Equity Division
Supreme Court
New South Wales

Case Name:	TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed) (No 4); Nakali Pty Ltd v SurfStitch Group Ltd
Medium Neutral Citation:	[2021] NSWSC 121
Hearing Date(s):	20-22 October 2020; further evidence and submissions 23 November 2020; further evidence and submissions 24 December 2020; further submissions 29 January 2021
Date of Decision:	19 February 2021
Date of Orders:	19 February 2021
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Settlement approved on condition that the Funders' entitlement to commission and costs be capped at $6.5 million
Catchwords:	CIVIL PROCEDURE – representative proceedings – shareholder claim against public company and chief executive officer – where level of likely directors and officers insurance cover revealed shortly after proceedings commenced - where company went into administration shortly thereafter and proceedings stayed - where efforts then made to settle proceedings - where part of settlement comprised a deed of company arrangement – where balance of settlement involved compromise by insurer – court approval – whether settlement reasonable inter partes – whether settlement reasonable inter se – where claimed costs and commission would consume bulk of settlement pool - whether costs proportionate - whether plaintiffs' legal advisers and funders engaged in disentitling conduct
Legislation Cited:	Civil Procedure Act 2005 (NSW) Civil Proceedings Act 2011 (Qld)

	Corporations Act 2001 (Cth)
Cases Cited:	Blairgowrie Trading Pty Ltd v Allco Finance Group Limited [2017] FCA 330; 118 ACSR 614 BMW Australia Limited v Brewster [2019] HCA 45 Brewster v BMW Australia Limited [2020] NSWCA 272 Bolitho v Banksia Securities Ltd [2019] VSC 638 Botsman v Bolitho (2018) 57 VR 68; [2018] VSCA 278 Caason Investments Pty Ltd v CAO (No 2) [2018] FCA 527 Camilleri v Trust Company (Nominees) Limited [2015] FCA 1468 Cantor v Audi Australia Pty Limited (No 5) [2020] FCA 637 Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd [2005] NSWSC 784 Court v Spotless Group Holdings Limited [2020] FCA 1730 Courtney v Medtel Pty Ltd [No 5] (2004) 212 ALR 311 Dyczynski v Gibson [2020] FACFC 120 Earglow Pty Ltd v Newcrest Mining Limited [2016] FCA 1433 Kelly v Willmott Forests Ltd (in liq) (No 4) [2016] FCA 323; 112 ACSR 584 Liverpool City Council v McGraw-Hill Financial, Inc [2018] FCA 1289 Modtech Engineering Pty Ltd v GPT Management Holdings Limited [2013] FCA 626 Newstart 123 Pty Ltd v Billabong International Limited [2016] FCA 1194 Peterson Superannuation Fund Pty Ltd v Bank of Queensland [2018] FCA 1842; 132 ACSR 258 Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3) [2018] FCA 1842 Smith v Australian Executor Trustees Ltd [2018] NSWSC 1584 TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (subject to deed of company arrangement) (No 3); Nakali Pty Ltd v SurfStitch Group Ltd (subject to deed of company arrangement) (No 2) [2018] NSWSC 1749; 133 ACSR 98 Vernon v Village Life Limited [2009] FCA 516 Williams v FAI Security Pty Ltd (No 4) [2000] FCA 1925
Texts Cited:	
Category:	Procedural and other rulings

Parties:	In proceedings 2017/193375: TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund (Plaintiff) SurfStitch Group Ltd (in administration) (First Defendant) Justin Peter Cameron (Second Defendant) Chubb Insurance Australia Ltd (Third Defendant) In proceedings 2017/347082: Nakali Pty Ltd (Plaintiff) SurfStitch Group Ltd (in administration) (First Defendant) Chubb Insurance Australia Ltd (Second Defendant)
Representation:	Counsel: In proceedings 2017/193375: L W L Armstrong QC with T J D Chalke (Plaintiff) G Donnellan with K Morris (Contradictor) J Burnett (First Defendant) N M Bender (Second Defendant) G Ng (Third Defendant) In proceedings 2017/347082: L W L Armstrong QC with T J D Chalke (Plaintiff) G Donnellan with K Morris (Contradictor) J Burnett (First Defendant) G Ng (Second Defendant) Solicitors: In proceedings 2017/193375: Gadens (Plaintiff) King Wood & Mallesons (First Defendant) Arnold Bloch Leibler (Second Defendant) YPOL Lawyers (Third Defendant) In proceedings 2017/347082: Johnson Winter & Slattery Lawyers (Plaintiff) King Wood & Mallesons (First Defendant) YPOL Lawyers (Second Defendant)
File Number(s):	2017/193375; 2017/347082

JUDGMENT

1 For many years prior to 2016, SurfStitch Group Limited ("SurfStitch") and its subsidiaries carried on business as swimwear manufacturers.

