FEDERAL COURT OF AUSTRALIA

Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (Settlement Approval) [2024] FCA 386

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| File number(s): | VID 769 of 2021  VID 383 of 2023 |
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| Judgment of: | **THAWLEY J** |
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| Date of judgment: | 17 April 2024 |
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| Catchwords: | **REPRESENTATIVE PROCEEDINGS** – settlement approval – where proposed settlement amount represents substantially all of the funds that the respondents have available to satisfy judgment – where settlement deed seeks to preserve ability of group members to make claims to the Australian Financial Complaints Authority – settlement approved  **COSTS** – whether costs incurred by litigation funder in stayed proceedings should be ordered in relation to settlement in this proceeding – where only some work of enduring benefit – limited costs awarded  **INSOLVENCY** – application by deed administrators for directions under s 90-15 of Div 90 of Sch 2 (*Insolvency Practice Schedule (Corporations)*) to the *Corporations Act (2001)* (Cth) – where application made in connection with approval of a settlement in representative proceedings – application for direction granted |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth)  *Corporations Act 2001* (Cth)  *Federal Court of Australia Act 1976* (Cth)  *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth)  *Corporations Regulations 2001* (Cth)  *Insolvency Practice Schedule (Corporations)*  *Legal Profession Uniform Law (NSW)* |
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| Cases cited: | *Algeri, in the matter of Gem Management Group Pty Ltd (in liq)* [2022] FCA 1229  *Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd* [2022] FCA 1105  *Australian Securities and Investments Commission v Letten**(No 7)* [2010] FCA 1231; 190 FCR 59  *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq) (No 3)* [2017] FCA 330; 343 ALR 476  *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468  *Camping Warehouse v Downer EDI (Approval of Settlement)* [2016] VSC 784  *Elliott-Carde v McDonald’s Australia Limited* [2023] FCAFC 162  *Ewok Pty Ltd as trustee for the E & E Magee Superannuation Fund v Wellard Limited* [2024] FCA 296  *Fowkes v Boston Scientific Corporation* [2023] FCA 230  *Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq)* [2012] FCA 75; 288 ALR 240  *Kosen-Rufu Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 573  *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103; 160 ACSR 530  *Lee v Bank of Queensland Ltd* [2014] FCA 1376; 103 ACSR 436  *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626  *Perera v GetSwift Limited* [2018] FCA 732; 263 FCR 1  *Perera v GetSwift Limited (No 2)* [2018] FCA 909  *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842; 132 ACSR 258  *Petrusevski v Bulldogs Rugby League Club Ltd* [2004] FCA 1712  *Re Halifax Investments Services Pty Ltd (in liq))* [2020] FCA 533; 144 ACSR 292  *Stott v Australian Securities and Investment Commission* [2021] FCA 1222  *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 1273  *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (No 2)* [2022] FCA 1504  *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (No 3)* [2023] FCA 988 |
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| Division: | General Division |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Number of paragraphs: | 215 |
|  |  |
| Date of hearing: | 3 April 2024; 17 April 2024 |
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| Counsel for the applicant | Mr L Armstrong KC and Mr S Hibble |
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| Solicitor for the applicant | Shine Lawyers |
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| Counsel for the first respondent and the deed administrators | Mr H Austin KC and Ms N Papaleo |
|  |  |
| Solicitor for the first respondent and the deed administrators | Clayton Utz |
|  |  |
| Counsel for the second respondent | Dr M Rush KC and Ms Papaelia |
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| Solicitor for the second respondent | Herbert Smith Freehills |
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| Solicitor for the third respondent | Mr J Biggs |
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| Counsel for Balance Legal Capital II UK Limited | Mr W A D Edwards KC and Mr T Bagley |
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| **Table of Corrections** |  |
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| 19 April 2024 | In the Annexure to the orders in VID 769 of 2021, the word “Proposed” in the heading has been removed |
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|  | In the Annexure to the orders in VID 769 of 2021, the “Withdrawal of Opt Out Notice” form has been included |

ORDERS

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|  | | VID 769 of 2021 |
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| BETWEEN: | **WATSON & CO SUPERANNUATION PTY LTD**  Applicant | |
| AND: | DIXON ADVISORY AND SUPERANNUATION SERVICES LTD (ACN 103 071 665) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)  Respondent  **E&P FINANCIAL GROUP LIMITED (ACN 609 913 457)**  Second Respondent  **ALAN COCHRANE DIXON**  Third Respondent  **CHRISTOPHER MATTHEW BROWN**  Fourth Respondent | |

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| order made by: | thawley j |
| DATE OF ORDER: | 17 April 2024 |

THE COURT ORDERS THAT:

*Distribution of further notice*

1. Pursuant to s 33X of the *Federal Court of Australia Act 1976 (Cth)* (**FCA Act**), the ‘*Notice to Group Members who Opted Out*’ set out in the annexure to these orders (**Notice**) is approved for distribution to persons who, according to the Court’s records, filed an Opt Out in the Proceeding (**Opted Out Group Members**).

2. The applicant’s solicitor shall, by no later than 4:00pm on 19 April 2024, send the Notice as a ‘PDF’ attachment to an email to each Opted Out Group Member, with the covering email to read: “Please see attached Notice provided to you pursuant to orders of the Federal Court of Australia, regarding the class action against Dixon Advisory & Superannuation Services Pty Ltd and others. It is important that you read the notice as it may affect your legal rights.”

***Leave to withdraw the Notice of Opting Out***

3. Pursuant to s 33ZF of the FCA Act, leave be granted to the Opted Out Group Members to withdraw their Notice of Opting Out by filing a completed ‘*Withdrawal of Opt Out Notice*’ (**Withdrawal Notice**) with the Registry of the Court by 4:00pm on 8 May 2024.

4. If any of the parties receive a notice purporting to be a Withdrawal Notice by 4:00pm on 8 May 2024, the notice shall be filed with the Court by 9 May 2024 and, upon such filing, that notice will be treated as having been received by the Court on the date that it was received by the relevant party.

***Confidentiality***

5. Unless otherwise ordered, the orders made on 8 April 2024, and order 1 of the orders of the Court made on 3 April 2024 (limited to the items referred to below), continue until 17 April 2029:

(a) Schedule 1:

(i) items 1, 2 and 3 in respect of the Affidavit of Vicky Antzoulatos dated 13 February 2024;

(ii) item 1 in respect of the Confidential Exhibit VA-4 to the Affidavit of Vicky Antzoulatos dated 13 February 2024;

(iii) item 1 in respect of the Confidential Exhibit VA-5 to the Affidavit of Vicky Antzoulatos dated 13 February 2024;

(iv) item 1 in respect of the Confidential Exhibit VA-7 to the Affidavit of Vicky Antzoulatos dated 13 February 2024;

(v) items 2, 3 and 4 in respect of the Confidential Exhibit VA-8 to the Affidavit of Vicky Antzoulatos dated 13 February 2024;

(b) Schedule 2:

(i) item 1 in respect of the Confidential Exhibit RG-6 to the Affidavit of Rebecca Louise Gill dated 5 March 2024 and filed in proceeding number VID383/2023,

(c) Schedule 3:

(i) item 1 in respect of the Confidential Exhibit VA-6 to the Affidavit of Vicky Antzoulatos dated 13 February 2024;

(ii) item 1 in respect of the Confidential Exhibit VA-11 to the Affidavit of Vicky Antzoulatos dated 3 April 2024;

6. Order 1 of the orders made on 3 April 2024, so far as it addressed items not referred to in order 5 above, is vacated.

***Settlement Approval***

7. Pursuant to s 33V of the FCA Act, the Court authorises the applicant *nunc pro tunc* to enter into and give effect to the releases and covenants set out in clauses 5 and 20 of the Settlement Deed dated 14 November 2023 (being part of Confidential Exhibit VA4 to the Confidential Affidavit of Vicky Antzoulatos sworn 30 November 2023) (**Settlement Deed**) for and on behalf of those persons who, as at 9 May 2024, are Group Members in the Proceeding.

8. Pursuant to s 33V of the FCA Act:

(a) the settlement of this proceeding be approved, on the terms set out in the Settlement Deed; and

(b) the Settlement Sum be distributed in accordance with the deed of company arrangement (**DOCA**) in respect of DASS dated 16 December 2022 (as amended).

9. Pursuant to s 33ZB of the FCA Act, the persons affected and bound by the settlement of this proceeding are:

(a) the applicant, DASS, the second respondent, the third respondent, the fourth respondent and those persons who, as at 9 May 2024, are Group Members in the Proceeding;

(b) each of:

(i) Stephen Longley, Craig Crosbie and Rebecca Gill each in their capacity as joint and several deed administrators of DASS (**Deed Administrators**);

(ii) Shine Lawyers Pty Ltd;

(iii) Berkshire Hathaway Speciality Insurance Company (Inc. In Nebraska, USA. Liability is limited) (ABN 84 600 643 034)) and XL Insurance Company SE (Australia Branch) (ARBN 083 570 441); and

(iv) Balance Legal Capital II UK Ltd (**Balance**), a company registered in the United Kingdom which has provided litigation funding to the applicants in proceeding *Kosen-rufu Pty Ltd & Anor v Dixon Advisory and Superannuation Services Ltd & Ors* (VID 640/2021) (**Kosen-Rufu Proceeding**).

***Appointment of Administrator***

10. Pursuant to ss 33V and 33ZF of the FCA Act, the Deed Administrators be appointed jointly and severally as Administrators of the Settlement to act in accordance with the DOCA, subject to any direction of the Court, and to have the powers and immunities conferred by the DOCA on the Deed Administrators.

11. Pursuant to s 33V of the FCA Act and for the purposes of the DOCA, the Court approves the following to be deducted from the settlement sum in accordance with the terms of the DOCA and the Settlement Deed:

(a) the applicant’s legal costs and disbursements and other costs in the sum of $2,781,554.70.

(b) the sum of $20,000 as reimbursement payment to the Lead Applicant, in respect of the reasonable claim for the compensation for the time and inconvenience incurred in prosecuting the proceeding on behalf of Group Members as a whole; and

(c) the costs and disbursements incurred by Balance in connection with the Kosen-Rufu Proceedingin the sum of $126,797.55.

***Consequential orders***

12. Pursuant to s 33ZF of the FCA Act upon the giving of notices by the Deed Administrators and the solicitors for the applicant pursuant to clause 3(d) of the Settlement Deed:

(a) the proceeding:

(i) against DASS is permanently stayed;

(ii) against the second to fourth respondents is dismissed; and

(b) the Kosen-Rufu Proceeding:

(i) against DASS is permanently stayed; and

(ii) against the second and third respondents is dismissed,

with no order as to costs, but without prejudice to:

(c) the rights of the parties and Group Members to relist the matter for the purpose of seeking orders consequential to or in connection with the Settlement Deed; and

(d) the right of the Deed Administrators to refer any issues relating to the deed administration of DASS to the Court for direction or determination in accordance with the terms of the DOCA or the Settlement Deed.

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

**ANNEXURE**

**Notice to Group Members who opted-out**

**WHY IS THIS NOTICE IMPORTANT?**

1. This notice is being sent to you because:

(a) you were previously a ‘group member’ in the class action against Dixon Advisory and Superannuation Services (**DASS**) and other respondents, but

(b) according to the Court’s records you filed an ‘opt out notice’ in the Proceeding.

2. On 3 April 2024, the Federal Court of Australia conducted a hearing to decide whether to approve the proposed settlement of the class action.

3. During that hearing, the Court made enquiries of the parties as to the effect that the proposed settlement might have on the rights of the Applicant and Group Members to apply to the Australian Financial Complaints Authority (**AFCA**) seeking compensation for the losses that were the subject of the class action.

4. The Court adjourned the settlement approval hearing to allow for correspondence to be sent to AFCA seeking clarification as to AFCA’s interpretation of the rules governing the complaint resolution scheme it administers.

5. Following the further correspondence required by the Court, AFCA has now stated that:

(a) it does not consider that the settlement of the class action, in accordance with and as contemplated by the Settlement Deed, would, in and of itself alone, require AFCA to exclude Group Members’ complaints against DASS in relation to matters that were also the subject of the class action; and

(b) each relevant complaint will be assessed by AFCA in accordance with the rules governing the scheme it administers, and in light of its specific circumstances.

**WHAT DO I NEED TO DO?**

6. The Court has received evidence indicating that some persons who were formerly group members have ‘opted out’ of the class action because they were concerned that the proposed settlement might prevent them from being able to claim compensation under the scheme administered by AFCA.

7. Now that AFCA has clarified its interpretation of the rules governing the scheme it administers, persons who opted out because of those concerns may wish to ‘withdraw’ their decisions to opt out, and ask to be re-admitted as Group Members and be able to claim some compensation under the class action settlement, while separately making claims to AFCA.

8. The purpose of this notice is to give the persons who opted out a chance to withdraw their ‘opt out notice’ and be re-admitted as Group Members in the class action.

9. If you filed an ‘opt out notice’ you now need to decide between two options.

**Option 1 – Withdraw your Opt-Out Notice**

10. If you want to re-join the class action as a Group Member, you need to complete the ‘Notice of Withdrawal of Opt Out’ below.

11. You must ensure that your ‘Notice of Withdrawal of Opt Out’ reaches the Federal Court, at the address shown on the notice, before 4:00pm on 8 May 2024. Provided you meet that deadline, you will be re-admitted as a Group Member and be included in the settlement of the class action.

**Option 2 – do nothing**

12. If you do nothing, then your earlier decision to opt out will remain in force. You will not be a Group Member and your rights against the respondents to the class action will not be affected by the settlement of the class action. The effect of opt out was explained to you in the notice that you were sent in 2023.

**More information**

13. If you previously filed an Opt Out Notice, and you are not sure whether to withdraw it or not, you can contact the Applicant’s lawyers in the class action, Shine, at the address below for more information. Alternatively, you might wish to obtain independent legal advice. Do not contact the Court as the Court staff are not permitted to give you legal advice.

**WITHDRAWAL OF OPT OUT NOTICE**

**“Dixon Advisory Class Action”**

Federal Court of Australia VID769 of 2021

**By post**: The Registrar

Federal Court of Australia Victorian District Registry

305 William St, Melbourne, VIC, 3000

**By email**: [vicreg@fedcourt.gov.au](mailto:vicreg@fedcourt.gov.au)

The person [identified below gives](mailto:vicreg@fedcourt.gov.au) notice that the person **wishes to withdraw the opt out notice** previously lodged this class action.

|  |  |
| --- | --- |
| Name of group member (including name of SMSF and beneficiaries) |  |
| Postal address of group member |  |
| Name of person providing this form |  |
| Telephone contact |  |
| Email address |  |

Date: 2024

Signed by: . . . . . . . . . . . . . . . . . . . . . . . . . . .

Print name: . . . . . . . . . . . . . . . . . . . . . . . . . . .

