FEDERAL COURT OF AUSTRALIA

Caason Investments Pty Limited v Cao (No 2) [2018] FCA 527

|  |  |
| --- | --- |
| File number: | NSD 1558 of 2012 |
|  |  |
| Judge: | **MURPHY J** |
|  |  |
| Date of judgment: | 16 April 2018 |
|  |  |
| Catchwords: | **REPRESENTATIVE PROCEEDING** – application for court approval of settlement under s 33V of the *Federal Court of Australia Act 1976* (Cth) – whether the proposed settlement is fair and reasonable as between the class members to be bound to the settlement – relevance of a low level of objections to settlement approval – reasonableness of a common fund condition precedent– whether the proposed settlement distribution scheme is reasonable – whether legal costs charged by legal representatives are reasonable – whether the proposed settlement administration costs are reasonable – the use of independent costs experts – the use of court-appointed referees to decide the reasonableness of legal costs – whether a common fund order is appropriate and if so at what funding rate – whether the applicants’ reimbursement claims are reasonable – the existence of side agreements between the litigation funder and the applicants which were not disclosed to class members – jurisdiction to hear disputes between lead applicants and funder arising from the funding agreement and side agreements – whether a defence of equitable set off should be allowed – settlement approval granted |
|  |  |
| Legislation: | *A New Tax System (Goods and Services) Act 1999* (Cth)  *Australian Securities and Investments Commission Act 2001* (Cth)  *Corporations Act 2001* (Cth)  *Federal Justice System Amendment (Efficiency Measures) Act 2009* (Cth)  *Judiciary Act 1903* (Cth) |
|  |  | |
| Cases cited: | *Abinger v Ashton* (1873) 17 LR Eq 358  *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89  *AWA Ltd v Exicom Australia Pty Ltd* (1990) 19 NSWLR 705  *Bim Kemi AB v Blackburn Chemicals* [2001] EWCA Civ 457  *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330  *Boase v Sullivan Commercial Pty Ltd trading as McGee’s Property (No 3)* [2013] FCA 15  *Caason Investments Pty Ltd v Cao* [2015] FCA 1435  *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468  *Chocolate Factory Apartments v Westpoint Finance* [2005] NSWSC 784  *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388  *Doherty v Murphy* [1996] 2 VR 553  *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19  *Downie v Spiral Foods Pty Ltd* [2015] VSC 190  *Downie v Spiral Foods Pty Ltd* [2016] VSC 411  *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433  *Farey v National Australia Bank Ltd* [2014] FCA 1242  *Farey v National Australia Bank Ltd* [2016] FCA 340  *Fencott v Muller* (1983) 152 CLR 570  *Gibb Australia Pty Ltd v Cremor Pty Ltd* (1992) 108 FLR 129  *Guglielmin v Trescowthick (No 5)* [2006] FCA 1385  *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541  *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21  *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671  *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139  *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323  *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980  *Kirby v Centro Properties Limited (No 6)* [2012] FCA 650  *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379  *Lopez v Star World Enterprises* [1999] FCA 104  *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663  *Matthews v AusNet Pty Ltd & Ors (Ruling No 40)* [2015] VSC 131  *Matthews v AusNet Pty Ltd & Ors (Ruling No 44)* [2016] VSC 732  *McLeish v Faure* [1979] FCA 38; (1979) 25 ALR 403  *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98  *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626  *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 2)* [2013] FCA 1163  *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 3)* [2014] FCA 680  *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 338 ALR 188; [2016] FCAFC 148  *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194  *P Dawson* *Nominees* *Pty Ltd v* *Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029  *Pathway Investments Pty Ltd v National Australia Bank Ltd* (Supreme Court of Victoria proceeding SCI 2010 6249)  *Pearson v State of Queensland* [2017] FCA 1096  *Rawson v Samuel* (1841) 41 ER 451  *Re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation* [1995] USCA3 325; (1995) 55 F 3d 768  *Re HIH Insurance Ltd (In Liq)* (2016) 335 ALR 320; [2016] NSWSC 482  *Re Wakim; Ex parte McNally* (1999) 198 CLR 511  *Roadshow Entertainment Pty Ltd v (ACN 053 006 269*) (1997) 42 NSWLR 462  *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731  *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549  *Thomas v Powercor Australia Ltd* [2011] VSC 614  Thomson Australian Holdings Ltd v Trade Practices Commission (1981) 148 CLR 150; [1981] HCA 48  *Tongue v Council of the City of Tamworth* [2004] FCA 209  *Walker v Department of Social Security* (1995) 56 FCR 354  *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (In Liq)* (1936) 54 CLR 361  *Williams v Ausnet Electricity Services Pty Ltd (Ruling No 3)* [2017] VSC 528  *Williams v Ausnet Electricity Services Pty Ltd* [2017] VSC 474  *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925 | |
|  |  | |
| Date of hearing: | 6 October 2017 and 16 November 2017 | |
|  |  | |
| Registry: | Victoria | |
|  |  | |
| Division: | General Division | |
|  |  | |
| National Practice Area: | Commercial and Corporations | |
|  |  | |
| Sub-area: | Corporations and Corporate Insolvency | |
|  |  | |
| Category: | Catchwords | |
|  |  | |
| Number of paragraphs: | 273 | |
|  |  | |
| Counsel for the Applicants: | Mr C H Withers and Mr D G Healey | |
|  |  | |
| Solicitor for the Applicants: | Squire Patton Boggs | |
|  |  | |
| Counsel for the Second to Fourth Respondents: | Mr R Yezerski and Mr A Smorchevsky | |
|  |  | |
| Solicitor for the Second to Fourth Respondents: | Whittens Lawyers | |
|  |  | |
| Counsel for the Sixth Respondent: | Mr E C Muston SC and Ms C Meduri | |
|  |  | |
| Solicitor for the Sixth Respondent: | Swaab Attorneys | |
|  |  | |
| Counsel for the Seventh Respondent: | Mr J Davis | |
|  |  | |
| Solicitor for the Seventh Respondent: | Robertson Saxton Osborne Lawyers | |
|  |  | |
| Counsel for the Eighth to Twentieth Respondents: | Ms P A Horvath | |
|  |  | |
| Solicitor for the Eighth to Twentieth Respondents: | Moray & Agnew Lawyers | |
|  |  | |
| Counsel for the Intervener: | Mr L W L Armstrong QC and Mr W A D Edwards | |
|  |  | |
| Solicitor for the Intervener: | Russells Law | |
|  |  | |
| Solicitor for Kramner Pty Ltd: | Mr N Sullivan, appearing as agent for David Gibbs & Associates Lawyers | |
|  |  | |
| Counsel for Mr G Ware: | Mr G Ware appeared in person | |
|  |  | |
| Counsel for Norita Pty Ltd: | Mr S Gregson appeared in person | |
|  |  | |
| Counsel for Caason Investments and Wise Plan in relation to their personal interests: | Mr D Barnett | |
|  |  | |
| Counsel for Squire Patton Boggs in relation to costs: | Ms E Bathurst | |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 1558 of 2012 |
|  | | |
| BETWEEN: | CAASON INVESTMENTS PTY LIMITED (ACN 089 590 858)  First Applicant  WISE PLAN PTY LTD (ACN 007 008 577)  Second Applicant | |
| AND: | SIMON XIAO FAN CAO  First Respondent  CHARLES MAO  Second Respondent  LARRY MARSHALL (and others named in the Schedule)  Third Respondent | |

|  |  |
| --- | --- |
| JUDGE: | MURPHYJ |
| DATE OF ORDER: | 6 December 2017 |

THE COURT ORDERS THAT:

Confidentiality Orders

1. Until further order, pursuant to sections 37AF and 37AG(1)(a) of the *Federal Court of Australia Act 1976* (Cth) (**Act**), and to prevent prejudice to the proper administration of justice:
   1. Trial Counsel’s Opinion dated 11 September 2017 exhibited at Exhibit AKB-12 to the Affidavit of Amanda Kim Banton sworn on 3 October 2017 and provided by email to the Court;
   2. Exhibit AKB-9 to the Affidavit of Amanda Kim Banton sworn 18 July 2017;
   3. the Confidential Affidavit of Amanda Kim Banton in support of Applicants’ Legal Costs (Costs Affidavit) sworn 18 September 2017, including Confidential Exhibits AKB-10 and AKB-11 and Confidential Annexures “A” – “G”;
   4. the Confidential Affidavit of Amanda Kim Banton sworn on 3 October 2017 including Confidential Annexure “H” and Confidential Exhibit AKB-12;
   5. Confidential Exhibit CAA-3 to the Confidential Affidavit of Craig Anthony Astill sworn 11 September 2017 including Confidential Exhibit CAA-3;
   6. the Confidential Affidavit of Amanda Kim Banton sworn on 17 October 2017 and Annexures AKB1 to AKB3;
   7. the Confidential Affidavit of Amanda Banton sworn 13 November 2017 and Confidential Exhibit AKB-13;
   8. Confidential Affidavit of Paul Fabricius Lindholm dated 3 October 2017;

are:

* + 1. to the extent identified in Annexure A to these orders, to be treated as confidential;
    2. to be sealed on the Court file in envelopes marked “*Not to be opened except by leave of the Court or a Judge*” and are not to be published or made available and any electronic version thereof is to be treated in an analogous fashion; and
    3. not to be disclosed to any person other than:

(A) the Court;

(B) the Applicants and their legal representatives;

(C) International Litigation Partners Pte and International Litigation Partners No 3 Ltd (collectively, **ILP**) and their legal representatives;

(D) group members who have signed funding agreements with ILP (**Funded Group Members**), group members who sent Group Member Registration Forms to the Applicants’ solicitors, Squire Patton Boggs, before 5.00pm on 7 February 2017 (**Registered Group Members**), and other group members who are deemed to have registered pursuant to the orders made by the Honourable Justice Murphy on 27 March 2017 and pursuant to Order 3 made 31 July 2017 and those listed in Order 6 below (**Additional Registered Group Members**) and Order 8 (a) to (h) (collectively the **Participating Group Members**) (upon the giving of a confidentiality undertaking in a form reasonably satisfactory to the Applicants’ solicitors), and their legal representatives.

1. Order 2(e) made on 31 July 2017 be extended to include as Participating Group Members all those persons or entities listed in Order 6 and 8 (a) to (h) below.

Approval of Settlement

1. Pursuant to section 33V and section 33ZF of the Act, the Applicants be authorised, *nunc pro tunc*, to enter into and give effect to the Settlement Deed executed by the Applicants and the Respondents (**Settlement**) and all transactions contemplated for and on behalf of all Group Members (excluding the Opt Out Group Members, as defined in the Settlement Deed).
2. Pursuant to section 33ZB of the Act, the persons affected and bound by the Settlement are the Applicants, the Group Members and the Respondents.
3. Pursuant to section 33V and section 33ZF of the Act:
   1. The terms of the Settlement are unconditionally approved;
   2. The terms of the Settlement Distribution Scheme, as revised by the Applicants, are approved; and
   3. The solicitor for the Applicant, Amanda Banton of Squire Patton Boggs, is appointed as the administrator of the Settlement Distribution Scheme.

Late Registrants

1. The following persons and entities be deemed to have registered pursuant to Order 4 of the Orders made by Murphy J on 5 January 2017, and therefore become Participating Group Members for the purposes of the Settlement, notwithstanding that those persons or entities may not have provided complete share transaction data to the Applicants’ solicitors at the date of the Court’s orders:
   1. Peter Ashby;
   2. Linda Heaton;
   3. INXS Pty Ltd;
   4. Beachhouse Investments Pty Ltd;
   5. Ricky Schawelson;
   6. Tina Schawelson;
   7. Christopher Bollam;
   8. Griffith Ware;
   9. Alan Marsden; and
   10. Laurice Assef.
2. The following persons and entities who sought to become Participating Group Members or to withdraw as Participating Group members will remain as Group Members but are not Participating Group Members:
   1. Kramner Pty Ltd;
   2. Norita Pty Ltd;
   3. John Cairns;
   4. Malcolm Willis;
   5. Robert Hastings Smythe;
   6. Eliane Deligeorges;
   7. Paul Holland; and
   8. UOB Kay Hian Private Limited.

Late Opt-outs

1. The following persons and entities who sought to opt out or to withdraw as Participating Group Members will remain as Group Members and are Participating Group Members:
   1. Trevor Pike (Jordan Pike Account);
   2. Trevor Pike (Shannon Pike Account);
   3. Trevor Pike (Callum Pike Account);
   4. Brentine Nominees Pty Ltd;
   5. Brentine Nominees Super Fund;
   6. William Laister;
   7. Conex 1 Pty Ltd;
   8. Hylerod Pty Ltd; and

the following persons and entities who sought to opt out or to withdraw as Participating Group members will remain as Group Members but are not Participating Group Members:

* 1. Ian Carpenter;
  2. Otto Christensen;
  3. UOB Kay Hian Private Limited.

Referee’s Reports

1. Pursuant to Federal Court Rules 28.67(1) the Court adopts the Referee’s report dated 4 October 2017 (**Primary Report**) of Mr Roland Matters (the Referee) and the Referee’s supplementary report dated 31 October 2017 (**Supplementary Report**), save that it:
   1. rejects the conclusions in paragraphs 53.1 and 53.4 of the Primary Report and corresponding parts of the Supplementary Report; and
   2. varies the conclusions in paragraphs 53.2 and 53.3 of the Primary Report and corresponding parts of the Supplementary Report such that the aggregate amount of legal costs and disbursements which are not approved as reasonable costs for deduction from the Settlement Sum is $220,000 inclusive of GST.

Legal costs and Applicants’ reimbursement

1. Pursuant to sections 33V and 33ZF of the Act:
   1. the Applicants’ legal costs (inclusive of GST) be approved in the sum of $7,564,026.06 (**Common Costs**);
   2. the sum of $882,290 comprising:
      1. $551,270.00 (incl GST) of Estimated Fixed Costs and Disbursements of the Scheme Administration Costs (pursuant to paragraph 427 of the Second Affidavit of Amanda Banton sworn 18 September 2017);
      2. $181,000 (incl GST) as Estimated Variable Costs of challenges by up to ten Participating Group Members to the Estimated Scheme Payments (pursuant to paragraph 428 to 430 of the Second Affidavit of Amanda Banton sworn 18 September 2017); and

(together **Scheme Administration Costs**); plus

* + 1. an allowance for the costs of challenging any ATO decision to refuse the GST refund in the amount of $150,000 (**GST Recovery Costs**);

(collectively the “**Costs Reserve**”)

be deducted from the Settlement Fund and held in the trust account of SPB, to be drawn against for Scheme Administration Costs and GST Recovery Costs as approved by the Court pursuant to Orders 13 and 33 below;

* 1. Caason’s reasonable representative reimbursement costs payable from the Settlement Fund (**Caason Representative Costs**) be approved in the sum of $26,730, plus a reasonable amount as agreed or as determined by the Honourable Justice Murphy, being costs of and incidental to their application for approval of the Caason Representative Costs;
  2. Wise Plan’s reasonable representative reimbursement costs payable from the Settlement Fund (**Wise Plan Representative Costs**) be approved in the sum of $22,513, plus a reasonable amount as agreed or as determined by the Honourable Justice Murphy, being costs of and incidental to their application for approval of the Wise Plan Representative Costs.

1. Caason:
   1. within 7 days after the date of this Order shall pay to the Scheme Administrator for inclusion in the Settlement Sum the sum of $397,251.51 received by or credited to Caason on account of the “GST refund” referred to at paragraph 31 of the affidavit of Craig Anthony Astill sworn 3 November 2017; and
   2. within 7 days after receipt or credit of any further amounts by way of GST refund as described at paragraph 31 of the affidavit of Craig Anthony Astill sworn 3 November 2017 shall pay the same to the Scheme Administrator for inclusion in the Settlement Sum; and

the total of the GST refunds received by the Scheme Administrator pursuant to this Order shall be the **GST Reserve**.

Common Fund Order

1. Pursuant to section 33V and section 33ZF of the Act, upon ILP by its Counsel or solicitors giving an undertaking to the Court and to the Applicants to abide by the terms of following Orders, the Court makes a common fund order in respect of the Participating Group Members such that:
   1. each unfunded Participating Group Member (**UGM**) shall have such rights and obligations in respect of ILP as if the UGM had executed a litigation funding agreement with ILP in the form entered into by funded Participating Group Members save that the litigation funding agreement shall be modified such that:
      1. the rate of commission payable to ILP shall be 30 per centum (30%);
      2. no Project Management Fee shall be payable;
      3. there shall be no cooling off period;
   2. the Scheme Administrator is authorised to deduct from any amounts otherwise payable to a Participating Group Member such amounts in respect of legal costs and approved commission as may be calculated in accordance with (c) above and pay the same to ILP prior to any distribution of settlement sums to participating group members.

Approved deductions from Settlement Fund

1. Prior to distribution of any amount to the Applicants or Group Members under the Settlement Distribution Scheme (**SDS**):
   1. thirty per cent (30%) of the Settlement Sum (calculated as excluding the GST Reserve) be deducted and paid into the trust account of SPB for the benefit of ILP as its funding commission in respect of the proceeding (**Common Fund Order**) and such payment will satisfy any liability of the Applicants, FGMs and UGMs to ILP to pay any funding commissions and project management fees;
   2. from the balance of the Settlement Sum after the deduction in (a):
      1. the Common Costs be deducted and paid into the trust account of SPB for the benefit of ILP;
      2. the Costs Reserve and the GST Reserve be deducted and paid to the trust account of SPB, to be held pursuant to Order 11 and subject to further order of the Court;
      3. subject to Caason’s compliance with Order 11(a) above, the Caason Representative Costs be deducted and paid into the trust account of SPB for the benefit of Caason; and
      4. the Wise Plan Representative Costs be deducted and paid into the trust account of SPB for the benefit of Wise Plan.

Distribution of Settlement Sum

1. The SDS be approved.
2. Forthwith after the deductions referred to in Order 13, the Scheme Administrator distribute the balance of the Settlement Sum then remaining to the Applicants and Group Members in accordance with the Settlement Distribution Scheme and these Orders.
3. The Respondents are not to bear any of the costs and disbursements associated with implementing the SDS.

Notice of Settlement and Expiry of Appeal

1. Pursuant to section 33Y(2) of the Act, the content and form of the Notice at Annexure “B”, to be sent to Group Members ( **Notice of Settlement**), is approved.
2. Pursuant to section 33Y(3) of the Act, the Notice of Settlement shall be given to group members by the Applicants’ solicitors sending it to:
   1. Funded Group Members by mail to the postal addresses recorded on their funding agreements or by email to any email address known to the Applicants’ Solicitors;
   2. Registered Group Members and Additional Registered Group Members by mail to the addresses recorded on their Registration Forms or by email to any email address known to the Applicants’ Solicitors; and
   3. Non-Participating Group Members by email to any email address known to the Applicants’ Solicitors or by mail to their postal address on the Share Register of Arasor International Limited held by the Applicants’ solicitors,

within five business days of the date of these orders.

Releases and security (Settlement Deed cl 6.3)

1. All interlocutory orders except for Orders 1 to 10 made on 5 January 2017 are vacated, save for those orders made on or after the date of the Settlement Deed.
2. Any unpaid costs orders previously made in the proceedings are vacated.
3. All costs assessments in relation to the Applicants’ amendment application and appeal on their amendment application are discontinued.
4. Subject to Order 23 below, the proceedings are dismissed as against the Respondents (Defendants) with no order as to costs with the intention that the Applicants (Plaintiffs) and Group Members are prevented from bringing and prosecuting fresh proceedings, or claiming the same relief in fresh proceedings, as against the Respondents (Defendants) or any of them.
5. With effect from the Effective Date (as defined in the Settlement Deed), all cross claims are discontinued with no order as to costs.
6. All monies paid into Court by or on behalf of the Applicants as security for costs in the Proceedings be released immediately to the Applicants’ solicitors and the Respondents shall assist in doing all things necessary to secure a release of that security.
7. The Court declares that the condition precedent in clause 3.1(e) of the Settlement Deed executed by the Applicants and the Respondents is, upon the making of Order 22, satisfied.

Costs

1. There be no order as to the costs of the Applicants and Respondents or Cross-respondents of and incidental to the application for settlement approval.
2. On 27 November 2017 SPB delivered to the Associate to his Honour Justice Murphy an affidavit of Amanda Banton sworn 27 November 2017 exhibiting evidence of the costs invoiced to the Applicants since 29 August 2017 together with those costs incurred or estimated but not yet invoiced and claimed as legal costs to be reimbursed from the Settlement Fund. Those costs are approved as part of the Common Costs under these Orders.

Applicants’ Variation Letter Costs claim

1. By 4:00pm on 18 December 2017 the Applicants file and serve any further evidence in support of their application for Variation Letter Costs.
2. By 4:00pm on 2 February 2018 ILP file and serve any further evidence in respect of the Applicants’ application for Variation Letter Costs.
3. By 5:00pm on 14 February 2018 the Applicants and ILP exchange submissions in respect of the Applicants’ application for Variation Letter Costs.
4. The Applicants’ application for Variation Letter Costs be listed for hearing at 10:15 am on 19 February 2018 at Sydney on an estimate of one (1) day.

