FEDERAL COURT OF AUSTRALIA

Newstart 123 Pty Ltd v Billabong International Ltd [2016] FCA 1194

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| File number: |  |
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| Judge: | **BEACH J** |
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| Date of judgment: | 7 October 2016 |
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| Catchwords: | **REPRESENTATIVE PROCEEDING** – approval of settlement – s 33V(1) of *Federal Court of Australia Act 1976* (Cth) – whether proposed settlement is fair and reasonable as between group members and the respondent – whether proposed distribution scheme is fair and reasonable as between group members – authority to give releases – claims of unregistered group members – scope of s 33ZF of the *Federal Court of Australia Act 1976* (Cth) – approval granted |
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| Legislation: | *Constitution* s 51(xxxi)*Federal Court of Australia Act 1976* (Cth) ss 33V, 33Z, 33ZB, 33ZF |
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| Cases cited: | *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468*Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311; [2004] FCA 1406*Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469*Farey v National Australia Bank Ltd* [2016] FCA 340*Foley v Gay* [2016] FCA 273*Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297*Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (1994) 179 CLR 155*Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134*Re HIH Insurance Ltd (In Liq)* (2016) 113 ACSR 318; [2016] NSWSC 482*Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925 |
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| Date of hearing: | 7 October 2016 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 82 |
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| Counsel for the Applicant: | P W Collinson QC with A D Pound |
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| Solicitor for the Applicant: | Slater and Gordon |
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| Counsel for the Respondent: | C G Button |
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| Solicitor for the Respondent: | Minter Ellison |
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ORDERS

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|  | VID 143 of 2015 |
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| BETWEEN: | NEWSTART 123 PTY LTD (ACN 001 833 129)Applicant |
| AND: | BILLABONG INTERNATIONAL LTD (ACN 084 923 946)Respondent |

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| JUDGE: | BEACH J |
| DATE OF ORDER: | 7 OCTOBER 2016 |

THE COURT ORDERS THAT:

**Approval of Settlement**

1. Pursuant to sections 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**Act**), settlement of the proceeding upon the terms set out in the Settlement Agreement executed by the Applicant, the Respondent, Slater and Gordon Limited and Comprehensive Legal Funding LLC dated 11 July 2016 (**Settlement Agreement**) and the Settlement Distribution Scheme (and any annexures) filed by the Applicant (**Settlement Documents**) be approved.
2. Pursuant to section 33ZF of the Act or otherwise, the Court authorises the Applicant *nunc pro tunc* for and on behalf of the Group Members (being those persons who meet the definition of “Group Member” in the Further Amended Statement of Claim and who did not file an opt out notice) to enter into and give effect to the Settlement Documents and the transactions contemplated for and on behalf of Group Members.
3. Pursuant to section 33ZB and section 33ZF of the Act, the persons affected and bound by the settlement of the proceedings be the Applicant, the Respondent and Group Members.
4. Pursuant to section 33ZF of the Act, Mr Timothy Michael Finney be appointed Administrator of the Settlement Distribution Scheme and is to act in accordance with the rules of the Settlement Distribution Scheme, subject to further directions and orders of the Court.

**Security for Costs**

1. Orders 1 and 2 made on 10 June 2016 (as amended by the Orders of 30 June 2016 and 5 August 2016) be vacated.
2. Upon Final Settlement Approval (as defined by the Settlement Agreement), all amounts lodged as security for costs in the proceeding on behalf of the Applicant be released to the Applicant or as it directs.

**Applicant’s Costs and Expenses**

1. Pursuant to section 33ZF of the Act:
	1. the costs and disbursements incurred by the Applicant in connection with the Applicant’s application dated 14 July 2016 (incurred after 7 September 2016) and the administration of the Settlement Distribution Scheme, from the date of the approval of the Settlement Documents to the date of completion of distribution of the Settlement Sum (within the meaning of the Settlement Distribution Scheme), be approved in the amount of $541,098.27 plus GST;
	2. the Applicant’s legal costs and disbursements on a solicitor and own client basis incurred in connection with the proceeding on its own behalf and on behalf of all Group Members in the proceeding up to 7 September 2016 be approved in the amount of $5,668,865.04 plus GST;
	3. the Applicant’s reasonable claim for compensation for the time and expenses incurred in the interests of prosecuting the proceeding on behalf of Group Members as a whole, be approved in the amount of $8,781.50.

**Objections**

1. A group member will be treated as if they had complied with paragraph 7 of the orders made on 22 September 2015 if that group member’s name or unique identification number is included in Schedule A to these orders.
2. Slater and Gordon is to write to those Group Members who filed a Notice of Objection in accordance with paragraph 8 of the orders made on 5 August 2016 informing them of the Court’s decision in respect of their respective Notices of Objection within 7 days of the date of this order.

**Confidentiality**

1. Subject to further order, the following affidavits, where hard copies have been retained by the Court, are to be sealed in envelopes marked “Not to be opened except by leave of the Court or a Judge”, and the documents (including exhibits) or any of their contents are not to be disclosed to any persons other than:
	1. in the case of the affidavits in subparagraphs (c) to (e) below, the authorised legal representatives of the Applicant in this proceeding; and
	2. in the case of the affidavit in subparagraph (f) below, the authorised legal representatives of the Applicant and the Respondent in this proceeding,

and are not to be published in their un-redacted form:

* 1. the affidavit of Timothy Michael Finney affirmed on 26 August 2016;
	2. the affidavit of Timothy Michael Finney affirmed on 16 September 2016;
	3. the affidavit of Elizabeth Mary Harris sworn on 16 September 2016;
	4. the affidavit of Julia Frances Avis affirmed 4 October 2016.
1. The ground upon which order 10 is made is to prevent prejudice to the proper administration of justice within the terms of section 37AG(1)(a) of the Act.