ORDERS

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|  | | VID 383 of 2023 |
| IN THE MATTER OF DIXON ADVISORY & SUPERANNUATION SERVICES PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 103 071 665 | | |
| BETWEEN: | STEPHEN GRAHAM LONGLEY, CRAIG DAVID CROSBIE AND REBECCA LOUISE GILL IN THEIR CAPACITY AS JOINT AND SEVERAL DEED ADMINISTRATORS OF DIXON ADVISORY & SUPERANNUATION SERVICES PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 103 071 665)  First Plaintiffs  DIXON ADVISORY & SUPERANNUATION SERVICES PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 103 071 665)  Second Plaintiff | |
| AND: |  | |

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| order made by: | THAWLEY J |
| DATE OF ORDER: | 17 April 2024 |

THE COURT ORDERS THAT:

***Definitions***

1. For the purposes of these orders:

(a) **Actual Loss Approach** means the quantification of loss by reference only to the loss of capital invested by former clients of Dixon Advisory & Superannuation Services Pty Ltd (subject to deed of company arrangement) (ACN 103 071 665 (**Company**);

(b) **Claim** means:

(i) claims for losses incurred by former clients of the Company; and

(ii) any other claim to receive a dividend out of the available assets of the Company (including by creditors who were not former clients of the Company) which can be established pursuant to the proof of claim process conducted under order 4 below;

(c) **Claimants** means any person who has a Claim, including Former Client Claimants (as defined below);

(d) **Deed Administrators** means the First Plaintiffs;

(e) **Deed Fund** has the meaning attributed to that phrase in the deed of company arrangement executed in respect of the Second Plaintiff / Company;

(f) **Former Client Claimants** means former clients of the Company who have suffered losses (as assessed by reference to the Actual Loss Approach) by reason of financial advice received from the Company;

(g) **IPS** meansthe *Insolvency Practice Schedule (Corporations)*;

(h) **March 2024 Gill Affidavit** meansthe affidavit of Rebecca Louise Gill affirmed on 5 March 2024; and

(i) **Materiality Threshold** means the thresholds described in the confidential exhibit to the March 2024 Gill Affidavit (**Confidential Exhibit**).

***Distribution of available funds***

2. Pursuant to s 90-15 of the IPS, the Deed Administrators are justified and acting reasonably in using the Creditor Portal to administer the adjudication and distribution process set out in orders 3 to 8 of these orders.

3. Pursuant to s 90-15 of the IPS and subject to order 5 below, the Deed Administrators are justified and acting reasonably in making distributions out of the Deed Fund to Claimants on the basis that:

(a) the losses suffered by Former Client Claimants are to be quantified by adopting the Actual Loss Approach; and

(b) any dividends to be paid to Former Client Claimants will be those as determined by the Deed Administrators, calculated by reference to the amount of their respective Claims as quantified in accordance with order 3(a).

4. Pursuant to s 90-15 of the IPS, the Deed Administrators are justified and acting reasonably, for the purposes of effecting the distribution of the Deed Fund, in conducting a proof of claim process in the following manner:

(a) the Deed Administrators shall give notice of their intention (**Notice of Intention**) to declare a dividend not more than 8 months before the intended date:

(i) by lodging a notice with ASIC in accordance with sub-reg 5.6.75(4) of the *Corporations Regulations 2001* (Cth); and

(ii) by notice sent to each Former Client Claimant and to each other person who has asserted a Claim or who the Deed Administrators otherwise consider may have a claim (**Notified Persons**);

(b) in their Notice of Intention, the Deed Administrators shall call for proofs of claim by notice to each of the Notified Persons;

(c) for the purposes of orders 4(a)(ii) and 4(b), notice is to be given as follows:

(i) where the Deed Administrators have an email address for a creditor, by notifying that creditor via email;

(ii) where the Deed Administrators do not have an email address for a creditor but have a postal address, by notifying that creditor via post;

(iii) where the creditor has an account on the Creditor Portal, by issuing a notice on the Creditor Portal; and

(iv) by publishing a notice on the website maintained by the Deed Administrators at: https://insolvency.pwc.com.au/singleEntityCases/dixon-advisory-superannuation-services-pty-ltd/casePage.

(d) the Notice of Intention is to specify a date not less than 60 days after the date of the Notice of Intention for all Claimants to submit a proof of claim;

(e) by 4:00pm on the day that falls 5 months after the date specified in the Notice of Intention, the Deed Administrators shall, in writing to each Claimant:

(i) admit all or part of the proof of claim submitted by the Claimant;

(ii) reject all or part of the proof of claim submitted by the Claimant; or

(iii) require further evidence in support of the proof of claim submitted by the Claimant within 28 days (**Request for Further Evidence**);

(f) if the Deed Administrators make a Request for Further Evidence to a Claimant, the Deed Administrators must, in writing, deal with the proof of debt or claim:

(i) within 14 days of the day on which the Deed Administrators receive a sufficient written answer to their Request for Further Evidence; or

(ii) if the Claimant fails to respond to the Request for Further Evidence, within 14 days after the date by which they were required to respond;

(g) within 14 days after the Deed Administrators have rejected all or part of a proof of claim, the Deed Administrators must:

(i) notify the Claimant of the grounds for that rejection in writing; and

(ii) give notice to the Claimant at the same time:

A. that the Claimant may appeal to the Court against the rejection within the time specified in the notice, being within 14 days after service of the notice, or such further period as the Court allows; and

B. that unless the Claimant appeals in accordance with sub-paragraph A above, the amount of his, her or its claim will be assessed in accordance with the Deed Administrators’ endorsement on the Claimant’s proof.

5. Pursuant to s 90-15 of the IPS, the Deed Administrators are justified and acting reasonably in proceeding on the basis that any review of Claims by Former Client Claimants is to be undertaken in accordance with the Materiality Thresholds.

6. Pursuant to s 90-15 of the IPS, the Deed Administrators are justified and acting reasonably in accepting Claims by Former Client Claimants where evidence of the following nature has been provided:

(a) documents created by the E&P Group, including portfolio and transactions statements, holding summaries, buy/sell statements or unit/share certificates;

(b) workings prepared by Client Claimants provided they are supported by bank statements and/or other documents created by the E&P Group;

(c) a statutory declaration supported by bank statements; and/or

(d) any other evidence the Deed Administrators reasonably consider is sufficient to prove the Claim.

7. Pursuant to s 90-15 of the IPS, the Deed Administrators are justified and acting reasonably in proceeding on the basis that any review of Claims by Former Client Claimants is to be undertaken in accordance with the scenarios described at [68] of the Affidavit of Rebecca Gill dated 5 March 2024.

8. Pursuant to s 90-15 of the IPS, a Claimant may appeal against the Deed Administrators’ rejection of their proof of claim within the period specified under order 4(g)(ii) or any further period allowed by the Court.

***Confidentiality***

9. Unless otherwise ordered, pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth), on the ground in s 37AG(1)(a), the Confidential Exhibit is to be marked “confidential” and not made available for inspection until 17 April 2029.

***General***

10. The Deed Administrators are to provide a copy of these orders to the creditors of DASS within 5 business days as follows:

(a) where the Deed Administrators have an email address for a creditor, by notifying that creditor via email;

(b) where the Deed Administrators do not have an email address for a creditor but have a postal address, by notifying that creditor via post; and

(c) by publishing them on the website maintained by the Deed Administrators at https://insolvency.pwc.com.au/singleEntityCases/dixon-advisory-superannuation-services-pty-ltd/casePage.

11. Any person on demonstrating sufficient interest has liberty to apply on 5 business days’ notice to the Deed Administrators in relation to these orders, specifying the relief sought.

12. The Deed Administrators have liberty to apply.

13. The Deed Administrators’ costs and expenses incidental to this application be costs in the deed administration of DASS.

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

REASONS FOR JUDGMENT

THAWLEY J:

# INTRODUCTION

1 These reasons concern three applications in two proceedings in the Court:

(1) The first proceeding, referred to as the **Watson Proceeding**, is a class action brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth) Act (**FCA Act**) against Dixon Advisory and Superannuation Services Ltd (**DASS**), **E&P** Financial Group Limited, and Mr Alan Cochrane Dixon and Mr Christopher Matthew Brown, who were – amongst other things – former directors of DASS. In this proceeding:

(a) the applicant applies for settlement approval under s 33V of the FCA Act; and

(b) **Balance** Legal Capital II UK Ltd, a company registered in the United Kingdom engaged in litigation funding, applies for approval of part of the legal costs that it paid in relation to a competing class action which was stayed in 2022 and which is referred to as the **Kosen-Rufu Proceeding**.

(2) The second proceeding is an application for directions and orders under s 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPS**), being Schedule 2 to the ***Corporations Act*** *2001* (Cth). The first plaintiffs in this proceeding were appointed as the **Deed Administrators** of DASS by a deed of company arrangement executed on 16 December 2022 (**DOCA**). Before that point, Mr Stephen Longley and Mr Craig Crosbie had been DASS’s joint and several administrators.

2 DASS was a financial services provider within the E&P Group of companies (**E&P Group**). From about 2011, it gave advice to its clients to invest in the US Masters Residential Property Fund (**URF**), a US-based property investment and development fund focused on residential property, primarily in New York. At the same time it gave that advice, however, other companies in the E&P Group were being paid fees for managing the URF’s assets and renovating its properties. This gave rise to an apparent conflict of interest for DASS.

3 The URF did not perform well. Its share price declined from a peak of $2.33 in September 2015 to $0.185 in March 2020.

4 URF’s performance, combined with concerns about the potential conflict of interest issues, resulted in the commencement of a proceeding by ASIC against DASS alleging various contraventions of the Corporations Act relating to the provision of financial services, including a failure to act in the best interests of its clients (**ASIC Proceeding**). In addition to the Watson Proceeding and the Kosen-Rufu Proceeding, former clients have lodged many complaints with the Australian Financial Complaints Authority (**AFCA**).

5 A settlement has been agreed in the Watson Proceeding. The funds payable by way of the proposed settlement are intended to flow into the deed fund under the DOCA and, after certain costs and expenses are first paid out (including any amount to be paid to Balance), the settlement funds are to be distributed to group members and DASS’ general creditors. The group members constitute the vast majority of DASS’ creditors.

6 The Deed Administrators seek orders approving their proposed process for the adjudication of claims to be made by DASS’ creditors and the distribution of the deed fund once those claims have been assessed.

7 Balance’s application for payment of legal costs is made under s 33V(2) of the FCA Act. The application arises in the following way. **Shine** Lawyers – who represent the applicant in the Watson Proceeding – had been investigating a potential class action since about June 2019. Balance was approached in early 2021 for potential funding of a class action arising from the same circumstances as were then being investigated by Shine. Balance provided funding support, including by paying Piper Alderman to conduct a class action.

8 Piper Alderman commenced the Kosen-Rufu Proceeding on 1 November 2021 and Shine commenced the Watson Proceeding on 22 December 2021. The applicant in the Watson Proceeding applied to have the Kosen-Rufu Proceeding stayed (the **carriage motion**). After hearing the carriage motion, the Kosen-Rufu Proceeding was stayed: *Kosen-Rufu Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 573. Orders staying the proceeding were made on 15 June 2022 and Balance was granted liberty to apply in the Watson Proceeding in respect of costs. Balance now seeks a part of the costs and disbursements it paid.

9 It is convenient to deal first with the settlement approval (which includes addressing the costs of Shine in the Watson Proceeding), secondly with the Deed Administrators’ application for directions and thirdly with Balance’s application for costs.

# SETTLEMENT APPROVAL

10 The group members comprise all persons who:

 at any time during the period from 15 April 2011 to 23 December 2021 (**Relevant Period**) were, within the meaning of s 761G of the Corporations Act, retail clients (including, where the retail clients were self-managed superannuation funds that existed during the Relevant Period but which have since closed, the beneficiaries of those self-managed superannuation funds during the Relevant Period) of the financial advisory business carried on by DASS; and

 on or after 22 December 2005, while a client of DASS, held or acquired interests in the URF. Where the client was a self-managed superannuation fund that existed during the Relevant Period, but which has since closed, a “client” includes the beneficiaries of that self-managed superannuation fund.

11 The applicant on its own behalf, and on behalf of the group members (together **Claimants**), claims damages from the respondents for advice allegedly given to them by DASS (and its authorised representatives) to acquire and thereafter retain interests in the URF.

12 There was an early mediation. This occurred before significant discovery and before pleadings had closed. In addition to the carriage motion, three other applications were made. In broad terms, these were aimed at obtaining information in order to determine whether there was insurance sufficient to warrant the significant expenditure anticipated in the proceeding – see: *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 1273 (**Watson No 1**) (Thawley J); *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (No 2)* [2022] FCA 1504 (**Watson No 2**) (Thawley J); and *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (No 3)* [2023] FCA 988 (**Watson No 3**) (Lee J).

13 After mediation, a **Settlement Deed** was executed by the parties. Although unclear, this appears to have occurred on 13 November 2023. The principal features of the proposed settlement are:

 the respondents (through both the Deed Administrators and the insurers of the respondents) will pay not less than $16 million in full and final settlement of the Claimant’s claims, with full releases given *inter partes* (**Settlement Sum**);

 a payment will be made from the Settlement Sum to Shine for the applicant’s and group members’ legal costs and disbursements in the proceeding;

 a payment will be made from the Settlement Sum in respect of the reasonable legal costs and disbursements of the applicants in the Kosen-Rufu Proceeding on a solicitor and own client basis;

 a payment of $20,000 will be made from the Settlement Sum to the applicant; and

 a settlement distribution scheme will be established whereby the residual of the Settlement Sum will be transferred to the Deed Administrators and distributed to the Claimants under the DOCA and any directions given by the Court.

14 The Court’s power to approve the settlement is subject to a requirement to give notice to group members: ss 33X(4) and 33Y of the FCA Act. On 12 December 2023, orders were made approving the form of a settlement notice to group members. On 15 December 2023, orders were made regarding the distribution of the settlement notice to group members.

15 The regime set up by these orders has been complied with.

16 Counsel who have been briefed in the Watson Proceeding since it began have provided a confidential opinion as to the fairness and reasonableness of the settlement. This part of these reasons for decision have drawn significantly on the non-confidential written submissions relied on by the applicant. The Court has also had regard to the confidential opinion of counsel. At the hearing, the Court made orders under s 37AI of the FCA Act in relation to certain material disclosed for the purposes of the approval application, including counsels’ opinion. The Court will now make orders under s 37AF of the FCA Act, such orders being necessary to prevent prejudice to the proper administration of justice.

## Principles

17 The principles to be applied in considering an application for approval of a proposed settlement of a Part IVA class action are well established. The central question is whether the settlement is fair and reasonable in the interests of the group members as a whole. The principles have been set out in numerous cases, including: ***Camilleri*** *v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5] (Moshinsky J) and *Fowkes v Boston Scientific Corporation* [2023] FCA 230 at [31] – [45] (Lee J). There is nothing about this case which warrants any further elaboration of what has been said before.

18 There are five aspects of the proposed settlement which require particular consideration:

(1) whether the settlement *inter partes* is fair and reasonable having regard to the interests of the group members considered as a whole;

(2) the interaction between the proposed settlement and the Commonwealth Government’s recently enacted Compensation **Scheme of Last Resort** procedure;

(3) whether, as a result of recent communications with AFCA concerning the issue in (2) above, group members who have opted out should be afforded an opportunity to withdraw from opting out;

(4) whether the proposed arrangements for distributing the Settlement Sum *inter se* among the group members are fair and reasonable, again taking the group members as a whole; and

(5) whether the proposed deductions from the Settlement Sum, including for past or future legal costs, are fair and reasonable in all the circumstances.

19 Each of these matters is addressed below.

## Is the settlement *inter partes* fair and reasonable?

20 The Court’s Class Actions Practice Note at [15.5] lists the basic factors relevant to the Court’s discretion to approve the *inter partes* aspects of a class action settlement.