GST refunds and second distribution

1. Caason shall, within three (3) business days of receipt of any correspondence from or on behalf of the Commissioner of Taxation in respect of Caason’s right to claim or retain in respect of the GST refunds (**GST Claim**), forward the same to the Scheme Administrator and ILP.
2. If the Commissioner of Taxation decides the GST Claim (or any part of it) adversely to Caason and:
   1. neither ILP nor Caason nor the Scheme Administrator wishes to challenge the decision, the Scheme Administrator shall as soon as practicable deliver to the Associate to his Honour Justice Murphy, as a confidential report, an explanation for the decision not to challenge the Commissioner’s decision and the reasonable costs of the said report (including any taxation advice obtained for the purposes of the report) shall be GST Recovery Costs, to the extent approved by the Court;
   2. if ILP or the Scheme Administrator wish to challenge the decision, the Scheme Administrator shall as soon as practicable deliver to the Associate to his Honour Justice Murphy, as a confidential report, an explanation for the decision to challenge the Commissioner’s decision and the reasonable costs of the said report (including any taxation advice obtained for the purposes of the report) and of the challenge to the Commissioner’s decision shall be GST Recovery Costs, to the extent approved by the Court and Caason must permit the Scheme Administrator to make and have conduct of any such challenge.
3. Upon final resolution of the GST Claim:
   1. the Scheme Administrator shall within 14 days apply to his Honour Justice Murphy for approval of the Administration Costs and GST Recovery Costs; and
   2. if the final resolution is that Caason was not entitled to claim the GST refunds and Caason is required to remit monies referable to the GST refunds and/or amounts referable to the GST refunds are otherwise deducted from amounts that Caason would be entitled to claim in its GST returns, the Scheme Administrator shall –
      1. deliver the GST Reserve, or such part of it as may be required by the final resolution of the GST Claim, to Caason or to the ATO as appropriate or as required pursuant to other order of the Court; and
      2. deduct any further approved Administration Costs and any approved GST Recovery Costs from the Costs Reserve; but
   3. if the final resolution of the GST Claim confirms Caason’s right to claim or retain the GST refunds the Scheme Administrator shall –
      1. deduct any further approved Administration Costs and approved GST Recovery Costs from the Costs Reserve and the GST Reserve, as the Court may direct; and
      2. after deduction of the amounts in (i), distribute the balance of the GST Reserve (including interest accrued on the balance) to the Applicants and participating group members as a second distribution of the Settlement Fund in accordance with the SDS.

Appeal

1. Pursuant to sections 33ZC(6) and 33ZF, and rule 35.13(b), the time by which any group member seeking to appeal these orders must file any appeal or application for leave to appeal is 14 February 2018.

Other

1. Amanda Banton of Squire Patton Boggs (as administrator of the Settlement Distribution Scheme) (**Administrator**) report to the Court at intervals of three (3) months’ from the date of these orders, and upon the conclusion of administration of the Settlement Distribution Scheme, by:
   1. sending a short-form report to the Associate to Murphy J, or as directed by Murphy J, setting out in tabular form:
      1. each of the principal steps to be taken in the administration of the Settlement Distribution Scheme;
      2. which of those steps have been completed and when they were completed;
      3. which of the steps have yet to be completed and when it is expected that they will be completed;
   2. including in the report:
      1. a brief explanation as to why any expected dates for completion of a step in any prior report have not been met;
      2. when it is expected that any such incomplete steps will be completed and why such additional time is necessary;
      3. a brief explanation of any matters that the Administrator considers may delay the timely administration of the Settlement Distribution Scheme; and
      4. the anticipated date upon which the Settlement Distribution Scheme will be fully and finally administered.
2. The Administrator and the parties have liberty to apply on three days’ notice.

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

REASONS FOR JUDGMENT

MURPHY J:

# INTRODUCTION

1. In this matter the applicants, Caason Investments Pty Ltd (**Caason**) and Wise Plan Pty Ltd (**Wise Plan**), seek Court approval of the settlement of a shareholder class action pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (the **Act**).
2. The applicants brought the class action on their own behalf and on behalf of all persons who acquired an interest in shares in Arasor International Ltd (**Arasor**) between 11 October 2006 and 12 May 2008 inclusive (the **relevant period**) and who suffered loss or damage by or resulting from the alleged wrongful conduct of the respondents. Arasor’s directors in the relevant period are the first to seventh respondents, and the partners in the accounting and auditing firm Grant Thornton South Australia are the eighth to twentieth respondents. The action is funded by a litigation funder, International Litigation Partners No. 3 Pte Ltd (the **Funder**).
3. The class action has been settled in principle by a deed of settlement signed on or about 17 July 2017 (**Settlement Deed**), subject to court approval. Under the proposed settlement the second to fourth, sixth and seventh respondents (together, the **Directors**) and the eighth to twentieth respondents (together, the **Auditors**) have agreed to pay $19.25 million inclusive of costs (the **settlement sum**) in full and final settlement of the proceeding. The applicants provide releases on their own behalf and on behalf of all class members. The settlement sum is to be distributed through a Settlement Distribution Scheme (the **SDS**) to those class members who registered in a court-ordered registration process (**Participating Group Members**). Only Participating Group Members may share in the settlement but all class members, including those who failed to register (**Non-Registered Class Members**) are bound by the settlement.
4. I consider the settlement sum and the SDS to be fair and reasonable but I have some concerns in relation to other aspects of the settlement. These include:
5. a condition precedent to the Settlement Deed which means the applicants could walk away from the settlement if the Court refuses to make a common fund order (the **Common Fund Condition Precedent**). In the finish the Funder and the applicants waived the condition and it is unnecessary to decide whether the settlement including such a term should be approved. In my preliminary view such a condition operates only to the Funder’s benefit and it is against class members’ interests;
6. whether to make a common fund order and, if so, at what percentage rate (**funding rate**). The applicants do not oppose a common fund order but they oppose the funding rate the Funder seeks;
7. the reasonableness of the legal costs charged by Piper Alderman and Squire Patton Boggs (**SPB**), the solicitors for the applicants at different points. In an effort to better safeguard class members’ interests in this regard I made orders to appoint an independent costs consultant (the **Referee**) to inquire and report in regards to the reasonableness of the costs charged. The solicitors for the applicant and the Funder dispute the Referee’s conclusions and submit that the Court should not adopt the Referee’s reports;
8. the reasonableness of the amounts the applicants sought to reimburse them for losses suffered in prosecuting the proceeding on behalf of the class (the **Reimbursement Claims**). The Funder argues that the applicants’ reimbursement claims are unreasonable;
9. a dispute regarding Caason’s failure to remit to the Funder the input tax credits (**GST refunds**) it received from the Australian Taxation Office (**ATO**) for the GST paid by the Funder on the legal costs invoiced (the **GST Refunds Issue**). Caason collected a total of $397,251.51 in GST refunds in relation to invoices for legal costs paid by the Funder up to 30 June 2017. Under the funding agreement it is required to remit these to the Funder, but did not do so. Caason also lodged further claims for GST refunds totalling $220,385 for the period up to 30 June 2017 which are yet to be determined. There is an Australian Taxation Office (**ATO**) review on foot in relation to Caason’s entitlement to claim GST refunds;
10. a dispute arising out of side agreements between the Funder and the applicants which vary their funding agreements (the **Variation Letters**). Under the Variation Letters the Funder is obliged to pay the reasonable costs of Caason’s and Wise Plan’s legal, accounting and administrative work and the time of nominated company officers at agreed hourly rates. Caason claims $690,608.26 plus approximately $70,000 in further costs, and Wise Plan claims $76,763.50 (less $9,163 already paid) (the **Variation Letter Costs Claims**). The Funder disputes the reasonableness of those claims and refuses to pay them; and
11. a dispute as to whether Caason is entitled to an equitable set-off of the Variation Letter Costs it is owed against its obligation to remit the GST refunds to the Funder.
12. The Funder seeks leave to appear, lead evidence and make submissions in the settlement approval application, including in support of a common fund order. The applicants and the Funder are in dispute in relation to various matters and it is appropriate that the Funder has leave to appear and file materials.
13. Following a hearing over two days I made orders:
14. to approve the settlement and the SDS as fair and reasonable;
15. for a common fund order at a 30% funding rate, which reduces the funding rate to be paid by class members from 35% or 40% (depending upon how many shares the class member acquired in the relevant period) and removes the requirement for class members to pay a pro rata share of the Project Management Fee of approximately $756,402;
16. to allow the applicants’ solicitors’ costs in the sum of $7,564,026.06, being a reduction of $250,000 from the amount claimed; and
17. to allow the applicants’ Reimbursement Claims in substantially reduced amounts from those claimed.
18. Contrary to the applicants’ submissions I reached the view that the Court has jurisdiction to deal with the Variation Letter Costs Claims and the GST Refunds Issue and should not decline to hear those claims. I made orders for Caason to pay the GST refunds it had received and may receive in the future, but I required the payment to be made to the Scheme Administrator to be held on trust rather than to the Funder. I did not allow Caason’s defence of equitable set off. With respect to the Variation Letter Costs Claims, in relation to which the applicants were not ready for hearing, I made orders timetabling the provision of evidence and listed the claims to be heard on 19 February 2018.
19. As part of the settlement approval the applicants’ solicitors, SPB, made blanket claims of confidentiality and sought blanket confidentiality or non-publication orders. It is wrong to assume that confidentiality or non-publication orders will be routinely or automatically made. Part VAA of the Act provides that the starting point for consideration of such orders, and it is mandatory under s 37AE for the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The Court must be satisfied that the order is necessary “to prevent prejudice to the proper administration of justice” (s 37AG(1)(a)), and “necessary” is a “strong word”: *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [30].
20. There is a basis for treating some of the applicants’ material as confidential (at least until settlement approval orders made) but the application for confidentiality orders was far too broad and wasted the time of the parties and the Court. There is a public interest in not making overly broad confidentiality orders in approving settlements in class actions, particularly the interests of class members in having a proper understanding of a settlement which affects their interests. I declined to make confidentiality orders in the terms sought and required the applicants’ solicitors to make appropriate redactions to the documents and to seek such orders only in respect of a more limited set of materials.
21. The applicants’ solicitors also filed seven lever arch binders of materials in support of the application, more than half of which was either irrelevant or had little probative value. In the finish counsel for the applicants only referred to a small subset of the materials filed. Had proper, focused attention been given to the materials less than half would have been filed, and far less of my time would have been spent picking through voluminous materials in order to understand the issues and deliver reasons. The approach taken by the applicants’ solicitors is inconsistent with the overarching purpose in s 37M of the Act, and there are likely to be costs consequences if a similar approach is taken in future approval applications.
22. I now provide reasons for the orders made, which are structured under the following headings:

B. The Relevant Principles.

C. The Key Features of the Settlement.

D. The Common Fund Condition Precedent.

E. Whether the Settlement Amount is Reasonable.

F. Whether the SDS is Reasonable.

G. Whether the Legal Costs Charged are Reasonable.

H. Whether the Scheme Administration Costs are Reasonable.

I. Whether a Common Fund Order is Appropriate, and if so, at What Funding Rate.

J. Whether the Applicants’ Reimbursement Claims are Reasonable.

K. The Side Agreements.

L. The Variation Letter Costs Dispute.

# THE RELEVANT PRINCIPLES

1. I set out the relevant principles in a settlement approval application under s 33V of the Act in *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323 (***Kelly***) at [62]-[77]. The Court’s fundamental task is to decide whether the settlement is fair and reasonable having regard to the interests of the class members who will be bound by it, including as between class members. In summary, the Court:
2. assumes an onerous and protective role in relation to class members’ interests, in some ways similar to Court approval of settlements on behalf of persons with a legal disability;
3. should be astute to recognise that the interests of the parties before it and those of the class members a whole may not wholly coincide. It must take care to ensure that the settlement is not only fair as between the parties but also as between class members;
4. should be alive to the possibility that a settlement may reflect conflicts of interest or conflicts of duty and interest between, for example;

* class members who are clients of the applicants’ solicitors (**client class members**) and those who are not (**non-client class members**);
* Participating Class Members and Non-Participating Class Members;
* class members who entered into a litigation funding agreement (**funded class members**) and class members who did not (**unfunded class members**); and
* the duty of the applicant’s lawyers to client class members and the interests of non-client class members;

1. should understand that at that point of settlement approval the interests of the parties have merged in the settlement and both sides have become “friends of the deal”. As a result they may not critique the settlement from the perspectives of those class members who may suffer a detriment or obtain lesser benefits through the settlement; and
2. must decide whether the proposed settlement is within the range of reasonable outcomes, not whether it is the best outcome which might have been won by better bargaining. The Court’s task is not to second-guess the applicant’s lawyers, and it should recognise that different applicants and different lawyers will have different appetites for risk:

*Lopez v Star World Enterprises* [1999] FCA 104 (***Lopez***) at [15] per Finkelstein J; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925 (***Williams***) at [19] per Goldberg J; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388 (***Darwalla***) at [43] per Jessup J; *P Dawson* *Nominees* *Pty Ltd v* *Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 (***Dawson No 4***) at [18] per Finkelstein J; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671 at [72] per Jacobson J; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (***Modtech***) at [9]-[12] per Gordon J; *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 (***Richards***) at [40] per Jacobson, Middleton and Gordon JJ; *Kelly* at [62]-[77] per Murphy J; *Newstart 123 Pty Ltd v Billabong International Ltd* (2016) 343 ALR 662; [2016] FCA 1194 at [9]-[13] (***Newstart***) per Beach J.

1. In *Williams* at [19], Goldberg J set out a number of factors that may be relevant in an application for settlement approval, including by reference to the United States Court of Appeals for the Third Circuit in *Re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation* [1995] USCA3 325; (1995) 55 F 3d 768 at 785, which factors were subsequently picked up in the Class Actions Practice Note CM 17. The Practice Note sets out the following relevant factors;
2. the complexity and likely duration of the litigation;
3. the reaction of the class to the settlement;
4. the stage of the proceedings;
5. the risks of establishing liability;
6. the risks of establishing loss or damage;
7. the risks of maintaining a class action;
8. the ability of the respondent to withstand a greater judgment;
9. the range of reasonableness of the settlement in light of the best recovery;
10. the range of reasonableness of the settlement in light of all the attendant risks of litigation; and
11. the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

There is though no requirement to deal with each of the factors and they are to be approached as a useful guide, subject to the circumstances of the particular case.

# THE KEY FEATURES OF THE SETTLEMENT

1. The key features of the proposed settlement are as follows:
2. the proceeding, including any cross-claims and cross-actions, is to be fully and finally settled by payment of the settlement sum of $19.25 million, with half to be paid by the Directors and half to be paid by the Auditors;
3. the settlement sum is to be paid into an escrow account within 28 days of execution of the Settlement Deed, and then paid to the Distribution Fund within five days of settlement approval and satisfaction of the conditions precedent;
4. the applicants on behalf of themselves and the class members will release the respondents from liability, and all other directors or officers of Arasor in the relevant period (**Other Directors**);
5. the respondents will release the applicants and each other from liability;
6. the proceeding will be dismissed; and
7. the parties will bear their own costs.
8. Under the proposed settlement the Auditors and the second to fourth, sixth and seventh Director respondents (the **active respondents**) are obliged to pay the settlement sum. The first Director respondent, Mr Cao, could not be served and the fifth Director respondent, Mr Kan, was served by substituted service and he did not enter an appearance. They have not participated in the proceeding and are not required to pay.
9. The Settlement Deed includes the following conditions precedent:
10. execution of the Settlement Deed by all parties and delivery of signed counterparts to the other parties;
11. the making of a settlement approval order by the Court at first instance;
12. an order being made that the applicants be authorised *nunc pro tunc* to enter into and give effect to the Settlement Deed on behalf of all class members (except for those class members who have opted out);
13. the proceeding being dismissed;
14. if the settlement approval order is made and the proceeding is dismissed any appeal period expiring, or if an appeal is commenced the appeal being finally determined; and
15. the making of a common fund order as part of settlement approval.
16. These terms are reasonable except, as I later explain, for the Common Fund Condition Precedent.

## The releases provided by the applicants and class members

1. The releases the applicants and class members will provide to the respondents and to the Other Directors are broad. They relate to:

…any and all Claims arising from, connected with or related to:

(a) any matter which is or ever has been, **or which could have been**, the subject of the Proceedings;

(b) the circumstances or allegations giving rise to, or referred to, in the Proceedings;

(c) any losses allegedly suffered by the Plaintiffs arising from or resulting from or connected with their investments in securities in Arasor;

(d) Legal Costs.

The Settlement Deed provides an absolute bar to any Claim (as defined) arising from, connected with or relating to any matter which is or ever has been the subject of the Proceedings, the circumstances or allegations giving rise to or referred to in the Proceedings, and any losses allegedly suffered by any class member (excluding those who have opted out) arising from or resulting from or connected with their investments in securities in Arasor.

1. Broad releases of this type are not uncommon in class action litigation. Parties to a settlement of a proceeding brought on behalf of numerous class members generally hope to resolve all disputes and in most cases there is little point in seeking to settle a class action without seeking to settle the totality of class members’ claims: *Tongue v Council of the City of Tamworth* [2004] FCA 209 at [45] per Allsop J (as his Honour then was). As Gordon J said in *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541at [26], when granting approval to a class action settlement:

...it is not uncommon in settlements for full releases to be made of all outstanding claims, whether directly at issue in the proceedings or not. The releases are given, as Counsel for the applicants submitted, as the price of finality.

1. Although class members were not given a second opportunity to opt out of the proceeding at the settlement stage, having regard to its terms I consider the settlement is fair and reasonable: see *Kelly* at [133]-[140].

## The preclusion of Non-Registered Class Members from sharing in the settlement

1. Upon Court approval of the settlement all class members will be bound into the settlement and therefore bound by the broad releases. The releases are provided on behalf of all class members in circumstances where only registered or Participating Group Members are entitled to receive a benefit under the settlement, and Non-Registered Class Members are not. While the preclusion of non-Registered Class Members from receiving a benefit under the settlement results from orders made on 5 January 2017 for class member registration and opt out (**Registration and Opt Out Orders**) rather than from the settlement, the releases are a term of the settlement.
2. The Registration and Opt Out Orders required that, by 10 January 2017, SPB send:
3. to class members who had already registered their intention to participate in the proceeding, notice of the pending mediation and information as to their right to opt out of the proceeding (**Opt Out Notice**); and
4. to all other class members, notice of the pending mediation, and information as to their right to register in order to share in any settlement achieved at or shortly after the mediation, the right to opt out of the proceeding, and their right to do nothing, together with the consequences of non-registration (**Registration and Opt Out Notice**).

The orders also directed a short form notice be published in *The Australian* and *The Financial Review* by 13 January 2017. Class members who were deemed to be registered or who registered as part of this process became entitled to share in any settlement achieved in the pending mediation, i.e. became Participating Group Members. The date for registration or opt out was 7 February 2017.

1. I am satisfied that SPB gave notice to the class members in accordance with the Registration and Opt Out Orders.
2. Orders 9 and 10 of the Registration and Opt Out Orders provide:

9 Subject to any further order of the Court, pursuant to s 33ZF of the *Federal Court of Australia Act 1976* (Cth) any group member who does not register as provided by Order 4 and who is not deemed to be registered pursuant to Order 5 (**Non-Registered Group Member**) and who does not opt out of the proceeding as provided by Order 6:

(a) will remain a group member for all purposes of these proceedings; but

(b) shall not, without leave of the Court, be permitted to claim any benefit pursuant to any settlement of these proceedings reached at the mediation scheduled to occur on or about 10 March 2017, or within 28 days after that mediation is terminated by the mediator.

10 Nothing in Order 9 precludes any Non-Registered Group Member from claiming any benefit under any later settlement if the mediation referred to in Order 9 is unsuccessful, or from making a claim under any judgment that may later be obtained.

Those orders meant that class members who did not register or opt out remained as class members and became bound by any settlement or judgment, but were precluded from claiming any benefit under a settlement. They were not, however, precluded from sharing in any judgment that was obtained if settlement was not achieved.

1. At that point there had been an unsuccessful mediation of the case and a second mediation was pending. The parties sought the Registration and Opt Out Orders by consent in order to facilitate settlement.
2. The Court has power under s 33ZF of the Act to make orders such as Orders 9 and 10 and in my view they were appropriate to ensure justice in the proceeding: see *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (***Earglow***) at [22]-[31]. In *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98 (***MCI v Treasury***) at [74] per Jagot, Yates and Murphy JJ, the Full Court said:

…if a class closure order operates to facilitate the desirable end of settlement, it may be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding and therefore appropriate under s 33ZF of the Act. The courts have accepted on numerous occasions that, in order to facilitate settlement, it is appropriate to make orders to require class members to come forward and register in order to indicate a willingness to participate in a future settlement, and to make orders that class members be bound into the settlement but barred from sharing in its proceeds unless they register…An important aspect of the utility of a class proceeding is that they may achieve finality not only for class members but also for the respondent.

(Citations omitted.)

1. Making orders of this type often involves striking a balance between conflicting interests of class members: *MCI v Treasury* at [76]. I consider Orders 9 and 10 appropriately protect the interests of Non-Registered Class Members and their preclusion from sharing in the settlement does not mean that the settlement is not fair and reasonable.