2 On various dates in 2016, TW McConnell Pty Ltd ("McConnell") and Nakali Pty Ltd ("Nakali") owned shares in SurfStitch.

3 In 2017, McConnell and Nakali each commenced representative proceedings against SurfStitch.

4 McConnell, but not Nakali, also named as a defendant the former chief executive officer and director of SurfStitch, Mr Justin Cameron.

5 The claims made by McConnell and Nakali against SurfStitch are to the same effect. The claims are that between nominated dates in 2016 SurfStitch failed to advise the Australian Securities Exchange of information that was likely to have a material impact on the value of SurfStitch's shares; and made statements concerning SurfStitch's EBITDA forecasts for which there was no reasonable basis and which were apt to mislead or deceive the market.

6 McConnell makes corresponding claims against Mr Cameron.

7 Nakali commenced its proceedings in the Supreme Court of Queensland on 22 May 2017 under Pt 13A of the *Civil Proceedings Act 2011* (Qld). The Nakali proceedings were transferred to this Court. McConnell commenced its proceedings in this Court on 28 June 2017 under Pt 10 of the *Civil Procedure Act 2005* (NSW).

8 Each of the proceedings is an open class action. All persons who held shares in SurfStitch on nominated dates are Group Members for the purposes of the proceedings. The Group Members in each proceeding are largely the same.

9 On 24 August 2017, very shortly after the two proceedings were commenced, the directors of SurfStitch and of its wholly owned subsidiary, SurfStitch

Holdings Pty Ltd ("SurfStitch Holdings"), resolved to place the companies into administration. The proceedings were thereby stayed[1]. A significant factor informing the directors' decision was the commencement of the two proceedings.

10 The McConnell proceedings are funded by International Litigation Partners No 17 Pte Ltd ("International Litigation Partners") and the Nakali proceedings are funded by Vannin Capital Operations Ltd ("Vannin"). I will refer to International Litigation Partners and Vannin, together, as "the Funders".

11 There were some 3,000 to 3,500 potential Group Members. Approximately 900 of those have now registered as Group Members.[2] Around 58% of those have executed Litigation Funding Agreements with one of the Funders (the "Funded Group Members"). The others registered as Group Members but have not executed a Litigation Funding Agreement with either of the Funders ("the Unfunded Group Members"). I will refer to the Funded Group Members and the Unfunded Group Members, together, as the "Continuing Group Members".

12 Each of the proceedings has, in principle, now settled ("the Settlement") on the basis of:

(1) Deeds of Company Arrangement entered into by SurfStitch and others ("the SurfStitch Deeds of Company Arrangement") and by SurfStitch Holdings and others ("the SurfStitch Holdings Deeds of Company Arrangement) on 18 April 2018 (together, "the Deeds of Company Arrangement" of "DoCAs"); and

(2) a Settlement Agreement ("the Settlement Deed") dated 9 September 2019 made between the plaintiffs, SurfStitch, SurfStitch Holdings, the administrators of SurfStitch and SurfStitch Holdings ("the

[1] S440D *Corporations Act 2001* (Cth)
[2] The actual number is 912, of whom 424 – almost half – registered after service of the notice of the proposed settlement of the class actions approved by the Court on 23 March 2020 and referred to below.

Administrators"), Mr Cameron, SurfStitch's D&O insurer Chubb Insurance Australia Pty Limited and the Funders.

13 By Notices of Motion filed on 6 March 2020, McConnell and Nakali seek approval of the Settlement pursuant to s 173 of the *Civil Procedure Act*.

14 By Interlocutory Process filed on 6 May 2020, the Administrators seek a direction under s 90-15 of the *Insolvency Practice Schedule (Corporations)*[3] that they are justified in entering into and performing and causing SurfStitch and SurfStitch Holdings to enter into and perform the Settlement.

15 There is no dispute before me, including from Mr Donnellan, the Contradictor appointed by the Court,[4] that the Settlement is reasonable *inter partes* and should be approved. This is so, notwithstanding that it is a "disappointing" result and that the returns have turned out to be "modest" and "small when compared with an estimate of the assessed losses of all Group Members".[5]

16 There is a dispute as to whether the Settlement is reasonable *inter se*.

17 The plaintiffs propose orders, including a Fund Equalisation Order, the result of which would be that the Continuing Group Members would bear *pro rata* the burden of the Funders' commissions ("the Commissions") and the plaintiffs' costs of the proceedings ("the Costs").

18 The Contradictor does not dispute the appropriateness of a Fund Equalisation Order but contends that:

(1) the Costs are unreasonably high;

(2) the quantum of Costs is disproportionate to the result that the plaintiffs and the Funders ought reasonably to have anticipated when the

[3] Schedule 2 of the *Corporations Act 2001* (Cth).
[4] On 5 July 2018 and on the application of the plaintiffs.
[5] To adopt the words of the plaintiffs' senior counsel.

proceedings were commenced and to the result achieved by the Settlement; and

(3) the Funders' overall entitlements ought to be reduced by reason of the Funders' and the plaintiffs' legal advisors' disentitling conduct.