21 This particular settlement approval application has a somewhat unusual feature, namely that – after making all enquiries reasonably available – it is clear that:

(a) the proposed Settlement Sum represents substantially all the funds that the respondents have readily available to fund a settlement or satisfy a judgment; and

(b) the cost to the applicant of continuing with the proceeding beyond this point will materially increase both:

(i) the respondents’ costs, eroding the fund able to be recovered from them; and

(ii) the applicant’s costs, eroding the portion of any recovered fund that is able to be distributed as compensation to the Claimants.

22 In those circumstances, a close examination of the merit of the underlying claims is of little utility in considering whether to approve the settlement. Even if the applicant was guaranteed success, the settlement reflects as good a commercial outcome as could be hoped for.

23 Claimants who do not register to participate in the settlement will nevertheless be bound by it and forfeit their rights to sue on the same or related claims in other proceedings against the respondents. Further, the making of an order to give effect to the settlement will crystalise releases to be given by the Claimants in favour of all respondents. Both of these features of the settlement are appropriate.

24 I am satisfied that the terms of settlement reflect a fair and reasonable compromise of the group member’s claims against the respondents.

## Non-extinguishment of claims

25 The Settlement Deed seeks to preserve the ability of Claimants to make claims to AFCA and, if the opportunity arises, to make claims under the Scheme of Last Resort procedure.

26 Clause 6.4 of the DOCA provides that “Former Client Claims” will not be extinguished or released, save to the extent the relevant client receives dividends under the DOCA in respect of the claim: CB31. Of course, the provisions of the DOCA cannot alter the operation of the statutory scheme which, from 2 April 2024, permits the lodgement of claims for compensation of up to $150,000.

27 Clause 6.5 provides:

**6.5 Moratorium**

(a) Subject to clause 6.5(b), during the Deed Period a Creditor may not, in relation to that Creditor’s Claim:

(1) make or proceed with an application for an order to wind up the Deed Company or for the appointment of a provisional liquidator or a court appointed receiver to the Deed Company and their property;

(2) institute, revive or continue any action, suit, arbitration, mediation or proceeding against the Deed Company or in relation to the property of the Deed Company;

(3) institute, revive or continue with any Enforcement Process against the property of the Deed Company;

(4) take any action whatsoever to seek to recover any part of its Claim;

(5) exercise any right of set off or defence, cross claim or cross action to which that Creditor would not have been entitled had the Deed Company been wound up on the Appointment Date;

(6) commence or take any further step in any arbitration against the Deed Company or to which the Deed Company is a party in relation to any matter arising or occurring before the Appointment Date; or

(7) otherwise enforce any right it may have or acquire.

(b) Nothing in clause 6.5(a) is intended to limit or prevent:

(1) a Former Client from taking any steps to access compensation under the CSLR for any Former Client Shortfall pursuant to clause 10.5;

(2) a Group Member or the plaintiffs in the Representative Proceedings from taking any steps necessary to achieve the Settlement of the Representative Proceedings.

28 Clause 10.4 provides:

**10.4 Access to CSLR**

(a) Notwithstanding clause 6.5(a), a Former Client will be entitled to make a complaint or application to AFCA and any CSLR operator with respect to a Former Client Claim for the purposes of accessing the CSLR for compensation for a Former Client Shortfall.

(b) The Deed Administrators will provide Former Clients with a document evidencing the Dividend paid to the Former Client in respect of their Claim, which can be provided to AFCA and any CSLR Operator to allow the Former Clients to commence or progress a determination by AFCA or seek compensation from the CSLR.

(c) The Former Client Shortfall **will** remain a claim against the Deed Company in favour of the Former Client.

29 The intended effect of this is to ensure, so far as is possible, that the ability of the Claimants to recover under the Scheme of Last Resort procedure is not affected.

30 At the hearing of the application for approval on 3 April 2024, Mr Armstrong KC properly raised with the Court the fact that Shine had become aware of a number of inquiries from group members about the interaction between the proposed settlement and any rights those group members might have under the Scheme of Last Resort.

31 These inquiries had resulted in Shine writing to AFCA on 21 March 2024 and a response from AFCA on 27 March 2024. AFCA had not been provided with a copy of the Settlement Deed and, accordingly, its response was qualified.

32 In these circumstances, the Court considered it desirable to grant leave to the applicant to disclose the Settlement Deed to AFCA, with the hope that AFCA would be able to provide a less equivocal view as to the ability of group members to make claims under the Scheme of Last Resort. The approval hearing was adjourned until 17 April 2024 for this purpose.

33 On 4 April 2024, Shine sent a letter to AFCA seeking clarification of AFCA’s position.

34 On 12 April 2024, AFCA responded, in summary stating that:

(a) AFCA had reviewed the Settlement Deed;

(b) AFCA did not consider that the settlement of the proceeding in accordance with the Settlement Deed would, in and of itself alone, require AFCA to exclude the DASS complaints under the AFCA Rules (including s C.1 of the AFCA Rules); and

(c) each DASS complaint would be assessed by AFCA in light of its specific circumstances.

35 In the Court’s view, AFCA’s response:

(a) goes as far as would reasonably be expected for AFCA, a regulatory body, to go in terms of addressing the concern that the proposed settlement might prejudice the applicant’s and group members’ rights to claim and obtain compensation under the Scheme of Last Resort.

(b) is an adequate response for the purposes of approval and, in substance, supports the view that the proposed settlement will not operate to prejudice the interests of the applicant and group members in relation to potential claims under the Scheme of Last Resort, relative to the position they would have been in but for the proposed settlement;

(c) is consistent with the effect of the proposed settlement as described in the notice distributed to group members informing them about the proposed settlement; and

(d) can safely be regarded as substantially addressing the concern that appears to have prompted some group members to file “notices of opting out”.

## Notice to group members who have opted out

36 Paragraph 12 of the Notice of Proposed Settlement approved by Lee J in orders made on 12 December 2023 stated that:

**Importantly**, the parties have agreed that, to the extent permitted by law, nothing in the settlement will not (sic) preclude, impair, limit or affect any claim for compensation that group members may have against DASS made to the Australian Financial Complaints Authority (AFCA) and/or under the Commonwealth Government’s “financial compensation scheme of last resort”.

37 Between 12 January 2024 and 22 February 2024 Shine received several email enquiries from group members seeking clarification of the impact of the proposed settlement on their ability to claim compensation under the Scheme of Last Resort.

38 As at 16 April 2024, a total of thirty-three group members had opted out of the proceeding. A solicitor from Maurice Blackburn has advised that:

(a) she was instructed to act on behalf of seven clients who were group members in this proceeding but have opted out of the proceeding;

(b) her clients opted out of the proceeding because of the perceived risk that if they remained in the proceeding and the proposed settlement was approved, they would be precluded from accessing the Scheme of Last Resort; and

(c) should AFCA confirm that the proposed settlement will not preclude group members from accessing the Scheme of Last Resort, her clients wish to have the opportunity to withdraw their opt-out notices.

39 On 15 April 2024, Shine received a letter from Maurice Blackburn which stated, amongst other things, that:

(a) they were writing on behalf of clients for whom they had authority to act in their AFCA complaints against DASS;

(b) their clients received the Notice of Proposed Settlement and were concerned about the risk of AFCA excluding their complaints should they remain group members in the class action;

(c) because of the risk referred to in (b) above, their clients elected to opt out of the class action and filed opt out notices by the date ordered;

(d) they understand that AFCA has now conveyed a view to the parties that it does not believe the settlement of the proceeding will require AFCA to exclude the DASS complaints; and

(e) in light of the above, their clients have instructed they wish to have their opt out notices withdrawn so that they may be re-included as group members in the class action and bound by any orders the court makes with respect to the settlement of the proceeding.

40 In these circumstances, the applicant seeks orders from the Court facilitating a mechanism for those who opted out to withdraw their opt-out notices, should they wish to do so. Shine proposes to send a notice to the group members who opted out (**Proposed Notice**):

(a) advising of AFCA’s position in relation to the DASS complaints; and

(b) setting out the steps to be taken to withdraw their opt-out notices on or before 1 May 2024.

41 In the Court’s view, this is appropriate. It is a request which does not prejudice the interests of group members who have opted out. The resolution of these additional claims in the proposed settlement, if an opt out is withdrawn, reduces the prospects of further litigation. The impact to the existing group members is negligible as far as the withdrawal of opt-out notices affects the available Settlement Sum and its apportionment. Providing the ability to withdraw opt-out notices will not delay the approval of the proposed settlement.

42 A copy of the Proposed Notice was contained at pages 12 to 14 of Exhibit VA-12. The Proposed Notice is in appropriate terms.

## Distribution of settlement sum

43 It is next necessary to consider the fairness and reasonableness of the proposed settlement as between group members. In *Camilleri* at [43]-[44], Moshinsky J said:

The cases indicate a number of factors relevant to the assessment whether a proposed distribution scheme is fair and reasonable having regard to the interests of the group as a whole. Some of these factors are as follows:

(a) whether the distribution scheme subjects all claims to the same principles and procedures for assessing compensation shares;

(b) whether the assessment methodology, to the extent that it reflects ‘judgment calls’ of the kind described above, is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle;

(c) whether the assessment methodology is likely to deliver a broadly fair assessment (where the settlement is uncapped as to total payments) or relativities (where the task is allocating shares in a fixed sum);

(d) whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution;

(e) to the extent that the scheme involves any special treatment of the plaintiffs or some group members, for instance via ‘reimbursement’ payments – whether the special treatment is justifiable, and whether as a matter of fairness a group member ought to be entitled to complain.

There are also procedural factors which relate to the fairness of a proposed distribution process, such as:

(a) whether appropriate individuals have been nominated to administer the scheme;

(b) whether the procedures for lodging and assessing claims are appropriate and to be conducted in a timely manner;

(c) whether the scheme incorporates appropriate ‘checks and balances’, such as procedures for ensuring consistency between assessments and meaningful opportunities for review (and objection) by group members.

44 As is discussed in more detail below in the context of the Deed Administrators’ application for directions, the Deed Administrators have set up a “Creditor Portal” as part of the DOCA, similar to that which would ordinarily be set up to administer a settlement in a class action.

45 TheDeed Administrators will assess the Claimants’ losses using the “Loss Quantification **Methodology**” outlined in Annexure B of the DOCA. The Methodology will calculate the loss of invested capital / actual loss, and those who are found to have an actual loss will be considered for compensation under the DOCA.

46 The Settlement Sum is to be allocated between all the Claimants in the proportion each Claimant’s entitlement bears to the total of all entitlements. This allocation method is simple and fair. It broadly reflects the relativerisks that the Claimants would face in trying to prove their claim in a trial. No better allocation methodology was put forward. A reworking of the settlement distribution scheme would require significant work, without it being obvious that it would achieve a better or fairer outcome, and it would erode the funds available to compensate the Claimants.

47 In my view, the settlement distribution scheme is fair and reasonable to the Claimants.

## Shine’s legal costs

48 The applicant seeks the Court’s approval of its legal costs incurred in respect of the litigation.

49 Shine relied on two reports prepared by an independent costs assessor, K A Rosati of DGT Costs Lawyers, dated 2 February 2024 (**Rosati 1**) and 28 March 2024 (**Rosati 2**): Confidential Exhibit VA8 and Confidential Exhibit VA10. In summary:

(a) **Rosati 1**: in the first report, Ms Rosati concludes that the total legal costs and disbursements on a solicitor and own client basis incurred by the applicant with Shine for work done up to 31 December 2023 as fair and reasonable is $2,784,899.83: Rosati 1 at [16].

(b) **Rosati 2**: in the second report, Ms Rosati concludes that the total legal costs and disbursements on a solicitor and own client basis incurred by the applicant with Shine for work done from 1 January 2024 up to and including the settlement approval hearing on 3 April 2024 as fair and reasonable is $346,097.17: Rosati 2 at [7].

### Rosati 1

50 In order to provide her opinion as to the fairness and reasonableness of the costs of the proceedings up until 31 December 2023, Ms Rosati was provided with: a Letter of Instruction; copies of costs agreements; Shine’s time recording protocols; the itemised account; tax invoices for disbursements; the DOCA; “information as to the size and composition of the Shine file” (which appears to be further explained at Rosati 1 [73] to [77]); and billing records and invoices for disbursements and Excel spreadsheets detailing the professional costs and disbursements incurred on a line by line basis (which is probably a reference to the “itemised account”: Rosati 1 at [14]; [35]). She did not have an “itemised bill of costs”.

51 The “itemised account” to which Ms Rosati did have access was described in the following way at [66] and [67]:

[66] The itemised account for Shine’s costs is large with 6,960 line entries for professional costs in the Excel spreadsheet. As such, this spreadsheet has not been printed or annexed to my report but a soft copy of the same can be provided if required.

[67] The itemised account records each fee earner, their rate of charge per hour and per unit, the time spent and the costs charged for each task and a detailed narration of the work performed and have been prepared applying a minimum 6 minute unit of charge. Shine also have categorised the items of work recorded by way of phase code and by the first word of each line entry. In order to analyse the work detailed in the itemised account and due to the size of the same, I scrolled through the itemised account and together with my paralegal, Hayley Crowley, performed a number of filtering exercises in order to analyse the costs therein. The results of this analysis are detailed below.

52 Ms Rosati summarised the relevant law about legal costs and the manner of her approach to the task at Rosati 1 at [29] to [37]. At [36] and [37], Ms Rosati stated:

[36] In light of the size of the Shine itemised account I have not done any sampling of the costs, that is, I have not costed or closely scrutinised any particular parts of the file. I consider that to do so in a matter of this size and scale would not assist as it would be arbitrary and random. Rather, I determined that it is appropriate to consider the line entries in the itemised accounts, filter the same into work or task categories and provide comments and observations as to the work performed and the team of lawyers performing the work.

[37] In order to provide an opinion as to a reasonable amount for costs in this instance, I have applied the following methodology:

(a) considered the terms of the costs agreements provided by Shine to the Applicant and Mr and Mrs Carfax-Foster;

(b) considered the hourly rates charged by Shine and counsel;

(c) considered the itemised account prepared from Shine time records and itemisations of disbursements and invoices provided by Shine;

(d) applied the legislative tests in the LPUL detailed above to consider whether the costs and disbursements were reasonable in amount, or reasonably incurred having regard to the circumstances in which the work was undertaken, including whether the work was undertaken efficiently and appropriately, whether the work was undertaken by a person at the appropriate level of seniority, whether the task and charge were appropriate having regard to the nature of the work, the time taken, and the ratio of work and interrelation of work undertaken by the solicitors and counsel retained;

(e) when applying these considerations, have had regard to judgments in other matters relating to the approval of legal costs in representative proceedings, including those in *Modtech Engineering Pty Limited v GPT Management Holdings* *Limited (No 2)* [2013] FCA 1163 and *Wills v Woolworths Group Limited* [2022] FCA 1545; and

(f) formed an opinion as to the fair, reasonable and proportionate amount for costs and disbursements.

53 Shine entered into a costs agreement with the lead applicant and two other costs agreements with the directors of the applicant on about 18 December 2021.