**Other matters**

1. The Applicant has liberty to apply to re-list the proceeding as soon as practicable after completion of the distribution of the Settlement Sum (and must in any event do so no later than thirty days after such completion) so that final orders can be made, including orders that:
	1. the proceeding be dismissed on the basis that the dismissal is a defence and absolute bar to any claim (either directly or indirectly) or proceeding by the Applicant or any Group Member in respect of, or relating to, the subject matter of the proceeding, without prejudice to:
		1. the right of any party to the Settlement Agreement to make an application to enforce the Settlement Agreement in a new proceeding; or
		2. the right of any Registered Group Member to make application to the Court in accordance with the terms of the Settlement Distribution Scheme; or
		3. the right of the Administrator of the Settlement Distribution Scheme to refer any issues relating to the Settlement Distribution Scheme to the Court for direction or determination in accordance with the terms of the Settlement Distribution Scheme.
	2. there be no order as to costs as between the Applicant and the Respondent.

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

## Schedule A

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| **Name or Beneficial Owner ID** |
| PJ6426 |
| FU7563 |
| VM5665 |
| ND3875 |
| IM2532 |
| AS7653 |
| OA6736 |
| Shannon Leigh Pittman |
| Mistdevil Holdings Pty Ltd ATF Mistdevil’s Super Fund |
| Anthem Pty Ltd |
| Michael Scott Adair |
| Michael Scott Adair Family Super Fund |
| Highfield Forge Pty Ltd  |
| Warren Ho |
| Gavin William Kerr |
| Robert Siew Tuck Ng (for the Ng Superannuation Fund) |
| Freddy Silva Aillon |
| Matthew Attwood |
| Christian Harris |
| Greenspot Pty Ltd ATF Greenspot Superannuation Fund |

REASONS FOR JUDGMENT

BEACH J:

1. By a settlement agreement dated 11 July 2016, the applicant (Newstart) and the respondent (Billabong) have agreed to settle the present proceeding subject to Court approval. Billabong is to pay $45 million in full and final settlement of the proceeding, including interest, litigation costs and Newstart’s expenses (the settlement sum).
2. Notice of the settlement (subject to approval) has been given to group members in accordance with the orders made on 5 August 2016. Since 26 August 2016, group members have been entitled to inspect the proposed settlement distribution scheme (scheme) by which the settlement sum is to be distributed.
3. By its interlocutory application dated 14 July 2016, Newstart has sought approval of the settlement and the scheme in accordance with s 33V(1) of the *Federal Court of Australia Act 1976* (Cth) (the Act). In support of its application, Newstart has relied upon various affidavits of Mr Timothy Finney (principal solicitor of Slater and Gordon Limited) dated 14 July 2016, 26 August 2016, 16 and 29 September 2016 and a confidential memorandum of advice dated 13 September 2016 from Newstart’s counsel discussing the fairness and reasonableness of the settlement and the scheme. Newstart also relies on a costs report of Ms Liz Harris, an independent costs consultant, who has provided an independent assessment of Newstart’s costs (costs report) and other matters.
4. In my opinion, it is appropriate to approve the settlement and the protocol set out in the scheme.
5. The proceeding was commenced on behalf of all shareholders who acquired securities in Billabong (Billabong securities) during the claim period, being the period from 18 February 2011 to immediately prior to the publication of Billabong’s December 2011 trading update on 19 December 2011. The proceeding was commenced as an open class.
6. On 22 September 2015, orders were made providing for closure of the class such that:
	1. group members were given the opportunity to “opt out” of the proceeding by 16 November 2015 or, if they wished to pursue a claim for compensation, register as a group member by that date;
	2. group members who had engaged Slater and Gordon and entered into a litigation funding agreement with Comprehensive Litigation Funding LLC (the funder) were deemed to be registered group members (RGMs); and
	3. group members who neither opted out nor registered were to be treated as group members for the purposes of any judgment or settlement, but were not thereafter to be entitled to receive compensation.
7. A notice informing group members of these matters (class closure notice) was:
	1. distributed (utilising Billabong’s share registry) by email or post to 14,284 identified security holders;
	2. advertised in The Australian and Australian Financial Review newspapers;
	3. displayed on the websites of Slater and Gordon and the Federal Court of Australia; and
	4. made available for inspection at the District Registries of the Federal Court of the Australia.
8. Only a small number of group members opted out. There is a total of 1,255 RGMs whose interests are affected by the settlement. Of the RGMs, the majority entered into funding agreements with the funder, but 376 RGMs did not. As to the unregistered group members (UGMs) it is envisaged that they will be precluded from participating in the distribution of the settlement sum and their claims will be extinguished as a consequence of the approval of the settlement.