# The reasonableness of the Common Fund Condition Precedent

1. Clause 3.1(c) of the Settlement Deed provides:

Performance of this Deed…is conditional upon:

…

(c) the making of a Common Fund Order by the Court, at first instance, unless this condition is waived by the Plaintiffs at their election by notice in writing to the Active Defendants at any time up to 7 days after the Court deciding whether to make a Common Fund Order.

1. “Common Fund Order” is defined in Annexure “A” to the Settlement Deed, as follows:

That pursuant to section 33V(2) and section 33ZF of the Act, that those Participating Group Members who have not entered into funding agreements with International Litigation Partners No. 3 Ltd and/or International Litigation Partners Pte Ltd shall pay to International Litigation Partners No. 3 Ltd a proportion of any amount and/or sum determined by the Court that might otherwise be payable to them by reason of the settlement of the proceedings, and otherwise be treated as if they had entered into a funding agreement with International Litigation Partners No. 3 Ltd on the same terms as Funded Group Members.

1. Clause 3.2 provides that if the Common Fund Condition Precedent is not satisfied (or waived) the Settlement Deed “shall cease to have any effect and shall be treated for all purposes as never having been made and never having had any effect” and the proceeding is to be relisted for trial at the earliest convenient date.
2. Clause 6.2 of the Settlement Deed requires the active respondents to consent to and support the making of a common fund order. Clause 6.2(b) provides:

The parties agree that [the Funder] is entitled to and will take the benefit of any monetary amounts to become payable by the Participating Group Members as a result of any Common Fund Order made by the Court.

1. I have no difficulty in accepting that, as part of the settlement approval application in the present case, orders directed at achieving equality of treatment between funded and unfunded class members should be made. There is no good reason why funded class members should carry the burden of litigation funding charges and unfunded class members be permitted to have a ‘free ride’: see *Earglow* at [83]. Even so, I consider the Common Fund Condition Precedent and the clauses which operate in support of it to be completely inappropriate. I have not had the benefit of argument but I would be strongly inclined to refuse to approve a settlement which included such a clause.
2. I informed counsel for the applicants and the Funder of my preliminary views in this regard at case management hearings on 14 June 2017 and 28 September 2017. On 28 September 2017 Mr Lachlan Armstrong QC, senior counsel for the Funder, informed the Court that to the extent it was able the Funder would waive the Common Fund Condition Precedent. The applicants’ solicitors later informed chambers that the applicants would also waive the condition precedent.
3. I consider such a clause to be inappropriate, *first*, because before a common fund order may be made, the Court must be satisfied that such an order is appropriate to ensure that justice is done in the proceeding: s 33ZF of the Act. There are likely to be various relevant considerations for the Court in deciding whether to make a common fund order and if so the terms of such an order: see *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 338 ALR 188; [2016] FCAFC 148 (***Money Max***) at [66]-[149] per Murphy, Gleeson and Beach JJ. Amongst other things, whether a common fund order should be made will depend upon the funding rate. The funding agreements provide funding rates of 35% or 40% of gross recovery (depending upon the number of shares acquired in the relevant period) and it is hard to see how, for example, a common fund order at a 50% rate would be in the interests of funded class members. Yet the Common Fund Condition Precedent, which I see as an attempt to dictate a common fund order to the Court, does not specify the funding rate.
4. Whether a common fund order is appropriate to ensure justice in the proceeding is a matter for the Court and not something to be procured by the applicants (or more likely the Funder) through a condition precedent backed by other terms which require the respondents to consent.
5. *Second*, if the Court decides that the settlement terms are otherwise fair and reasonable but a common fund order should not be made, the Common Fund Condition Precedent would permit the applicants to walk away from the settlement and go to trial. It is not in the interests of class members that a fair settlement be abandoned so that they face the risks of a trial, in order to give the Funder a chance to receive a higher funding commission. In the present case I consider the settlement amount to be fair and reasonable and there is no benefit for class members in their walking away from the settlement. Instead there is a risk they will suffer detriment.
6. *Third*, the Common Fund Condition Precedent is inconsistent with the overarching purpose in s 37M of the Act. The settlement approval application has required the Court to consider seven lever arch binders of documents, conduct hearings over two days, and provide detailed reasons. If the Court decided to approve the settlement as fair and reasonable but refused to make a common fund order then the settlement will have no effect unless the condition precedent is waived. In that event it would be necessary to relist the matter for hearing. That would involve a significant waste of Court time and resources. I would decline to hear the settlement approval application if it was open to the applicants to walk away from the settlement in the event it was approved but without a common fund order.
7. The use of such a condition precedent in the settlement of class action proceedings should be strongly discouraged.

# THE REASONABLENESS OF THE SETTLEMENT amount

## The confidential Counsel’s Opinion

1. I have had the benefit of a confidential opinion by Mr David Healey of Counsel dated 11 September 2017 (**Counsel’s Opinion**) in relation to the reasonableness of the proposed settlement. Mr Healey has been briefed as junior counsel in the proceeding since April 2016, being led by Mr Michael Lee SC until his appointment a judge of this Court in March 2017. Mr Healey was briefed to appear in the trial in July 2017 and he prepared the opinion as the counsel who had the longest history of involvement in the proceeding.
2. Counsel’s Opinion is thorough and candid and it comprehensively deals with the factors relevant to whether the Court should approve the proposed settlement. In Counsel’s view the settlement is fair and reasonable having regard to the interests of class members.
3. I have also had the benefit of considering the confidential position papers the parties prepared for the second mediation. Although these position papers put the parties’ respective positions at their highest, I found them useful in understanding the complexities of the litigation and forming a view as to the reasonableness of the proposed settlement.

## The stage of the proceeding at which the settlement was reached

1. On 11 October 2012 the applicants commenced the proceeding NSD 1558/2012 against the Directors (the **Director Proceeding**). On 28 February 2013, the applicants commenced proceeding NSD 341/2013 against the Auditors (the **Auditor Proceeding**). On 6 March 2013 the Director Proceeding and the Auditor Proceeding were consolidated within proceeding NSD 1558/2012 together with various amendments.
2. Pursuant to orders of the Court the parties mediated the dispute on 12 May 2016 and 25 May 2016. No settlement was reached. A further mediation took place on 11 April 2017. No settlement was reached at the mediation but the parties continued to negotiate with the assistance of the mediator. On 18 May 2017 SPB informed the Court that the parties had reached a settlement in principle.
3. The parties reached the settlement not long before the matter was listed for hearing in July 2017. By that point the parties had filed the following evidence:
4. on behalf of the applicants:

(i) lay affidavits by the first and second applicants;

(ii) an affidavit and expert accounting and audit report by Christopher Westworth, expressing an opinion as to deficiencies in the Auditor’s audits and reviews of Arasor’s financial statements, together with a reply report;

(iii) an expert report by Mr Frank Torchio expressing an opinion as to the losses suffered per share, using an event study methodology as well as a fundamental valuation analysis;

(iv) an expert report by Ms Dawna Wright, taking Mr Torchio’s opinions and calculating the damages suffered by the applicants as a result of the alleged misrepresentations; and

(v) an expert report by Professor Raymond da Silva Rosa, expressing an opinion as to the materiality of the alleged misrepresentations to investors, together with a reply report;

1. on behalf of the Directors:

(i) a lay affidavit by each active Director; and

(ii) an expert report by Mr John Holzwarth regarding the losses suffered per share;

1. on behalf of the Auditors:

(i) lay affidavit evidence from the partner, audit manager and audit junior who worked on the prospectuses and financial reports upon which the Auditors were engaged to work;

(ii) an expert accounting and audit report by Mr John Shanahan, expressing an opinion as to the audits and review work undertaken by the Auditors; and

(iii) an expert report by Mr Alessandro Frino regarding the losses suffered per share.

1. At that point the applicants and their lawyers were in a good position to make an informed assessment of the evidence likely to be adduced at trial, the strength of the respective cases, the damages likely to be payable if the case was successful under one or more of the main claims, the likely course of the trial, and the costs likely to be involved should the proceeding continue. They were also in a good position to assess the merit of the respondents’ professed confidence in their factual and legal position and their determination to continue to vigorously defend the proceeding to judgment.
2. The stage at which and the circumstances in which the settlement was reached support the conclusion that the settlement is the best outcome achievable by the applicants.

## The reaction of the class to the settlement

1. On 31 July 2017 the Court made orders approving the Notice of Proposed Settlement to be sent to class members which included a Notice of Objection to Settlement Form. The orders directed the solicitors for the applicant to give the notice to all class members by mail or email within five days. I am satisfied that SPB sent the notice in compliance with the orders.
2. The orders required that the Notice of Proposed Settlement be given not just to registered or Participating Group Members. It informed all class members that if they wished to object to settlement approval they must file a Notice of Objection to Settlement Form by 1 September 2017, together with any submissions and evidence upon which they wished to rely. It informed Non-Registered Class Members that if they wished to apply to become a Participating Group Member (so as to share in the settlement) they must file an application seeking orders in that regard by 1 September 2017, together with any submissions or evidence upon which they wished to rely.
3. The evidence is that there are approximately 700 Participating Group Members and only one class member objected to the settlement. The low level of objection to settlement is an indication that the settlement is fair and reasonable, but it does not carry much weight. It is the Court’s responsibility to protect class members’ interests and the absence of objections or a low level of objections does not relieve it of that task: *Money Max* at [50]; *Kelly* at [58] and [61].

### The objection to settlement approval

1. Adem Pty Ltd (**Adem**) is the only class member to object to settlement approval. Adem noted that the applicants’ total legal costs total approximately $7.556 million, the Funder’s proposed funding charges total between 35% or 40% of the settlement amount plus the Project Management Fee and costs of administering the SDS. It objected to the settlement on the basis that class members are not receiving a “fair share” of the proposed settlement.
2. Adem argued:

Whilst I understand that solicitors need to be paid for the work done, I question the motivation of the solicitors and associated parties in devising this claim and request that the court consider the amounts claimed by the group members’ solicitor and associated parties in the context of the percentage of the claim being paid to the group members, which may be as low as 13.4%.

Adem’s (understandable) concern relates to the proportionality of legal costs and litigation funding charges compared to the amounts to be received by class members. It is, however, necessary to keep several matters in mind.

1. *First*, as I later explain in more detail, although legal costs take up 40% of the settlement that reflects the difficulties and complexities of the proceeding, the vigour with which the respondents defended it, and the fact that the parties were unable to reach a settlement until about two months before trial. Although the quantum of legal costs seems large to the uninitiated it is unremarkable in litigation of this type. The case budgets indicate that at the commencement of the proceeding and for a significant period thereafter the applicants’ solicitors and the Funder believed the case would be brought to a successful conclusion at a much lower total cost.
2. *Second*, the reasonableness of the applicants’ costs and reasonableness of the litigation funding charges are to be addressed by the Court as part of the settlement approval application. Without seeking to minimise the significance of the objection it goes no further than raising matters which the Court is already required to address. Reasonable legal costs and litigation funding charges represent the substantial cost of producing *some* recovery, when otherwise the shareholders would have had none.
3. *Third*, the objection is predicated on the basis that a 35% to 40% funding rate would be charged (which Adem calculated as $6.73 million to $7.7 million) plus a project management fee of $755,000, giving a total funding commission of between $7.485 million and $8.455 million. However, the Funder sought a funding commission rate of 30% with no project management fee which is a total funding commission of $5.775 million. It is unclear whether Adem would maintain its objection when, in fact, the approved funding fee is between $1.71 million and $2.68 million less than Adem’s estimate.
4. *Fourth*, in referring to the motivation of the solicitors for the applicant and the Funder in “devising this claim” Adem suggested that the applicants’ solicitors and the Funder knew (or at least had a good idea) that the case would be settled for an amount in the broad range that did with legal costs and funding commission taking up the proportion of the settlement that they do. The case budgets point away from drawing such an inference and I do not accept Adem’s suggestion.
5. Having regard to the evidence there are good reasons to doubt that the Funder would have agreed to fund the case had it fully understood the determined and well-resourced nature of the respondents’ defence and had it known it would be required to pay more than $7.8 million in costs and to post security for costs of $2.4 million which monies would be outlaid over almost five years. I infer from the materials that the Funder agreed to fund the case based upon a view that the applicants and class members would achieve a reasonable settlement at a much lower cost.
6. In my view Adem’s objection does not justify refusal to approve the settlement.

### Non-registered class members who sought to be included as Participating Group Members

1. A number of class members who failed to register within the timeframe provided by the Registration and Opt Out Orders came forward after the settlement and expressed a desire to register and become Participating Group Members, so that they might share in the settlement.
2. I considered each individual application as part of the settlement approval hearing and allowed 11 Non-Registered Class Members to be included as Participating Group Members. The reasons for doing so are on transcript and it is unnecessary to repeat them here.
3. It is however appropriate to set out the reasons for my refusal to allow seven Non-Registered Class Members to become Participating Group Members. I now do so:
4. Kramner Pty Ltd (**Kramner**): Mr Ronald Gower, a director of the company, filed an affidavit in support of the application and said that:

It was my understanding that Kramner Pty Ltd was included as a Participating Group Member to the Class Action due to my acquisition of shares. I was waiting for notification of the Class Action particulars.

The applicants contended, and I accept, that to have had any understanding of the class action and its existence Mr Gower must have received the Registration and Opt Out Notice which set out the options for class members. Mr Gower did not explain whether he read the notice, read the notice but misunderstood it, or simply made an assumption without reading the notice. He did not explain what he made of the fact that there was a form requiring completion of details for registration. Counsel appearing for Kramner was unable to shed any further light in that regard. The applicants noted that because Kramner did not register, its claim had not been included in the damages estimates provided to the respondents in the mediation, and they oppose Kramner’s inclusion. The evidence does not disclose a proper basis for including Kramner as a Participating Group Member, and I do not do so;

1. Norita Pty Limited (**Norita**): Mr Simon Grigson, a director of the company, filed an affidavit in support of the application and said that:

Norita Pty Ltd did not register as a Group Member prior to 7th February 2017 as it was my understanding that it was not necessary to do so and by not registered [sic], Norita Pty Limited would not be excluded from future participation in the class action.

Mr Grigson appeared at the application. He accepted that he received the Registration and Opt Out Notice and that, reading the notice now, it clearly stated that if he did not register he would not be included as a Participating Group Member. He said, however, that at the time “when I’ve decided to do nothing about that” he did not think he was excluding Norita from the case. Norita’s claim was not included in the damages estimate provided in the mediation, and the applicants oppose its inclusion as a Participating Group Member. Mr Grigson’s concession that he “decided” to do nothing about registration is significant to my refusal to allow Norita to be included as a Participating Group Member;

1. Mr Robert Smythe: Mr Smythe filed an affidavit in support of his application. The substance of it is that he was aware of the need to register and provide documentation but he was busy with other matters and did not then consider that the time and effort required was likely to be worthwhile. He was reluctant to potentially waste time at the expense of his other commitments, but now that he sees that there is a return available he wishes to participate in the class action. Mr Smythe’s claim was not included in the damages estimate provided in the mediation, and the applicants oppose his inclusion. Mr Smythe’s evidence does not disclose a proper basis for him to be included as a Participating Group Member, and I do not do so;
2. Mr John Cairns: on 30 August 2017 Mr Cairns wrote to SPB and said that he wished to become a Participating Group Member so as to share in any benefit of the settlement. By way of explanation for his failure to register the letter said:

I left Australia in 2014 and have been itinerant up until a couple of months ago, when some post finally began to filter through.

The letter provided an email address by which he could be contacted. The following day SPB emailed him and advised that to apply for inclusion as a Participating Group Member he was required to file an application and affidavit. Mr Cairns did nothing thereafter. His claim was not included in the damages estimate provided in the mediation, and the applicants oppose his inclusion. There is no application or evidence upon which the Court could properly include Mr Cairns as a Participating Group Member, and I do not do so;

1. Mr Malcolm Willis: Mr Willis sent an email to SPB on 5 September 2017 in which he said:

I was concerned that by signing previous documents [the class member registration forms] that I could be liable for legal costs from perusing [sic] the class action if it failed and then lose even more money so I did nothing…

Mr Willis also filed an affidavit sworn 12 September 2017 in support of the application and said that:

I have not registered before now as I did not understand the documentation that was supplied to me and was scared I was going to lose further. I was concerned about losing my remaining assets in legal costs to the legal company. I was also concerned the letters could be a scam…

In essence Mr Willis accepted that he receive the Registration and Opt Out Notice and made a decision not to register out of a concern about legal costs. In my view that notice explained in clear terms that class members were not liable for legal costs, subject to some exceptions. Although his claim was not included in the damages estimate provided in the mediation, the applicants did not oppose his inclusion as a Participating Group Member. Notwithstanding the applicants’ position I am not persuaded on the evidence that it is appropriate to include Mr Willis, and I do not do so;

1. Ms Eliane Deligeorges: on 15 August 2017 Ms Deligeorges wrote to SPB and sought inclusion as a Participating Group Member. Her letter provided no explanation as to why she did not register by the deadline provided in the Registration and Opt Out Notice. On 24 August 2017 SPB wrote to her and advised that to apply for inclusion as a Participating Group Member she was required to file an application and affidavit. Ms Deligeorges did nothing thereafter. Her claim was not included in the damages estimate provided in the mediation, and the applicants oppose her inclusion. There is no application or evidence upon which the Court could properly include Ms Deligeorges as a Participating Group Member, and I do not do so;
2. Mr Paul Holland: on 12 August 2017 Mr Holland sent a completed Group Member Registration Form to SPB. On 15 August 2017 SPB wrote to him and advised that to apply for inclusion as a Participating Group Member he was required to file an application and affidavit. On 21 August 2017 Mr Holland filed an affidavit which provided no explanation as to why he had failed to register before the deadline in the Registration and Opt Out Notice. On 29 August 2017 Mr Holland sent an email to SPB in which he said only “You won”. Nothing further was received from Mr Holland. His claim was not included in the damages estimate provided in the mediation, and the applicants oppose his inclusion. The evidence does not disclose a proper basis for his inclusion as a Participating Group Member, and I do not do so.
3. The Court also made orders for one previously registered class member to cease to be a class member, namely UOB Kay Hian Private Limited (**UOB**). UOB registered as a class member but, on 1 March 2017, it sent an email to SPB advising that it wished to withdraw its registration. It appears that UOB does not wish to participate in the settlement nor wish to independently pursue any cause of action by opting out. I accept the applicants’ contention that an order should be made removing UOB as a Participating Group Member.

### Late Opt-Outs

1. A number of class members sought to opt out of the proceeding after the 7 February 2017 deadline provided by the Registration and Opt Out Orders (the **Late Opt Out Parties**).
2. The evidence is that:
3. on 15 February 2017 SPB sent an email to the solicitors for the respondents advising that the firm had received the following three opt out notices out of time, only the last of which appeared to have been filed with the Court:

(i) Ms Brenda Darley;

(ii) Mr Neville Smith; and

(iii) (what appears to be) Fourearth Group Pty Ltd as trustee of the Earthrowl No 2 Family Trust (**Fourearth**);

1. on 3 April 2017 SPB received an opt out notice from Mr William Laister. SPB assumed that Mr Laister also sought opt out on behalf of his associated companies Connex 1 Pty Ltd and Hyerod Pty Ltd although that is not clear on the face of the notice;
2. on 12 April 2017 SPB received opt out notices from a funded group member and related entities, being Trevor Pike on behalf of Jordon Pike, Trevor Pike on behalf of Shannon Pike, Trevor Pike on behalf of Callum Pike, Brentine Nominees Pty Ltd and Brentine Nominees Super Fund (the **Pike Opt Outs**).
3. On 11 April 2017 the parties participated in the mediation, and by 18 May 2017 had reached a settlement. Mr Baron Alder, the solicitor for the Auditors, said that he was not aware until 5 October 2017 (when he was served with the applicants’ submissions for settlement approval) that there were any persons seeking to opt out late other than Ms Darley, Mr Smith and Fourearth. It was not until 9 October 2017 that he was provided with copies of the Pike Opt Outs, and at the time he swore his affidavit he had not been provided with any opt out notices by Connex 1 Pty Ltd and Hyerod Pty Ltd.
4. By email to the solicitors for the respondents on 12 October 2017 SPB confirmed that the damages claims made by each of the Late Opt Out Parties were included in the damages model for the mediation and in the damages model for the purposes of the estimated distributions under the SDS.
5. As Ms Horvath of counsel for the Auditors submitted, the Late Opt Out Parties should not be permitted to opt out after the Court imposed deadline when their claims had been included in the damages modelling and the settlement reached took account of the value of their claims. To permit them to opt out now would mean they could pursue individual litigation against the respondents, notwithstanding that the settlement amount includes an amount for their claims.
6. I do not allow the Late Opt Out Parties to opt out or to withdraw as Participating Group Members. I also refuse to allow three other class members to opt out or withdraw as Participating Group Members. They shall remain class members but be treated as Non-Participating Group Members.