54 The costs agreements disclosed that Shine’s fees, excluding GST, were between $250 per hour for law clerks and $840 per hour for special counsel. Ms Rosati considered market hourly rates from [53] to [62]. Ms Rosati concluded that Shine’s rates were fair and reasonable. Ms Rosati stated at [62]:

[62] …The rates are also within the range of rates that in my experience are routinely charged by lawyers in complex commercial and representative proceedings as outlined above. The rates are above the upper end of the rates in the Federal Court scale and are at the upper end of and above the rates set out in the 2016 version of the NSW Guideline. In my opinion, noting each of these lawyers’ experience and the issues and complexity in this matter, I consider that the hourly rates charged are fair and reasonable.

55 With respect to counsels’ fees, Ms Rosati stated at [64]:

[64] I have no information as to whether the rates of counsel were disclosed to the Applicant however I note that the rates charged are within the range of rates routinely charged by counsel for work in complex commercial litigation and representative proceedings and I consider that all of the hourly rates charged by counsel are fair and reasonable in the circumstances of this proceeding.

56 Shine’s costs agreement entitled it to charge an uplift fee of 25% on their professional fees. Clauses 26 to 28 of the costs agreement stated:

26. We will also charge you on the successful outcome of the matter an uplift fee (success premium) of 25% of our professional fees …

27. We are entitled to levy an uplift fee in the event of a successful outcome because we cover the costs of running your claim and bear the risk that your claim may not succeed. We charge you this uplift fee to cover that possibility and the potential risk we take.

28. Importantly, we also charge the uplift fee because of our reasonable belief that a successful outcome of your matter is reasonably likely.

57 The costs agreement covered pre-retainer work: Rosati 1 at [45]. The work was described in cl 29 of the costs agreement, which provided:

29. Prior to your signing of this Costs Agreement, Shine had undertaken extensive work and incurred costs and disbursements investigating the matter and taking the following pre­ action steps that resulted in significant forensic advantage for you:

(a) Liaising with Counsel regarding prospects;

(b) Taking registrations, and liaising with group members regarding their factual circumstances;

(c) Researching and examining relevant evidence, including extensive public material including from the ASX, Company Reports, and analyst reports;

(d) Researching legal issues including relevant case law;

(e) Interviewing witnesses or other members of this class action;

(f) Conferring with and reviewing written advice and pleadings from Counsel.

58 The pre-retainer work cost was disclosed in Rosati 1 at [46] as:

|  |  |
| --- | --- |
| Fees | Amount including GST |
| Professional fees and internal expenses | $763,395 |
| Uplift fee (25%) | $190,849 |
| Disbursements | $105,609 |
| Total | $1,059,853 |
| Fees | Amount including GST |
| Professional fees and internal expenses | $763,395 |

59 Shine’s estimate of total legal costs (Rosati 1 at [47]) was:

|  |  |
| --- | --- |
| Fees | Amount including GST |
| Professional fees | $3,431,020 |
| Uplift fee on professional fee (25%) | $857,755 |
| Counsels’ fees | $1,696,250 |
| Other disbursements | $686,129 |
| Correct total | $6,671,154 |
| Set out in the table in paragraph 31 | $6,645,885 |

60 The costs agreement stated in cl 31 that “the progress of the class action is very unpredictable” and that the estimate of total fees was for the “common issues stage” of the proceeding. The table to cl 31 was as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Estimated Total Legal Costs (including GST) ($) | | | | |
| Budget Item | Professional fees | Counsel fees | Other disbursements | Totals |
| Pre-retainer fees (excluding Uplift Fee) | 763,395 | 50,000 | 55,609 | 869,004 |
| Application and Statement of Claim | 67,500 | 44,500 | 11,560 | 123,560 |
| Bookbuild / Group Member communications | 123,250 | Nil | 20,000 | 143,250 |
| Particulars, defence and close of pleadings | 38,925 | 29,250 | 5,000 | 73,175 |
| Opt out | 71,025 | 11,500 | 10,000 | 92,525 |
| Discovery and Subpoenas | 297,900 | 26,500 | 170,000 | 494,400 |
| Expert Evidence | 371,550 | 149,000 | 250,000 | 770,550 |
| Lay Evidence | 153,950 | 46,000 | 16,380 | 216,330 |
| Group member registration /  class closure | 118,750 | 8,000 | 20,000 | 146,750 |
| Interlocutory Procedures | 329,875 | 142,500 | 1,020 | 473,395 |
| Settlement negotiations and mediation | 243,750 | 92,500 | 21,560 | 357,810 |
| Preparation for hearing | 216,375 | 274,500 | 44,000 | 534,875 |
| Trial | 440,700 | 660,000 | 50,000 | 1,150,700 |
| Settlement Approval | 194,075 | 162,000 | 11,000 | 367,075 |
| Uplift Fees | 857,755 | NIL | NIL | 857,755 |
| ESTIMATE OF TOTAL LEGAL COSTS | 4,288,775 | 1,696,250 | 686,129 | 6,645,885 |

61 The table contains an error in that the total should be $6,671,154.

62 The costs agreement emphasised in cll 32 and 33 that the estimate of total fees was an estimate only and that there were many variables as to how the litigation might unfold.

63 Ms Rosati recorded that Shine had incurred the following costs and expenses for work in the proceeding between 13 June 2019 and 22 December 2023 as set out in the “itemised account” at [65]:

|  |  |  |
| --- | --- | --- |
|  | **Amount including GST** | **Percentage** |
| Professional Fees | $1,750,708.30 | 71.97% |
| Counsels’ Fees | $476,898.75 | 19.61% |
| Consultants/Experts’ Fees | $119,930.60 | 4.93% |
| General Disbursements | $84,949.38 | 3.49% |
|  | **$2,432,487.03** | **100.00%** |

64 Ms Rosati worked out the percentage across three periods (within the period 13 June 2019 to 22 December 2022) of the total professional fees of $1,750,708.30, which resulted in the following summary at [81]:

|  |  |  |
| --- | --- | --- |
| Professional Fees per period | Total costs (incl GST) | Percentage of total |
| Pre-retainer work up to 17 December 2021 | $680,757.00 | 38.88% |
| Work from 18 December 2021 to 12 November 2023 | $1,011,882.30 | 57.80% |
| Work from 12 November 2023 to 31 December 2023 | $58,069.00 | 3.32% |
|  | $1,750,708.30 | 100.00% |

65 Ms Rosati set out the kind of work performed in the three periods and recorded certain aspects of the work which should not be recoverable: Rosati 1 at [82] to [101]. In respect of the second period (18 December 2021 to 12 November 2023), Ms Rosati analysed the work done by reference to six-month intervals: Rosati 1 at [89] to [99].

66 The “pre-retainer costs” – being the work performed from 13 June 2019 to 17 December 2021 – was described in the following way at [83]:

[83] A summary of the work undertaken by Shine in pre-litigation investigation is set out in paragraph 4 of my letter of instructions. From my consideration of the itemised account, the work performed by the fee earners at Shine in the period up to 17 December 2021 includes:

(a) Research regarding possible causes of action and of other similar matters;

(b) Numerous telephone calls and emails with potential group members and obtaining information and consideration of the information obtained;

(c) Preparing, amending and maintaining database of group members;

(d) Consideration of various Product Disclosure Statements (PDS) and preparing summaries of the same;

(e) Preparation and ongoing amendment and updating of a list of documents obtained;

(f) Attendances on the media;

(g) Internal work in relation to drafting and updating an investigation memorandum;

(h) Preparation and amendment of group member statements;

(i) Preparation of brief to and liaising with Paul Green of Vincents, consideration of preliminary advice from Vincents;

(j) Preparing a brief to counsel in October 2019 for preliminary advice and conferring with counsel;

(k) Seeking additional information and advice from Vincents as to quantum and loss;

(l) A number of attendances on Trudy Stott, one of the KR Applicants, are recorded in late 2019 and early 2020;

(m) Preparing updates to group members;

(n) Consideration of pleadings and issues in related ASIC proceedings;

(o) Undertaking research of the Respondents information and preparing and updating case theories and statements of advice;

(p) Work related to selection of the lead Applicant;

(q) A proposal was drafted by Ms Hamrey, associate, in September 2021 for submission to the Shine board for approval to self-fund and a brief for litigation lending was also prepared;

(r) There were entries recorded in October 2021 that referred to budgets and funding;

(s) A brief to counsel was also prepared in October 2021;

(t) Correspondence was recorded with Piper Alderman, Herbert Smith Freehills and the Court from November 2021 in relation to the competing class actions, consent orders were prepared in early December 2021 and Ms Hamrey attended a case management hearing on 15 December 2021;

(u) The Statement of Claim was drafted, amended and settled in late 2021;

(v) Document review of group members material was undertaken, witness lists and chronologies prepared; and

(w) A large number of internal conferences, discussions, and emails are recorded during this period

67 Ms Rosati concluded that either a “proportion” or “much” of these costs “would be considered to be costs of the proceeding rather than purely pre-action investigative costs”: Rosati 1 at [85]. Ms Rosati considered that some of the costs in this period were not claimable, stating at [86] to [88]:

[86] There are only a few entries recorded in the itemised account for work in relation to budgets and funding of the proceeding and only very minor work that refers to the Shine Costs Agreements. There are charges recorded (just 5 line entries) for preparing the Shine Costs Agreement and explaining it to the Applicant via Mr and Mrs Carfax-Foster. These costs are not claimable from the Applicant.

[87] There is significant time recorded during 2020 and 2021 for internal conferences sometimes involving up to 6 members of the Shine team, emails and phone calls. I do note that this was the time when COVID-19 lockdown and work from home orders were in place and as such it was necessary for the team to communicate in this manner as they would have been working remotely rather than in the office. I am of the view that some of these attendances might not be considered to be reasonable, noting the number of staff members attending in some instances, on a solicitor client basis.

[88] A very large proportion of the costs during this stage involved attendances on potential group members, noting that there were more than 4,600 group members, this is not unusual. However, I note that during this period work was recorded (usually done by law clerk Jonathon Trembath) in providing email updates to various potential group members (with identical narrations in the itemised account save for the name) charged on the basis of one unit for each email when presumably this was a template email that was sent to large numbers of people. Each of these groups of entries is recorded, usually on the same date, with narrations such as “draw email to XX (enquirer) to discuss eligibility and matter update” or “draw email to XX (enquirer) for group member update. Later in the proceeding, these bulk updates were not generally recorded in the same manner. Whilst it is necessary for Shine to liaise and respond to claimant enquiries, in my experience it is not reasonable for each of these emails to be charged for separately if they were in fact template or pro-forma identical or almost identical emails. It is my opinion that some of these costs would not be considered to be reasonable on a solicitor client basis.

68 As noted earlier, 58% of the costs were incurred between 18 December 2021 and 12 November 2023, when the proposed settlement was reached. Ms Rosati described the work in detail in Rosati 1 at [92] to [101]. This is in a form similar to what has been set out above from Rosati 1 at [83]. It is not repeated here, but has been taken into account in the analysis below.

69 Ms Rosati was provided by Shine with a separate itemisation detailing all disbursements incurred together with copies of invoices.

70 The total amount for disbursements incurred by the applicant from mid-2019 up to 31 December 2023, inclusive of GST where applicable, was $681,778.81. The majority of the disbursements incurred were for counsels’ fees and experts’ fees: Rosati 1 at [102]. Ms Rosati considered counsels’ fees to be within the usual range of rates and fair and reasonable: Rosati 1 at [112]. Ms Rosati concluded that the fees for experts and consultants were reasonable: Rosati 1 at [119]. Ms Rosati considered the remaining disbursements from [121] to [133], concluding that the majority were fair and reasonable.

71 Ms Rosati applied the relevant legislative tests she had earlier summarised to consider whether the costs and disbursements were reasonable in amount and reasonably incurred having regard to the circumstances in which the work was undertaken: Rosati 1 at [134] to [160]. She provided a “Summary of Opinion” from [163] to [188]. At [182], Ms Rosati noted that she applied a 5% reduction to account for professional costs that might not be considered to be fairly and reasonably incurred on bases as outlined earlier in her report. She stated at [183] and [184]:

[183] The total professional costs recorded by Shine in the itemised account for work done to 31 December 2023 is $1,750,708.30 inclusive of GST and applying the 5% reduction gives **reasonable professional costs of $1,663,172.88 inclusive of GST**.

[184] As outlined above, Shine is entitled, from the terms of the Shine Costs Agreement, to charge an uplift fee of 25% on their reasonable professional costs. Applying 25% to the reduced professional costs of $1,663,172.88 gives an **uplift fee payable of** **$415,793.22, inclusive of GST.**

72 Ms Rosati provided a “Summary” from [189] to [193]. The summary at [189] was as follows:

|  |  |
| --- | --- |
| Incurred by | Fair and Reasonable Costs |
| Shine – Professional Costs up to 31 December 2023 | $1,663,172.88 |
| Shine – 25% Uplift fee on reasonable professional fees | $415,493.22 |
| Counsels’ fees | $476,898.75 |
| Experts’ & Consultants’ fees | $119,930.60 |
| General Disbursements | $82,949.38 |
| My costs for preparation of this report | $26,455.00 |
| TOTAL REASONABLE COSTS & DISBURSEMENTS | $2,784,899.83 |

73 Under the heading “Proportionality of the costs”, Ms Rosati stated at [190] to [193]:

[190] I note from the information provided to me that the settlement sum is not less than **$16,000,000** for the claim brought by the Applicant on its own behalf and that of the group members. I consider that the Applicant’s reasonable costs incurred and estimated to be incurred by Shine in relation to the proceeding, up to 31 December 2023 and including my costs of preparing this report, to be **$2,784,899.83**.

[191] This amount does not include the costs and disbursements likely to be incurred from 1 January 2024 up to including the settlement approval hearing estimated by Shine to be $475,000. Adding this amount to the total costs outlined above, gives a total for costs of around **$3,259,899.83**.

[192] This equates to around 20% of the settlement sum but is significantly less than the estimate of total legal costs provided by Shine to the Applicant.

[193] In my opinion, the amount of costs incurred and estimated to be incurred is not disproportionate to the outcome of the proceeding in light of the issues involved and the work required to be performed as detailed above. However I note that the percentage of costs incurred in this matter is slightly higher than the median percentages of settlement proceeds used to pay legal costs of between 15% and 17% taken from an analysis of thirty representative proceedings finalised in the Court in the period between 2013 and 2018 set out in the Australian Law Reform Commission report *Integrity, Fairness and* *Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) at paragraph 3.49.

### Rosati 2

74 Ms Rosati was provided with further information for the purposes of her second report, including a further “itemised account”: Rosati 2 at [5]. Ms Rosati applied the same methodology as she did in relation to Rosati 1: Rosati 2 at [9]. Again, Ms Rosati provided an account of her findings and reasoning for her various conclusions. Ms Rosati described the work for the period 1 January 2024 to 25 March 2024 in Rosati 2 at [29]. It is not repeated here, but has been taken into account in the analysis below.

75 Ms Rosati again applied a 5% reduction to professional fees to account for professional costs that might not be considered to be fairly or reasonably incurred: Rosati 2 at [69]. At [70] and [71] she stated:

[70] The total professional costs recorded by Shine in the March 2024 itemised account for work done from 1 January 2024 to 25 March 2024 is $140,990.30 inclusive of GST and applying the 5% reduction gives **reasonable professional costs of $133,940.79** **inclusive of GST**.