## General principles

1. Section 33V(1) of the Act provides that a representative proceeding may not be settled without the approval of the Court. The central question is whether the proposed settlement is fair and reasonable and in the interests of the group members bound by the settlement, considered as a whole. That entails consideration of whether the proposed settlement is, first, fair and reasonable as between the applicant (on behalf of the group members) and the respondent, and second, as between the group members inter se.
2. A number of general principles can be distilled from the case law regarding s 33V(1) applications (see, for example, *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5], [32], [53] and [54] per Moshinsky J, *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925 at [19] per Goldberg J, *Foley v Gay* [2016] FCA 273 at [14] and [22] to [24] and *Farey v National Australia Bank Ltd* [2016] FCA 340 at [31], [32] and [43] to [49]).
3. There is no single way in which a settlement should be framed, either as between the claimants and the respondents (inter partes) or in relation to sharing the compensation as between claimants (intra-group). Reasonableness is a range. The question is whether the proposed settlement and scheme fall within that range.
4. The Court’s role is not to second-guess the strategic decisions made by the applicant’s legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of potential decisions, having regard to the circumstances which are known by and reasonably knowable to the applicant and its legal representatives, and that there has been a reasonable assessment of the relevant risks based on such circumstances.
5. There is no definitive set of factors that must or may be taken into account in approving a settlement. But factors relevant to an assessment of the reasonableness of a proposed settlement include:
	1. the complexity and duration of the litigation;
	2. the stage of the proceedings;
	3. the risks of establishing liability, establishing damages, and maintaining the class action;
	4. the ability of the respondent to withstand a greater judgment than the prospective settlement sum;
	5. relatedly, the range of reasonableness of the settlement in light of the best recovery;
	6. the range of reasonableness of the settlement in light of all the risks of litigation; and
	7. the reaction of the class to the settlement.
6. Further, in relation to the fairness of the settlement as between group members, it must be ensured that the interests of the representative party, the signed-up clients of the solicitors, and any litigation funder are not being preferred over the interests of other group members, absent strong and compelling reason(s) for any such preferential treatment. Any distribution scheme should achieve a fair and equitable division of the proceeds. In that regard the following may be noted:
	1. First, an important consideration will be whether group members were given timely notice of the essential elements, so that they had an opportunity to take steps to protect their own position if they wished.
	2. Second, once appropriate notice has been given, the absence of objections or other response action from group members may be a relevant consideration in support of the settlement.
	3. Third, it is not the role of the Court to go behind or rewrite costs agreements or litigation funding agreements, but rather to satisfy itself that such agreements meet any relevant legal requirements and contain reasonable and proportionate terms relative to the commercial context within which they have been entered and that they have been applied reasonably in accordance with their terms. Relatedly, the level of detail which the Court requires in order to be satisfied that legal costs have been calculated in accordance with the applicable costs agreements will vary, and depends on factors such as whether the group members are all clients, or include non-client claimants, and the proportion of the settlement funds to be applied to legal costs.

## Reasonableness of the settlement

1. In relation to the reasonableness of the settlement as between Newstart and the group members on the one hand and Billabong on the other hand, I would observe the following.
2. First, the proceeding is complex at both a factual and a legal level. In the further amended statement of claim, Newstart claimed that Billabong engaged in conduct that was misleading or deceptive in contravention of s 1041H of the *Corporations Act 2001* (Cth) and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) by making representations as to its expected financial performance for the second half of the financial year ended 30 June 2011 and the financial year ended 30 June 2012 for which it had no reasonable basis, and that it contravened its continuous disclosure obligations under ASX Listing Rule 3.1 and s 674(2) of the *Corporations Act* by failing to disclose material information which would have corrected its earlier misrepresentations.
3. Billabong is an Australian surf-wear and action sports apparel wholesaler and retailer. It has operations worldwide, divided into three main regions: Australasia (including Australia, New Zealand, Japan and South Africa), Europe and the Americas (including Canada, the United States of America, Brazil, Peru and Chile). During the 2010-11 financial year and the 2011-12 financial year Billabong changed from a predominantly wholesale business to a mixed wholesale and retail business by implementing a retail acquisition program. As at 1 July 2010, Billabong operated 380 stores. By 30 June 2011, it operated 639 stores. In that period, it acquired or opened new stores and closed stores. The claims have arisen in the context of this transformation and expansion of Billabong’s business and its nature.
4. The claims made in the proceeding raise complex issues, including relating to the integration of acquired and new retail outlets into Billabong’s existing business, the reasonableness of the internal forecasts on which Billabong asserts that it relied upon in providing its guidance to the market, and Billabong’s knowledge of its trading performance at various times during the claim period. Those general themes are further divisible into issues particular to each of Billabong’s regional businesses (Australasia, Europe and the Americas) and indeed to country-specific issues.
5. Although substantive evidence has not yet been filed in the proceeding, the complexity of the case is partly reflected in the scope of expert evidence proposed, including questions that need to be addressed by one or more retail industry experts, an accounting expert, a “materiality” expert, and what is sometimes described as a forensic economist.
6. Approximately 17,000 documents had been discovered by Billabong and, by orders made on 2 June 2016, Billabong was to give further discovery arising from additional searches of repositories held at its Australian headquarters, together with documents from repositories in Europe and North America. There is little doubt that this proceeding is a major enterprise for all concerned.
7. The trial is due to commence on 20 March 2017 with an estimate of seven weeks. Given the unknown number of lay witnesses that Billabong intends to call, the likely volume of expert evidence to be presented, the likelihood that most (if not all) of the witnesses would be extensively cross-examined and the expected duration of the parties’ opening and closing submissions, there is a real possibility that the trial could occupy more than the allocated hearing time.
8. Moreover, there is a real possibility that absent a settlement, the litigation would not end with a trial. The proceeding raises important legal issues that have yet to be resolved at appellate level including the appropriate treatment of causation and the degree to which reliance must be shown by an applicant in cases involving the alleged non-disclosure of information that is material to the price of listed securities (that is, the debate about whether direct reliance must be shown, or whether “market-based” causation is sufficient), and the correct methodology for assessing loss and damage in the context of alleged contraventions that have had the effect of increasing or unjustifiably sustaining a listed entity’s security price.
9. I note however the recent decision of *Re HIH Insurance Ltd (In Liq)* (2016) 113 ACSR 318; [2016] NSWSC 482, which accepts the indirect or market-based theory of causation, albeit not considered in the context of s 674 of the *Corporations Act* and through a narrower procedural mechanism than Part IVA proceedings. But given the significance of the issue, inevitably there is the potential for an appeal on this issue alone. The potential for an appeal and its implications for group members in terms of delay, uncertainty and costs, is a relevant factor in my present assessment.
10. All of these matters speak in favour of the settlement, as it is clear that if the trial were to go ahead, significant further costs and delays would be incurred in prosecuting Newstart’s claims and obtaining recovery for the group members.
11. Second, notice of the settlement was provided to the RGMs, and as many of the UGMs as appear on Billabong’s share registry, in accordance with the orders of the Court made on 5 August 2016 (settlement orders) and in the form approved by the Court (notices of settlement). The notices of settlement set out the nature of the settlement and its impact on RGMs and UGMs. The notices of settlement also informed RGMs and UGMs of their right to object to the settlement and to be heard at the approval hearing before me this morning.
12. Under the settlement orders, the deadline by which group members were to lodge any objection to the settlement application was 23 September 2016. By that date, 12 objections had been received, and in each case (other than where no reason had been given) the objection was from a UGM whose complaint was to the effect that they believed that they should be considered an RGM eligible for a distribution under the scheme. Since that time, other objections have been filed but no objection has been received going to the merits of the settlement or the scheme, whether from a RGM, UGM or generally save as to one objector, Greenspot Pty Ltd, a UGM. I will deal with its position later.
13. The class includes a large number of group members who have held relatively small amounts of Billabong securities. Now it may be said that such group members might not consider it worth taking the trouble to object to the settlement. But a number of the group members are institutional investors, for whom potentially large amounts of money are at stake. The absence of objection from any significant group members speaks in favour of approval.
14. Third, the settlement was reached after Billabong had provided substantial discovery and Newstart had provided the transaction data for RGMs, amended its pleadings twice and proposed a set of questions for expert witnesses. The parties had engaged in mediation on 7 and 8 April 2016, for which purpose they exchanged detailed position papers and calculations of loss. There was a resumed mediation on 23 June 2016. Accordingly, the settlement was made at a stage when the parties were in a position to make an informed assessment of the evidence likely to be adduced at trial, the strength of the parties’ cases, the likely course of the trial and the costs involved should the proceeding continue. Moreover, there is now no relevant disproportionate asymmetry in relation to the information each party relevantly possesses.
15. Fourth, from the thorough and thoughtful confidential memorandum of advice provided by senior and junior counsel for Newstart in relation to the particular issues raised in the proceeding, I am satisfied that the risks to Newstart succeeding in its claims are material, and that the settlement has been reached by Newstart having regard to a full appreciation of those risks. Moreover, from the confidential memorandum of advice, I am able to say that the complexity of the proceeding, both factually and legally as to liability and quantum, makes it difficult to accurately predict Newstart’s “best” recovery. Nevertheless, the settlement sum falls within the range of recovery that might realistically be expected.
16. Fifth, Newstart has already incurred substantial costs in conducting the proceeding to date. The cost of reviewing the further discovery to be made by Billabong, briefing experts and of preparing and running the proceeding to and through trial (and through any appeals) would increase Newstart’s legal costs substantially. On any view these will not be fully recovered.
17. Sixth, if the settlement is not approved, this would likely give rise to a substantial delay in group members obtaining compensation.