Decision

19 I propose to approve the settlement.

20 However, such approval will be on the condition that the Funders' overall entitlement to Costs and Commission is capped at $6.5 million.

The Approval Application

21 This application was heard over three days in October 2020. That time was required because of the factual complexity of the matter and the large amount of material adduced by the parties in connection with the application.

22 Following that hearing, I sought further submissions from the parties as to a range of matters and received those submissions, and further evidence between November 2020 and January 2021.

23 I was greatly assisted by the careful submissions of the parties, both in writing and orally. Much of what follows, especially as to uncontroversial background matters, is drawn with gratitude from those submissions.

24 The main protagonists were the plaintiffs and the Contradictor, although I also heard submissions on behalf of Mr Cameron and the Administrators.

The Settlement

25 The claims of the Group Members are "Subordinated Claims" in the administration of SurfStitch.[6]

26 The Settlement has two components.

27 The first component is represented by the Deeds of Company Arrangement under which Group Members may make a claim in the Deed of Company Arrangement fund entitling them to a *pari passu* share of:

(1) cash of some $1.81 million available for distribution to admitted claimants ("the Admitted Subordinated Claimants") of SurfStitch;[7] and

(2) 12 million convertible notes ("the Convertible Notes") with a face value of $1 each issued by Alceon Retail Hold Co Pty Limited, a wholly owned subsidiary of the proponent of the Deeds of Company Arrangement, Ezibuy Holdings Limited ("Ezibuy").[8]

28 The second component is $6.5 million to be paid by Chubb under the Settlement.

29 A fund ("the Settlement Pool") is to be established for the distribution of the proceeds payable to Group Members under the SurfStitch Deed of Company Arrangement and the Settlement Deed. The deed administrators of the SurfStitch Deed of Company Arrangement are to:

(1) pay the cash to which the Continuing Group Members are entitled under the SurfStitch Deed of Company Arrangement into the Settlement Pool; and

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[6] See s 563A of the *Corporations Act* and see *In the matter of SurfStitch Group Limited* [2018] NSWSC 164; 124 ACSR 235 (Brereton J) at [4].

[7] There will be approximately $2.37 million cash available in the Deed of Company Arrangement for distribution to the Admitted Subordinated Claimants, of which 76.2% of the value available to Admitted Subordinated Claimants (ie the $1.81 million) will flow into the settlement pool available for distribution to Continuing Group Members.

[8] The Convertible Notes were issued by Alceon in consideration of Alceon's purchase of an aspect of the SurfStitch business, carried on by a SurfStitch subsidiary, SS Australia Pty Limited.

(2) allocate the Convertible Notes to which Continuing Group Members become entitled to, to the administrator of the Settlement Pool.

30 In order to register to participate in the Chubb payment, Continuing Group Members are required to give a direction to the Deed of Company Arrangement administrators to make the payments referred to in [29(a)] above.

31 The purpose of those transfers was to allow for the management of distributions to Group Members and to facilitate the deduction from the Settlement Pool of the Costs and the Commission.

32 The Settlement Pool will thus comprise:

(1) the $1.81 million referred to at [27(1)] above;

(2) the Convertible Notes, estimated to have a value of between $0 and approximately $3.24 million; and

(3) the $6.5 million from Chubb.

33 The final value of the Settlement Pool cannot be known until:

(1) the Administrators determine the precise value of the cash from the SurfStitch Deed of Company Arrangement that will flow into the Settlement Pool; and

(2) the Convertible Notes convert into shares in Alceon, and an assessment can be made of the value of the shares into which the notes will convert.[9]

34 The Funders propose to charge a Commission of 25% of the value of the gross amounts recovered by the Group Members. This represents a

[9] The notes will convert into shares in Alceon on the happening of an "exit event" as described in a Convertible Note Deed Poll, dated 10 April 2018 or, absent the occurrence of an "exit event", on the "Conversion Date", 18 April 2021.

compromise of the Commission to which the Funders are entitled under their Litigation Funding Agreements. I discuss the circumstances in which that compromise arose later in these reasons.

35 The plaintiffs contend their reasonable Costs are in the range of $5.2 million to $6 million.

36 Of the total losses suffered by the Group Members, Funded Group Members and Unfunded Group Members have suffered approximately 58% and 42% of those losses, respectively.

37 Based on these matters, the plaintiffs have prepared the following table. This table was handed up during the October 2020 hearing and sets out the plaintiffs' assessment of what the Funded Group Members and Unfunded Group Members are likely to receive "in hand" under the Settlement.