[71] As outlined above, Shine is entitled, from the terms of the Shine Costs Agreement, to charge an uplift fee of 25% on their reasonable professional costs. Applying 25% to the reduced professional costs of $133,940.79 gives an **uplift fee payable of $33,485.20,** **inclusive of GST.**

76 Under the heading “Summary” at [75], Ms Rosati set out a summary of what she considers to be fair and reasonable in the following way:

|  |  |
| --- | --- |
| Incurred by | Fair and Reasonable Costs |
| Costs incurred from 1 January 2024 to 25 March 2024 |  |
| Shine – Professional Costs | $133,940.79 |
| Shine – 25% Uplift fee on reasonable professional fees | $33,485.20 |
| Counsels’ fees | $69,552.00 |
| General Disbursements (excluding my costs for my first report) | $1,096.68 |
| Future costs from 26 March 2024 |  |
| Shine – Professional Costs (no uplift fee claimed) | $40,000.00 |
| Counsels’ fees | $57,000.00 |
| General Disbursements | $5,000.00 |
| My costs for preparation of this report | $6,022.50 |
| TOTAL REASONABLE COSTS & DISBURSEMENTS | $346,097.17 |

### Summary of Shine’s submissions

77 Shine submitted that Ms Rosti’s opinion should be accepted. As to the litigation more generally, the applicant submitted:

(a) the proceeding has been conducted for over two years and has been vigorously defended;

(b) there were necessary costs incurred in preparing material in support of the carriage motion as well as attending the carriage motion hearing;

(c) the proceeding is at a stage where the parties are ready for the preparation of evidence in chief, expert evidence, discovery and obtaining defences as well as setting down for a trial date;

(d) the proceeding is complex, has novel aspects and has involved dealing with the administration of DASS shortly after the matter was filed as well as Shine’s participation in the committee of inspection at the relevant creditors’ meetings;

(e) the parties and their legal representatives attended two mediation sessions over two days in April and June 2023, and subsequent detailed and protracted negotiations resulting in the execution of the Settlement Deed on 13 December 2023;

(f) between August 2020 and 31 December 2023, Shine received approximately 4,346 telephone calls and emails from group members enquiring about the proceeding requiring action from Shine’s legal team;

(g) the quantum of legal costs and disbursements does not exceed the quantum of the legal costs and disbursements that were first estimated and disclosed to the lead applicant in the retainer; and

(h) the legal costs have in fact already been paid or incurred by Shine.

### Summary of Deed Administrators’ submissions

78 The Deed Administrators had been provided access to a redacted version of Ms Rosati’s report of 2 February 2024 and made a number of submissions in relation to the costs claimed by Shine. There was some debate about whether the Deed Administrators had standing in this respect, but ultimately no-one objected to the Court taking into account what the Deed Administrators submitted or what the applicant submitted in response.

79 At the core of the submissions made by the Deed Administrators was the proposition that the Letter of Instruction to Ms Rosati was, in a number of ways, conclusionary and lacking in foundation: Deed Administrators’ Submissions at [42]. The Letter of Instruction included the following:

**Complexity of the litigation**

[19] We note the litigation was conducted over three years and proceeded on an open class basis. The litigation was a complex class action proceeding involving over approximately 4,606 group members. It concerned difficult legal issues regarding fiduciary obligations, accessorial liability, misleading and deceptive conduct and negligence. The SOC is 63 pages and 101 paragraphs.

[20] We note the Proceeding was defended with vigour, and no issues were conceded by the Respondents.

[21] The litigation was further complicated by the following:

a. Kosen-rufu Proceeding Carriage Motion preparation and hearing (discussed above in paragraph 14(b));

b. administration of the first respondent, DASS, in January 2022 shortly after the matter was filed and Shine’s participation in the committee of inspection and at the relevant creditors’ meetings;

c. the presence of multiple respondents and different legal representatives for each respondent as well as the presence of relevant insurers;

d. additional legal representatives for the DASS Deed Administrators and dealing with issues associated with the administration of DASS and its affect on the Proceeding; and

e. the introduction of the SOLR and ensuring that the Proceeding did not affect group members’ rights to claim under the SOLR.

*Discovery*

[22] The litigation was further complicated by the need to seek Orders on the production of any type of discovery or disclosures, as set out in paragraphs 15 to 17 and paragraph 19 above. In summary:

a. On 4 February, the Court made orders for EP1 to give minutes of DASS and EP1 meetings.

b. On 27 October 2022, the Court made orders for EP1 to produce the Insurance Policies; and

c. On 14 August 2023, Shine Lawyers made an interlocutory application to seek the production of financial information, and while was unsuccessful, was deemed necessary by his Honour, Justice Lee.

*Settlement and Administration*

[23] The settlement negotiations were further complicated by:

a. the administration of DASS and its representatives having their own requirements and obligations to fulfil;

b. amending the group member definition to ensure that:

(i) group members who had since closed their self-managed superannuation funds (**SMSF**) were still included; and

(ii) group members who were part of the Kosen-Rufu proceedings were still included.

c. ensuring that nothing in the Settlement Deed would preclude a group member from claiming under the SOLR.

*Counsel*

[24] Given the stated complexity, senior and senior/junior and junior counsel were briefed on this matter. Solicitors were allocated on tasks as described in the relevant tax invoices.

[25] The Proceeding settled at a stage where the Applicant was about to begin preparation of its evidence, seek a timetable from the Court for the provision of discovery and set down a trial date.

80 It was submitted that the “only information Ms Rosati received about the nature of, and steps taken in, the proceeding is the information contained in the Letter of Instruction”: Deed Administrators’ Submissions at [18].

81 It was submitted that the Letter of Instruction was inaccurate in its portrayal of what was involved in the case and that this may have led Ms Rosati to a flawed conclusion about the reasonableness and proportionality of the costs: Deed Administrators’ Submissions at [42].

### Consideration

82 The Court must be satisfied that an order made with respect to costs is “just” within the meaning of s 33V(2) of the FCA Act.

83 Section 172 of the *Legal Profession* ***Uniform Law*** *(NSW)* includes:

**172 Legal costs must be fair and reasonable**

(1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are—

(a) proportionately and reasonably incurred; and

(b) proportionate and reasonable in amount.

(2) In considering whether legal costs satisfy subsection (1), regard must be had to whether the legal costs reasonably reflect—

(a) the level of skill, experience, specialisation and seniority of the lawyers concerned; and

(b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and

(c) the labour and responsibility involved; and

(d) the circumstances in acting on the matter, including (for example) any or all of the following—

(i) the urgency of the matter;

(ii) the time spent on the matter;

(iii) the time when business was transacted in the matter;

(iv) the place where business was transacted in the matter;

(v) the number and importance of any documents involved; and

(e) the quality of the work done; and

(f) the retainer and the instructions (express or implied) given in the matter.

84 For an order under s 33V(2) of the FCA with respect to costs to be “just”, the costs sought to be recovered from group members would need to be reasonable and proportionate or, in terms of s 172(1) of the Uniform Law, “proportionately and reasonably incurred” and “proportionate and reasonable in amount”: ***Modtech*** *Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 at [32] (Gordon J); ***Petersen*** *Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842; 132 ACSR 258 at [130] (Murphy J).

85 As mentioned, a central submission made by the Deed Administrators was that Ms Rosati misunderstood the nature and complexity of the proceedings as a consequence of the Letter of Instruction. The material which Ms Rosati had available to her – in particular, the “itemised account” – inevitably revealed more than the Letter of Instruction as to what was involved in the proceeding. As has been set out above, Ms Rosati considered the work said to have been performed over the course of the Watson Proceeding as contained in the itemised account – see: Rosati 1 at [83], [92], [95], [98], [99] and [101]. This must have informed her assessment of what was involved and her opinion as to what was fair and reasonable.

86 Ms Rosati was not provided with access to the electronic file, referred to as the “Shine File Material”, but was provided with an index to the files and was provided certain information about the content of the file in terms of numbers of documents: Rosati 1 at [73] to [77]. It is not clear whether Ms Rosati requested access to the “Shine File Material”, although (as requested in the Letter of Instruction) she stated in Rosati 1 at [194] that she had made all inquiries which she believed desirable and that no matters of significance have been withheld.

87 Ms Rosati addressed the complexity, novelty and difficulty of the matter in Rosati 1 at [146] to [151]:

**The level of complexity, novelty or difficulty of the matter**

[146] The narrations as to the work performed for the Applicant and times for each task generally in the itemised account appear to be fair and reasonable for acting a representative proceeding with one lead senior and several junior counsel that settled at mediation at an early stage.

[147] I note from my letter of instructions that the proceeding was commenced on an open class basis on behalf of some 4,606 investors. The proceeding had difficult legal and factual regarding fiduciary obligations, accessorial liability, misleading and deceptive conduct and negligence.

[148] The investigative phase took around 18 months and it was necessary to obtain preliminary expert assistance before the proceeding was commenced. The Statement of Claim was 63 pages with 101 paragraphs. The claim was for a significant amount of money and was defended with vigour by the Respondents. The matter was resolved with no issued being conceded by the Respondents.

[149] As outlined in paragraph 21 of my letter instructions, the matter was further complicated by the following;

(a) the competing claim filed by the KR Applicants and the preparation and running of the KR Proceeding;

(b) the administration of the First Respondent in January 2022 shortly after the proceeding was filed required Shine to attend and participate in the committee of inspection and creditors meetings;

(c) multiple Respondents and their insurers being separately represented;

(d) additional representation from the Administrators and the effect of the administration on the proceeding;

(e) the introduction of the Commonwealth Government SOLR financial compensation scheme of last resort; and

(f) the need to seek formal orders for production of relevant document from the Respondents.

[150] The parties participated in a mediation in March 2023 which was reconvened on 31 May 2023. The settlement negotiations were further complicated by the involvement of the Administrators and amending the group member definitions.

[151] In my opinion, this matter involved issues of considerable complexity, novelty and difficulty. In turn, it is to be expected that the costs incurred in running this litigation will be significant.

88 As to “complexity”, there is no question that the Watson Proceeding had difficult legal and factual issues regarding fiduciary obligations, accessorial liability, misleading and deceptive conduct and negligence as stated in Rosati 1 at [147].

89 However, there are degrees of complexity. The legal issues identified by Ms Rosati were not of an overly complex kind. The legal issues relevant to the causes of action would have required careful consideration, in particular for the purposes of considering whether to commence the proceeding and drafting the statement of claim.

90 The matters referred to by Ms Rosati in Rosati 1 at [149] accurately describe aspects of what was involved. However, again, the complexities should not be overstated. None of the matters referred to is particularly unusual and the lawyers engaged in this case would be used to dealing with such issues. Complex cases are not unusual and experienced solicitors and counsel deal with such issues regularly and efficiently, which in part justifies the level of fees charged. Higher rates might be expected to reflect greater experience and a greater capacity to deal efficiently with complex issues.

91 The legal issues involved in the interlocutory applications concerned confined issues and were, in the scheme of things, not particularly complex, even if appropriately characterised as “novel”. The complexities in the Watson Proceeding were particularly relevant to confined areas of work at confined times. The complexity of an issue or circumstance is particularly relevant where it results in a requirement to perform more work.

92 As to the fact that the Watson Proceeding was commenced “on behalf of some 4,606 investors”, as stated at Rosati 1 at [147], that does not translate to significant complexity or necessarily to significantly more work. As Ms Rosati acknowledged in parts of her report, a number of communications with investors were in the nature of “group communications”. As is discussed further below, the case was settled before pleadings were closed, before any comprehensive discovery and before evidence. The fact that there were 4,606 investors with claims should not cloud the assessment of what was fair and reasonable in terms of work required.

93 The fact that there were “4,346 telephone calls or emails from Group Members enquiring about the proceeding requiring action from Shine’s legal team”, as was submitted, must also be assessed in context. The issue is what work was required and what was fair and reasonable. It is likely that many inquiries were appropriately addressed through group responses.

94 The context includes the following:

(a) there was at all times from at least November 2021 an obvious issue about whether the respondents would have the capacity to meet the claims of the group members;

(b) the statement of claim was filed on 22 December 2021;

(c) at least by the time proceedings were commenced, and probably for some time before, it could not have been particularly difficult to form a view about prospects of success in the circumstances;

(d) DASS went into administration on 19 January 2022 and the proceeding as against DASS was stayed from that time;

(e) at least from when DASS went into administration, one month after the proceeding was commenced, it would have become increasingly obvious that the best solution for group members was likely to be through an agreed resolution rather than a litigated outcome;

(f) very limited discovery was ordered on 4 February 2022, being discovery of minutes of meetings likely to be directly relevant, amounting to 23 documents comprising 144 pages: Affidavit of Jackson Clyde Macaulay affirmed 28 March 2024 at [27];

(g) on 8 March 2022, an order was made by consent that the respondents not be required to file defences until further order and orders were made for carriage motions to be filed;

(h) the carriage motions were not complex, requiring affidavits and submissions addressing the standard matters raised in such applications;

(i) no defences were filed;

(j) no evidence in the substantive proceeding was filed;

(k) there was no comprehensive discovery;

(l) it follows that there was no significant expenditure on discovery;

(m) it is difficult to see that significant expenditure could have been justified in relation to evidence which would be required at a (somewhat unlikely) final hearing;

(n) there were two confined interlocutory hearings relating to the obtaining of insurance policies: Watson No 1 and Watson No 2 – these involved some novel arguments, but were not especially complex or involved in terms of evidence or argument;

(o) there was one interlocutory hearing relating to the production of documents to be used in connection with the mediation: Watson No 3 – this involved a novel argument, but was not especially complex or involved in terms of evidence or argument;

(p) these three interlocutory applications were made in circumstances where: (i) there was substantial doubt about the prospect of significant recovery; and (ii) the proceeding, if fully litigated, would be costly and potentially exhaust all of what could be recovered;

(q) the likely recovery position would have become relatively clear after the first two interlocutory applications;

(r) the mediation included two mediation sessions over two days in April and June 2023 and subsequent negotiations;

(s) the settlement process was necessarily involved, and the agreed resolution of the dispute involved various complexities, including those resulting from DASS being in administration; and

(t) by 22 December 2023, the total professional fees incurred was $1,750,708.30 (before the 25% uplift), representing over half of the total professional fees estimated in the costs disclosures of $3,431,020 (before the 25% uplift).

95 In relation to Rosati 1, I consider that Ms Rosati’s reduction of professional fees by 5% is low. As a matter of substance, that reduction comes close to a conclusion that Shine are entitled to a full indemnity for costs. Under its costs agreements, and the Settlement Deed, Shine is entitled to costs on a solicitor and own client basis.

96 The reduction in pre-retainer professional fees of 5% is low having regard to what is known about the work which was performed, primarily divined from the description of the work in the Letter of Instruction, what is stated in the costs agreements, and the summary of what was contained in the “itemised account” as summarised in Rosati 1 at [83]. Having regard to the context and this information, it is likely that a substantial amount of work in the pre-retainer period concerned Shine’s commercial, business, and legal interests as a company considering whether to be engaged in, and promote, the representative proceedings it was investigating. I also consider the reduction low noting the way in which charges were recorded for group communications with potential group members in the pre-action period – see: Rosati 1 at [89].

97 There was also substantial work performed in the pre-retainer period which was of benefit to group members. The cost of the work for the benefit of group members is fairly passed on.