## Reasonableness of the scheme

1. Substantive factors relevant to specific intra-group aspects of the scheme are whether:
	1. the scheme subjects all claims to the same principles and procedures for assessing individual compensation claims;
	2. the assessment methodology, to the extent that it involves matters of judgment as to the strength of the claims made on behalf of individual group members, is consistent with the case that was to be advanced at trial and supportable;
	3. the assessment methodology is likely to deliver a broadly fair relative payout as between individual group members, in circumstances where a fixed sum is to be distributed;
	4. the incremental costs of a more improved assessment procedure would exceed the incremental benefit of a more exact distribution; and
	5. the scheme involves any special treatment of the representative party or a subset of group members and, if so, whether as a matter of fairness that is justifiable and if so how.
2. Further, procedural factors are also relevant, such as whether appropriate individuals have been nominated to administer the scheme, whether the procedures for lodging and assessing claims are appropriate and to be conducted in a timely manner, and whether the scheme incorporates appropriate checks and balances such as procedures for ensuring consistency between assessments and meaningful opportunities for review by participating group members.
3. In the present case, the terms and operation of the scheme are addressed in detail in the confidential memorandum of advice. The scheme makes the following provision for the distribution of the settlement sum:
	1. First, the scheme provides for payment of Newstart’s legal costs out of the settlement sum, including the costs of obtaining approval of the settlement.
	2. Second, the scheme provides for payment of actual and anticipated costs of administering the scheme, first from the interest earned on the settlement sum, and then from the settlement sum.
	3. Third, the scheme provides for payment of Newstart’s expenses incurred in its capacity as the representative party, in an amount approved by the Court.
	4. Fourth, once those amounts are deducted, a loss assessment formula is applied to determine each group member’s share of the amount available for distribution.
	5. Fifth, for RGMs who entered into a funding agreement with the funder (funded RGMs), the funder will be paid a funding commission calculated by reference to the group member’s recovery (including any incremental sum from the application of the funding equalisation mechanism that I am just about to describe), in accordance with the relevant funding agreement.
	6. Sixth, for the remaining RGMs (ie the unfunded RGMs), the scheme employs a funding equalisation mechanism whereby an amount equivalent to the funding commission that would have been payable if the group member had entered into a funding agreement will be deducted from that group member’s entitlement, with the sum of those amounts redistributed on a pro rata basis to *all* group members, whether funded or unfunded (funding equalisation mechanism).
4. Now each of these aspects of the scheme is a relatively common feature in settlement distribution schemes in comparable class actions, including the funding equalisation mechanism for open classes (absent any approved common fund mechanism).
5. Further, the notices of settlement identified key features of the settlement and the scheme. The notices of settlement also advised the RGMs and UGMs of their entitlement to lodge an objection to the settlement or the scheme by 23 September 2016. Only 20 or so UGMs (of over 14,000 shareholders who received the Notice of Proposed Settlement Form B) have lodged an objection to date and those objections (where a reason has been given) are unrelated to the merits of the settlement or the scheme, save for one objector, Greenspot Pty Ltd. None of the total pool of approximately 1,255 RGMs has lodged an objection to the scheme.
6. In my view, the procedures set out in the scheme for assessing the claims of the RGMs and distributing their individual entitlements are reasonable and appropriate. This aspect of the scheme, including by the application of the loss assessment formula, is addressed in the confidential memorandum of advice. It is apparent that the relevant claim data of the RGMs has already been subjected to a series of checks and verifications, the scheme incorporates mechanisms whereby individual RGMs can seek to have their individual entitlements reviewed by the administrator of the scheme or, if necessary, by the Court, and the administrator can also seek directions from the Court should the need arise. Further, the amount of each RGM’s entitlement (before deduction of funding commission or the application of the funding equalisation mechanism, as the case may be) will be assessed by way of the loss assessment formula. There is no impermissible discrimination between the RGMs as to the calculation of their compensation. The loss assessment formula incorporates matters of judgment as to the strength of particular aspects of Newstart’s claims at various points throughout the claim period. The fairness and reasonableness of the formula is addressed in the confidential memorandum of advice. I accept counsel’s views on this aspect. It is not appropriate to disclose the formula as it is the product of legal advice concerning relative strengths and weaknesses of various issues relevant to the claims. Publication of the formula could facilitate the reverse engineering of that advice.
7. The notices of settlement have also made it clear that it is proposed that a principal solicitor of Slater and Gordon will be appointed to administer the scheme. He will be obliged to act impartially and no longer act as a lawyer for individual RGMs. Further, the notices referred to the entitlement of RGMs to obtain access to the scheme and its terms after signing confidentiality undertakings.
8. No objections to the procedural aspects of the scheme have been received.