## The complexity of the proceedings

1. The proceeding commenced in October 2012 and was listed for hearing in July 2017. It had been on foot for more than four and a half years at the point that it settled. It is factually and legally complex, and the main claims in the proceeding are hotly disputed. I set out a summary of the Amended Consolidated Statement of Claim (**ACSOC**) in *Caason Investments Pty Ltd v Cao* [2015] FCA 1435 at [7]-[11] (although it should be kept in mind that the summary focused on the conduct of the Auditors, whose discovery obligations were at issue in that decision).
2. Broadly speaking, the proceeding alleges contraventions of the continuous disclosure obligations under s 674 of the *Corporations Act 2001* (Cth) (**Corporations Act**) as well as contraventions of the prohibition on misleading or deceptive conduct and false or misleading statements in ss 728, 1041E, 1041H of the Corporations Act and cognate provisions in s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and various state *Fair Trading Acts* (**FTAs**). The proceeding concerns allegedly false or misleading representations made in various financial reports and prospectuses, which it is alleged did not provide a true and fair picture of Arasor’s business in the relevant period.
3. The class includes investors who allege losses suffered by their direct reliance on the alleged misleading prospectuses and financial reports as well as investors who allege losses caused indirectly, through their purchase of Arasor shares on the ASX in the expectation that the market price reflected Arasor’s compliance with its continuous disclosure obligations. The applicants allege that Arasor shares were offered for $1.50 under the 2006 Initial Public Offering prospectus (**Prospectus 1**) which raised $35 million for Arasor, for $3.05 under the March 2007 Prospectus (**Prospectus 2**) which raised $34.413 million, and for $2.10 per share in a private placement in August 2007 which raised approximately $12 million.
4. The applicants assert that Arasor’s shares traded at a high of $3.88 on about 10 April 2007. In April 2008 and May 2008 certain alleged ‘corrective’ announcements were made by Arasor and as a result the price of Arasor shares fell materially. On 5 February 2009 Arasor’s shares were trading at 2.9 cents per share.
5. On about 26 February 2009 Arasor shares were suspended from quotation on the ASX. On about 17 May 2011 administrators were appointed to the company. On or around 17 August 2011 Arasor executed a Deed of Company Arrangement (**DOCA**). The applicants allege that from the time of the DOCA Arasor was insolvent. Arasor’s shares never regained the value lost. The applicants allege that in practical terms the shares they acquired in the relevant period are valueless.
6. In broad terms the ACSOC pleads that the misstatements (or the conduct that gave rise to the representations and/or statements) in the prospectuses and in the financial reports were also the responsibility of the directors who authorised the publication of those documents and who, through their statements and those documents, represented expressly or impliedly that they had exercised reasonable skill and care in making the public statements.
7. The Further Amended Consolidated Statement of Claim (**FACSOC**) also pleads a case under s 1041E of the Corporations Act to incorporate additional alleged failures, including in connection with the carrying value of intangible assets. The applicants contend that the claims under ss 728 and 1041E of the Corporations Act and under s 12 of the FTA (Vic) are not apportionable and that they may therefore prove and recover their losses against any respondent or respondents.
8. The respondents strenuously deny the allegations in the FACSOC. Each of the active Directors has filed a witness statement explaining the basis for the representations made in the prospectuses and financial reports, and denying that their conduct was misleading or deceptive. The Auditors have filed witness statements by the partner, audit manager and audit junior who worked on Arasor’s prospectuses and financial reports (upon which they were engaged) denying the alleged deficiencies in the audit work. They also filed a report by a well-qualified and experienced accounting and audit expert to the effect that they complied with the standard of a reasonable auditor in the circumstances.
9. A number of features of the case increase the difficulty for the applicants, including that:
10. the proceeding alleges non-disclosure or misleading disclosures over a lengthy period - 11 October 2006 to 12 May 2008 - and in five different documents being Prospectus 1, the 2006 full-year annual financial report, Prospectus 2, the 2007 half-year financial report and the 2007 full-year annual financial report, with alleged partial corrective disclosures in April 2008 and then in May 2008;
11. the relevant events occurred approximately 10 years ago, and the case is focused on Arasor’s true financial position in 2006, 2007 and 2008, and no party has evidence from any person who was formerly an Arasor employee;
12. many of Arasor’s corporate records in respect of the relevant period are missing, which likely occurred at some point during the transfer of corporate records between the Directors, the administrator and the directors of the rebadged business;
13. Arasor was a holding company which, to a large extent, did not trade in its own right. The bulk of Arasor’s business was conducted outside Australia, in the United States, China, India, and to a limited extent Japan. The accounting records for the trading entities of the business were located offshore and were not discovered to the applicants; and
14. there are no signed board minutes of the Arasor Board and the applicants relied on unsigned copies of the minutes of the Board and of the due diligence committee. It seems likely that the respondents would object to the reliability of such minutes.
15. The case also has difficulties or complexities in regard to establishing loss at the level claimed, including that:
16. the assessment of loss and damage by Mr Torchio, the applicants’ loss expert, is the subject of strong criticism by the respondents’ loss experts. At the point the case settled the applicants had not yet filed a reply report by Mr Torchio responding to those criticisms;
17. whether an indirect or ‘market-based’ causation approach to share market losses is available at law is not settled. Brereton J accepted a market-based theory of causation in *Re HIH Insurance Ltd (In Liq)* (2016) 335 ALR 320; [2016] NSWSC 482 but the issue has not been decided by an intermediate court of appeal; and
18. the correct loss measurement methodology, in relation to alleged contraventions that are said to have the effect of increasing or unjustifiably maintaining the price of shares on the ASX, is not settled. Whether LIFO, FIFO or a “no transaction” approach is appropriate may have a significant effect on the quantum of the losses that may be claimed.
19. The level of factual and legal complexity, combined with the fact that the case is strenuously defended by well-resourced respondents, means it is impossible for the parties to be confident of the outcome, and there is a prospect that if the case proceeds to judgment, the unsuccessful parties will appeal. The likelihood of an appeal (or appeals) and the implications for class members in terms of delay, uncertainty and costs is a relevant factor in settlement approval: see *Kirby v Centro Properties Limited (No 6)* [2012] FCA 650 at [4] per Middleton J.
20. These matters all point in favour of approving the proposed settlement.

## The risks of establishing liability and quantum

1. It is plain that the applicants face real risks in relation to liability and quantum. It was commenced against the directors of an insolvent corporation in circumstances where, until the applicants’ solicitors stepped in, Arasor was proposing a DOCA which would have released all claims against the company and its directors. The level of any directors or officers insurance Arasor held was unknown, as was the extent to which such insurance would respond to the claims. The proceeding was then expanded to include claims against the Auditors, which were more difficult and, again, strongly resisted.
2. It is difficult to say much without disclosing the contents of the confidential Counsel’s Opinion or the position papers for the mediation, and it is inappropriate to descend to a detailed analysis of the evidence. It must suffice to note that having regard to Counsel’s Opinion and the position papers I am well satisfied that the applicants face real risks in establishing liability and in relation to establishing loss and damage at the level claimed.
3. The material risks on liability and quantum point strongly in favour of approving the settlement.

## The ability of the respondents to withstand a greater judgment

1. The Directors and the Auditors each have their own professional indemnity insurance, but the respondents are unwilling to disclose the limits of cover for the particular policy years, whether the insurer has accepted that it is on risk for each policy year relevant to the claims, and the extent of insurance cover remaining after payment of legal costs. The respondents’ legal costs are likely to be significant and will have eaten into the available insurance cover.
2. The Directors and the Auditors have each contributed $9.625 million to the total settlement sum of $19.25 million. It is unknown whether the insurance cover is sufficient to meet a greater judgment, and the applicants know little about the personal asset position of the respondents or whether they have implemented structures in order to protect their personal wealth from any judgment.
3. It is unknown whether the respondents could withstand a greater judgment. This militates in favour of approving the settlement.

## The range of reasonableness of the settlement in light of the best recovery

1. “Best recovery” refers to full recovery by the applicants and class members on the basis that they succeed in full on all issues. Of course, in a case like the present case it is unrealistic to expect such a recovery.
2. There are also difficulties in estimating the best recovery when, for example, it is unknown how many class members assert direct reliance and how many assert ‘market-based’ causation. However, having regard to some modelling of the aggregate value of class members’ claims set out in Counsel’s Opinion, estimated by reference to losses suffered per share using either event study methodology or a fundamental valuation analysis, and by reference to success or failure over particular timeframes within the relevant period, I am satisfied that the settlement sum falls within a reasonable range in light of the best recovery.

## The range of reasonableness of the settlement in light of all the attendant risks of litigation

1. Counsel’s Opinion recommends the proposed settlement and I give that opinion substantial weight. Having regard to Counsel’s Opinion, the legal and factual complexities in the proceeding, the material risks in relation to liability and quantum and the settlement in light of the best recovery, I am satisfied that the settlement amount is fair and reasonable.

# WHETHER THE SETTLEMENT DISTRIBUTION SCHEME IS REASONABLE

## The terms of the SDS

1. The SDS provides that the sum paid into the settlement fund will include interest earned on settlement monies while it was held in escrow pending satisfaction of the conditions precedent. The sum paid into the settlement fund will be invested in an interest-bearing account and the interest will form part of the sum to be distributed.
2. Prior to the distribution of monies to class members the SDS provides for various deductions to be made from the settlement fund:
3. the Court-approved legal costs paid by the Funder;
4. the costs incurred in the administration of the SDS (**Scheme Administration Costs**);
5. the 30% funding commission to the Funder; and
6. the applicants’ Reimbursement Claims.
7. For the proposed SDS to be fair and reasonable the deductions must be reasonable so that class members receive a fair share of the settlement, the settlement fund must not be eaten up or distribution unreasonably delayed through the settlement administration process, and the SDS must achieve a fair division of the proceeds of the settlement between claimants.
8. I am satisfied that deductions of the nature proposed are appropriate but there is a question as to whether the amounts are reasonable.
9. The claims resolution process in the SDS is relatively straightforward. In summary:
10. Participating Group Members have already submitted information relating to their acquisition of Arasor shares (**Claim Data**) through the class member registration process. That information forms the basis upon which claims are assessed by the Scheme Administrator (**Administrator**). Having regard to that information and following a Claim Data verification process the Administrator shall provide a Claim Data Notice to each claimant together with an estimate of the amount likely to be payable to the claimant (**Claim Value Estimate**) calculated by reference to a loss assessment methodology set out in the SDS. Much of the Claim Data verification and calculations have already been performed;
11. there are two levels of review available to claimants who are dissatisfied with the Claim Data Notice and/or the Claim Value Estimate, one internal and one external;
12. once each step in the process is complete for all claimants, the settlement fund will be distributed on a pro rata basis between the claimants;
13. if a claimant does not claim the payment to which he or she is entitled or fails to present any cheque drawn by the Administrator within 90 days of being sent it (**Inactive Claimant**) there may be some unclaimed funds. The SDS provides that:

(i) the amount of the unclaimed funds in respect of that Inactive Claimant shall be applied, first, to any intervening Scheme Administration Costs and, second, pro rata among the other claimants; but

(ii) if the total amount of the unclaimed funds in respect of Inactive Claimants is less than $20,000 (and thereby uneconomic to distribute) the Administrator may in its discretion apply those unclaimed funds to the Public Interest Advocacy Centre.

Such terms are common in shareholder class actions and I consider them appropriate. I consider the time allowed for each step in the process to be reasonable.

## The loss assessment methodology

1. In order to reflect the composition of the class of Participating Group Members the loss assessment methodology in Schedule A to the SDS applies a damages model which uses a “blended” approach to their losses, calculating them using “artificial inflation” and “fundamental valuation” methodologies and averaging the two. The loss assessment methodology calculates the amount payable to each claimant based on the number of shares acquired in the relevant period and the price paid, and by reference to the different prospects of success for claims of direct reliance and market-based causation and in relation to the periods within the claim period in which the shares were required, doing so through a “prospects matrix”. The “prospects matrix” is based on Counsel’s opinion, in respect of each period of time, in relation to liability, reliance and damage.
2. The calculation of the amount payable to each Participating Group Member does not involve an evaluative assessment by the Administrator, but the “prospects matrix” introduces into the calculation a judgment made by the applicants’ solicitors as to the strength of class members’ claims at different points of time through the claim period. I am satisfied that to the extent the loss assessment methodology incorporates those matters of judgment it is consistent with the case that the applicants intended to advance at trial and is maintainable as a matter of legal principle.
3. The SDS subjects each Participating Group Member’s claim to the same procedures for calculating their share of available compensation, and in my view it is likely to deliver a broadly fair payout as between them. In deciding whether to approve the loss assessment methodology the Court must balance the cost of a more perfect assessment procedure against the notional benefit of a more exact distribution: *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 at [43] per Moshinsky J; *Earglow* at [87].
4. SDS’s with broadly similar features have been approved by the Court in numerous shareholder class actions and I consider the loss assessment procedure and methodology to be fair and reasonable.

## The review process

1. Following verification by the Administrator of the Claim Data provided by each Participating Group Member, there are two levels of review available. In the first level of review, Administrator shall provide a Claim Data Notice and Claim Value Estimate to each class member. If the class member is dissatisfied with that Claim Data Notice and/or the Claim Value Estimate the Administrator shall undertake an internal review and provide any revised notice or estimate. In the second level of review, if the class member remains dissatisfied with the Claim Data Notice and/or the Claim Value Estimate the Administrator shall appoint an external Independent Assessor (being a member of the NSW Bar of at least five years’ standing) to make a final determination in respect of the dispute.
2. To discourage unmeritorious requests for external review the SDS provides that the class member may be requested to pay a bond not exceeding $5,000 in respect of the costs of that review, which amount shall be returned if the review results in an increase of 5% or more in the Claim Value Estimate.
3. SDS’s with broadly similar review features have been approved by the Court in numerous shareholder class actions and in my view these terms are fair and reasonable.

## The appointment of the Administrator

1. The Administrator of the SDS will be Ms Amanda Banton, the partner in charge of the case at SPB. The SDS requires that when acting as the Administrator she must act fairly in the interests of the claimants as a whole and not as a solicitor for any individual claimant. It also provides that Ms Banton may at any time refer any issues arising in relation to the administration of the SDS to the Court for directions.
2. Ms Banton is a partner of SPB and has significant experience in the conduct of shareholder class actions and in acting as the administrator of SDSs in such actions. Her experience should assist the efficient administration of the SDS and her appointment as Administrator is appropriate, although I expect that the great bulk of the work will be performed by paralegals and junior lawyers under her supervision.

## Court supervision of the settlement administration

1. The obligation of the Court to protect class members’ interests does not end with settlement approval, and in my view the Court should require reports as to progress and costs of the settlement administration in order to best safeguard class members’ interests.
2. The Court directed that the SDS be amended so as to include a requirement that if any act or thing required under the SDS is not completed within 14 days of the due date the Administrator must, as soon as practicable, notify the Court of that occurrence, provide a short form explanation as to why the required time was not met, and provide the Administrator’s best estimate as to when the act or thing is likely to be completed and why that amount of time is necessary.
3. The Court also directed that the SDS be amended to provide that the Administrator must report to the Court at three month intervals and upon completion of settlement administration setting out in tabular form each of the principal steps to be taken in the settlement administration, which of those steps have been completed and when, and which of the steps have yet to be completed and when they will be. This should operate to prevent delays in the settlement administration.
4. With those amendments I am satisfied that the SDS is fair and reasonable. I now turn to deal with the proposed deductions from the settlement fund.

# WHETHER THE LEGAL COSTS CHARGED ARE REASONABLE

## Whether it is fair that unfunded class members pay a pro rata share of the legal costs incurred in the proceeding

1. The SDS provides that the total legal costs paid by the Funder be deducted from the settlement sum prior to distribution to Participating Group Members. This term reflects the funding agreements between the Funder and funded class members and it is appropriate for them. Unfunded class members did not, however, retain solicitors and this part of the SDS means that they pay a pro rata share of the legal costs incurred in the proceeding.
2. There is no good reason why funded class members, who effectively financed the proceeding, should carry the burden of legal costs alone. I consider that the interests of justice in the proceeding require that unfunded class members that enjoy the benefits of a settlement pay a proportionate share of the legal costs incurred to obtain the settlement. Orders requiring that unfunded or non-client class members make a pro rata contribution to legal costs have been made in numerous class actions: see *Thomas v Powercor Australia Ltd* [2011] VSC 614 at [30] per Beach J; *Modtech* at [24]; *Kelly* at [325]-[326]; *Newstart* at [40].
3. There is though a question as to the reasonableness of the amount of legal costs proposed to be deducted from the settlement fund. As I said in *Earglow* at [91]:

…The Court has a supervisory role in relation to costs paid by class members and should scrutinise costs in the settlement approval process: *Kelly* at [11], [333] and [346]. The Court should satisfy itself that the arrangements in relation to legal costs meet any relevant legal requirements, contain reasonable and proportionate terms relative to the commercial context in which they were entered, and that the costs and disbursements are in accordance with the terms of the relevant agreements and are otherwise “reasonable”: *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311; [2004] FCA 1406 at [61] (Sackville J); *Modtech* at [32]; *Newstart* at [14].

1. In *Lopez* Finkelstein J said (at [16]):

[I]t [approving solicitors’ fees and disbursements] is a task in which the court inevitably must rely heavily on the solicitor retained by, and counsel who appears for, the applicant to put before it all matters relevant to the court’s consideration of the matter.

## The use of independent costs experts

1. To satisfy itself as to the reasonableness of costs the Court often relies on expert evidence from an independent costs consultant engaged by the applicant’s solicitors: see for example *Williams* at [19]; *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980 at [15] per Moore J; *Guglielmin v Trescowthick (No 5)* [2006] FCA 1385 at [16] per Mansfield J; *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663 (***Matthews***) at [356]-[386] per Osborn JA.
2. The Class Actions Practice Note provides:

15.2 It will usually be sufficient that an independent expert has examined the relevant files or records of the applicant’s lawyer…and that:

(a) in relation to legal costs the expert:

(i) has examined a sufficient sample of the legal work recorded to clarify whether the work was properly costed in accordance with applicable costs agreements; and

(ii) expresses an expert opinion, by reference to the sample and the expert’s experience of comparable litigation, as to whether the total legal costs claimed are fair and reasonable; and

…

15.3 Lawyers should expect that a more extensive sampling of legal costs, a greater level of examination by an independent expert…may be required where:

(a) the class members include persons who are not clients of the applicant’s lawyers or of the litigation funder;

(b) the deduction per class member constitutes a significant proportion of the settlement amount otherwise payable to each class member; …

1. There is however a question as to whether costs experts routinely engaged by solicitors that act for applicants in class actions are truly independent, and whether they are likely to suffer from bias such as to be “tame” experts. Such concerns are not new, nor unique to costs experts or class actions. More than 140 years ago the Master of the Rolls, Sir George Jessel, commented on the tendency of expert witnesses to take on the views of those that regularly instruct them: see *Abinger v Ashton* (1873) 17 LR Eq 358 at 374.
2. More recently, writing extra-judicially in 2002, Justice G L Davies said:

Expert witnesses, as much as or perhaps even more than lay witnesses, are subject to adversarial pressure. Many of them make their living primarily from giving reports for and evidence in litigation. Almost all of them derive substantial fees from giving such reports and evidence, in many cases fees which are substantially higher than those which they derive from their other professional work.  **There is therefore, at the outset, an incentive for them to be chosen by a party to give evidence; and they must know that that party will not choose them unless their evidence supports that party’s cause.** The likelihood that an expert’s evidence will be biased in favour of the client is then increased by the pressure which all witnesses feel to join the team.

(Emphasis added.)

: Justice G L Davies, “The reality of civil justice reform: why we must abandon the essential elements of our system”, paper presented to the 20th AIJA Annual Conference (Brisbane, 12-14 July 2002) at 12.

1. To similar effect the NSW Law Reform Commission said in 2005:

Experts frequently chosen by plaintiffs’ lawyers, or by insurance companies, will know perfectly well that they have been chosen because their views happen to favour the client’s position; it might involve loss of face, as well as perhaps loss of income, for them to depart from their familiar views, and this may make it difficult to approach the issues with an open mind. Some experts will be more able than others to resist such pressures.”

: NSW Law Reform Commission, *Report 109:  Expert Witnesses* (June 2005) at 5.14.

1. The possibility of expert witness bias is amplified when an independent costs expert provides an opinion in a settlement approval application because: (a) the expert is engaged by a firm of solicitors which is, in reality, acting for itself in seeking that its costs be approved; (b) there is no opposing expert’s report; and (c) there is usually no contradictor in the application. Class members can object to the quantum of costs claimed but such objections are usually at a high level of generality.

### Using registrars and other court officers to assess the reasonableness of costs

1. In some instances judges have used officers of the Court to assist in the task of assessing the reasonableness of costs. In *Modtech* (at [41]-[51]) Gordon J declined to accept the evidence of the applicant’s costs expert because the expert’s report lacked detail and proper analysis. Her Honour appointed a registrar of the Court to make an assessment of the costs: *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 3)* [2014] FCA 680. In *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 at [199]-[201] Justice J Forrest ordered that a registrar conduct an independent review, at a general level, of the independent costs expert’s estimate. In *Williams v Ausnet Electricity Services Pty Ltd* [2017] VSC 474 at [106] and [121] Emerton J referred the question of whether the plaintiff’s solicitors were entitled to fee loadings because of the complexity and difficulty of the case to the Costs Court for determination: see *Williams v Ausnet Electricity Services Pty Ltd (Ruling No 3)* [2017] VSC 528 per Wood AsJ.
2. There is merit in such approaches but I doubt that it is a solution to the problem overall. The Court presently has 82 active class actions. Performing a costs assessment in such large cases often requires picking through or at least sampling rooms full of documents and many tens of thousands of costs items to ascertain whether they are reasonable. They can take more than a month to undertake and if registrars of the Court are regularly requested to assist in assessing the reasonableness of the costs charged in cases of this size they will have little or no time for other work.