98 I am not satisfied that a 5% reduction in the professional fees claimed in respect of the pre-retainer period, as determined from the “itemised account”, appropriately reflects what is fair and reasonable for solicitor and own client costs, having regard to the various matters in s 172(2) of the Uniform Law.

99 The reduction of 5% is also low in the post-retainer period, from 18 December 2021 until 12 November 2023, when regard is had to the context referred to at [94] above. The level of professional fees in the post-retainer period is high having regard to the work which had already been performed in the pre-retainer period, the estimate of professional fees given in the costs disclosures (in particular the various line items in the table to cl 31 of the costs agreements), and the steps actually taken in the litigation.

100 The submission made by Shine recorded at [77(g)] above – that the costs do not exceed what was first estimated and disclosed to the lead applicant in the retainer – is not really to the point in circumstances where the proceedings came to an early end and where many of the steps referred to in the retainer never occurred. It is more pertinent to examine the costs claimed by reference to the table in cl 31 of the costs agreements – see: [60] above.

101 One of the matters to take into account in determining what is fair and reasonable is the fact that the prospect of substantial recovery was always in some doubt and became increasingly doubtful during the post-retainer period. This circumstance called for careful assessment of what work should be performed so as to maximise the interests of the group members by ensuring that whatever might be recovered would not be soaked up by legal costs. The fact that a 25% uplift fee was payable, subject to the orders made on approval of any settlement, accentuated an increasing need to conserve costs as the unlikelihood of significant recovery increased. In making that observation, I do not mean to suggest that there was no regard to these matters.

102 Viewed in context and looking carefully at the descriptions of the work carried out as described in Rosati 1, in particular at and [92] to [101], a 5% reduction to what was claimed in respect of the post-retainer period does not reflect a fair and reasonable or proportionate assessment of costs on a solicitor and own client basis at the time the costs were incurred.

103 As to Rosati 2, I again consider the reduction of 5% does not give rise to a fair and reasonable quantification of solicitor and own client costs.

104 I have reached these views seeking to adjust for hindsight bias – see: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq) (No 3)* [2017] FCA 330; 343 ALR 476 at [181] (Beach J); see also *Petersen* at [134] and [135].

105 I considered whether to bifurcate the approval and the costs issues, including whether to refer the question of costs to a referee or obtain a further report. Such a course would add to the costs and further deplete the amount available to the Claimants through the DOCA.

106 In the particular circumstances of this case, and on the basis of the information which has been provided, including the considerable assistance provided by the reports of Ms Rosati, I consider that an appropriate order can be made without taking one of the courses just mentioned. I consider a “just” result is as follows:

(1) In respect of Rosati 1:

(a) the disbursements identified by Ms Rosati should be allowed in full. These comprise:

(i) counsel fees: $476,898.75;

(ii) experts fees: $119,930.69;

(iii) general disbursements: $82,949.38; and

(iv) Ms Rosati’s costs: $26,455.

(b) I would reduce the total professional fees for the pre-retainer period up until 17 December 2021 by 25%, before allowing the uplift of 25%: $680,757.

(c) I would reduce the total professional fees in the post-retainer period from 18 December 2021 to 12 November 2023 by 25%, before allowing the uplift of 25%: $1,011,882.30.

(d) I would reduce the total amount claimed for the period 12 November 2023 to 31 December 2023 by 15% before allowing the uplift of 25%. The amount is therefore $58,069 less 15%: $49,358.65. After the 25% uplift, the total is: $61,698.31.

(2) In respect of Rosati 2:

(a) the disbursements identified by Ms Rosati should be allowed in full. These comprise:

(i) counsel fees: $126,552;

(ii) general disbursements: $6,096.68; and

(iii) Ms Rosati’s costs: $6,022.50.

(b) I would reduce the total professional fees from 1 January 2024 to 25 March 2024 by 15%, before allowing an uplift of 25%. The amount is therefore $113,849.67 + 25%: $142,312.09.

(c) I would allow the total future professional costs of $40,000 in respect of which no uplift is claimed.

107 The total that is therefore appropriate in respect of professional fees ($1,936,649.70) and disbursements ($844,905) is $2,781,554.70. The total which was claimed was $3,130,997. The amount which is allowed represents 88.8% of what was claimed, as assessed by Ms Rosati in Rosati 1 ($2,784,899.83) and Rosati 2 ($346,097.17).

108 In terms of professional fees, the actual professional fees incurred (before the reduction of 5% made by Ms Rosati, but including the 25% uplift where claimed) were:

|  |  |  |
| --- | --- | --- |
| Rosati 1: | $1,750,708.30 (fees) + $437,677.08 (uplift) | $2,188,385.38 |
| Rosati 2: | $ 140,990.30 (fees) + $35,247.58 (uplift) | $ 176,237.88 |
|  | $ 40,000.00 (no uplift claimed) | $ 40,000.00 |
| **Total:** |  | **$2,404,623.26** |

109 What has been allowed is:

|  |  |  |
| --- | --- | --- |
| Rosati 1: |  | $1,754,337.61 |
| Rosati 2: | $113,849.67 (fees) + $28,462.42 (uplift) | $ 142,312.09 |
|  | $ 40,000.00 (no uplift claimed) | $ 40,000.00 |
| **Total:** |  | **$1,936,649.70** |

110 The total allowed equates to a little over 80% of what was claimed for professional fees as recorded in the itemised account, together with full allowance for the 25% uplift, where claimed.

111 Ms Rosati made only minor adjustments to the disbursements which had been claimed. I consider Ms Rosati’s adjustments appropriate. The consequence is that there is almost complete recovery of disbursements.

112 Assessing the matter globally, and by reference to all the various issues raised, an amount of $2,781,554.70 is just for the purposes of an order under s 33V(2) of the FCA Act. Pursuant to s 33V(2) the Court approves the sum of $2,781,554.70.

## Objections

113 One of the objections referred to the percentage of the total proposed settlement amount that the legal costs would comprise. The objection also noted, correctly, that the reason for this is driven by the “paltry amount being offered”. It is unfortunate, but the harsh reality is that this settlement is driven by commercial commonsense. The applicant is unlikely to recover more if the proceeding continues and, indeed, is likely to recover less if the proceeding continues.

114 A common feature of a number of objections was to the effect that the Settlement Amount was not enough when regard was had to the losses sustained by the Claimants. This is an understandable sentiment. However, appropriate investigations have been made as to the amount that might be *recovered* from the respondents as opposed to *awarded* against the respondents by way of damages. If the proceeding continued, the amount which would be recovered is likely to be very substantially less than the amount which would be recovered if the settlement were approved. This is because the amount available to satisfy an award of damages is likely to be seriously or completely depleted by the legal costs of both the applicant and the respondents if the proceeding were to continue.

115 The inquiries made in relation to the assets available to the respondents has been sufficient – see in this regard: Watson No 1; Watson No 2; and Watson No 3. There is no real prospect of any of the respondents generating further funds over the course of the litigation (should it continue) sufficient to warrant not approving the settlement.

## Payment to lead applicant

116 The proposed settlement contemplates a payment to the lead applicant of $20,000. The payment is intended to recognise the fact that two individuals on behalf of the applicant have been obliged to expend time and effort in bringing the proceeding. In my view this is appropriate.

117 I note that such payments are not unusual: *Camping Warehouse v Downer EDI (Approval of Settlement)* [2016] VSC 784 at [163]-[176] (Digby J); *Petrusevski v Bulldogs Rugby League Club Ltd* [2004] FCA 1712 at [13] (Gyles J); *Lee v Bank of Queensland Ltd* [2014] FCA 1376; 103 ACSR 436 at [55]-[56] (Collier J).

## Conclusion on approval

118 For these reasons, and on the basis indicated, the settlement is approved.

# THE APPLICATION FOR DIRECTIONS

119 The DOCA was executed while the Watson Proceedings was on foot. It has been amended twice. It has been drafted in terms that anticipated a settlement of the Watson Proceeding, with settlement funds and insurance proceeds from policies held by E&P on its own behalf and on behalf of other E&P Group companies (including DASS) intended to flow into the deed administration to satisfy the claims made by the former clients. Its terms operate so that, once the settlement and insurance payments are made, the former clients may make claims against the deed fund and the Deed Administrators will adjudicate them.

120 The DOCA anticipates two payments into the deed fund, being:

(a) the “Tranche A” payment of about $17,662,489 (less some adjustments), which has already been paid; and

(b) the “Tranche B” payment, which comprises:

(i) a $4 million payment by E&P and E&P Operations Pty Ltd (**E&PO**), $1 million of which has already been paid and $3 million of which will be paid within 5 days of the “Settlement of the Representative Proceedings” under the DOCA (**Settlement Payment**); and

(ii) proceeds of an insurance policy held by E&P (and on behalf of DASS), which are expected to be approximately $12 million, less the costs of the Watson Proceeding.

121 If the proposed settlement is approved, which it is, the second part of the Tranche B Payment (being the $3 million remaining to be paid by E&P and E&PO plus the “Insurance Proceeds” as defined by clause 1.2 of the Deed of Settlement) can be paid into the deed fund.

122 The funds will then be available to be distributed to the creditors of DASS.

123 The affidavits filed on behalf of the Deed Administrators reveal the following, in summary. The Deed Administrators have conducted extensive investigations in an attempt to determine the extent of each former client’s investment in the URF products. Their investigations have revealed that there could be up to 8,000 former clients who may assert a claim as a result of losses suffered due to financial advice to invest in related party investment products, including the URF. The total losses may rise to approximately $350 million. Given the limited pool of assets from which to pay a dividend to creditors under the DOCA, it is not commercially viable to assess each former client’s claim on a case-by-case basis. Rather, it is necessary to formulate a loss methodology that can be used to assess the quantum of each former client’s claim without having to conduct a case- by-case assessment.

124 The voluntary administrators engaged Mr Campbell Jaski, a partner in the PwC “Corporate Value Advisory” practice, to prepare an appropriate loss methodology. Mr Jaski took the view that there were two available alternative loss methodologies, being:

(1) the loss of the capital sum actually invested by the former clients (**Actual Loss Approach**); and

(2) the loss of profit that could have been earned on that invested capital (**Loss of Opportunity Approach**).

125 Mr Jaski concluded that the appropriate methodology is the Actual Loss Approach. The Deed Administrators agree with this position.

126 The Actual Loss Approach simply requires the determination of the actual return received from investing in the URF by each former client. The Loss of Opportunity Approach would require investigation into the former clients’ investment history and investment goals, the advice they received and the alternative possible investments (along with the probability that they would have invested in them). It would be an expensive, protracted, and impractical process, assuming it were possible. The deed fund will only compensate the former clients for a fraction of their losses even when the Actual Loss Approach is taken, with a return of 5.54 to 5.92 cents in the dollar being estimated. The Loss of Opportunity Approach would reduce that compensation further and the costs and fees incurred in doing so would likely exceed the total value of the deed fund.

127 In those circumstances, the Deed Administrators consider that the most practical course is to implement their proposed adjudication and distribution process, which would see them adopt the Methodology, facilitate a proof of claim process by pre-populating claim forms on behalf of former clients (based on the records they have been able to obtain from E&PO) and pay those claims as assessed on a rateable basis.

128 The Deed Administrators seek orders endorsing:

(a) their proposed process for administering and distributing the deed fund, including:

(i) their use of the “Creditor Portal” to communicate with creditors of DASS;

(ii) the classes of documents to which they may have regard when considering whether a former client creditor has proven their claim;

(b) their adjudication of the losses claimed by the former clients on the basis of the Actual Loss Approach, rather than the Loss of Opportunity Approach; and

(c) their application of a materiality threshold, which would allow them automatically to admit claims within a certain tolerance of specified benchmarks without further investigation where such further investigation would be uneconomic, so as to protect the deed fund from undue wastage.

129 The Deed Administrators’ application is made in circumstances where many of the former clients are not sophisticated investors, many are elderly and many regard themselves as victims of DASS’ misconduct. It would be natural for many of them to feel aggrieved by their losses. The Deed Administrators submitted that many of these people may not appreciate the reasoning behind the Deed Administrators’ adjudication and distribution process and that it would be just and beneficial to the administration process to afford the Deed Administrators protection against any allegations that might be made that they have acted unreasonably or inappropriately or in breach of their duty in effecting that process. I accept this submission.

130 Section 90-15(1) of the IPS provides that the Court may make such orders as it thinks fit in relation to the external administration of a company which may include an order determining any question arising in the external administration of the company: see s 90-15(3)(a).

131 Relevant principles were set out by Gleeson J in *Re Halifax Investments Services Pty Ltd (in liq))* [2020] FCA 533; 144 ACSR 292 at [50] to [59]. It is not necessary to repeat them.

132 Directions providing for the rateable distribution of deficient funds have been made before – see: *Australian Securities and Investments Commission v Letten**(No 7)* [2010] FCA 1231; 190 FCR 59; *Algeri, in the matter of Gem Management Group Pty Ltd (in liq)* [2022] FCA 1229.

## The Creditor Portal

133 During the DOCA administration, the Deed Administrators have developed a bespoke digital platform through which they have communicated with the creditors of DASS. The purpose of the portal is to create a single point of contact between the Deed Administrators and the creditors for all aspects of the adjudication and distribution process. The Deed Administrators consider that the Creditor Portal is the most efficient and effective means of engaging with the creditors during that process, because:

 there are potentially up to 8,000 creditors, which would render a physical mail process expensive and impracticable;

 the Creditor Portal is a more secure way to engage with the creditors than physical post; and

 the Creditor Portal has been purpose-built to conduct the distribution process and manage the complexity of the data that will underpin the loss claims.

134 The Deed Administrators consider that the use of the Creditor Portal achieves the objective of maximising the return to creditors. The committee of inspection has endorsed its use. The Deed Administrators submitted that the use of technological platforms such as this to promote efficiency and reduce cost is properly the subject of relief under s 90-15. I accept the Deed Administrators’ submissions.

## E&P loss data

135 During the course of the deed administration, the Deed Administrators have not had direct access to any former client creditor information, including any former client lists, client personal details, and client investment data. They consider that:

(a) DASS, as a wholly owned subsidiary within the E&P Group, did not maintain its own repository of this type of information;

(b) all client data was, and is, held by Evans and Partners Pty Ltd (on its own behalf and on behalf of other group companies, including DASS); and

(c) DASS was reliant on E&PO (its immediate parent company) for all finance and operational services, including staffing.

136 In those circumstances, the Deed Administrators state that they have been reliant upon other companies within the E&P Group to provide the information that will enable them to effect the proposed distribution. They have obtained an affidavit from the chief technology officer of E&P, Mr McPhillips, who explains the process by which the relevant data (**E&P Loss Data**) was extracted from the systems of the E&P Group.

137 On the basis of their review of that data and Mr McPhillips’ affidavit, along with their dealings with Mr McPhillips, the Deed Administrators are satisfied that the E&P Loss Data forms a reasonably reliable and complete set of records of the former clients’ investment data and is sufficient to enable them to determine the appropriate distributions to be made.

## Proofs of debt

138 The Deed Administrators expect there to be two categories of creditors lodging proofs of debt:

(1) former clients; and

(2) other creditors, for example employees or trade creditors.

139 The Deed Administrators propose to call for proofs of debt broadly, because of the existence of the other creditors who may not be accessing the Creditor Portal. The Deed Administrators believe there to be nine creditors in the “other creditors” category.