## Newstart’s legal costs

1. In my view, it is fair and reasonable that Newstart’s legal costs should be paid out of the settlement sum prior to any distribution to RGMs. This has the effect that the liability for those costs will be shared by all those who benefited from those legal costs being incurred, ie the group members as a whole.
2. It should also be noted that Newstart does not seek recovery of the costs actually incurred, but rather an amount identified in the costs report as reflecting only such costs and disbursements that, in the cost consultant’s opinion, were fair and reasonable.
3. The costs report has been prepared by an experienced costs consultant and is framed in a manner that is not discordant with Sackville J’s observations in *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311; [2004] FCA 1406 at [61]. The methodology is set out in the costs report and Ms Harris has had regard to:
	1. relevant authorities considering approvals under s 33V(1) and the recent Federal Court consultation draft practice note in relation to class actions, which addresses the assessment of costs to be deducted from settlements;
	2. the fact that the task is not a taxation;
	3. the need for an appropriate balance in relation to the level of disclosure of information available to the Court to reach a conclusion regarding the reasonableness of the fees sought, having regard to the costs associated with the provision of such information; and
	4. a variety of methodologies available in assessing the reasonableness of the costs claimed.
4. In my view, on the basis of the matters set out in the costs report it is fair and reasonable to approve an amount of $5,668,865.04 (plus GST) to be deducted from the settlement sum and applied towards Newstart’s legal costs for work up to and including 5 September 2016. These costs are, and were at the time they were incurred, proportionate to any realistic expectation of the potential return.
5. Finally, let me say that my role is not that of a taxing registrar or master. Further, subject to the question of proportionality, if unchallenged expert opinion is put before the Court which sets out a commercial and reasonable methodology consistent with the terms of any retainer and which demonstrates that it has been accurately and thoroughly applied to sufficient and probative source records of the solicitors, then it is no part of my function to:
	1. reject that evidence as to whole or part without very good reason; or
	2. apply one’s own subjective view of what the legal work is “really worth”, divorced from the reality of the commercial context within which the work was carried out and the expenses incurred.
6. But what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved and the expected benefit. The Court should not approve an amount that is disproportionate. But such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. In the latter case, spending $0.50 to recover an expected $1.00 may be proportionate if it is necessary to spend the $0.50. In the former case, the absolute dollar amount as a free-standing figure is an irrelevant metric. The question is to compare it with the benefit sought to be gained from the litigation. Moreover, one should be careful not to use hindsight bias. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved. Proportionality looks to the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed; at the later time, circumstances may have changed to alter the calculus, but that would not deny that the work performed and its cost was proportionate at the time it was performed. Perhaps the costs claimed can be compared with the known return, but such a comparison ought not to be confused with a true proportionality analysis. Nevertheless, any disparity with the known return may invite the question whether the costs were disproportionate, but would not sufficiently answer that question.
7. As I have said, in the present case I am satisfied that the amount claimed is proportionate.