### Using a referee to report regarding the reasonableness of costs

1. Section 54A of the Act, inserted in 2009 by the *Federal Justice System Amendment (Efficiency Measures) Act 2009* (Cth) contains a power to appoint a referee. It states:

**Referral of questions to a referee**

(1) Subject to the Rules of Court, the Court may by order refer:

(a) a proceeding in the Court; or

(b) one or more questions arising in a proceeding in the Court;

to a referee for inquiry and report in accordance with the Rules of Court.

(2) A referral under subsection (1) may be made at any stage of a proceeding.

(3) If a report of a referee under subsection (1) is provided to the Court, the Court may deal with the report as it thinks fit, including by doing the following:

(a) adopting the report in whole or in part;

(b) varying the report;

(c) rejecting the report;

(d) making such orders as the Court thinks fit in respect of any proceeding or question referred to the referee.

1. In *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139 at [35]-[62] Lee J helpfully set out the background to the use of referees as a method of ensuring that discrete issues in litigation are determined with maximum efficiency. I adopt his Honour’s summary of the principles relevant to the exercise of the power to appoint a referee.
2. On three occasions judges of the Supreme Court of Victoria have appointed a referee to assess the reasonableness of costs incurred in administering SDSs: see *Matthews v AusNet Pty Ltd & Ors (Ruling No 40)* [2015] VSC 131 at [29] per Forrest J; *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731 at [1]-[7] per John Dixon J; *Downie v Spiral Foods Pty Ltd & Ors* [2016] VSC 411 at [20] per J Forrest J and orders made on 27 July 2016; see also *Matthews v AusNet Pty Ltd & Ors (Ruling No 44)* [2016] VSC 732 at [13] per J Forrest J. The costs of the settlement administrations in each of these three cases were much greater than in the present case and two of them were particularly large, complex and expensive.
3. On 31 July 2017 I made orders in this proceeding to appoint a referee in relation to the reasonableness of costs overall. I made similar orders on 1 March 2018 in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*. Recently, in *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 at [40]-[41], Lee J said that “[i]t may be that the time has come for the Court to establish a regular practice of appointing a referee to inquire and provide a report to the Court.”
4. In my view referees are likely to be a useful tool in assessing the reasonableness of costs charged in class actions. If a panel of competent and reputable independent costs consultants can be developed and the Court chooses an expert from that panel, the reasons for conscious or unconscious bias are reduced. That should assist in the protection of class members’ interests in relation to costs in circumstances where the Court does not have the benefit of an opposing expert’s report and usually does not have a contradictor. The use of referees should provide a just, efficient and cost-effective procedure consistent with the overarching purpose in s 37M of the Act.
5. That does not mean that appointment of a referee will always be appropriate; it will depend on the circumstances of each case. Amongst other things it should be kept in mind that the costs of such supervisory processes ultimately come out of the settlement fund, and the Court should be astute to ensure that the cost of such supervision is proportionate to the costs claimed and the amount that might potentially be saved.

## The reasonableness of the costs claimed

1. I made the following orders to appoint a referee:

**Independent costs assessment**

14 Pursuant to s 54A of the Act the question of the reasonableness of the legal costs and disbursements (**costs**) proposed to be charged to class members and deducted from class members’ recoveries under the SDS be referred to Mr Roland Matters as a referee (**Referee**) to inquire and report in writing in accordance with the Rules. If he is unavailable to do so the Reference will be made to such other suitably qualified person as the Court later nominates as appropriate.

15 The Reference will commence within five days of this order or such other date as the Referee orders:

(a) the Referee is to consider and implement the Reference without undue formality or delay so as to enable a just, efficient and cost-effective resolution of the Reference. This may include enquiries by telephone and direct communication, without intervention of lawyers, with any expert retained on behalf of the Applicants and/or group members, and/or any other person who the Referee believes may have relevant information;

(b) to facilitate the just, efficient and cost-effective resolution of the Reference the Referee is to make such directions as the Referee considers appropriate as to the conduct of the Reference, including for the attendance of any person, the production of documents and records relevant to legal costs, and/or the provision of any submissions;

(c) the Referee shall submit the report arising from the Reference to the Court and to the Applicants on or before 12 September 2017;

(d) without affecting the power of the Court as to costs, the Applicants’ solicitors, Squire Patton Boggs, are liable for the reasonable fees of the Referee in the first instance, which shall become the Applicants’ costs of the Application;

(e) Squire Patton Boggs shall forthwith deliver to the Referee a copy of this Order and make available information and records which the Referee believes are relevant to the Reference; and

(f) the Referee and party shall have liberty to seek directions with respect to any matter arising in the Reference upon 24 hours notice, or such other notice as ordered by the Court.

1. Consequent upon these orders the Referee provided a report dated 4 October 2017 (the **First Costs Report**). The applicants sought approval of $7,216,943.70 inclusive of GST for the legal costs incurred up to that point. In the First Costs Report the Referee said that the hourly rates charged by the applicants’ solicitors, the allocation of work between solicitors of different seniority and the bulk of the costs and disbursements charged were reasonable but concluded that $690,000 of the costs were not reasonably incurred.
2. The disallowed costs arose in the following four categories of the legal work undertaken:
3. $50,000 in respect of the litigation of the Director Proceeding and the Auditor Proceeding under separate proceeding numbers until 6 March 2015, and the several iterations of the originating process and statement of claim;
4. $186,000 in respect of considering documents, drafting pleadings and attending with counsel in finalising the content of the statement of claim;
5. $175,000 in respect of the work of multiple personnel of Piper Alderman and SPB concurrently attending on barristers and experts, attending on each other and no other person, and emailing each other and no other person; and
6. $279,000 in respect of fees paid to expert witnesses Mr Westworth, Mr Torchio and Ms Wright.
7. SPB and the Funder submitted that the First Costs Report should not be accepted because the Referee did not provide reasons sufficient for the parties or the Court to be satisfied that the Referee had adopted a thorough, analytical and scientific approach, had regard to the evidence, had not made arbitrary conclusions, and had not made conclusions that were manifestly unreasonable. They sought leave to file evidence and submissions in that regard.
8. In my view there was force in the submissions in regard to the inadequacy of the Referee’s reasons. Although the reference procedure is not to be treated as “some kind of warm-up for the real contest” (see *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 at 563-4 per Gleeson CJ and at 566-7 per Mahoney JA) I made orders on 18 October 2017 directing the Referee to provide more detailed reasons, and granting leave for applicants, the Funder and the applicants’ solicitors to be heard in relation to costs. I also directed that the Referee consider and report on two other questions which in my view emerged from the materials, being:
9. whether the hourly rates charged by Ms Banton and Ms Gallate are reasonable, including by reference to the rates usually charged for complex commercial litigation, the particular case and the experience of the practitioners; and
10. whether the total costs charged are reasonable having regard to the initial budget and subsequent budgets provided to the applicants and/or the Funder.
11. Following those directions the Referee filed a supplementary report dated 31 October 2017 (the **Supplementary Costs Report**).

## The Referee’s approach

1. The Referee’s reasons in the First Costs Report were essentially limited to broad non-specific references to the work he had undertaken to check the costs in each of the four categories and the report provided little explanation as to how that work supported the Referee’s conclusion. In explaining his approach in the Supplementary Costs Report the Referee said that he undertook what he described as a “quantitative analysis” in relation to each category of disallowed costs, which resulted in an amount of costs which the Referee said were unreasonably incurred. Then he undertook what he described as a “qualitative analysis” in relation to each category (largely reading the affidavits and submissions of the applicants’ solicitors) which resulted in a reduction in the amount of costs which he said were unreasonably incurred.
2. The relevant principles for exercising the Court’s discretion to reject or not adopt part of a referee’s report were set out by McDougall J in *Chocolate Factory Apartments v Westpoint Finance* [2005] NSWSC 784 at [7]. Relevantly to the present case his Honour explained that:
3. an application contending that a report not be adopted is not an appeal;
4. the discretion to not adopt a report should be exercised consistently with the purpose of the reference;
5. where the report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a disposition to accept the report;
6. where the report reveals some error of principle, patent misapprehension of the evidence or manifest unreasonableness in fact finding, then there would arise reasons for rejecting it; and
7. the referee should give sufficient reasons to enable the parties and the Court to know the that the conclusion is not arbitrary or influenced by improper considerations, and is not affected by the flaws described in (d) above.
8. In my view the Referee’s reports do not adequately explain the basis for the conclusion in respect to each category of disallowed costs. Viewed in combination the reports fail to provide adequate reasons to satisfy the parties and the Court that the Referee took an analytical and scientific approach, had proper regard to the evidence, and that his conclusions are not arbitrary. I will not descend to the minutiae of the evidence in relation to costs to explain my view in this regard and it suffices to note the following in relation to each category of disallowed costs.

#### The disallowance in respect of separate litigation of the Director and Auditor Proceedings

1. The Referee’s reports do not provide an adequate explanation of the Referee’s approach to the disallowance, including what items or categories of items were disallowed, or how the figure of $50,000 in disallowed costs was calculated. Nor does either report explain why it was unreasonable for Piper Alderman not to have commenced the proceedings earlier or for them to have commenced the proceedings urgently at the time that they were in fact commenced. Ms Banton said that the statement of claim was initially prepared against Arasor but the company went into voluntary administration and the creditors subsequently approved a DOCA, the effect of which was to release all claims against Arasor. Subsequently the claim was reconstituted and repleaded as a claim against certain former directors of Arasor, i.e. the Director Proceeding. The applicants had sufficiently investigated that proceeding to establish a reasonable basis for filing, and did so because the limitation period was close to expiry. However they had not yet established whether there was a reasonable basis to commence proceedings against the Auditors, and on the advice of senior counsel, proceedings were not issued against the Auditors at that time. Because the causes of action in the proposed Auditor Proceeding arose later in time, it was not subject to the same limitation period.
2. I am satisfied that there was a clear imperative for the Director Proceeding to be issued at the time it was, and Piper Alderman had advice from senior counsel that the Auditor Proceeding should not be commenced at that time. The proposed Auditor Proceeding was far from straightforward and it was not commenced until senior counsel said it was ready for filing. The Referee’s reports do not identify anything in the preparation of the Auditor Proceeding that was inefficient or that ought efficiently to have been done earlier than it was. They do not provide adequate reasons to satisfy the parties or the Court that the Referee had regard to the evidence explaining the sequence of events and the constraints confronting the applicants’ solicitors. I do not adopt the Referee’s report in regard to this category of disallowance.

#### The disallowance in respect of the costs of considering documents, drafting pleadings, and attending with counsel in finalising the content of the Statement of Claim

1. The Referee’s reports do not provide an adequate explanation of his approach to the disallowance, including what items or categories of items were disallowed, or how the figure of $186,000 of disallowed costs was calculated. They do not provide adequate reasons to satisfy the parties or the Court that the Referee had regard to the evidence which explained the reasons for the amendments, and to show that the conclusion was not arbitrary. I do not adopt the Referee’s reports in regard to this category of disallowance but I accept the Referee’s broad conclusion that there were some wasted costs in the various amendments of the pleadings. As the case management judge I saw some of the inefficiencies and substantial wasted costs in the last round of pleadings amendments. I take the wasted costs associated with amendments to the pleadings into account in my conclusion that it is appropriate to disallow $250,000 overall.

#### The disallowance in respect of the work of multiple personnel of Piper Alderman and SPB concurrently attending on barristers and experts, attending on each other and no other person, and emailing each other and no other person

1. The Referee’s reports do not provide adequate reasons for the quantum of this deduction. He did not explain what attendances or categories of attendances were disallowed, or how the figure of $175,000 of disallowed costs was calculated. They do not make any reference to the fact that the retainers specifically contemplate attendances by lawyers working together on the case, and provide that costs for reasonable concurrent attendances were properly chargeable. Nor do the reports adequately explain the basis upon which the Referee reached the view that the concurrent attendances were unreasonable.
2. I accept the applicants’ evidence that in large complex class action litigation against different groups of respondents such as the present case it is not unreasonable for solicitors working on the matter to attend together on barristers and experts, to attend on each other and to email each other. Errors and inefficiencies are likely to result unless there is a high level of communication between members of the team working on the matter, and often this means that senior and junior lawyers working on the case must attend conferences together and regularly communicate so that the work is properly coordinated, supervised and reviewed. The Referee did not suggest that the work in the present case was not appropriately delegated to junior lawyers. The reports did not provide adequate reasons to allow the parties or the Court to be satisfied that the process to disallow $175,000 was not arbitrary, or that the Referee had regard to the evidence as to the reasons for concurrent attendances.
3. I do not adopt the Referee’s reports in regard to this category of disallowance. I do not however completely discard the Referee’s conclusion that the level of concurrent attendances was excessive and I take that into account in my conclusion that it is appropriate to disallow $250,000 overall.

#### The disallowance in respect of fees paid to expert witnesses Mr Westworth, Mr Torchio and Ms Wright

1. The Referee’s reports do not provide adequate reasons to explain how the disallowance of $279,000 was appropriate. The quantitative analysis to which the Referee referred was simply a consideration of the invoices provided by the experts which invoices said little that would enable an assessment of whether the charges were reasonable. The Referee provided little explanation as to the basis for his conclusion that $542,438 of the expert’s fees were unreasonably incurred. The Referee’s criticism of SPB for not having “shopped around” for cheaper experts indicates that he did not have regard to the applicants’ evidence as to the limited availability in Australia of “event study” experts for shareholder class actions; the need to engage a different expert midway through the proceeding; the true cost of Ms Wright’s report (as distinct from other charges relating to damages modelling and the SDS methodology); and the process through which Mr Westworth was engaged. The experts’ fees are within the range of fees commonly charged by experts for large and complex litigation in the highly specialised fields of expertise involved and I consider such fees are likely to be allowed on a taxation of costs. I do not adopt the Referee’s reports in regard to this category of disallowance.
2. I now turn to the two additional matters upon which the Court requested the Referee to report.

### Whether the hourly rates charged by Ms Banton and Ms Gallate are reasonable

1. Ms Banton and Ms Gallate are the two senior solicitors who worked on the case. In March 2010 Ms Banton charged $825 per hour, and by July 2017 her hourly rate had increased by increments to $1017.50 per hour. In September 2012 Ms Gallate charged $660 per hour, and by July 2017 her hourly rate had increased by increments to $770 per hour.
2. To address my concern that these rates may be unreasonable I directed the Referee to inquire and report on “[w]hether the hourly rates charged by the two senior solicitors on the file (Ms Banton and Ms Gallate) are reasonable, including by reference to the rates usually charged for complex commercial litigation, the particular case and the experience of the practitioners”. In the Supplementary Costs Report the Referee said that Ms Banton’s and Ms Gallate’s hourly rates were high but not unseen in his experience of the rates charged by solicitors for the applicant in complex commercial litigation, including class actions. He said that solicitors charging such hourly rates commonly had longer practice experience than have Ms Banton and Ms Gallate, but he considered the rates themselves were not unreasonable including by reference to the rates usually charged for complex commercial litigation, the particular case and the experience of the practitioners.
3. In the absence of any other evidence, I adopt the Referee’s report in this regard. I approve the hourly rates charged by Ms Banton and Ms Gallate on this occasion but that does not necessarily mean that I will do so in the future. It has come to my attention that lower hourly rates are being charged by more (or at least similarly) experienced solicitors running large and complex class action litigation. This question may require further attention in future settlement approval applications.

### Whether the total costs charged are reasonable having regard to the initial budget and subsequent budgets provided to the applicants and/or the Funder.

1. At all material times Ms Banton was the partner with conduct of the case for the applicants. Over the life of the proceeding the budgeted estimates of total legal costs and disbursements (which I infer Ms Banton either prepared or supervised) significantly increased. The costs sought to be approved are approaching three times more than what was estimated in the early stages. In 2012 the budgeted cost of the Director Proceeding and the Auditor Proceeding was $2.085 million and $679,228.50 respectively and over the years to 2017 the budgeted costs increased incrementally. In February 2017 the estimate for the consolidated proceeding was $8.374 million. In the Supplementary Costs Report the Referee accepted that the increased estimates reflected Piper Alderman and SPB’s honestly held view at the time the budget was prepared, which views changed as the litigation developed. I accept the Referee’s report in this regard.
2. I approve the costs charged by the applicants’ solicitors with a deduction of $250,000 for costs unreasonably incurred. While the costs appear significant to the uninitiated they are within the range of costs commonly charged and approved in large complex and strenuously defended commercial class actions.

## The proportionality of the costs

1. It is also appropriate to consider the proportionality of the costs, which in the present case take up almost 40% of the settlement.
2. Class actions are to be conducted for the benefit of the applicants and class members rather than for service providers such as lawyers (or funders) and the costs should be proportionate. However, as I said in *Earglow* at [99] proportionality of costs is not necessarily to be measured against the result achieved in the litigation and it can be appropriate to assess it against the amount in dispute. As Beach J said in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330 (***Blairgowrie***) at [181], the proportionality of legal costs cannot be assessed on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. Like Beach J, I consider the appropriate question is the benefit which the solicitors reasonably expected the applicants and class members would achieve not the benefit they actually achieved.
3. I say this, *first*, because in large, complex and strenuously defended class actions it is exceedingly difficult at the commencement of a proceeding to make a reasonably accurate assessment of the quantum of a settlement or judgment that may ultimately be achievable, or of the costs that will necessarily be incurred to achieve that result. Over the life of such proceedings it is common for the views formed at the outset about the risks of the case and the likely quantum of any settlement or judgment to be revised following discovery, evidence preparation and exchange, and mediation.
4. *Second*, any settlement or judgment achieved will to an extent reflect the aggregate claim value. In a class action that is a function of the number of participating class members and the value of their individual claims. In an “open” class action the number of class members who will register and the value of their claims, and therefore the aggregate claim value, cannot be known until after a class member registration process.
5. *Third*, the likely quantum of legal costs can be estimated by the applicant’s lawyers at the outset and a case budget prepared, as in the present case. In large complex and strenuously defended class action litigation the accuracy of the case budget is subject to numerous matters outside the applicant’s solicitors’ control which are exceedingly difficult to accurately budget.
6. In circumstances where the applicant’s solicitors cannot be expected to be completely accurate in assessments they make at the commencement of a case about the level of risk, the likely aggregate claim value and the likely quantum of legal costs, the proper question in relation to proportionality of legal costs is what settlement or judgment amount it was reasonable for the applicant’s solicitors to expect would be achieved by class members, not what they actually achieved. It is true that the applicant’s solicitors know more about the risks of the case than the class members, but that does not mean they should not be paid costs reasonably incurred in pursuing a benefit for class members which they reasonably expected to be achievable. Nor does it mean that the applicant’s solicitors should be punished when, by reason of the strenuous defence of the proceedings, the costs blow out.
7. Having regard to the evidence I am satisfied that the costs as approved are proportionate.

# WHETHER THE SCHEME ADMINISTRATION COSTS ARE REASONABLE

1. Ms Banton filed an affidavit sworn 18 September 2017 in which she estimated the fixed costs and disbursements to be incurred in administering the SDS at approximately $551,270 inclusive of GST. She gave evidence that she anticipated that those costs will be comprised of the following (inclusive of GST):
2. verifying Claim Data and calculating each claimant’s Claim Value Estimate in accordance with the loss assessment methodology, and preparation and issue of Claim Data Notices and Claim Value Estimates to claimants – $178,475;
3. attendances with the applicants and the Funder regarding distributions from the SDS and calculating the distributions including deductions of the reimbursement payment sought by the applicants, the legal costs and any administration costs already incurred – $44,110;
4. attendances with Ms Wright and FTI Consulting in relation to the methodology and distributions – $64,735;
5. communications with claimants and distributing the payments to claimants – $168,300;
6. estimated cost of independent external verification by Ms Wright and FTI Consulting of the calculation of distributions – $20,000;
7. estimated disbursements for accounting and taxation services to prepare the financial statements and tax return for the Scheme – $20,000;
8. miscellaneous printing and other expenses – $4,150; and
9. cost of one further hearing before the Court including preparation of one post-approval report to the Court regarding the work undertaken, the fees incurred, and the distributions made – $50,000.
10. Ms Banton also said that costs might arise from the internal and external review processes available under the SDS, which would vary depending upon how many claimants applied for such reviews. She estimated costs of $3,102 in relation to each claimant that disputes the Claim Value Estimate, and $15,000 in relation to each claimant that refers the dispute to an external review. The orders make an allowance of $181,000 for the costs associated with first level and second level reviews by up to ten Participating Group Members.
11. The Referee was directed to inquire and report on the reasonableness of the legal costs to be deducted from the SDS, which include Scheme Administration Costs. In the First Costs Report the Referee accepted the reasonableness of the proposed Scheme Administration Costs. I approve the proposed Scheme Administration Costs but note that they include an allowance for a certain number of reviews and also for the possible costs of challenging any ATO decision to refuse the GST refunds. If there are fewer reviews under the SDS than Ms Banton estimated as likely or if there is no challenge to any ATO decision SPB must repay that amount to the settlement fund so that it may be distributed to class members.