140 The Deed Administrators will facilitate the submission of proofs by former clients by pre-populating their proofs with the E&P Loss Data, which those clients will simply be able to confirm or object to. If the former clients disagree with the pre-populated data, they will have an opportunity to provide to the Deed Administrators evidence which supports their contentions. That evidence will then be assessed.

141 Paragraph 3 of the Deed Administrators’ proposed form of orders sets out the process the Deed Administrators propose to follow to administer the proof of debt process. It is based upon the terms of regs 5.6.48, 5.6.53 and 5.6.54 of the ***Corporations Regulations*** *2001* (Cth), with an amended timeframe permitted to the Deed Administrators to account for a number of factors, including:

(a) payment of the Tranche B Payment, which will not occur until after the expiry of the 49-day appeal period (should the settlement be approved);

(b) stress-testing the Creditor Portal with the committee of inspection prior to commencing the adjudication process, and any necessary maintenance to the Creditor Portal following that process to ensure it operates as intended; and

(c) facilitating the notification and adjudication process to up to 8,000 creditors via electronic means and ordinary post.

## Documents to substantiate the proofs of debt

142 As mentioned, during the deed administration, the Deed Administrators have formed the view that there are a substantial number of former clients who are unsophisticated investors. These include people who may not have established document retention regimes. They expect there to be a wide variation in the quality of record-keeping across the body of former clients.

143 The Deed Administrators seek a direction that they are justified and acting reasonably in accepting claims where evidence of the following nature has been provided:

(a) documents created by the E&P Group, including portfolio and transactions statements, holding summaries, buy/sell statements or unit/share certificates;

(b) workings prepared by former clients provided they are supported by bank statements and/or other documents created by the E&P Group;

(c) a statutory declaration supported by bank statements; and/or

(d) any other evidence the Deed Administrators reasonably considers is sufficient to prove the claim.

144 The Deed Administrators submitted that this direction would permit the Deed Administrators to act efficiently and cost-effectively in assessing claims, in circumstances where the quality of documentation is likely to vary and it would be unrealistic to expect perfection in the documentary evidence available.

## Materiality thresholds

145 It is possible that there will be a difference between the quantification of the loss the Deed Administrators have calculated for some former clients (Quantified Claims) and the sum of the loss the former clients assert they suffered (Asserted Loss Claims). Where the Asserted Loss Claim sum is higher, and the difference between those two amounts is immaterial, the Deed Administrators propose to accept automatically the Asserted Loss Claim figure. This proposal is aimed at addressing cases where the differences between the Quantified Claims and the Asserted Loss Claims are modest, and do not justify the incurring of further costs. The Deed Administrators have estimated that the cost of reviewing alternative calculations of each relevant claim will cost in the range of $1,200 to $1,900 per creditor.

146 In this respect, the Deed Administrators referred to the decision of Gordon J in *Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq)* [2012] FCA 75; 288 ALR 240. Liquidators had been appointed to Sonray, which provided financial product advice and services to its clients about trading in financial products and provided access to trading platforms to enable clients to trade. The funds and assets were spread over a number of segregated accounts, denominated in various currencies, with numerous shareholdings and open trading positions held by a range of third-party institutions. The funds had been mixed and subjected to substantial unauthorised withdrawals, dealings, and trading. This had resulted in $45.6 million in losses. Approximately 4,000 investors were affected. Sonray’s records were incomplete, and it was practically impossible to ascertain entitlements to each of the segregated accounts. The liquidators sought orders pooling the funds and distributing them rateably, along with a direction that they be entitled to treat Sonray clients whose entitlement to participate in the segregated accounts was $50 or less as having no entitlement. It was common ground that the approach suggested by the liquidators was sensible, practical and expedient in the circumstances, and the court gave the direction sought – see order 4 made on 10 February 2012.

147 The Deed Administrators submitted that it was appropriate to take a similar approach here. Balancing the cost of assessing the Asserted Loss Claims against the likely differences between the Quantified Claims and the Asserted Loss Claims (as set out in a Confidential Exhibit), it is evident that there is no material benefit to be gained by creditors from the Deed Administrators undertaking the work of reviewing Asserted Loss Claims that fall beneath the proposed materiality thresholds.

148 The Deed Administrators’ proposed approach is practical and expedient in the circumstances and the directions they seek should be made.

## Inconsistency between former client creditors and claimants

149 The Deed Administrators have become aware that some former clients may have taken steps to alter, dissolve or deregister the client entity that entered into the contract with DASS for the provision of services. This includes, for example, dissolving a self-managed superannuation fund (**SMSF**) and moving to an industry or retail superannuation fund or appointing a new trustee to manage the SMSF. The consequence of such steps is that the beneficiaries of the SMSF (being the persons who have in fact suffered the loss) might be prevented from receiving a dividend under the DOCA because the entity making the claim may not correspond to the entity recorded in the E&P Loss Data. In her affidavit, Ms Gill gave the following example at [65] of her affidavit:

… For example, suppose that:

(a) Jack and Jane Smith are the beneficiaries of the “Jack and Jane Smith SMSF”, and the trustee is “JJ Smith Trustee Co Pty Ltd”;

(b) the Former Client Creditor recorded in the E&P Loss Data is the corporate trustee, JJ Smith Trustee Co Pty Ltd;

(c) following the Voluntary Administration of the Company, Jack and Jane Smith decided to roll the assets of the Jack and Jane Smith SMSF into an industry fund, wind up the Jack and Jane Smith SMSF and deregister JJ Smith Trustee Co Pty Ltd; and

(d) Jack and Jane Smith personally lodge a formal proof of debt in the DOCA administration of the Company.

In the above scenario, the E&P Loss Data would record “JJ Smith Trustee Co Pty Ltd” as a creditor with a Loss Claim against the Company, but not Jack and Jane Smith, because “JJ Smith Trustee Co Pty Ltd” is the client entity listed within the E&P Loss Data (and the entity that entered into a contract for services with the Company).

150 Ms Gill explained at [67]:

Given the large number of Former Client Creditors (currently estimated at approximately 4,476), we are concerned that if there are a large number of these unaligned claims, significant resources will be required to identify and investigate these claims, correspond with Former Client Creditors (or their representatives) and seek further information, and verify the identity and capacity of the claimant to make a claim on behalf of the Former Client Creditor. Expending these resources would potentially significantly reduce the funds available for distribution to creditors.

151 At [68] of her affidavit, Ms Gill stated:

To mitigate the resource burden that this issue presents, we have sought to identify each possible scenario in which the claimant entity may not align with the Former Client Creditor entity, and we have developed a process for resolving each scenario, with an aim to ensuring a consistent and methodical approach that will reduce the resource burden of investigating the unaligned claims. Each scenario that we have identified, and our proposed approach to deal with them, is set out in the table below. Not all the scenarios identified below represent issues with aligning the claimant with the Former Client Creditor listed in the E&P Loss Data. However, we have considered and included each scenario for completeness.

(a) **SMSF with individual trustees**

|  |  |  |
| --- | --- | --- |
| Scenario | Features | Deed Administrators’ Approach |
| 1 | The benefits of the SMSF have been paid out to its members, or the benefits have been rolled over into another fund; and  there has not been an assignment of the claim against the Company; and  the SMSF has been wound up (i.e. administrative steps have been taken to wind up the SMSF as required under SMSF laws and regulations, including finalising outstanding tax and compliance obligations, appointing auditor for final audit, and lodging final return).  When we say the SMSF has been "wound up" in this context, we do not mean that the trust has been dissolved, if there are other assets that remain held on trust (e.g. a right of action against the Company that has not been formally appointed to the beneficiaries). | No issues, as the individual trustees remain the legal owner of the claim against the Company. Moreover, the trustees will align with the beneficiaries, so we do not perceive any risk the claimant will differ from the Client Creditor. |
| 2 | The benefits of the SMSF have been paid out to its members, or the benefits have been rolled over into another fund; and  there has not been an assignment of the claim against the Company; and  the SMSF has not yet been wound up. | Follow approach per scenario 1. |
| 3 | The benefits of the SMSF have been paid out to its members, or the benefits have been rolled over into another fund; and  there has been assignment, or purported assignment, of the claim against the Company; and  the SMSF has been wound up. | We will:  1) request that the claimant provide details of the purported assignment (i.e. who is the assignor, and copies of assignment documentation);  2) assess the validity of the assignment; and  3) accept or reject the claim based on the validity of the assignment.  4) if the claim is rejected, notify claimant of our view that the purported assignor is the proper claimant. |
| 4 | The benefits of the SMSF have been paid out to its members, or the benefits have been rolled over into another fund; and  there has been assignment, or purported assignment, of the claim against the Company; and  the SMSF has not yet been wound up. | Follow approach per scenario 3. |

(b) SMSF with a corporate trustee

|  |  |  |
| --- | --- | --- |
| Scenario | Features | Deed Administrators’ Approach |
| 5 | The benefits of the SMSF have been paid out to its members, or the benefits have been rolled over into another fund; and  there has not been assignment of the claim against the Company; and  the SMSF has been wound up and the corporate entity deregistered. | The right of action by the corporate trustee against the Company will have vested in the Commonwealth immediately before deregistration.  We will advise the claimant that the proper claimant is the corporate trustee, and if the trustee wishes to make a claim against the Company it will need to be reinstated, or an application will need to be made to ASIC to transfer the right of action to the beneficiaries. |
| 6 | The benefits of the SMSF have been paid out to its members, or the benefits have been rolled over into another fund; and  there has not been assignment of the claim against the Company; and  the SMSF has not yet been wound up. | The right of action remains with the corporate trustee, which can make a claim against the Company.  If the beneficiaries of the SMSF attempt to make a claim against the Company, we will advise the claimants that the proper claimant is the corporate trustee. |
| 7 | The benefits of the SMSF have been paid out to its members, or the benefits have been rolled over into another fund; and  there has been an assignment, or purported assignment, of the claim against the Company; and  the SMSF has been wound up and the corporate entity deregistered. | 1): Follow approach per scenario 3  PLUS  if we consider the assignment is not effective,  2): Follow approach per scenario 5. |
| 8 | The benefits of the SMSF have been paid out to its members, or the benefits have been rolled over into another fund; and  there has been an assignment, or purported assignment, of the claim against the Company; and  the SMSF has not yet been wound up. | 1): Follow approach per scenario 3  PLUS  if we consider the assignment is not effective,  2): Folow approach per scenario 6. |

152 The Deed Administrators seek an order in the following terms to address this difficulty:

Pursuant to section 90-15 of the IPS, the Deed Administrators are justified and acting reasonably in proceeding on the basis that any review of Claims by Former Client Claimants is to be undertaken in accordance with the scenarios described at paragraph 68 of the March 2024 Gill Affidavit.

## Conclusions on application for directions under s 90-15 of the IPS

153 I accept that directions should be made in the terms sought. The return likely to Claimants under the settlement are already very small compared to the losses which they have sustained. As noted earlier, whilst this is unfortunate, the evidence indicates that this is as much as is ever likely to be recovered.

154 In the unfortunate circumstances which have occurred it is necessary to take a practical approach in order to maximise the return to the Claimants and creditors. Perfection is not possible because the Deed Administrators’ costs of achieving perfection would substantially, if not entirely, consume the amount available for distribution.

# BALANCE’S COSTS

## Introduction

155 Section 33V(2) of the FCA Act provides that, if the Court gives approval for settlement of a representative proceeding, the Court “may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court”.

156 The costs which Balance seeks to recover are costs incurred in connection with the Kosen-Rufu Proceeding, although not always directly in that proceeding.

157 Balance sought costs in the amount of $969,339.71 as identified at [8] of the Affidavit of Ms Elizabeth **Harris** dated 26 March 2024. Ms Harris identifies, amongst other things, whether the costs were “fair and reasonable and properly incurred on a solicitor and own client basis”: Harris at [2]. Ms Harris provided various calculations depending on whether the costs in relation to the carriage motion and the establishment of a Managed Investment Scheme (**MIS**) were allowed or not. Balance did not ultimately seek costs associated with the carriage motion.

158 The total of $969,339.71 claimed by Balance comprised: professional fees of $568,622.98; counsels’ fees of $147,208.13; and disbursements of $253,508.60. Broadly speaking, the costs which were claimed can be divided into the following categories:

(1) Costs associated with the establishment of a MIS in relation to the Kofen-Rufu Proceeding. The relevant costs and disbursements totalled $209,009.86: Harris at [23].

(2) Costs associated with an application made to intervene in the ASIC Proceeding referred to earlier, in which a civil penalty was agreed to be paid to the Commonwealth. The relevant costs and disbursements totalled $126,797.55: Harris at [31].

(3) Costs incurred in an application to re-registerKosen-rufu Pty Ltd and costs to provide advice and indemnity to the lead applicants in the Kosen-Rufu Proceeding: Harris at [32] to [39].

(4) Costs incurred before the carriage motion in commencing and prosecuting the proceeding. The costs included the costs of preparing the pleadings in the Kosen-Rufu Proceeding and reviewing initial discovery.

159 It was submitted that all of these costs were incurred to advance the interests of group members in the period before and shortly after the Watson Proceeding was filed. Balance submitted that, in circumstances where Balance had provided funding, including an indemnity for adverse costs and does not seek any funding commission, it is reasonable for the Court to allow its costs on a “costs recovery” basis. This was because, it was submitted, the costs were incurred for the benefit of group members.

160 Balance did not seek costs after the carriage motion, although it did claim the amount of $5,830 in relation to the approval application: Harris at [10].

## Further factual background

161 In addition to the evidence of Ms Harris, Balance relied on an affidavit from Mr Simon Robert **Burnett**, a director of Balance, dated 26 March 2024. Mr Burnett described how initial investigations were undertaken by the firm Brown Ward King which had approached Balance for funding on 29 January 2021: Burnett at [1]. A second firm, Piper Alderman, was later also engaged. Ms Harris did not allow for recovery of costs beyond what would have been allowed had only one firm been engaged: Harris at [13].

162 It was submitted by reference to [15] to [25] of Mr Burnett’s affidavit, that “Balance agreed to fund the proceedings after forming the view that Shine no longer appeared to be pursuing proceedings”. Mr Burnett’s affidavit does not state any such proposition at [15] to [25] and an inference to that effect is not a natural one to draw from what is stated. Mr Burnett’s evidence was that the majority of investors spoken to in connection with Kosen-Rufu Proceeding had registered with Shine several months earlier and were said to be frustrated with the lack of progress: Burnett at [19(c)], [20]. If Balance had thought Shine was not pursuing the proceedings at that time it could have given direct evidence to that effect. Balance observed in submissions that Mr Burnett was not cross-examined. There was no reason to cross-examine Mr Burnett on this topic. The evidence did not establish that Balance thought Shine was not pursuing proceedings.

163 To the extent it is relevant, I do not accept that Balance or its advisers were so commercially naïve as to think that Shine would not seek to progress the class action which Balance knew that firm had been investigating since mid-2019.

164 On 9 July 2021, a conditional settlement of the ASIC Proceeding was announced: Burnett at [18(b)].

165 An important aspect of Balance’s due diligence in relation to the potential claims was assessing the ability of the respondents and their insurers to settle the proceedings or satisfy a judgment at a level that would cover the costs (including the funding commission) and deliver meaningful compensation to group members: Burnett at [29].