## Newstart’s expense claim

1. It is reasonable that a representative party who has sacrificed time and incurred expenses in the interests of prosecuting a proceeding on behalf of group members as a whole should be entitled to reimbursement from the settlement sum. Newstart seeks reimbursement of its expenses, principally the time and associated disbursements spent by Newstart’s director, Mr Malone, in being involved in necessary decision-making, meetings and the mediation, and complying with Court orders on behalf of group members. The claim is for an amount of $8,781.50. This is modest on any view of the matter. The costs report also concludes that this amount is moderate and reasonable in the circumstances. I will approve this sum.
2. As I have said in another context, Professor Vince Morabito has undertaken empirical analysis of the justification for and the quantum of reimbursement payments to applicants (V Morabito, “An Empirical and Comparative Study of Reimbursement Payments to Australia’s Class Representatives and Active Class Members” (2014) 33 *CJQ* 175). On any view, the amount to be deducted for Newstart is very modest when one considers the ranges reported by Professor Morabito. Moreover, in the present case the deduction is not some proxy for any incentivisation award; I am using “incentivisation” to refer here to reward rather than restitution in the sense of reasonable recompense for the time and effort expended. In the present case the deduction is just and there is adequate power to approve it as part of approving the settlement (ss 33V(2) and 33ZF(1)). But to say that the present proposed payment is not an incentivisation payment should not be taken to say or imply that such reward style payments cannot ever be authorised or justified. There is adequate statutory power (ss 33V(2) and 33ZF(1)) to approve incentive reward payments and their deduction from any settlement proceeds. But if such incentive mechanisms are to be invoked, in the usual case they should be approved at least in a preliminary or contingent way (subject to further order) at or close to the inception of the proceedings and then unconditionally approved (if appropriate) in the subsequent formal s 33V process. Of course, where there is an external litigation funder who has taken on the costs risk, including any exposure to an adverse costs order, it may be difficult to see how any such incentivisation award could ever be justified in addition to reasonably remunerating the applicant for the time spent in pursuing the proceeding for the benefit of the group members.

## Other and future costs

1. The costs report addresses future costs relating to the costs of the settlement approval application from 7 September 2016 and the costs of administering the scheme.
2. In my view, costs incurred in applying for approval of a settlement are a necessary element of a representative proceeding. Further, the approval of future costs for administering a distribution scheme is a feature of settlement approvals. The costs report has considered an estimate of these future costs provided by Slater and Gordon. I will approve an amount of $541,098.27 (plus GST) which I consider to be a reasonable amount.

## Funding commission and equalisation mechanism

1. An entitlement on the part of a litigation funder to receive a reasonable funding commission in exchange for funding is unremarkable. In the present case the proceedings would not have been commenced in the absence of the involvement of the funder. The funder has financed the group’s participation in the proceeding through the ongoing payment of Newstart’s legal costs and disbursements, the funder has undertaken the risk of any adverse cost orders by indemnifying Newstart against such orders, and the funder has posted security for Billabong’s costs in the amount of $2.75 million. In my view, the funded RGMs entered into reasonable commercial agreements with the funder and had the opportunity of seeking advice before doing so. Further, the funder’s commission rate is at the lower end of the range of commission rates typically charged by litigation funders in Australian class actions. Further, because of the “net recovery” mechanisms stipulated, rather than “gross recovery” mechanisms, on which the commission rates are to be applied, the funder and the funded RGMs have been equally incentivised to ensure that costs were kept within reasonable parameters.
2. In the circumstances, coupled with the operation of the funding equalisation mechanism, it is fair and reasonable to allow the funder to receive its commission payments in accordance with its agreements with the funded RGMs.
3. As to the unfunded RGMs, I should observe the following. In recent years, some form of funding equalisation mechanism has been included in a number of approved distribution schemes. The rationale is that absent such a mechanism, unfunded group members would be in a better position than funded group members, even though without a litigation funder the relevant proceeding would not have been commenced. The fact that unfunded RGMs did not sign an agreement with the funder should not result in those RGMs receiving an unfair gain compared to those RGMs who did so sign. It would be unreasonable not to apply an equalisation mechanism. Not to do so would encourage “free riders”.
4. In any event, the claims of unfunded RGMs are relatively small (less than 1% of all RGM losses). The justice of applying an equalisation mechanism to their position is well apparent. Accordingly, the funding equalisation mechanism is fair and reasonable.

## Releases

1. The releases to be provided by group members as against Billabong itself accord with the notifications given. I will deal with the releases against related parties later.
2. First, in my view I have clear statutory power to make proposed orders dealing with the authority question covering the breadth of the releases against Billabong, putting to one side the related party releases for the moment. Sections 33ZF and 33Z(1)(g) are sufficiently broad. Moreover, in terms of s 33ZB, any order made under s 33Z(1)(g) can bind accordingly. Such powers are not limited to the pleaded claims.
3. Second, there is little doubting the statutory authority of an applicant in a representative capacity under Part IVA taking action which binds group members. If it be accepted that an applicant has statutory authority on behalf of group members to negotiate and enter into a settlement agreement subject to Court approval, then such an applicant has implied statutory authority to negotiate and agree to ancillary and reasonably tailored and proportionate terms and conditions, such as broader releases, to achieve the primary aim.
4. Third, there may be doubt as to how far any such releases could extend beyond the pleaded case but still be within such authority. But there are several practical answers that can be given. If the releases deal with non-pleaded claims which if brought within separate later proceedings could be the subject of an issue estoppel or *Anshun*estoppel if the first proceeding had been litigated to judgment, then there would be such authority. It would be counterintuitive to suggest otherwise. Not to permit of the authority to give such a broader release would condone of a situation (the bringing of a later proceeding) which by definition would be an exercise in futility. But more fundamentally, if an applicant had authority to apply to amend the proceeding to bring such a new claim on behalf of group members, why would not the applicant have the authority to release the new claim without going through unnecessary formalities in the context of a s 33V process?
5. Fourth, in those cases where a group member has opted in to or registered in respect of a settlement (or at the least has chosen not to opt out) with notice of its terms including broader releases, such conduct in a particular case may separately constitute implied authority.
6. Fifth, in any event if there is a doubt or authority needs to be extended beyond any express or implied statutory authority, the statutory powers referred to above can be exercised. Having viewed the settlement agreement and the releases in the present case, I am satisfied that I should make the order sought on this aspect insofar as the releases concerning Billabong.
7. As to the releases against related entities of Billabong, it must be said that the orders of Murphy J of 22 September 2015 and 5 August 2016 and the notification protocols thereunder did not expressly advert to the same, contrary to the suggestion made in some of Newstart’s material before me. Preferably this ought to have been done. But notwithstanding this omission, although with some hesitation, I am prepared to accept the following:
	1. First, releases of this type are a common feature of settlements of commercial litigation.
	2. Second, the settlement with Billabong would have been unlikely to have been obtained absent such broader releases.
	3. Third, there is no suggestion in the material that claims against related entities had any significant value that was being given away.
	4. Fourth, I do not consider it realistic that a RGM or UGM (particularly those who had a very modest holding of Billabong securities) would have taken any different course in response to Murphy J’s orders of 22 September 2015 and 5 August 2016 even if the notification protocols had referred expressly to the potential for releases against related entities.
	5. Fifth, my observations set out above on the authority question apply in this context as well.
8. In my view it is appropriate to make the orders sought, the effect of which will be to bind RGMs and UGMs to the releases in the settlement agreement, including the releases against related entities of Billabong. For completeness, I should note on this aspect that I do not consider it necessary to formally modify paragraph 10(b) of the orders of Murphy J of 22 September 2015 given the operation of the settlement agreement concerning the releases once approval is given. Further, what I have said in the preceding paragraph partly deals with one aspect of the objection of Greenspot Pty Ltd.