## Tendering settlement administration work

1. Some commentators have said that the work associated with settlement administration should be the subject of a tender process. In my view there is something to be said for implementing a tender process for such work, as it may be that in some types of class actions, including shareholder class actions, an accounting firm or a claims administration company could undertake this work just as well as the applicant’s solicitors and do so more cheaply.
2. However, any such tender process should be limited and inexpensive because settlement administration costs make up only a small part of the overall costs in class action proceedings, and any cost savings are unlikely to be great. I doubt that a tender process will be appropriate in settlement administrations that require evaluative decisions by the Administrator such as cases involving personal injury, property damage and economic loss claims. Experience teaches that through their interaction with class members over the course of a proceeding the applicant’s solicitors usually obtain a detailed and nuanced understanding of the different categories of claims and of the complexities within each category of claim. Usually the applicant’s solicitors earn the trust of the great majority of class members. Fairness and efficiency in the settlement administration will be enhanced by such an understanding of the claims. The trust in the applicant’s solicitors also enhances efficiency as it means that class members are more likely to accept the Administrators’ evaluative assessments rather than dispute them through the review process.

# WHETHER A COMMON FUND ORDER IS APPROPRIATE, AND IF SO, at what funding rate

1. The proceeding was commenced as an “open” class action and from the outset the class included persons who had entered into a funding agreement with the Funder (described as funded class members) and persons who had not (described as unfunded class members). There are approximately 105 funded class members and 572 unfunded class members who make up the 677 Participating Group Members permitted to share in the settlement monies.
2. Under their funding agreements the funded class members are obliged to reimburse the Funder for the legal costs paid, and to pay a funding commission to the Funder at the rate of 35% or 40% of their gross recovery (i.e. before deduction of legal costs) plus a pro rata share of the Project Management Fee of $756,402. Absent an order of the Court, the unfunded class members have no obligation to pay any share of the legal costs or litigation funding charges.
3. It is uncontentious that unfunded class members in a class action should not receive more in the hand from a settlement or judgment than funded class members, who effectively financed the proceeding by pooling their promises to pay a funding commission to the Funder. Equality of treatment between class members in this regard is usually achieved by way of:
4. a funding equalisation order, as in cases such as *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19 at [14] and [17] per Stone J; *Dawson No 4* at [28]; *Modtech* at [58]; or
5. a common fund order, as in cases such as *Pathway Investments Pty Ltd v National Australia Bank Ltd* (Supreme Court of Victoria proceeding SCI 2010 6249) per Pagone J; *Farey v National Australia Bank Ltd* [2014] FCA 1242 per Jacobson J; *Money Max* at [8]; *Blairgowrie* at[91]-[106]; *Pearson v State of Queensland* [2017] FCA 1096 at [22] per Murphy J. It is settled that the Court has power to make a common fund order in an appropriate case: *Money Max* at [161]-[168].
6. Both types of order are aimed at ensuring that all class members entitled to share in a settlement recover the same pro rata share of the settlement after deduction of legal and funding costs, but they also affect the funder’s return. The different results for funded class members, unfunded class members and a funder under a funding equalisation order compared to a common fund order depends upon the ratio of the value of funded class members’ claims to the value of unfunded class members’ claims, whether “grossing up” is permitted by the funding agreement and the funding rate allowed in any common fund order: *Money Max* at [55]-[56].
7. The ratio of funded class members to unfunded class members in the present case is lower than usual, as there are 105 funded class members and 572 unfunded class members and funded class members’ claims comprise only approximately 33% of aggregate claim value.
8. The Funder seeks a common fund order at a funding rate of 30% of the gross recovery. The applicants did not oppose a common fund order but argued that the funding rate should be less than 30%. The applicants submitted that the parameters of the funding rate should reflect:
9. the financial outcome for class members under a funding equalisation order; or
10. the discounted funding rate to which the applicants are entitled under their side agreement with the Funder, under which they were provided a funding commission rate of 20% with no Project Management Fee.
11. In the circumstances of the present case I consider it appropriate in the interests of justice in the proceeding to make a common fund order at a funding rate of 30% of the gross recovery.
12. I say this, *first*, because without an order equalising the payment of litigation funding charges across the class the entirety of funded class members’ recoveries will go towards paying the Funder. Funded class members’ claims make up approximately 33% of aggregate claim value, which means that their gross recovery will be approximately $6,352,500. That is not even enough to pay the approved legal costs. Even if (as is appropriate) the payment of legal costs is equalised across the class, the balance of funded class members’ recoveries will be eaten up by the funding commission that is payable. There is no good reason why funded class members should carry the burden of the proceeding when unfunded class members also benefit from it. It is in the interests of justice in the proceeding that, through a common fund order, all class members pay the same pro rata share of funding charges from the common fund of the amounts they will receive through the settlement.
13. *Second*, a common fund order at a funding rate of 30% of gross recovery, with no Project Management Fee, is to the benefit of both funded and unfunded class members. In the absence of such an order funded class members will be obliged under their funding agreements to pay funding rates of either 35% or 40% of their gross recoveries plus a pro rata share of the $756, 402 Project Management Fee. They are better off with a 30% funding rate with no Project Management Fee. Unfunded class members are also better off because, if a funding equalisation order were made, they would be saddled with deductions from their recoveries at funding rates of either 35% or 40% plus a pro rata share of the Project Management Fee.
14. *Third*, in my view a common fund order is a simpler and more transparent mechanism for fairly apportioning funding charges across the class than a funding equalisation order. It avoids disputes about whether, on its proper construction, the funding agreement permits the Funder to charge a funding commission on the “grossed up” amount redistributed to funded class members from unfunded class members’ recoveries. It is easier for class members to understand, and it has the benefit that the funding rate is the same for large and small shareholders.
15. *Fourth*, class members were informed in the Registration and Opt Out Notice that orders would be sought requiring class members who had not entered into a funding agreement to pay the Funder a proportion of any amount payable to them under a settlement or judgment, equivalent to the amount they would have paid had they entered into a funding agreement. Class members were able to opt out if they wished to avoid an obligation to pay the Funder a proportion of their recoveries. Class members were informed in the Notice of Proposed Settlement that the applicants intended to apply to the Court for a common fund order at the rate of 35% or 40% plus a Project Management Fee, and that they could object to such an order. Only one class member, Adem, did so and its objection centred on the funding rate and the quantum of legal costs, not whether a common fund order was appropriate. The approved funding rate is lower than that advised to class members.
16. *Fifth*, unless a common fund order is made, notwithstanding that the litigation has been successful for the applicant and class members the Funder will suffer a loss of capital. It cannot recoup all of the legal costs it paid or all of its funding commission from the recoveries of funded class members alone because the amount payable to the Funder is capped by the funded class members’ share of the settlement sum.
17. Further, (using an average funding rate of 37.5% and on the assumptions that “grossing up” is not available to the Funder and that funded class members represent 33% of aggregate claim value) a funding equalisation order will mean the Funder would receive a funding commission of $2.38 million plus a Project Management Fee of $756,402 from funded class members, being a total of $3.138 million. That amounts to only approximately 16.3% of the gross recovery.
18. *Sixth*, Mr Paul Lindholm, the Funder’s authorised representative, gave evidence that a common fund order at a funding rate of 30% of gross recovery would mean the Funder achieved an annualised return on investment of *negative* 3% and a total return on investment of *negative* 20%. It is unnecessary to decide whether the Funder’s rate of return is as poor as that, and the evidence as to the Funder’s weighted cost of capital over the life of the project was opaque, but I accept that at a 30% funding rate the Funder’s rate of return is low.
19. The Court should approve funding rates that “avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder…”: *Money Max* at [82]. It is appropriate to take into account whether the funding rate provides a realistic rate of return for the funder: see *Blairgowrie* at [122].
20. *Seventh,* having regard to the factors set out in *Money Max* at [80] I note:
21. the 30% funding rate is below the rates agreed by sophisticated class members at the outset of the proceeding, i.e. 35% and there is no requirement to pay a Project Management Fee of approximately $756,402;
22. the funding rate is below the rates disclosed to class members in the Notice of Proposed Settlement;
23. the funding rate is within the range of the funding rates available or common in the class action litigation funding market: *Earglow* at [166]-[177]; *Blairgowrie* at [125]-[126];
24. the risks of providing funding in the proceeding are significant, as I have noted;
25. the Funder took on a substantial adverse costs exposure (likely exceeding $10 million) to four separate groups of respondents;
26. the Funder paid legal costs of more than $7.56 million and advanced security for costs of $2.4 million over several years;
27. the proceeding settled for $19.25 million. In *Money Max* (at [86]-[89]) the Full Court indicated that a very large settlement might necessitate a lower commission rate so that the amount paid to the funder is proportionate to the risk the funder assumed. Beach J said the same in *Blairgowrie* (at [160]). This is not a large settlement; and
28. there is only one objection to settlement approval and it does not indicate that a 30% funding rate is unreasonable.

In these circumstances I consider a funding rate of 30% of gross recoveries to be reasonable.

# WHETHER THE APPLICANTS’ REIMBURSEMENT CLAIMS ARE REASONABLE

1. Caason and Wise Plan seek orders for amounts to be deducted from the settlement fund in reimbursement of their respective time and costs incurred in acting as representative applicants to prosecute the proceeding on behalf of class members.
2. It is settled that that a lead applicant who has sacrificed time and incurred expenses in prosecuting a proceeding on behalf of the class as a whole should be entitled to some reimbursement from the corpus of any settlement or judgment. The compensation is for the time and expense attributable to the representative features of the lead applicant’s involvement as a party in the litigation, not to compensate the applicant for the time and expense which are an ordinary incident of the applicant’s involvement in his, her or its own interests: see *Darwalla* at [76]; *Dawson No 4* at [29]; *Matthews* at [423]-[426]; *Farey v National Australia Bank Ltd* [2016] FCA 340at [42] per Beach J; *Newstart* at [47].
3. The question however remains as to the reasonableness of the reimbursement claims made in the present case.

## Caason’s Reimbursement Claim

1. Caason relies on affidavits by Mr Craig Astill, Caason’s managing director, sworn 11 September 2017 (the **Third Astill Affidavit**), 5 October 2017 (the **Fourth Astill Affidavit**), 3 November 2017 (the **Fifth Astill Affidavit**) and an affidavit of Mr Richard Flory, Caason’s General Counsel, sworn 3 November 2017. The material put forward to support Caason’s Reimbursement Claim also supports its claim for Variation Letter Costs, and vice versa.
2. Caason primarily relies on the Third Astill Affidavit in which Mr Astill advanced a Reimbursement Claim of $80,073.88 for the costs associated with the representative aspects of its role as lead applicant. Mr Astill broke down the claim as follows:
3. $8,183.13 for reading and writing emails from and to SPB;
4. $59,752.75 for reading and writing attachments to emails from and to SPB;
5. $6,666 for telephone calls from and to SPB; and
6. $5,472 for attending the mediation on 11 April 2017.
7. Mr Astill said that Caason agreed to act as lead applicant on the basis that he and Mr Flory would be entitled to be paid for the time and expenses incurred in acting in that role, and that their hourly rates would be fixed at 60% of the hourly rates of the senior lawyers for the applicants engaged on the case. This results in rates between $252 and $342 per hour in the period from 2012 to 2017.
8. Mr Astill and Mr Flory are senior officers of Caason, which is the manager of the Caason Group – a large and diverse investments group and private family office with interests in international trade, direct investment, sustainable development and innovation through research and development across multiple sectors and diverse local and overseas markets, with interests in businesses in India, Singapore, Indonesia, Malaysia and Australia, share trading and direct and indirect investments in private and listed companies and businesses in Australia and overseas.
9. Mr Astill’s day-to-day responsibilities within Caason include managing Caason’s private investment in listed and unlisted public companies, private companies and funds; ASX listings, placements, mergers and acquisitions; natural resources, farming, agriculture, mining, mining equipment/services and environmental technologies; and property development, acquisition and renovations. Mr Flory’s day-to-day responsibilities within Caason include drafting and executing contracts of sale and purchase agreements for assets for Caason, providing assistance to Mr Astill in negotiations for mergers and acquisitions, managing commercial disputes and litigation, advising in relation to commercial matters involving intellectual property, technology, mining, agribusiness and international trade, advising in relation to financial matters between Caason and banks and other financial institutions and attending meetings with Mr Astill as required in relation to business and operational matters of Caason.
10. I infer that the time Mr Astill and Mr Florey devoted to Caason’s role as lead applicant would otherwise have been spent in other income-producing activities for Caason. It can be said that Caason has sacrificed valuable time in the interests of prosecuting the proceeding on behalf of class members as a whole. It would be contrary to the “access to justice” policy underpinning the Part IVA regime if lead applicants such as Caason were to be disadvantaged by taking on the role, and Caason should be reasonably compensated for Mr Astill’s and Mr Flory’s time.
11. Mr Astill’s and Mr Flory’s responsibilities within Caason indicate that the hourly cost to Caason of the time they spent working on the proceeding is higher than the hourly rates claimed. Further, the claimed hourly rates fall within the range allowed in similar reimbursement applications: see for example *Darwalla* at [77]-[79]; *Earglow* at [108](c); Morabito Study at 198-201. I consider the hourly rates Caason claimed to be reasonable.

## Wise Plan’s Reimbursement Claim

1. Wise Plan relies on affidavits by Mr Timothy Burke, a director of Wise Plan, sworn 20 September 2017 (the **Third Burke Affidavit**), 5 October 2017 (the **Fourth Burke Affidavit**) and 3 November 2017 (the **Fifth Burke Affidavit**). The material put forward to support Wise Plan’s Reimbursement Claim also supports its claim for Variation Letter Costs, and vice versa.
2. In the Third Burke Affidavit Mr Burke advances a Reimbursement Claim of $76,708.27 (less $9,163 already received) for the costs associated with the representative aspects of its role as lead applicant. Mr Burke broke down the claim as being made up of the total costs of reading and writing emails from and to SPB, reading and writing attachments to emails from and to SPB and telephone calls from and to SPB.
3. Mr Burke is a lawyer and a Certified Practising Accountant by training. He worked for more than 10 years at Macquarie Bank and was a director of Macquarie Corporate Finance Limited until approximately 1996, during which period he was in charge of some large capital raising projects. For the last approximately 20 years he has been self-employed. He is a director of Wise Plan which acts as corporate trustee for the Burke Family Trust. Wise Plan administers and invests the capital of the Trust principally in listed equity securities, and also acts as the corporate trustee for the Burke Superannuation Fund 2. Mr Burke is responsible for Wise Plan’s investment decisions and responsible for the day-to-day management of the Fund.
4. Mr Burke does not charge an hourly rate for his services to Wise Plan or the Fund, and although he has a practising certificate he does not work as a lawyer and charge his time by the hour. He argues that his hourly rate during his time at Macquarie Corporate Finance, $340 per hour in or around 1996, is a reasonable proxy for the purposes of calculating Wise Plan’s Reimbursement Claim.
5. I infer that the time Mr Burke devoted to the litigation would otherwise have been spent on other income-producing activities for Wise Plan, and that Wise Plan has sacrificed valuable time in the interests of prosecuting the proceeding on behalf of class members as a whole. Wise Plan should be reasonably compensated for his time. Mr Burke’s expertise and responsibilities indicate that the hourly cost to Wise Plan of the time he spent devoted to the litigation is higher than the hourly rate claimed. The claimed hourly rate also falls within the range allowed in similar reimbursement applications. I consider the hourly rate of $340 per hour to be reasonable.
6. However, as I now explain, the applicants’ Reimbursement Claims suffer from several serious deficiencies.

## Consideration

1. I do not allow reimbursement payments to Caason and Wise Plan in the amounts they claimed and I consider a substantial reduction is appropriate. I allow reimbursement payments to Caason of $26,730 and to Wise Plan of $22,513. I also allow them a reasonable amount as agreed or as determined by the Court for the costs of and incidental to their application for approval of the Reimbursement Claims.
2. *First*, and most importantly I have reached this view because, notwithstanding that both Mr Astill and Mr Burke understood that Caason’s and Wise Plan’s Reimbursement Claims would be advanced on the basis of time spent, neither Caason nor Wise Plan maintained adequate records in that regard. Their claims are based upon a reconstruction.
3. Mr Astill said that he had responsibility for the management of Caason’s involvement in the proceedings and was assisted in that by Mr Flory. He identifies the tasks they performed in relation to the proceeding as follows:
4. his general practice as the first applicant in the proceedings from October 2012, which involved reviewing all correspondence received from SPB (and I infer also from Piper Alderman when that firm was acting as the applicants’ solicitors) and responding where necessary by email or by telephone;
5. providing day-to-day instructions to the applicants’ solicitors in relation to the general conduct of the proceedings;
6. reviewing advices received from the applicants’ solicitors and considering issues raised in the proceedings;
7. reviewing documents provided by the applicants’ solicitors, including interlocutory applications, affidavits, draft pleadings and submissions and responding where necessary in relation to those documents;
8. time spent preparing his first affidavit in the proceedings (during the period December 2015 to February 2016);
9. time spent preparing his second affidavit in the proceedings (during the period September 2016 to October 2016);
10. time spent preparing for and reviewing materials relevant to the first mediation (during the period April to May 2016)
11. time spent reviewing and giving instructions in relation to the offer made to the respondents to settle the proceedings in May 2016;
12. time spent preparing for and reviewing materials relevant to the second mediation, including time spent reviewing, providing input and instructions on the Registration and Opt-Out Notices, the mediation agreement and strategy discussions, mediation materials, possible mediation outcomes and various exchanges of offers post-mediation, the terms of the Settlement Deed and the terms of the SDS and the evidence required to support the damages modelling (during the period February 2017 to August 2017); and
13. preparing for, travelling to and attending the second mediation on 11 April 2017.
14. Mr Burke said that he had sole responsibility for the management of Wise Plan’s involvement in the proceeding. He identifies the tasks undertaken by Wise Plan in relation to the proceeding as follows:
15. his general practice as the second applicant in the proceeding since February 2013 including:
    1. reviewing all correspondence received from SPB and responding where necessary by email or telephone;
    2. providing day-to-day instructions to SPB in relation to the general conduct of the proceedings;
    3. reviewing advices received from SPB and considering issues raised in the proceedings; and
    4. reviewing documents provided by SPB including interlocutory applications, affidavits, draft pleadings, submissions and responding when necessary in relation to those documents;
16. time spent preparing his first affidavit in the proceedings (during the period December 2015 to February 2016);
17. time spent preparing his second affidavit (during the period September 2016 to October 2016);
18. time spent preparing his evidence in relation to lost opportunity cost;
19. time spent preparing for and reviewing materials relevant to the first mediation (during the period April to May 2016);
20. time spent reviewing and giving instructions in relation to the offer made to the respondents to settle the proceedings in May 2016;
21. time spent preparing for and reviewing materials relevant to the second mediation, including time spent reviewing, providing input and instructions on the Registration and Opt-Out Notices, the mediation agreement and strategy discussions, mediation materials, possible mediation outcomes and various exchanges of offers post-mediation, the terms of the Settlement Deed and the terms of the SDS and the evidence required to support the damages modelling (during the period February 2017 to August 2017).
22. Mr Astill said he reviewed his email account for all emails to and from the applicants’ solicitors since the commencement of the proceedings and said that Mr Flory was copied into all or substantially all of the emails. By reference to his email account Mr Astill calculated the number of emails exchanged between himself (and Mr Flory) with the applicants’ solicitors during the course of the proceedings, as follows:
23. 179 emails he sent to Piper Alderman between 26 September 2012 and 6 January 2015; and
24. 292 emails he sent to SPB between 23 January 2015 and 11 September 2017.

Mr Astill also said that he had received 1,213 emails since opening his file in relation to Arasor in or around 2006. Mr Astill did not say how this last category related to Caason’s Reimbursement Claim and, *prima facie*, they do not given Caason did not agree to become the lead applicant until September 2012.