		Low $m	**Mean $m**	**High $m**
A	Amount available for distribution	8.31	9.93	11.55
B	Less ILP Commission	*.42*	*.50*	*.58*
C	Less Vannin Commission	*.79*	*.94*	*1.09*
D	Gross settlement funds available for distribution (A – B – C)	7.1	8.49	9.88
E	Less plaintiffs' costs ($5.83m)	1.27	2.66	4.05
F	Funded Group Members	.74	1.54	2.35
G	Unfunded Group Members	.53	1.11	1.7

38 The table assumes that Costs are approved at $5.83 million. In written submissions following the October 2020 hearing the plaintiffs produced a revised version of this table that repeated the figures for "gross settlement fund for distribution" but provided for a range of possible figures for Costs. As I set out below, I have concluded that reasonable Costs should be assessed

at some $5.67 million[10] and propose to deal with proportionality by setting a cap on the total of Costs and Commission.

39 The "Low", "Mean" and "High" variables reflect the range in possible value of the Convertible Notes. "Low" assumes the Alceon shares, and thus the Convertible Notes, prove to have no value. "High" assumes the highest estimated value.

40 Thus, the amount that Group Members will receive "in hand" from the cash component of the Settlement Pool[11] is set out under the "Low" column; $740,000 for the Funded Group Members and $530,000 for the Unfunded Group Members: a total of $1.27 million to be divided between 912 Group Members. That is, assuming an equal distribution,[12] about $1,394 each. The result will be better for Group Members if the Alceon shares prove to be of value: around $4,440 each assuming "High" value and equal distribution. The corresponding figures in the revised schedule varied according to the amount posited for Costs but are of the same order.

41 Either way, a "disappointing" result indeed.

42 It is, however, common ground, and the Contradictor accepts, that there are "minimal prospects of further recovery". That is, the Settlement is the best that the Group Members can hope for.

The alternative to Settlement – the "Counterfactual"

43 If the Settlement does not proceed, SurfStitch is likely to go into liquidation.

44 In that event, it is the Administrators' opinion that the cash available for distribution to Group Members will be a little less than is available under the Deeds of Company Arrangement.

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[10] See [273] below.
[11] The $1.81 million from the Deed of Company Arrangement distribution plus the $6.5 million from Chubb.
[12] In fact, the Settlement Pool will be distributed *pari passu*.

45 Further, so far as concerns Mr Cameron, if the Settlement does not proceed, Chubb's $6.5 million will be taken off the table and McConnell's claim against Mr Cameron will have to proceed.

46 Mr Armstrong QC and Mr Chalke, who appeared before me for the plaintiffs, have given a confidential opinion as to McConnell's prospects of success in those proceedings.

47 Before me, Mr Armstrong and Mr Chalke submitted:

> "At a general level, it is difficult to make any assessment of the specific liability risks at this stage of the proceeding, when discovery has not been completed, and no evidence has been filed. Nevertheless, as set out above, the proceedings involve relatively complex questions regarding the application of accounting standards, which involve the exercise of matters of judgment, and the operation of 'pure play' online trading, which will likely require significant expert evidence. Those matters necessarily entail forensic uncertainty and litigation risk."

48 I see no reason to doubt the accuracy of this assessment. The Contradictor did not challenge it.

The Settlement Distribution Scheme

49 There was a controversy as to the fairness of the scheme proposed to distribute the Settlement Pool.

50 However, the Contradictor now accepts that, leaving aside the questions of the quantum of Costs, the proportionality of the Costs, the questions of disentitling conduct and the amount of the Funders' Commission, the mechanics of the scheme proposed to distribute the Settlement Pool are satisfactory.

The settlement is fair and reasonable *inter partes*

51 The relevant principles were not in dispute before me. The following summary is drawn, with gratitude, from the submissions of Mr Armstrong and Mr Chalke, and Mr Donnellan.

52 The central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the Group Members considered as a whole.[13] The Court's role in relation to Group Members is supervisory and protective.[14] The Court's role is analogous to that which it assumes when approving settlements on behalf of persons with a disability.[15]

53 When considering the reasonableness of the settlement *inter partes*, the Court is asked to determine whether the settlement is fair and reasonable considering the alternative, which is usually the risks and costs to which the plaintiff Group Members would be exposed were the matter to proceed to trial.[16] That counterfactual circumstance is relevant here to the claim against Mr Cameron, but not the claim against SurfStitch. That is because, as I have set out,[17] the alternative to the Deed of Company Arrangement settlement is that SurfStitch be wound up.

54 The question of whether the settlement is reasonable *per se*, cannot be separated from ancillary questions concerning the approval of funding and legal costs. The evaluation of whether a settlement is fair and reasonable "must be carried out by reference to what all [G]roup [M]embers obtain in their hands following the resolution of their individual claims in the event that the settlement is approved".[18]

55 At this point, I am considering, separately, the question of whether the Settlement is fair and reasonable *inter partes*.