166 On 28 July 2021, Balance engaged an accountant with Basford Consulting to prepare a report on the financial position of E&P: Burnett at [30].

167 On 29 July 2021, Balance engaged Piper Alderman to establish an MIS for the purposes of the proceeding: Burnett at [48]. In 2020, the *Corporations Regulations* were amended to remove the exemptions for funded class actions and funded class actions were declared a financial product for the purpose of the Corporations Act: reg 7.1.04N(3). The Explanatory Statement of the *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth) explained (at page 10) that “class action structures will be required to be registered” and that:

… consumers will benefit from increased ASIC oversight of the entities funding their litigation, improved and formalised disclosure of the risks involved in engaging third-party litigation funding, and reinforced confidence that funders will act in consumers’ best interests, with access to dispute resolution and redress in circumstances where they do not.

168 The manager of Balance (Balance Legal Capital LLP (**BLC**)) had been funding class actions in Australia since 2017. The new regulations introduced additional regulatory requirements for funders seeking to fund class actions in Australia, making that activity more time-consuming and expensive. Notwithstanding, BLC decided it wished to continue to fund class actions in Australia. BLC engaged advisors in November 2020. It submitted its application for an Australian financial services licence (**AFSL**) with ASIC and was ultimately granted an AFSL on 21 April 2021.

169 BLC also decided not to seek for its funding entities to become authorised responsible entities, but instead decided the relevant entities would outsource that function.

170 On 10 August 2021, Balance entered into an agreement with Kosen-rufu and Ms Stott, a director of that company, to provide funding to support the investigation of potential proceedings: Burnett at [22]. Kosen-rufu was de-registered on 11 August 2021, pursuant to an application made by Ms Stott on 8 June 2021, and Balance agreed to fund an application for its re-instatement under s 601AH of the Corporations Act. That relief was subsequently granted: *Stott v Australian Securities and Investment Commission* [2021] FCA 1222. Ms Harris quantified these costs separately on the basis that the costs were arguably solely for the benefit of the lead applicants, although she considered it was reasonable to have pursued this course when considered against the additional work which would have been required to identify an alternative lead applicant: Harris at [36].

171 Ms Harris also separately quantified costs in respect of independent advice and the provision of indemnity to the lead applicants which she considered were not recoverable: Harris at [39].

172 On 10 September 2021, Balance engaged **CASL** Governance Ltd to act as the responsible entity of the MIS intended to be registered in respect of the litigation funding scheme concerning the proposed claims: Burnett at [48(b)].

173 On 1 October 2021, CASL submitted a copy of the Constitution, Compliance Plan, and Litigation Management and Funding Agreement (**LMFA**) (annexing the Litigation Funding Relationship Agreement) to ASIC in order to register the MIS: Burnett at [48].

174 The **Dixon** Advisory Litigation Funding **Scheme** was registered on about 12 October 2021.

175 A report was provided by Basford Consulting to Balance on 21 October 2021: Burnett at [30]. As a result of this report, Balance had concerns about the financial position of the proposed respondents.

176 Balance considered that insurance proceeds would be an important part of any resolution of a future proceeding. Piper Alderman and Balance sought copies of relevant insurance policies and engaged in correspondence with solicitors acting for the insurers: Burnett at [31]. No policies had been obtained at the time of the carriage motion.

177 Full funding was approved by Balance on 21 October 2021.

178 On 25 October 2021, CASL held a Board meeting in which they approved amongst other things:

(a) to issue the Dixon Advisory Scheme Product Disclosure Statement (**PDS**) following an extensive verification process; and

(b) to approve and/or execute the following Dixon Scheme documents: the LMFA; the Law Firm Relationship Agreement; the Litigation Funding Relationship Deed; the Lawyer’s Retainer for general Group Members; the Lawyer’s Retainer for the Representative Member; CASL’s Financial Services Guide; Balance’s Financial Services Guide; the PDS; the Target Market Determination.

179 On 31 October 2021, a scheme website for the “Dixon Managed Investment Scheme” went live. The Kosen-Rufu Proceeding was filed on 1 November 2021.

180 On 10 November 2021, Piper Alderman wrote to ASIC foreshadowing an application for leave to intervene in the ASIC Proceeding to seek an order under s 1317QF of the Corporations Act for the penalty sum to be made available to compensate group members.

181 On 15 November 2021, Piper Alderman instructed Dawna Wright of FTI Consulting to prepare an expert report addressing the estimated total loss suffered by group members and the financial position of DASS and E&P (the **Wright Report**). The applicants filed an interlocutory application, affidavit, and written submissions in the ASIC Proceeding on 15 November 2021. The Wright Report was served in the ASIC Proceeding on 22 November 2021: Burnett at [38].

182 The applications (which were considered to be novel) were not ultimately pursued because of the “carriage issues” which later emerged.

183 As part of the operation of the MIS, updates were provided to group members on 20 January 2022, 3 February 2022, and 12 May 2022, as required by the LMFA and the PDS: Burnett at [50]. Further, as required by the Litigation Funding Relationship Deed between CASL and Balance, Balance provided reports to CASL on 22 February 2022, 14 April 2022, and 18 July 2022: Burnett at [51] and [52].

## Consideration

### General principles

184 Balance submitted that it was seeking a form of common fund order. Balance referred to the decision of Gordon J in *Modtech* at [24] and submitted that “the legal costs should be borne by those who benefitted from those legal costs being incurred – the group members as a whole”.

185 *Modtech* involved a situation in which only some group members had signed a costs agreement. Her Honour concluded that the group members who did not sign a costs agreement “should not be entitled to receive a windfall by reason of their refusal to sign”.

186 Balance also referred to *Elliott-Carde v McDonald’s Australia Limited* [2023] FCAFC 162, in particular the reasoning of Beach J from [95] to [105], and to the decision of Button J in *Ewok Pty Ltd as trustee for the E & E Magee Superannuation Fund v Wellard Limited* [2024] FCA 296, particularly at [85] and [88].

187 None of these cases dealt directly with the question of whether it was “just” within the meaning of s 33V(2) of the FCA Act to make an order in favour of a litigation funder for legal costs and disbursements paid to solicitors in the context of commencing and, for a time, pursuing representative proceedings which are then stayed after a carriage dispute.

188 The issue was addressed under the heading “Pre-Multiplicity Dispute Costs” by Lee J in *Perera v GetSwift Limited (No 2)* [2018] FCA 909 (***GetSwift (No 2***) at [28] to [35].

189 Section 33V(2) contains a wide judicial discretion. The only express requirement apart from justness is that the orders be “with respect to the distribution of any money paid under a settlement”.

190 In determining what is “just”, it is relevant to consider: whether the cost was incurred with the object of benefitting group members; whether a benefit to group members was obtained from the work; whether any benefit endured. There is no reason why each of these matters might not be potentially relevant in a given case, in particular where recovery in respect of the work would not result in group members paying twice (or more) for substantially the same work. The significance will depend on the particular circumstances. The strongest case for it to be “just” to make an order under s 33v(2) of the FCA Act is where the outlays in connection with the stayed proceeding created an enduring benefit for group members in the other proceeding.

191 Also relevant is the fact that the funder is not acting altogether – or perhaps even predominantly – altruistically. The funder is pursuing its own business and commercial gain. That involves costs, including costs in the nature of sunk costs. Funders must be well aware that the costs expended might not be recovered if the litigation commenced is stayed as a result of a carriage dispute – see: *Perera v* ***GetSwift*** *Limited* [2018] FCA 732; 263 FCR 1 at [323]; *Getswift (No 2)* at [33].

192 In this case, Balance must have known that it was likely to face a carriage motion. It took steps in pursuit of its own commercial interests, in substance in competition with Shine, including commencing proceedings. In this case, it was only two players in the competition to bring the class action, but in other cases it is more. Balance must also have known that the work it instructed be undertaken was likely, in various respects, to be duplicative of work being undertaken by Shine or work which it was likely would be necessary to be undertaken.

193 There is nothing unjust in funders wearing costs expended in their own pursuit of a commercial gain in circumstances such as the present. And there is much which would be unjust in visiting the costs of unsuccessful funders on group members, particularly where there are many unsuccessful funders. For example, it is difficult to think why it would be “just” for group members to pay for all the investigations and each of the statements of claim filed in numerous stayed class actions. That would result in group members paying for substantially the same work a number of times, when the work was undertaken by the funders with eyes open, in substantial part in pursuit of a commercial opportunity. No doubt this is taken into account by litigation funders in setting their fees.

194 It may be accepted that there will be circumstances in which it would be “just” to order costs. An obvious case is where there was a benefit obtained by group members from the funder’s activities, particularly where the work was not duplicative and the benefit derived by group members is enduring.

195 The funder bears the onus of establishing that the order sought under s 33V(2) of the FCA Act is just.

### The Wright Report

196 The applicant in the Watson Proceeding accepted that the report which was prepared by Ms Wright has been of assistance to the group members in the Watson Proceeding and accepted that those costs were “properly recovered” by Balance because it was work that was done, and endured, for the benefit of group members in the Watson Proceeding: T74.26-31. The applicant in the Watson Proceeding has not had the value of the group member claims independently valued, but has used the Wright Report as one of the bases for valuing group member claims. The relevant disbursement was $31,386.30: Harris Affidavit at [31].

### The MIS

197 The MIS work was undertaken at a time when a MIS was thought to be necessary as part of the funding structure of a representative proceeding. On 16 June 2022, a Full Court of this Court held that litigation funding schemes were not managed investment schemes: *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103; 160 ACSR 530. CASL applied to ASIC to deregister the Dixon Scheme in October 2022 and the Dixon Scheme was deregistered on 15 January 2023.

198 In my view, it would not be “just” to make an order under s 33V(2) of the FCA Act which resulted in the group members bearing the cost of the structure set up for the Kosen-Rufu Proceeding.

199 The MIS costs were expended in establishing a part of the structure that was then regarded on the law as it stood as necessary for the anticipated litigation. The costs were incurred as part of the structure for costs recovery. The costs of establishing the MIS were incurred at a time when Balance had concerns about the financial capacity of the proposed respondents to meet a judgment against them. The costs were incurred by Balance at a time when it must have known that it was likely ultimately to face a carriage motion. Pre-carriage costs of unsuccessful funders had been treated as sunk costs: *GetSwift* at [323]; *Getswift (No 2)* at [33]. The MIS costs were not ultimately of any benefit to group members.

200 In my view, it would not be just for the group members to bear these costs by making an order under s 33V(2). That is particularly so when regard is also had to the terms of the settlement which see the group members obtaining a paltry return because of the unfortunate circumstances referred to earlier.

### The ASIC Proceeding

201 Piper Alderman advised Balance that the application under s 1317QF was novel and that the prospects of success were difficult to estimate. Mr Burnett stated at [37]:

In Balance’s assessment, there was a significant chance that such an application would fail, and in that event Balance could be liable to both ASIC and DASS for adverse costs (in relation to the application) in addition to Balance having lost significant costs incurred up to that point. However, notwithstanding these risks (and the cost), Balance decided to agree to the steps recommended by Piper Alderman (and to fund such steps) for two primary reasons: (i) the concerns it had about recoverability from the respondents in the Kosen-rufu Proceedings; and (ii) in the interests of preserving as much compensation as possible for affected group members.·

202 Balance submitted that the application to intervene was of practical benefit to group members in the sense that, without the proceeding, the penalty of about $7.2 million would have been paid to the Commonwealth. Balance submitted that – although the application was ultimately not determined, because DASS entered administration before it could be heard – that was no reason not to recognise that the work was performed for the benefit of group members.

203 On 15 October 2021, consent orders were signed between ASIC and DASS which included orders for payment of a pecuniary penalty of $7.2 million and $800,000 in costs: CB1984. ASIC was also proposing to make an order under s 91 of the *Australian Securities and Investments Commission Act 2001* (Cth) that DASS pay ASIC’s investigation costs of $200,000. The Kosen-Rufu Proceeding and the Watson Proceeding were commenced on 1 November 2021 and 22 December 2021, respectively.

204 The ASIC Proceeding was stayed under s 440D of the Corporations Act when administrators were appointed to DASS on 19 January 2022: CB373. On 19 September 2022, the Court made orders which included that DASS pay pecuniary penalties of $7.2 million and ASIC’s costs of $800,000: *Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd* [2022] FCA 1105. The Court also ordered that ASIC “not seek to enforce any orders for pecuniary penalties, or any costs order … without first obtaining leave of the Court to do so”. It was not suggested that ASIC could or would seek to enforce the penalty and it may be that ASIC is not able to enforce at all: CB1825.

205 It is possible that group members have obtained a benefit from the steps taken to intervene in the ASIC Proceeding. The agreed penalty required Court approval and the matter had been listed for 25 November 2021: CB1542. Ordinarily, such an application would be addressed either immediately or expeditiously. The penalty hearing was adjourned to 28 January 2022, it would seem as a consequence of the application to intervene: CB1546.

206 Taking all the circumstances into account, it is “just” to make an order for Balance to recoup its costs in relation to the ASIC Proceeding. These costs total $126,797.55. This amount includes the disbursement for the Wright Report in the amount of $31,386.30.

### Re-registration and advice and indemnity to the lead applicants

207 I do not consider it “just” to make an order in respect of registration costs in the Watson Proceeding or of the indemnity advice given to the lead applicants.

208 These costs are duplicative so far as concerns group members and there is no enduring benefit which has been obtained by group members.

### Other costs

209 As mentioned, Balance sought an order for recovery of the costs it incurred before the carriage motion in commencing and prosecuting the proceeding. The costs included the costs of preparing the pleadings in the Kosen-Rufu Proceeding and reviewing initial discovery and other matters, including (for example), liaising with insurers.

210 Ms Harris’ analysis was predominantly focussed on whether the costs were fair and reasonable in the context of the Kosen-Rufu Proceeding. There was no analysis by Ms Harris of work performed which was duplicative of work performed by Shine. This is not intended as a criticism of Ms Harris’ report. Ms Harris was not asked to undertake such a task and the task is complicated by not having access to Shine’s files. The fact is that much of the pre-carriage motion work performed by Piper Alderman is likely to be duplicative of work which had already been performed by Shine, or was then being performed or would have to be performed.

211 The evidence does not enable the Court to determine what work can properly be regarded as work which has benefitted the group members and is not work which would result in them paying twice for substantially the same work.

212 In my view, it would not be just to make an order under s 33V(2) of the FCA Act in respect of these costs. Much of the work is necessarily duplicative. Non-recovery of costs expended in pursuing a commercial opportunity was and is a risk in Balance’s business, which it presumably addresses through the level of charges it sets for funding. It is not “just” to make an order the effect of which is for group members to pay duplicative costs in this context.

213 Balance also claimed the amount of $5,830 in relation to this approval application: Harris at [10]. I do not consider it appropriate to allow costs in this respect. This is duplicative from the perspective of group members, of no benefit to group members, and in the nature of costs incurred in Balance’s business pursuing its own commercial activities.

### Conclusion in relation to Balance’s application

214 Pursuant to s 33V(2) of the FCA Act, the Court approves the sum of $126,797.55 being paid to Balance Legal Capital II UK Ltd.

# CONCLUSION

215 The settlement is approved on the basis indicated above and directions should be made under s 90-15 of the IPS for the reasons given.

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| I certify that the preceding two hundred and fifteen (215) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thawley. |

Associate:

Dated: 17 April 2024