1. Mr Burke exhibits screenshots of his email account for the period February 2014 to January 2017, some annotations he made to the screenshots and some notes. He describes them as his time records, but in my view that description is not apt.
2. Caason and Wise Plan did not maintain contemporaneous records of the time spent on the tasks Mr Astill and Mr Burke identified, nor indeed adequate records as to whether Mr Astill, Mr Flory or Mr Burke attended to those tasks at all. Mr Burke’s annotations do not record the time taken in relation to each email or attachment and they were not made contemporaneously. They are just a reconstruction made years after the event. Although Mr Astill and Mr Burke each identify a comprehensive list of tasks on which they said they were engaged at the relevant time, 84.8% of Caason’s Reimbursement Claim relates to the time Mr Astill and/or Mr Flory spent reading and/or writing emails and attachments sent from and to SPB, as does the great bulk of Wise Plan’s Reimbursement Claim.
3. The applicants largely sought to justify their Reimbursement Claims though a reconstruction prepared by SPB of the time Mr Astill, Mr Flory or Mr Burke (**the company officers**) *would have* spent on such emails and attachments, doing so by using the following methodology (the **SPB Schedules**):
4. collating and reviewing all emails sent by SPB to the company officers and by them to SPB;
5. reviewing the emails and attachments to determine whether they related to time spent in a representative capacity, and only including those that did;
6. so as to avoid double counting time spent, if an email or attachment was sent by either Mr Astill or Mr Flory and reviewed by the other, not allowing that reviewing time. If an email or attachment was sent to both Mr Astill and Mr Flory, only allowing the time of one officer;
7. if the company officer was sent multiple emails containing a similar attachment with amendments, only the time for reviewing the pages where the amendments were made is counted;
8. if the company officer sent an email to SPB including attachments which did not require him to prepare a particular attachment then no time is allowed for the cost of writing or sending those attachments.
9. copying the contents of the relevant emails and attachments into Microsoft Word to obtain a word count;
10. allowing the company officers 200 words per minute to read an email or attachment from SPB, and 25 words per minute to write an email or attachment;
11. applying the applicable hourly rate, for Caason 60% of the hourly rate of senior lawyers engaged in the proceeding, and for Wise Plan $340 per hour; and
12. setting out the emails and attachments, time spent and costs incurred in a schedule.
13. In the finish Caason and Wise Plan did not adduce evidence to demonstrate the actual time the company officers spent. The SPB Schedules do not go much further than counting the emails and attachments, counting the words, and applying a standard formula to those variables to calculate the respective Reimbursement Claims.
14. Nor do Mr Astill or Mr Burke distinguish between substantial and routine emails. Many of the emails listed in the SPB Schedules are less than 25 words and reading or writing such an email should not be equated with a 200-500 word email or attachment of which there are few. Many of the short emails are likely to have been routine and to have required little more than a skim read or quick glance. In relation to the longer emails and attachments it is unlikely that Mr Astill and Mr Burke fully considered all of them. It is likely that some were uncontroversial, that the thrust of some was explained by telephone, that for some they would have relied on their solicitor’s recommendation, and sometimes they would have been too busy with other work to consider the email. The notion that Mr Astill, Mr Flory or Mr Burke fully considered each email and attachment sent to them flies in the face of common experience, and I do not accept that they did.
15. They are the parties that stand to benefit from allowing the Reimbursement Claims and it was Caason’s and Wise Plan’s responsibility to maintain the records on which their Reimbursement Claims were to be based. The consequences of the deficiencies in the evidence should fall on them: *Darwalla* at [80].
16. Although I would not set out a hard and fast rule in this regard, there is force in the remarks of Gordon J in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 2)* [2013] FCA 1163 at [10]. In relation to the reimbursement claim in that case her Honour said:

If a claim of this nature is to be made, then the claim cannot be reconstructed after the event. Consideration needs to be given at the commencement of the litigation as to how the claim might be made and, in particular, how the work undertaken might be contemporaneously recorded. If, for example, there is to be a claim based on hourly rates on the basis that the work on the litigation impacted on the earning capacity of the lead applicant, then not only will the time need to be recorded, but a proper foundation for the rate or rates will need to be provided as well as sufficient particulars of the work undertaken to justify the cost being imposed on *all* group members. Of course, the rate may change throughout the life of the claim.

1. *Second*, both Mr Astill and Mr Burke seem to proceed on the basis that they were responsible for day-to-day decisions in relation to the proceeding, but they were not. Under cl 5.1 of the funding agreement the Funder was obliged to advise the applicants on strategy, coordinate the lawyers, barristers and expert witnesses and provide day-to-day instructions to the lawyers, subject to Caason’s and Wise Plan’s right under cl 12.3 to override such instructions by themselves giving instructions to the lawyers. Even if, in fact, Mr Astill, Mr Florey and Mr Burke read all the emails and documents they claim, they were not obliged to do so and the costs of their doing so should not be visited on the class.
2. *Third*, Professor Vince Morabito has conducted an empirical analysis of the justification for and the quantum of reimbursement payments made to 44 applicants in Part IVA proceedings up to September 2013: An Empirical and Comparative Study of Reimbursement Payments to Australia’s Class Representatives and Active Class Members (2014) 33 *Civil Justice Quarterly* 175, 185 (the **Morabito Study**). Although Caason’s and Wise Plan’s claims are within the range reported in the Morabito Study (at 186, 188 and 200) they are at the high end. The highest reimbursement award made is $268,243, which I consider to be an outlier. As at September 2013 the average total reimbursement award was $68,785.
3. I note also that expenses incurred by a lead applicant are commonly rolled up into the higher reimbursement awards and there is no evidence of any actual expenses incurred by Caason or Wise Plan. Caason’s claim is significantly higher than two, and marginally higher than the other, of the three lead applicants in *Darwalla*, even though that was an unfunded class action and one would expect those lead applicants to have more actively supervised the proceeding than Caason was required in the present case.
4. *Fourth*, both Caason and Wise Plan have enjoyed or may enjoy other benefits from acting as the lead applicant:
5. pursuant to the Variation Letters, both Caason and Wise Plan are entitled to a 50% discount on the funding rates in the funding agreement and they will pay only a 20% funding rate;
6. over the years up to 30 June 2017 Caason claimed and received GST refunds from the ATO totalling $397,251.51 of the GST on legal costs invoices the Funder paid. As at 3 November 2017 Caason had not remitted any of those monies to the Funder and I infer that Caason has had the use of those monies for a significant period; and
7. pursuant to the Variation Letters, the Funder is obliged to pay Caason’s and Wise Plan’s reasonable costs for their own legal, accounting and administrative work and the time of nominated company officers. Caason’s Variation Letter Costs Claim totals $690,608.26 and Wise Plan’s totals $76,763.50 (less $9,163 already received), less any amounts ordered in relation to their Reimbursement Claims.

It is appropriate to take these matters into account when in large part the rationale for allowing such reimbursement payments is to ensure that persons who agree to take on the role of lead applicant for the benefit of the class are not out of pocket by doing so.

1. *Fifth*, class members were not informed in the Opt Out Notice and only obliquely informed in the Notice of Proposed Settlement that Caason and Wise Plan would make the Reimbursement Claims. The class members should have been given notice and an opportunity to object: see *Boase v Sullivan Commercial Pty Ltd trading as McGee’s Property (No 3)* [2013] FCA 15 at [11] per McKerracher J and the US and Canadian authorities cited in the Morabito Study at 202.
2. In the present case the failure to inform class members is aggravated because Caason and Wise Plan entered into secret side agreements with the Funder. I describe them as secret because there is nothing in the evidence to indicate that the existence of the Variation Letters was disclosed to the class members.
3. Under the Variation Letters Caason and Wise Plan are entitled to a 50% reduction in the funding rate, not required to pay a pro rata share of the Project Management Fee, and entitled to reimbursement of their reasonable costs for their own legal, accounting and administrative work including Mr Astill’s or Mr Burke’s time. Had class members been informed that Caason and Wise Plan were to receive these benefits they may well have objected to *any* reimbursement payment being made to Caason and Wise Plan. Class members could reach the view that Caason and Wise Plan were not out of pocket as a result of the time spent by Mr Astill or Mr Burke because they were entitled to be reimbursed in full pursuant to the Variation Letters.
4. Even so I accept that that Mr Astill, Mr Flory and Mr Burke spent considerable time in acting as lead applicants, and that some of the time they spent, such as the time taken in telephone attendances on SPB and Mr Astill’s and Mr Flory’s attendance at the mediations, is not contentious. The applicants should be compensated for the reasonable time of Mr Astill, Mr Flory and Mr Burke spent in taking on the obligations of lead applicant that would otherwise have been spent in income earning activities.
5. In the circumstances of the case it is appropriate to take a cautious approach, and only allow reimbursement payments in the amounts set out above.
6. In passing I note that the parties should not proceed on the assumption that my views in relation to Caason’s and Wise Plan’s Reimbursement Claims will automatically or necessarily be transposed to the determination of the Variation Letter Costs Claims when those claims are heard. It seems likely that some different considerations will apply.

# THE SIDE AGREEMENTS

1. Before dealing with the issues surrounding the Variation Letter Costs Claims there is a broader issue in relation to the Variation Letters which I will not let pass without comment.
2. On about 7 December 2012 Mr Astill signed a funding agreement with the Funder on Caason’s behalf, and at around the same date he signed the Variation Letter to vary the funding agreement (**Caason Variation Letter**). On or about 21 June 2013 Mr Burke signed a funding agreement with the Funder on Wise Plan’s behalf, and I infer that he signed the Variation Letter at around the same time (**Wise Plan Variation Letter**).
3. The Variation Letters are side agreements which significantly improve the funding terms for Caason and Wise Plan. I infer that the Funder provided the letters to sweeten the funding arrangements so as to procure Caason’s and Wise Plan’s agreement to act as lead applicants.
4. There is no evidence that class members were ever informed of the existence or terms of the Variation Letters. In my view such secret side agreements between a funder and a representative applicant must be deprecated.
5. In his affidavit sworn 14 November 2017 (the **Second Lindholm Affidavit**) Mr Lindholm said, and I accept, that the cost of the applicants’ reduced funding rate would be borne by the Funder as a reduction in its overall commission rather than be a cost shared by the class members as would the cost of waiving the applicants’ pro rata share of the Project Management Fee. Even so, I consider class members have a legitimate interest in knowing whether the representative applicant is to receive a special deal. Amongst other things, failure to disclose the special funding rate meant class members were denied an opportunity to try to negotiate a lower funding rate themselves. Failure to disclose that the Funder had agreed to pay the applicants’ reasonable legal, accounting and administrative costs and for Mr Astill’s and Mr Burke’s time denied class members an informed opportunity to object to the applicants’ Reimbursement Claims. Class members should not have been left in the dark in this regard.
6. The applicants’ solicitors have an obligation to protect class members’ interests and if Piper Alderman or SPB were aware of the Variation Letters they should have ensured the class members were informed of their existence and terms. Ms Banton disclosed the Variation Letters to the Court as part of “Confidential Exhibit AKB 10” to her affidavit sworn 18 September 2017 but there is no evidence that they were ever disclosed to class members. There is also no evidence as to when Ms Banton was first made aware of the side agreements.
7. I direct Ms Banton to file an affidavit within 14 days which discloses when and in what circumstances she (or another solicitor at Piper Alderman or SPB) first became aware of the Variation Letters, and to explain why class members were not informed. I have not made orders in this regard but will do so if that becomes necessary.

# THE VARIATION LETTER COSTS DISPUTE

## The procedural background

1. When the settlement approval application first came before the Court on 6 October 2017 several of the issues raised essentially concerned Caason’s and Wise Plan’s ‘personal’ interests, i.e. their Reimbursement Claims, their Variation Letter Costs Claims, and Caason’s claim for an equitable set-off of the Variation Letter Costs amount against the GST refunds it has an obligation to remit.
2. On 6 October 2017 I heard those parts of the settlement approval application which were ready for determination. I informed the parties of my views at the time and on 18 October 2017 made orders:
3. giving leave to the applicants to be separately represented for the purposes of those claims;
4. requiring that by 3 November 2017:
   * 1. the applicants file and serve any evidence and submissions in support of any Variation Letter Costs Claim additional to their Reimbursement Claims;
     2. Caason file and serve any evidence and submissions in support of any claim to retain any part of the GST refunds it had received from the ATO; and
     3. the applicants file and serve any evidence and submissions in respect of the contractual or other relationship between them and the Funder under the Variation Letters and its bearing if any on the case;
5. requiring that by 8 November 2017 the Funder file and serve any evidence and submissions in response;
6. listing Caason’s and Wise Plan’s ‘personal’ claims for hearing on 16 November 2017.
7. The applicants’ interests in those claims are different to the class members’ interests and I considered it appropriate that the applicants be separately represented. Both applicants filed further affidavits and written submissions in support of their personal claims and they were jointly represented by counsel at the hearing on 16 November 2017.
8. Caason accepts that, if it is entitled to claim GST refunds, then under the funding agreement and the Variation Letter it is obliged to remit any GST refunds it received to the Funder. It contends however that the Court cannot or should not determine any question about the respective rights and obligations of Caason and the Funder in respect of GST refunds collected by Caason because: (a) the Court lacks jurisdiction to decide the Variation Letter Costs Claims and the GST Refunds Issue; (b) it is entitled to an equitable set-off of its obligation to remit the GST refunds to the Funder against the Funder’s obligation to pay its Variation Letter Costs Claims; and (c) the Court should decline to decide the Variation Letter Costs Claims because, amongst other things, the claim should proceed on pleadings and the applicants wanted to put on further evidence to establish those claims.
9. It is common ground that the Court should decide the Reimbursement Claims and, as I have previously explained, I have done so. For the reasons I explain below I made orders on 6 December 2017 to deal with the other ‘personal’ issues as follows:
10. in response to the applicants’ submission that they were not ready to proceed with their Variation Letter Costs Claims I made orders timetabling the provision of further evidence and listing the Variation Letter Costs Claims for hearing on 19 February 2018;
11. I refused Caason’s claim for an equitable set-off of its (admitted) obligation to remit to the Funder the GST refunds it had received against its entitlements under its Variation Letter Costs Claim. The orders require Caason to pay the sum of $397,251.51 in GST refunds it received within seven days, and to repay any further GST refunds within seven days of receipt; and
12. to mitigate Caason’s concern that the Funder will not disgorge the GST refunds (if that is the result of the ATO review) the orders provide that the GST refunds be paid to the Scheme Administrator to be held on trust pending the result of the ATO review. Depending upon the result of that review the input tax credit monies are to be: (a) returned to Caason; (b) paid to the ATO; or (c) paid into the settlement fund for distribution to the class members.

## The factual background

### The GST Refunds Issue

1. It is common ground between the parties that under *A New Tax System (Goods and Services) Act 1999* (Cth)(the **GST Act**), while the Funder pays GST as a component of the legal costs paid on behalf of Caason and Wise Plan, it is Caason who is entitled to claim GST refunds from the ATO in respect of that GST. The ATO is currently reviewing Caason’s entitlement to claim GST refunds but that is not an issue before the Court. Wise Plan does not assert an entitlement to claim GST refunds.
2. Clause 15 of the funding agreement provides that, if entitled to do so, Caason shall claim GST refunds from the ATO for the GST paid or payable in respect to the legal costs invoiced, and remit to the Funder any GST refunds received. It states:

**Input Tax Credits on Legal Costs**

15.1 In this clause 15 the following expressions shall have the following meanings:

(a) **ATO** means the Australian Taxation Office;

(b) **BAS** means a business activity statement;

(c) **Creditable Acquisitions** has the same meaning given to the term “creditable acquisitions” in the GST Act;

(d) **Input Tax Credit** has the same meaning as the expression “input tax credit” as in the GST Act;

15.2 [Caason] must not claim any Input Tax Credit for the GST paid or payable with respect to any Legal Costs unless such a claim is made by [Caason] for an on behalf of [the Funder] for the benefit of [the Funder] pursuant to clause 15.3.

15.3 In the event that [Caason] is entitled to any Input Tax Credit for the GST paid or payable as part of the Legal Costs [Caason] must:

(a) when legally entitled to do so, lodge with the ATO a BAS for each tax period during the course of this Agreement and must do so within the prescribed timeframes;

(b) include in its BAS for the relevant tax period the amount of Input Tax Credit that it is entitled to claim in respect of its Creditable Acquisitions that were paid for as part of the Legal Costs; and

(c) repay to [the Funder] the amount of the Input Tax Credit referred to in clause 15.3(b):

(i) within 7 days upon receipt of the refund from the ATO; and/or

(ii) in the event that the ATO credits the amount of any such Input Tax Credit to which [Caason] is entitled against any other tax liability of [Caason], then within 7 days of notification by the ATO that such a credit has been made.

15.4 For the avoidance of doubt, [Caason] acknowledges that [the Funder] is beneficially entitled to the Input Tax Credits referred to in this clause 15 and undertakes to provide [the Funder] with the benefit of all the Input Tax Credits received.

1. The Caason Variation Letter includes a provision to similar effect. It states:

…Caason must also file BAS statements that recover the full GST component of the Legal Costs (as defined in the Caason Funding Agreement) paid by [the Funder] and must make the amount equal to the GST component of the Legal Costs available to [the Funder].

1. Caason has claimed GST refunds from the ATO in relation to the legal costs paid by the Funder over the years up to 30 June 2017 and in that period it collected a total of $397,251.51. It has lodged further claims with the ATO for GST refunds of $220,385 pursuant to invoices for legal costs rendered up to 30 June 2017, and those claims have not yet been accepted. In addition to those claims Caason proposes to lodge further claims for GST refunds of $80,072.66 once the ATO review is complete (subject to its outcome). The total amount of GST refunds relevant to the dispute between Caason and the Funder is therefore $697,709.17.
2. Under the funding agreement the GST component of the legal costs paid by the Funder forms part of the outlay that the Funder is entitled to recover from the applicants and funded class members. Clause 11.1(a) of the funding agreement provides for the applicants and funded class members to pay a pro rata share of the legal costs and GST the Funder paid, from any settlement or judgment achieved. To the extent that the Funder does not recover the GST it has paid, it is entitled to be reimbursed that amount from the settlement monies pursuant to cl 11(a).
3. If the result of the ATO review is that Caason was not entitled to claim GST refunds then it will be obliged to pay back to the ATO the amounts it received and *prima facie* the Funder will have no entitlement to any amount from Caason in respect of the GST refunds. Under cl 11(a) of the funding agreement the Funder would be entitled to be reimbursed from the settlement fund for the GST it paid, which would reduce the monies available for distribution.
4. If the result of the ATO review is that Caason was entitled to claim GST refunds then it is obliged under the funding agreement to remit any such amounts received to the Funder and the Funder will not then be entitled to be reimbursed from the settlement fund.

### The Variation Letter Costs Claims

1. I have not decided the applicants’ Variation Letter Costs Claims. I set out the facts below to explain the orders made and I may reach a different view on a full hearing.
2. Mr Astill said, and I accept, that in early discussions he told Mr Lindholm that being involved in the preparation and running of the case against Arasor would be a major distraction from Caason’s normal business activities. He said that if Caason was to become the lead applicant it would need to be properly compensated by the Funder for the time and energy it would expend. At around the same time he had discussions with Mr Lindholm in which they agreed on a 60% benchmark hourly rate measured against the senior lawyers working on the case.
3. That the parties reached such an agreement is apparent from the Caason Variation Letter which states:

Caason will be entitled to be paid its reasonable costs for its own legal, accounting and administrative work including Craig Astill’s time when and if necessary, such costs will be calculated on a reasonable hourly rate which will not be more than 60% of the hourly charge out rate of the senior lawyers in the funding agreement.

In order to obtain the benefit of the above variation, Caason must also file BAS statements that recover the full GST component of the Legal Costs (as defined in the Caason Funding Agreement) paid by ILP and must make the amount equal to the GST component of the Legal Costs available to ILP.

The Wise Plan Variation Letter similarly provides for Wise Plan to be paid its reasonable costs for its own legal, accounting and administrative work including Mr Burke’s time at the rate of $340 per hour. It also notes that Wise Plan is not obliged to recover the GST paid by the Funder.

1. There is, however, a dispute between Mr Astill and Mr Lindholm as to whether the parties agreed that Caason is entitled to offset its reasonable legal, accounting and administrative expenses under the Variation Letter against the GST refunds it received. The difference in the evidence is that:
2. Mr Astill states in the Fifth Astill Affidavit that “in or around 2015” Caason advised the Funder that it would invoice the Funder for its Variation Letter Costs on the conclusion of the matter and that it would only pay the Funder any difference between the GST it was refunded and any shortfall for its Variation Letter Costs. He said that from 2015 the Funder took no further action in that regard until the proceeding was settled; and
3. in the Second Lindholm Affidavit Mr Lindholm denies that there was ever any agreement that Caason would retain the GST refunds and only pay the Funder any difference between the GST refunds it and any alleged costs shortfall at the conclusion of the matter. Mr Lindholm exhibits to his affidavit an email exchange between himself and Mr Astill, shortly before Mr Astill signed the Variation Letter, in which he rejected Mr Astill’s request to amend the Variation Letter so that Caason was permitted to deduct its Variation Letter Costs from any GST refunds it received. Mr Astill signed the Variation Letter without obtaining the changes that he sought.

That difference in the evidence is a matter for the hearing and I do not now decide the issue.

1. Although Caason provided an indicative estimate of its Variation Letter Costs Claim on 26 May 2017 it did not substantiate its claim until 3 November 2017 when Mr Astill quantified the claim in the sum of $690,608.26 (plus an estimated $70,000 for further costs it claims it has or will incur) in his Fifth Affidavit.

## Whether the Court has jurisdiction to determine the GST Refunds Issue and the Variation Letter Costs Claims

1. In written submissions the applicants contend that the Court does not have jurisdiction to determine any questions about the respective rights and obligations of Caason and the Funder in respect of its Variation Letter Costs Claims and the GST refunds collected by Caason. They submit:

[I]t is not at all clear that any dispute as to the rights and obligations of Caason and the Funder inter se is part of the matter currently before the Court and within the reach of ss33V and 33ZF of the Federal Court Act.

1. In oral submissions counsel for the applicants expanded that contention as follows:

… But the two ways in which your Honour might deal with this that were identified by my friend are section 22 of the Federal Court Act or section 33ZF. As to section 22, that section makes it plain that the power to grant remedies must be in respect of a claim properly brought forward: that is by an originating process of some kind, whether pleadings are required or not, but by some process that activates the judicial power of the Commonwealth and provides procedural fairness. So that’s the point about section 22. The power in section 33ZF is what’s appropriate or necessary to ensure that justice is done in a proceeding. Firstly, the proceeding that one is speaking of there is the proceeding for the approval of the settlement. It’s not a proceeding for the resolution of all rights between parties to funding agreements. It’s for approval of the settlement. And for reasons that I want to develop, properly analysed, the inter se dispute between my client and the funder should have no impact on distribution of the settlement sum.