56 I will return to the question of the proposed Costs and Commission below.

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[13] For example, see *Caason Investments Pty Ltd v CAO (No 2)* [2018] FCA 527 at [12] (Murphy J); *Blairgowrie Trading Pty Ltd v Allco Finance Group Limited* [2017] FCA 330; 118 ACSR 614 at [81] (Beach J); *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323; 112 ACSR 584 at [68] (Murphy J); *Camilleri v Trust Company (Nominees) Limited* [2015] FCA 1468 at [5(a)] (Moshinsky J); and *Smith v Australian Executor Trustees Ltd* [2018] NSWSC 1584 at [22] (Ball J).
[14] Eg *Kelly v Willmott Forests* at [62].
[15] Eg see *Court v Spotless Group Holdings Limited* [2020] FCA 1730 at [8] (Murphy J).
[16] Eg *Kelly v Willmott Forests* at [64] and *Williams v FAI Security Pty Ltd (No 4)* [2000] FCA 1925 at [19] (Goldberg J).
[17] See [43] above.
[18] *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 at [2] (Lee J).

57 I am satisfied that the Settlement, in this sense, is a fair and reasonable compromise of the plaintiffs', and thus the Continuing Group Members' claims against SurfStitch and Mr Cameron, including SurfStitch's D&O insurer, Chubb.

58 The cash component from the Deeds of Company Arrangement is all that is now available to the Admitted Subordinated Claimants such as the Continuing Group Members.

59 It is not known what value the Convertible Notes now have, or will prove to have, once they are converted into shares in Alceon. Nonetheless, the Administrators recommended, as the best alternative to liquidation, the arrangement that had led to the availability of the Convertible Notes to the Admitted Subordinated Claimants of SurfStitch, and now to Group Members. I see no reason to doubt the wisdom of the Administrators' recommendation. The Contradictor did not criticise it.

60 The contribution from Chubb, in effect on account of the claim against Mr Cameron, is an amount less than the limit of its D&O policy. However, it has come about following two mediations and in circumstances where it was by no means clear that the claims in respect of which the policy potentially or actually responded, especially that against Mr Cameron, would succeed. The Contradictor did not criticise this compromise with Chubb.

61 Indeed, overall, as I have said, the Contradictor agreed that the settlement was the best that could reasonably be expected, *inter partes*.

Were the Administrators justified in entering the Settlement Deed?

62 On this basis, I am satisfied that the Administrators were justified in entering the Settlement Deed. I propose to give the Administrators the direction they seek under the *Insolvency Practice Schedule (Corporations)*.[19]

[19] See [14] above

63 I now turn to the more controversial questions: the Costs, their proportionality, the disentitling conduct asserted by the Contradictor and the proposed Funders' Commission.

The Litigation Funding Agreements

64 The Funders' Litigation Funding Agreements made different provision for the Commission from its Funded Group Members due to the Funder in question.

65 Under the International Litigation Partners Litigation Funding Agreement, International Litigation Partners was entitled to a commission from each Funded Group Member calculated as a percentage of costs and recovery. The precise details are said to be confidential and need not be recorded here.

66 Under the Vannin Litigation Funding Agreement, Vannin was entitled to a funding commission from each Funded Group Member equal to a pro-rated share of recoveries plus what the parties described as a "Costs Multiplier". Again, the details are said to be confidential and need not be repeated here.

67 As I have said, the Funders have now agreed to accept a Commission less than in accordance with the terms of their Litigation Funding Agreements.

The Road to Settlement

68 There is no dispute before me that, at the time Nakali and McConnell commenced proceedings against SurfStitch in mid-2017, they had reasonable prospects of establishing that SurfStitch was liable to them, and to the Group Members on whose behalf they brought the proceedings, on the bases of the cases then pleaded. The Contradictor accepted this, in terms.

69 However, the Contradictor submitted that the plaintiffs, and the Funders, were at all times aware that the prospects of recovering any substantial amount from SurfStitch or from Mr Cameron were problematic.

70 McConnell's solicitors, Gadens, commenced investigating potential claims of SurfStitch shareholders in mid-2016.

71 Vannin, the Funder of the Nakali proceeding, began its investigations in about November 2016.

72 McConnell's solicitor, Mr Glenn McGowan QC deposed:

> "…at the time Gadens was negotiating with various funders to obtain funding for this proceeding, our assessment was that the proposed claims were strong claims, but there were real risks for the claimants in the proceeding.
>
> Those risks included the considerations that:
>
> (a) [SurfStitch] itself seemed unlikely to be able to meet a large damages award (or settlement);
> (b) The CEO, Mr Cameron, was unlikely to have sufficient personal assets to be able to meet a large damages award (or settlement);
> (c) We did not know what insurance might stand behind either proposed defendant."

73 Mr Coope, then a director of Vannin, deposed that he saw recoverability as being the "biggest risk to Vannin successfully funding the proposed claims", that he did not know to what extent SurfStitch was insured, but that his "best guess" based on experience in other cases was that SurfStitch "would have between $50 [million] and $75 [million] of available insurance".

74 Similarly, Mr Paul Lindholm, an authorised representative of International Litigation Partners deposed that, based on discussions with "insurance brokers with knowledge of the retail clothing industry", he understood that companies with "similar profiles" to SurfStitch "had cover up to $50 to 100 million".