## Unregistered group members

1. A question arises concerning the position of the UGMs, ie group members who have not opted out but have not registered. It is intended that they be bound to the settlement including the releases but will not now be able to prove under the scheme. Do I have power to make orders to give effect to such an arrangement including the bar of their claims against Billabong and its related parties?
2. At one level it may be said that I need not consider this aspect. Murphy J made orders on 22 September 2015 which stated in orders 10 and 11 the following:

10. Pursuant to s 33ZF of the Act, any group member who:

(a) wishes to opt-out of this proceeding must, before the Class Deadline, deliver an opt-out form to the Victorian District Registry of the Federal Court of Australia; or

(b) neither opts out nor registers as a group member on or before the Class Deadline shall remain a group member for the purposes of any judgment or settlement but shall be barred from making any claim against the Respondent in respect of or relating to the subject matter of this proceeding, including participating in any form of compensation or otherwise benefiting from any relief that might be ordered or agreed.

11. Any group member wishing [to] seek a variation of Order 10(b) must deliver to the Applicant’s solicitors, by no later than the Class Deadline, written notice of the variation sought and a statement of the reasons for seeking the variation, and the solicitors shall forthwith notify the Respondent and the Court of the notice and the reasons.

1. On one view I can leave such orders in place and assume that relevant factors justifying such orders were considered at that time. Alternatively, I can reconsider the matter. In my view, given the powers that I am exercising under s 33V(1) and generally under Part IVA, I propose to reconsider the matter given the finality, in a substantive sense, that attends any s 33V(1) approval. Paragraphs 1 to 3 of the orders that I propose to make implicitly proceed on the foundation that Murphy J’s orders of 22 September 2015 concerning the bars applicable to UGMs are operative and effective. Further, I would also note that Murphy J’s orders were only directed to claims against Billabong but not claims against related parties and hence my orders will, in effect, operate as a broader bar against the UGMs.
2. There are a number of issues to consider.
3. First, I consider that the power contained in s 33ZF(1) is sufficiently broad to encompass such a barring order, although s 33ZF(1) is not unlimited. As I said in *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at [33]:

… although in a general sense s 33ZF(1) has been described as a plenary power, nevertheless it is not unlimited. It is in one sense both trite and question begging to assert that the power must be exercised judicially. But let me pass to the language of s 33ZF(1) itself. It uses the language “make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding”. Grammatically, “thinks” is to be applied distributively, so that it reads “thinks appropriate” or “thinks necessary”; there is no “is” before “necessary”. But as applied distributively, “thinks appropriate” has a lower threshold than “thinks necessary”. But in the composite phrase, the concept is “thinks appropriate … to ensure that justice is done in the proceeding” (emphasis added). In other words, although the words “thinks appropriate” have a lower threshold than “thinks necessary”, nevertheless the relevant element of necessity in another guise is enshrined in the coupling of the words “to ensure that”. In summary, the question becomes whether I think it is appropriate, to ensure that justice is done in the proceeding, to make the orders sought by Newcrest. It is not whether I think it to be merely convenient or useful per se. Section 33ZF(1) is not a licence for me to impose my own expansive case management philosophy. Rather, I must be satisfied that any order that is made satisfies the statutory test. Now I accept that s 33ZF(1) is a very wide power and ought not to be construed narrowly (*McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4 and *Owners of Shin Kobe Maru v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421). Nevertheless, any exercise of power has to fit within the statutory formulation.