1. The submission that the Court lacks jurisdiction is not clearly articulated but it appears to be based in the fact that the Funder’s obligation to pay the applicants their reasonable Variation Letter Costs and Caason’s obligation to remit to the Funder the GST refunds it received arise from the contractual arrangements between those parties. I have no difficulty in accepting that in many circumstances the Federal Court will not have jurisdiction in relation to a dispute that arises from the contractual arrangements between a litigation funder and class members. But in the circumstances of the present case I consider the Court has jurisdiction.
2. By s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), enacted in 1997, the Federal Court is conferred with jurisdiction in any matter arising under a federal law. The word “matter” adopts the meaning and content given it in ss 75, 76 and 77 of the Constitution. In context it means the underlying justiciable controversy or dispute between the parties, made up of the substratum of facts, claims and defences representing or amounting to the dispute, of which the federal issue forms part. It means more than the legal proceeding between the parties, and is identifiable independently of such proceedings: *Fencott v Muller* (1983) 152 CLR 570 (***Fencott***) at 603-608 per Mason, Murphy, Brennan and Deane JJ; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (***Re******Wakim***) at [135]-[138] per Gummow and Hayne JJ.
3. In *Re Wakim* Gummow and Hayne JJ explained at [140]-[141]:

What is a single controversy “depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships” [*Fencott* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ]. There is but a single matter if different claims arise out of “common transactions and facts” or “a common substratum of facts” [*Philip Morris* (1981) 148 CLR 457 at 512 per Mason J], notwithstanding that the facts upon which the claims depend “do not wholly coincide” [*Fencott* (1983) 152 CLR 570 at 607 per Mason J, Murphy, Brennan and Deane JJ]. So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other [*Philip Morris* (1981) 148 CLR 457 at 512 per Mason J], as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination. Conversely, claims which are “completely disparate” [*Felton v Mulligan* (1971) 124 CLR 367 at 373 per Barwick CJ], “completely separate and distinct” [*Philip Morris* (1981) 148 CLR 457 at 521 per Murphy J] or “distinct and unrelated” [*Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 482 per Stephen, Mason, Aickin and Wilson JJ] are not part of the same matter.

Often, the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter. By contrast, if the several proceedings could not have been joined in one proceeding, it is difficult to see that they could be said to constitute a single matter.

1. The Court also has jurisdiction, sometimes referred to as accrued jurisdiction, to deal with non-federal parts of matters where they are part of a “single justiciable controversy”; that is, they are attached to and not severable from federal claims within jurisdiction. What is a single justiciable controversy depends on what the parties have done, the relationships between them and the laws which attach rights or liabilities to their conduct and relationships: *Fencott* at 608; *Re Wakim* at [140]. As their Honours said in *Fencott* at 608:

In the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter.

Practically speaking, whether the focus of the inquiry is the scope of the “matter” or the Court’s accrued jurisdiction the question is whether there is a “single justiciable controversy”.

1. *First*, there is no suggestion that the Court lacks jurisdiction to determine the substantive proceeding. Section 33V of the Act provides that the proceeding may not be settled without Court approval and the purpose of that power is to ensure that the settlement is fair and reasonable having regard to the interests of class members who will be bound by it: *Richards* at [7]. Although the Funder is not a party to the proceeding, the justiciable controversy is broader than the legal proceeding between the parties and it includes the question as to the reasonableness of the settlement.
2. Under the SDS to be approved by the Court, whether or not (and when) Caason remits the GST refunds it received (or will receive) to the Funder affects the amount that ultimately goes to class members. This is because prior to distributing any of the settlement sum to the class members, the Funder is entitled to be reimbursed for the Court-approved legal costs and GST it paid. To the extent that Caason does not remit the GST refunds the settlement fund will be less. To the extent that there is delay in Caason remitting GST refunds that too will affect the amount available for distribution to class members.
3. The orders made on 6 December 2017 provide for $7,564,026.06 to be paid to the Funder in reimbursement of the legal costs and GST it paid. If Caason had remitted to the Funder the $397,251.51 in GST refunds it received in the period until 30 June 2017, the amount to be paid to the Funder would have been less by that amount. If Caason had lodged its additional claims for GST refunds of $220,385 in a timely way and remitted those monies to the Funder that would have further reduced the amount to be paid to the Funder. The impact on class members’ recoveries just described shows that the GST Refunds Issue is important to class members and relevant to the Court in assessing the reasonableness of the settlement.
4. Caason contends that it is entitled to retain the GST refunds it received pending determination of its Variation Letter Costs Claim, which it says must be heard in a different court. It has not however commenced any such proceeding and it seems likely that it will be one to two years before another court could hear the claim. That would mean class members would suffer significant delay before the question as to the distribution of up to $697,709.17 in GST refunds is resolved. That delay is a matter of importance to class members and to the Court in assessing the reasonableness of the settlement.
5. For these reasons, whether and/or when any GST refunds received by Caason are required to be remitted to the Funder is inextricably linked to the reasonableness of the settlement. The Court has power under s 33V(2) to make such orders as are just with respect to the distribution of settlement monies in a class proceeding, and the GST Refunds Issue has a direct potential impact on the class members’ ultimate recoveries: see *Earglow* at [133]. Caason’s and the Funder’s rights and obligations in relation to the GST refunds are therefore properly treated as part of the justiciable matter before the Court.
6. *Second*, the applicants’ Variation Letter Costs Claims form part of the same justiciable controversy as the applicants’ Reimbursement Claims, based as they are on the same substratum of facts, claims and defences. As Gummow and Hayne JJ noted in *Re Wakim*, a touchstone of the existence of a single justiciable matter is whether, if the claim in question were tried in a different court, there would be a risk of an inconsistent verdict. I have made findings regarding the sufficiency of the evidence adduced by the applicants in support of their Reimbursement Claims and the applicants rely upon essentially the same evidence and loss methodology in their Variation Letter Costs Claims. The Funder opposes the applicants’ Variation Letter Costs Claims on the same basis as it opposed the applicants’ Reimbursement Claims.
7. Notwithstanding that some different considerations may apply in deciding the Variation Letter Costs Claims, there is a risk of inconsistent findings if those claims are heard by a different court. The applicants accept that the claims overlap to the extent that any amounts they were awarded in respect to the Reimbursement Claims must reduce their Variation Letter Costs Claims. It could not sensibly be said that the Variation Letter Costs Claims are “completely disparate” or “distinct and unrelated” from the Reimbursement Claims.
8. Further, Caason accepts that if the Court has jurisdiction to deal with the GST Refunds Issue it has jurisdiction to deal with the Caason’s Variation Letter Costs Claim.

## Whether the Court should determine the GST Refunds Issue and the Variation Letter Costs Claims

1. In written submissions the applicants contend that, if contrary to their submissions the Court has jurisdiction to decide the questions about the respective rights and obligations of the applicants and the Funder in respect of the applicants’ Variation Letter Costs Claims and the GST refunds collected by Caason, it should decline to do so. They submit:

…even if such a dispute is within the reach of [s 33V and s 33ZF of the Act], if the rights and obligations of Caason and the Funder are to be resolved, it should occur by way of properly pleaded claim commenced by one of those parties in a court of competent jurisdiction allowing for full evidence and relevant interlocutory processes. A resolution without affording those elements of procedural fairness would not be “just” to either party.

1. I do not accept this contention.
2. *First*, the applicants are of course entitled to procedural fairness but there is nothing to show that they have or would suffer any unfairness from the orders made. The applicants raised their Reimbursement Claims and Variation Letter Costs Claims on 6 October 2017, but were not ready to proceed on that date. I therefore made orders allowing them until 3 November 2017 to file and serve any evidence and submissions in support of any Variation Letter Costs Claim additional to their Reimbursement Claims, and adjourned the matter for hearing on 16 November 2017. At this resumed hearing both applicants had filed further evidence and were jointly represented by counsel, but submitted that the four weeks they were given was insufficient to put on material that would establish their contractual claim under the Variation Letters. Counsel for the applicants went as far as to say that the applicants’ evidence at that time was insufficient to establish their contractual claims and the amount of Caason’s claimed set-off. Given the unusual nature of the dispute and, on the basis that settlement distribution would not be further delayed, I granted the applicants additional time for evidence and set down the Variation Letter Costs Claims for hearing on 19 February 2018.
3. Having regard to the time extensions they were allowed I do not consider the applicants have suffered procedural unfairness.
4. *Second*, having regard to s 22 of the Act the Court should decide the Variation Letter Costs Claims and the GST Refunds Issue. Section 22 provides:

**Determination of matter completely and finally**

The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

1. The provision does not confer additional jurisdiction, but it empowers the Court to dispose of all rights, legal and equitable, in the one action, so far as that is possible: Thomson Australian Holdings Ltd v Trade Practices Commission (1981) 148 CLR 150; [1981] HCA 48 at 161 per Gibbs CJ, Stephen, Mason and Wilson JJ. The critical question is the meaning to be given to the expression “properly brought forward”. That expression should be construed liberally so that its operation may not be unnecessarily restricted: *McLeish v Faure* [1979] FCA 38; (1979) 25 ALR 403 at 413 per Sweeney, Evatt and Northrop JJ.
2. Caason contends that it is entitled to retain the GST refunds it received pending determination of its Variation Letter Costs Claim. Provided the Court has jurisdiction it is appropriate that those claims be heard now rather than requiring the issue of fresh proceedings, more legal costs and further delay. Section 22 requires this Court to avoid such multiplicity of proceedings.
3. *Third*, s 37M of the Act provides that the overarching purpose of the civil practice and procedure provisions is the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. The substantive proceeding was filed in 2012 and it is finally at the stage of settlement approval. It will be quicker, less expensive and more efficient for this Court rather than another to determine the rights and obligations of the applicants and the Funder in relation to the GST Refunds Issue and their Variation Letter Costs Claims, consistently with the overarching purpose.

**Whether to allow the equitable set-off claim**

1. Caason contends that it is entitled to an equitable set off of its obligation to remit the GST refunds to the Funder against its entitlement to be paid Variation Letter Claim Costs. It argues that the two claims are inextricably linked, that the GST Refunds Issue and its Variation Letter Costs Claim share a common substratum of facts, and that its entitlement to Variation Letter Costs “spring[s] up immediately” on payment of a GST refund. It submits that its Variation Letter Costs have been incurred and it has an immediate right to recover them upon remittal of the GST refunds to the Funder. It contends that it would be unconscionable to order that Caason remit the GST Refunds it received to the Funder and leave Caason with only a contractual claim against the Funder for its Variation Letter Costs Claim.
2. Caason also contends that allowing its claim for equitable set-off is particularly appropriate in circumstances where its entitlement to claim GST refunds is the subject of the ATO review, which may find that Caason is not entitled to the GST refunds it has received. It says that, if that is the case, there will be no obligation for it to remit the GST refunds to the Funder. Caason submits that it would not be just to require it to remit monies to the Funder which it may not owe and which it may be required to disgorge to the ATO. Caason also expresses a concern that, if the ATO review finds that Caason was not entitled to the GST refunds in the first place, the Funder (which is based in Singapore) might not disgorge the GST refunds remitted to it.
3. Caason contends that however the GST Refunds Issue is resolved there will be no deduction from the settlement fund and no injustice to the Funder if an equitable set-off is allowed. On its submissions the Funder will receive only the overall amount to which it is entitled.

### Consideration

1. In order to set up a defence of equitable set-off the applicant must have a cause of action – i.e. it must be able to establish the constituent elements of a cross-claim against the other party which gives rise to a legal liability. Beyond the mere existence of a cross-claim the applicant must also show a good equitable ground for being protected against the demand of the other party, such that the entitlement of the latter to satisfaction of his or her demand is impeached: see *Rawson v Samuel* (1841) 41 ER 451 at 458-9 per Lord Cottenham: *Roadshow Entertainment Pty Ltd v (ACN 053 006 269*) (1997) 42 NSWLR 462 (***Roadshow***).
2. What constitutes a good equitable ground depends upon the circumstances and is not capable of precise formulation: *Gibb Australia Pty Ltd v Cremor Pty Ltd* (1992) 108 FLR 129 at 135. In *AWA Ltd v Exicom Australia Pty Ltd* (1990) 19 NSWLR 705 (***Exicom***), after an extensive review of the case law in Australia and the United Kingdom, Giles J concluded (at 712):

In the consideration of all the circumstances of the case no mechanical test can be applied. … The ultimate question is whether, bearing in mind that the existence of [the defendant’s] claim is not enough and that something more is needed, sufficient to warrant the intervention of equity to protect [the defendant], it would be unjust or inequitable that [the plaintiff] should be permitted to proceed with its claim. Primarily that throws up the relationship and closeness of connection between the claims. That the ultimate question is one of equity’s intervention is shown by the observations that the general conduct of the parties will be relevant to the granting of equitable relief: *D Galambos & Son Pty Ltd v McIntyre* (at 26) and *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (at 296; 623). Those observations were given effect in *APM Wood Products Pty Ltd v Kimberley Homes Pty Ltd* (Cole J, 17 February 1989, unreported) where an equitable set-off was denied notwithstanding closeness of the respective claims because the cross-claimant’s failure to investigate, quantify or press its cross-claim disentitled it in equity from maintaining the cross-claim as defence.

1. If there are factors or circumstances which militate against the justice or fairness of allowing it, a claim for an equitable set-off may be denied, notwithstanding that the claims are sufficiently connected,: see *Exicom* at 712; *Bim Kemi AB v Blackburn Chemicals* [2001] EWCA Civ 457at [39]; *Walker v Department of Social Security* (1995) 56 FCR 354 at 365-7 per Drummond J (in dissent but not on this point). The conduct of a cross-claimant may also disentitle it from being allowed an equitable set-off, including where they have failed to investigate, quantify or press the cross-claim: see *Exicom* at 712.
2. I consider Caason’s claim for an equitable set-off should be refused.
3. *First*, it is appropriate to do so as a matter of case management pursuant to the broad case management powers of the Court. Section 37M of the Act requires that the powers and duties under the civil practice and procedure provisions of the Act and the Rules be exercised in a way that best promotes the overarching purpose of the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Section 33ZF empowers the Court to make any order that it considers appropriate to ensure that justice is done in the proceeding.
4. In my view the interests of justice in the proceeding and the overarching purpose in the just, speedy and efficient resolution of disputes strongly point away from allowing Caason to now raise an equitable set-off. The proceeding was filed in 2012, the parties have reached a settlement after drawn-out litigation, and settlement monies are finally about to flow to class members. It is in the interests of justice in the proceeding that class members receive their full entitlements under the settlement and, as far as possible, to avoid delay in the distribution of up to $697,709.17 in GST refunds (which Caason admits it is obligated to remit).
5. *Second*, while I did not hear detailed submissions regarding the merits of Caason’s Variation Letter Costs Claim and I do not express a concluded view, it is not clear to me that Caason has an enforceable claim on which it can rely to make out the equitable set-off. The Caason Variation Letter states:

In order to obtain the benefit of the above variation [being the entitlement to claim Variation Letter Costs], Caason must also file BAS statements that recover the full GST component of the Legal Costs (as defined in the Caason Funding Agreement) paid by ILP and must make the amount equal to the GST component of the Legal Costs available to ILP.

Caason’s entitlement to Variation Letter Costs appears to be contingent on a future act of performance by it – remitting the GST refunds to the Funder. Caason has not remitted any GST refunds to the Funder and so it does not appear to have an immediately enforceable right.

1. Caason relies on the decision in *Roadshow* but in my view that case is of little assistance to its argument. In that case the NSW Court of Appeal considered the appellant’s claim for equitable set-off in respect of sums which were not yet due at the time that the respondent commenced proceedings. The Court concluded that while the sums were not payable as at the relevant date, the appellant’s right to them had nonetheless accrued by the time proceedings were commenced: at 489. They were therefore distinct from entitlement which depends on “further acts of performance”: at 485. The Court cited with approval the remarks of Dixon and Evatt J in *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (In Liq)* (1936) 54 CLR 361 at 379-380 where their Honours said:

In general the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further act of performance. …But if all the facts have occurred which entitle one party to such a right as a debt, the fact that the right to payment is future or is contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation.

1. *Third*, I do not consider that Caason’s entitlement to be paid its Variation Letter Costs by the Funder is so connected with or related to the Funder’s entitlement to the GST refunds it received that it would be unconscionable to determine the GST Refunds Issue without determining the Variation Letter Costs Claim. There is little to commend Caason’s construction of the contractual arrangements between it and the Funder and little connection between the two claims. Amongst other things:
2. Caason’s obligation to claim GST refunds and remit them to the Funder arises from cl 15 of the funding agreement, not from the Caason Variation Letter. The Variation Letter does not impose that obligation, it simply provides that “in order” for Caason to obtain the benefit of the Variation Letter it must have taken those steps;
3. the funding agreement imposes an ongoing obligation on Caason to claim GST refunds and to remit them to the Funder. Caason does not contend that it is entitled to claim GST refunds and then retain them for its own use, but that is the effect of its construction of the contractual arrangements between the parties. It has received $397,251.51 in GST refunds up to 30 June 2017 and it has had the use of those monies for a significant period. Clause 15.3(c) of the funding agreement requires Caason to pay the GST refunds it receives to the Funder within seven days of receipt. In cl 15.4 of the funding agreement Caason acknowledges that the Funder is beneficially entitled to the GST refunds and undertakes to provide the Funder with the benefit of all GST refunds received; and
4. the reason why Caason’s entitlement to Variation Letter Costs and the Funder’s entitlement to GST refunds now temporally coincide is not a result of the contractual arrangements but the result of Caason’s failure to remit the GST refunds within seven days of receipt.

The two entitlements are of a different nature, they are not temporally related and Caason’s entitlement to the Variation Letter Costs does not impugn or impede the Funder’s title to the GST refunds.

1. *Fourth,* the email exchange between Mr Lindholm and Mr Astill on 6 December 2012, the day before Mr Astill signed the Variation Letter, is contemporaneous documentary evidence of the parties’ intentions. I do not decide the question, but the email exchange is cogent evidence that the parties considered allowing Caason to set-off its reasonable legal, accounting and administrative costs against the GST refunds it received but agreed not to do so. It would not be unconscionable to refuse to allow Caason to claim an equitable set-off when that was what the parties initially agreed (at least on that view of the evidence).
2. *Fifth,* several other considerations confirm that this is not a case where refusal to allow an equitable set-off would be unconscionable:
3. it cannot be said that the Funder’s failure to meet Caason’s demand for Variation Letter Costs has affected Caason’s ability to repay the GST refunds it received: see *Doherty v Murphy* [1996] 2 VR 553;
4. Caason did not put on materials to substantiate its Variation Letter Costs Claim in a timely manner. Even if Mr Astill’s account (that there is an agreement that Caason is entitled to only pay the Funder the difference between the GST refunds and its Variation Letter Costs) is accepted, Caason did not substantiate its Variation Letter Costs Claim until 3 November 2017. Even then, as its counsel concedes, the materials are insufficient to substantiate its claim. Caason’s delay should not be permitted to delay the class members’ receipt of their entitlements under the settlement; and
5. Caason’s concern that the Funder might not disgorge the GST refunds it was paid was adequately addressed in the orders requiring Caason to pay the GST refunds to the Scheme Administrator to be held on trust pending the result of the ATO review.

# CONCLUSION

1. If arising from these reasons there are further matters which the parties wish to raise with the Court they have liberty to apply on two days’ notice to the other parties, or with such shorter notice as is appropriate in the circumstances.

|  |
| --- |
| I certify that the preceding two hundred and seventy-three (273) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy. |

Associate:

Dated: 16 April 2018

**SCHEDULE OF PARTIES**

|  |  |
| --- | --- |
|  | **NSD 1558 of 2012** |
| **Respondents** |  |
| Fourth Respondent: | GEORGE SYCIP |
| Fifth Respondent: | JI RAN LAURIE KAN |
| Sixth Respondent: | IAN RICHARD NEAL |
| Seventh Respondent: | ANTHONY JOHN SURTEES |
| Eighth Respondent: | SIMON JEREMY NEWTON GRAY |
| Ninth Respondent: | JAMES ABERDEEN HARVEY |
| Tenth Respondent: | PHILIP SYDNEY PATERSON |
| Eleventh Respondent: | DEAN LLOYD MARSH |
| Twelfth Respondent: | STEVEN JOHN WESTAWAY |
| Thirteenth Respondent: | TIMOTHY WILLIAM MURTON |
| Fourteenth Respondent: | DARREN CRAIG KLENK |
| Fifteenth Respondent: | MALCOLM STEVEN WIGHT |
| Sixteenth Respondent: | DEAN BRIAN CROOK |
| Seventeenth Respondent: | DALE JOHN RYAN |
| Eighteenth Respondent: | STEPHEN HAROLD KUCHAR |
| Nineteenth Respondent: | GEOFFREY ALLAN LLOYD |
| Twentieth Respondent: | JUSTIN LUKE HUMPHREY |