75 On 4 August 2017, very shortly after the McConnell proceedings were commenced and shortly before SurfStitch was placed into administration, the Court ordered SurfStitch to produce responsive insurance policies that it held for its own benefit, or for the benefit of any of its officers.

76 SurfStitch produced the Chubb policy. It showed that Chubb's limit of liability in relation to any claims against SurfStitch or Mr Cameron was very much less than the limits that Mr Coope and Mr Lindholm had anticipated.

77 As I have said, once SurfStitch and SurfStitch Holdings were placed into administration on 24 August 2017, the proceedings were stayed.

78 Mr Armstrong submitted that, thereafter, the sole focus of the plaintiffs' solicitors and the Funders was on seeking to achieve a settlement of the proceedings. The Contradictor did not dispute this although, as I will develop, he criticises the manner in which the settlement was pursued.

79 Mr Coope and Mr Lindholm endeavoured to locate a proponent for a Deed of Company Arrangement into which SurfStitch and SurfStitch Holdings could enter.

80 Mr Armstrong submitted that the Funders were "key participants" in the negotiations that led to the proposal and acceptance of the SurfStitch Deed of Company Arrangement. In particular, Mr Armstrong submitted that International Litigation Partners identified and introduced Ezibuy to the Administrators as a proponent of an arrangement whereby Ezibuy would acquire the shares in a SurfStitch subsidiary, SS Australia Pty Ltd, and thus the business of that company, in consideration for the issue of the Convertible Notes.

81 In their 16 March 2018 report to creditors, under s 439A of the *Corporations Act 2001,* the Administrators said that:

(1) commencement of the two class actions was one of the reasons leading to SurfStitch's failure;

(2) both SurfStitch and SurfStitch Holdings were solvent prior to the Administration;

(3) the potential exposure of SurfStitch to the claims of Group Members was $85 million;

(4) the administrators had received two proposals for Deeds of Company Arrangement, including that from Ezibuy; and

(5) the administrator recommended that the Ezibuy proposal be accepted.

82 Under the SurfStitch Holdings Deed of Company Arrangement:

(1) Alceon acquired the shares in SS Australia Pty Ltd;

(2) in consideration for the purchase of those shares, Alceon issued the Convertible Notes in itself. These have a face value of $15 million which, as I have set out above, will convert into shares in Alceon on 18 April 2021 unless an earlier "Exit Event" occurs; and

(3) 80% of those Convertible Notes will be distributed to Group Members and, ultimately, form part of the Settlement Pool.

83 Together, the Deeds of Company Arrangement represent a settlement of the plaintiff's actions against SurfStitch.

84 On 4 April 2018, the creditors of SurfStitch voted to approve the Deeds of Company Arrangement. The vote was carried by proxies held by the plaintiffs' solicitors on behalf of the then Funded Group Members.

85 The Deeds of Company Arrangement were executed on 18 April 2018.

86 The SurfStitch Deed of Company Arrangement is conditional on Court approval. The SurfStitch Holdings Deed of Company Arrangement is not conditional on Court approval. That is, the Convertible Notes will issue whether or not the Settlement is approved.

87 The Contradictor made no criticism of the conduct of the plaintiff or the Funders to this point and accepted that the Funders had made a significant contribution to the bringing about of the settlement represented by the 18 April 2018 Deeds of Company Arrangement.

First settlement approval application

88 On 4 July 2018, the plaintiffs filed notices of motion seeking approval of the proposed settlement of the proceedings reflected in the terms of the Deeds of Company Arrangement ("the Deed of Company Arrangement Settlement").

89 The plaintiffs then sought a Common Fund Order proposing a rate of 30% of the net Settlement Pool and costs reimbursement order.

90 The plaintiffs also sought orders purportedly under s 183 of the *Civil Procedure Act* and, in effect, as conditions precedent to their application for approval of the Deed of Company Arrangement Settlement, dispensing with:

(1) the giving of notice to Group Members of their right, under s 175(1)(a) of the *Civil Procedure Act* to opt out of the proceedings and of the fixing of a date, pursuant to s 162(1) of the *Civil Procedure Act* by which Group Members may opt out of the proceedings; and

(2) the provision of notice to Group Members of the proposed settlement.

91 It was at this stage that, at the plaintiffs' instigation, Mr Donnellan was appointed as Contradictor.

92 Mr Donnellan appeared at a directions hearing on 5 July 2018 to submit that the Court did not have the power to make the orders referred to at [90(1)] above and ought not make the order referred to at [90(2)] above.

93 The plaintiffs did not press the application to dispense with giving notice to Group Members of the settlement and, on 9 August 2018, a notice was sent to the Group Members ("the First Notice").