1. Second, it is in the interests of justice and the group members generally that such a barring order is made. The orders affecting the UGMs have underpinned the settlement. Absent such orders, the settlement would not have been agreed to by Billabong. That would not have been in the interests of group members as a whole. Moreover, now that the settlement is to be approved, there needs to be finality and certainty on who can participate and who is barred. Otherwise distributions under the scheme cannot be finalised. It cannot be correct to say that a UGM, who has been given adequate opportunity to participate, can come along months or years later and belatedly seek a distribution or even commence a new proceeding against Billabong. That is not conducive to efficiency, finality or justice for group members generally or indeed Billabong. Yet that would be the likely counterfactual if the bars were not in place. Those who posit that barring orders should not be made, do not posit a satisfactory alternative to address such questions.
2. Third, the orders of the Court made on 22 September 2015 and 5 August 2016 and their implementation gave more than adequate notice to the UGMs as to how their rights might be affected. They were also given adequate opportunity to challenge Murphy J’s orders of 22 September 2015, which none did. Moreover, and importantly, they were given the opportunity to positively identify themselves and to register if they wanted to participate or to opt out.
3. I do assume and for all practical purposes must assume that such notification protocols were adequate (cf ss 33X and 33Y). It cannot be correct to say that because of the possibility that a UGM may not have actually received a notice that somehow this undermines the present barring arrangements concerning UGMs. After all, if an open class proceeding went to judgment and I dismissed the proceeding, it is most unlikely that I would entertain an application from a group member (who had not opted out) asserting that they should not be bound because they did not receive any opt out notification. The class action regime would be undermined by entertaining such assertions. There should be finality flowing from the judgment and its operation. By parity of reasoning, there should be finality flowing from any approved settlement and its operation. I will proceed on the basis that the current notification protocols were adequate to protect the interests of group members generally and UGMs in particular. As I have said, I do accept that the notification protocols did not refer to releases against related entities, but I repeat my earlier observations on the significance of that omission. It is hardly credible to suggest that the UGMs would have taken a different course if they had been notified of the broader releases.
4. Relatedly, I have considered whether I should allow some form of “release mechanism” for UGMs who did not receive actual notice, but I have determined not to do so. If it operated *after* Court approval it would have the attendant vices set out above. But as part of giving Court approval, I do consider that there is no difficulty in now allowing various UGMs who have filed notices of objection to participate as RGMs. I will order accordingly.
5. There is one final matter that I should briefly address. It is whether Murphy J’s orders or my own orders impermissibly trespass on the operation of s 51(xxxi) of the Constitution being the so-called guarantee implied in the phrase “[t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws”. In other words, do the barring orders and releases as they apply to UGMs effect an impermissible “acquisition” otherwise than on “just terms”? Now this is not an occasion for any disquisition on constitutional theory, but it is a matter touched on by one of the notices of objection, and in any event is a matter that requires some mention albeit briefly.
6. First, it can be accepted that the claim or cause of action of a UGM is “property” as encompassed by s 51(xxxi) (*Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 and 304 per Mason CJ, Deane and Gaudron JJ and at 311 and 312 per Brennan J).
7. Second, it can also be accepted that the barring order or orders which give effect to the releases constitute an “acquisition” as encompassed by s 51(xxxi), putting to one side for the moment the identity of the acquirer. It would be a triumph of form over substance to suggest otherwise (*Georgiadis* at 305). I do not propose to linger on nuanced theory concerning the difference between the extinguishment of a right and an acquisition.
8. Third, the “acquirer” is not the Commonwealth or any of its authorities or agencies, rather it is Billabong. But this does not matter in and of itself (see *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 165 per Dawson J). I will proceed on the basis that the identity of the acquirer not being the Commonwealth is no impediment to the operation of s 51(xxxi) save for the qualification that the identity of the acquirer may be relevant to the *purpose* of the acquisition and to the question of whether it is a “purpose in respect of which the Parliament has power to make laws”.
9. But once one proceeds beyond the satisfaction of these foundational elements of the argument, the so-called constitutional impediment becomes illusory.
10. First, the present context is an exercise of judicial power rather than legislative power. Now no doubt it is impermissible for the legislature to confer power on me to do indirectly what it could not do directly. But nothing in Part IVA could be so described.
11. Second and more fundamentally, I need do little more than refer again to *Georgiadis* at 306 and 307 per Mason CJ, Deane and Gaudron JJ where it was said:

Not every Commonwealth law with respect to the acquisition of property falls within s 51(xxxi) of the Constitution. It may be outside that paragraph because, although it effects an acquisition of property, it is a law of a kind that is clearly within some other head of legislative power. That is the case with a law imposing taxation or a law providing for the sequestration of the estate of a bankrupt. Or it may be outside s 51(xxxi) because it effects an acquisition of a kind that does not permit of just terms, as in the case of a law imposing a penalty by way of forfeiture. And, it may fall outside s 51(xxxi) because it cannot fairly be characterized as a law for the acquisition of property for a purpose in respect of which the Parliament has power to make laws. That will generally be the case with laws directed to resolving competing claims or providing for “the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest”. (footnotes omitted)

1. To this may be added what was said in *Nintendo* in the joint reasons at 161:

The cases also establish that a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution. The Act is a law of that nature. It cannot properly, either in whole or in part, be characterised as a law with respect to the acquisition of property for the purposes of that section. Its relevant character is that of a law for the adjustment and regulation of the competing claims, rights and liabilities of the designers or first makers of original circuit layouts and those who take advantage of, or benefit from, their work. Consequently, it is beyond the reach of s 51(xxxi)’s guarantee of just terms. (footnotes omitted)

1. The point is that Part IVA and the provisions that I am acting under are not properly characterised as a law with respect to the acquisition of property. At most, what I have before me are laws conferring statutory power which are “appropriate and adapted to the achievement of an objective falling within another head of power where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed” (*Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (1994) 179 CLR 155 at 179 per Brennan J). And even then that is to overstate the matter. In the present context, there is no such “necessary or characteristic” feature as such in any event. Generally, the laws that I am considering are not directed to the acquisition of property at all (see *Mutual Pools* at 170 to 172 per Mason CJ).
2. Any constitutional concern is illusory. But even if I am wrong on such matters, I would consider that “just terms” has been provided in any event by the opportunity given to the UGMs to either positively participate (register) or to opt out (pursue their own claims elsewhere). Any disadvantage that they may now be placed in is not due to the absence of “just terms” but rather because they have not availed themselves of a valuable opportunity.

## Conclusion

1. I will make orders in the terms discussed with counsel.

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| I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 7 October 2016