. Fifth, if there is a doubt or authority needs to be extended beyond any express or implied statutory authority, the statutory powers referred to above (see at [45]) can be exercised. Having viewed the settlement deed and the releases in the present case, I am satisfied that I should make the order sought on this aspect.

# Conclusion

1. Finally and for completeness, I discussed with counsel the decision of Murphy J in *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323 published yesterday. I am in agreement with his Honour’s exposition at [62] to [70], [74] and [77]. I also note that his Honour did not need to decide questions of authority ([114]).
2. I will make the orders sought by counsel.

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| I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 6 April 2016