94 The First Notice:

(1) informed Group Members of the terms of the Deed of Company Arrangement Settlement;

(2) estimated the cash available for distribution to be between $3.38 million and $4.03 million;

(3) stated that the Convertible Notes had a face value of $12 million but made no statement as to their value, save that the value of the shares into which the notes would convert would be "determined at the time they were issued";

(4) explained the effect of the then proposed Common Fund Order; and

(5) foreshadowed the proposed application to dispense with the Group Members' right to opt out.

95 I heard the plaintiffs' application to dispense with the giving of an opt out notice and on 15 November 2018, in effect, dismissed it.[20]

Second settlement approval application

96 Evidently, my decision put an end to the plaintiffs' application to approve the Deed of Company Arrangement Settlement.

97 The plaintiffs' and the Funders' attention then turned to Chubb.

98 In March 2019, the plaintiffs joined Chubb as a defendant to the proceedings with the intention that Chubb would then be involved in a subsequent mediation.

[20] *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (subject to deed of company arrangement) (No 3); Nakali Pty Ltd v SurfStitch Group Ltd (subject to deed of company arrangement) (No 2)* [2018] NSWSC 1749; 133 ACSR 98.

99 Mediations took place in June and September 2019.

100 A settlement was achieved and is recorded in the Settlement Deed.

101 Pursuant to that settlement, Chubb agreed to contribute $6.5 million to the Settlement Pool.

102 On 24 October 2019, the plaintiffs filed notices of motion seeking approval to the settlement set out in that document and seeking, amongst other things, a Common Fund Order.

103 On 13 November 2019, the plaintiffs sent a further notice to Group Members ("the Second Notice") summarising the terms of the Settlement.

104 The Second Notice stated that the Court would be asked to approve this settlement on 16 December 2019 and that Group Members had until 11 December 2019 to register or opt out.

105 On 4 December 2019, the High Court handed down its decision in *BMW Australia Limited v Brewster*[21] in which it held, by majority, that the Court had no power under s 183 of the *Civil Procedure Act* to make a Common Fund Order.[22]

106 Accordingly, the plaintiffs' legal advisers gave consideration to whether the Settlement as proposed in the plaintiffs' notice of motion of 24 October 2019 could proceed.

[21] [2019] HCA 45.

[22] cf whether there is power under s 173 of the Civil Procedure Act and its Federal analogue to make a Common Fund Order at the point of settlement approval: see *Brewster v BMW Australia Limited* [2020] NSWCA 272 at [28](iv)-(v), [30] and [41]-[43] (Bell P with whom Bathurst CJ and Payne JA agreed); and the discussion in *Court v Spotless Holdings Limited* [2020] FCA 1730 at [78]-[79] (Murphy J).

Third settlement approval application

107 By 6 March 2020, the plaintiffs had determined, in light of the High Court's decision in *Brewster*, to seek a Funding Equalisation Order, instead of the Common Fund Order that had been foreshadowed in the Second Notice.

108 On 6 March 2020, the plaintiffs filed the notices of motion, on which they now move, to seek approval of the Settlement.

109 Those notices of motion seek orders pursuant to s 173 of the *Civil Procedure Act* that the Settlement be approved and ss 173 and 183 of the *Civil Procedure Act* approving the Costs and that:

> 23. Pursuant to ss 173(2) and 183 of the [*Civil Procedure Act]:*
>
> (a) each [Continuing Group Member] shall pay a share of the reasonable costs and disbursements incurred by the plaintiffs, and [the Funders] in or incidental to the proceeding, as approved by the Court (Reimbursable Costs), such share to be:
>
> (i) calculated as the proportion that the final assessed entitlement of that [Continuing Group Member] to the combined value of cash and Convertible Notes under the Settlement Distribution Scheme bears to the total value of cash and Convertible Notes in the [Class Action Settlement] Pool ([Continuing Group Members]s' shares), and
>
> (ii) payable from the cash available in the [Class Action Settlement] Pool (and *pro rata* as between the [Continuing Group Members] Chubb Cash and the [Continuing Group Members] [Deed of Company Arrangement] Cash as defined below); and
>
> (b) the obligations incurred by those [G]roup [M]embers who entered into litigation funding agreements with either funder (FGMs) to remunerate either funder out of compensation recovered in or as a result of the proceeding (FGM Obligations) shall be equalised among all [Continuing Group Members] (including [Continuing Group Members] who had not entered litigation funding agreements with either funder) (UGMs) by:
>
> (i) the [Funded Group Members] Obligations being deducted from the cash and Convertible Notes available for distribution in the [Class Action Settlement] Pool (after deduction of Reimbursable Costs from the cash) prior to any other distribution to [Continuing Group Members], and

(ii) the balance of the cash (and the Convertible Notes) then being distributed among the [Continuing Group Members] in the [Continuing Group Members'] Shares.

110 On 19 March 2020, Mr McGowan affirmed an affidavit in which he set out calculations comparing the return to Continuing Group Members, assuming the making of a Funding Equalisation Order using a "blended" funding commission rate of 45%.

111 In that affidavit, Mr McGowan said that one of the assumptions he had made in making his calculations was that:

> "The terms of the funding agreements entered into by [F]unded [G]roup [M]embers in this proceeding and in the Nakali Proceeding would require the [Funded Group Members] to pay 45% of any recovery by each [Funded Group Member] to the funder with whom they entered their respective funding agreements."

112 Those calculations showed a higher return to Continuing Group Members under a Funding Equalisation Order compared to a Common Fund Order.

Events following 23 March 2020

113 In his submissions concerning disentitling conduct, Mr Donnellan placed particular emphasis on the events following 23 March 2020.

114 In his oral submissions, Mr Donnellan said:

> "So, your Honour, that leads me to the registration issue that Mr Armstrong spoke to you about yesterday, and in my submission, this is the most serious allegation of disentitling conduct, and quite an egregious example of the plaintiff's representatives not having proper regard for [G]roup [M]ember interest, and I need to make clear that includes [F]unded [G]roup [M]embers who are clients of the plaintiffs' solicitors."

115 Mr Donnellan submitted that, after 23 March 2020, the plaintiffs' solicitor sought to "solicit" or "corral" Group Members who had not yet agreed to participate in the settlement. The parties referred to these Group Members as "Non-participating Group Members".

116 Non-participating Group Members had a choice. They could either join the settlement or lodge a proof of debt in the SurfStitch Deed of Company Arrangement.

117 In their written submissions, Mr Armstrong and Mr Chalke explained:

> "If the aggregate of costs and commission to be deducted from the CAS Pool is less than $6.5 million (being the amount of the Chubb payment that is only available to participants in the class actions), then shareholders would be better off participating in the class action, rather than only lodging a proof of debt in the SGL [Deed of Company Arrangement]. On the other hand, if the aggregate of costs and commission exceeds $6.5m then *all* [U]nfunded [G]roup [M]embers (UGMs) would have been better off *not* registering in the class actions, and simply proving in the [Deed of Company Arrangement]."

118 In oral submissions, Mr Armstrong put it this way:

> "The additional amount that's achieved for the [G]roup [M]embers through the class action settlement that is in excess of what's available to them just as a result of the [Deed of Company Arrangement], is the 6.5 million dollar Chubb payment. If and to the extent that the Court approves costs plus commission in excess of that 6.5 million dollars, then the only way that the … funders can recover their outlaid costs plus the commission is by accessing recoveries under the [Deed of Company Arrangement] that are brought into the cash pool and added to the Chubb amount.
>
> …
>
> To the extent that your Honour approves costs plus commission in excess of the Chubb figure, then that excess, so far as it's taken out of the [Deed of Company Arrangement] recoveries of the [U]nfunded [G]roup [M]embers, it puts them in a less beneficial position than they would have been had they only claimed under the [Deed of Company Arrangement], and that's the gravamen of part of Mr Donnellan's objections. We don't shy away from that, your Honour. I'm going to need to explain to your Honour why it's a consequence of what has been an extraordinarily difficult settlement process, bedevilled by the uncertainty associated with a [Deed of Company Arrangement] that's running in parallel with the class action settlement, and which frankly, is unaffected in a relevant sense by the class action."

The Third Notice

119 On 23 March 2020, the Court approved a further notice to be sent to Group Members ("the Third notice").

120 The Third Notice informed Group Members that the plaintiffs proposed to seek a Funding Equalisation Order rather than a Common Fund Order and stated:

> "6. The plaintiffs no longer intend to seek a common fund order. Instead, the plaintiffs now propose to seek a 'funding equalisation order' by which:
>
> (a) The funders would be entitled to claim a funding commission from [G]roup [M]embers who signed a funding agreement in relation to the Class Actions (Funded [Group Members]) at a rate … determined by applying the terms of the relevant funding agreement; and
>
> (b) Non-funded [G]roup [M]embers who register to participate in the proposed settlement (Non-funded [Registered Group Members]) will be required to contribute to the funding costs of the Funded [Group Members] in an amount not exceeding that required to ensure that all [Registered Group Members] receive the same rate of return from the settlement." (My emphasis)

121 The words I have emphasised were included in the draft of the Third Notice on 20 March 2020 at the suggestion of the plaintiffs. That part of the draft had hitherto read that the funding commission would be "at a rate of [plaintiff to insert %]".

122 This added language was apt to convey to recipients of the notice, including the Non-participating Group Members, that the plaintiffs were now proposing a Funding Equalisation Order an aspect of which was that the Funders would be entitled to commission at the rates determined by the Litigation Funding Agreements.

123 The Third Notice also informed Group Members that:

> "8. Due to developments, including a very difficult retail environment, it is now expected that the fair value of the convertible notes will be materially less than the estimate provided in the [second] notice and will be in the range of $0 to $4.25m."

124 The notice continued:

> "10. There are two consequences of the above developments.
>
> 11. First, as a result of the change in estimated value of the convertible notes, the returns of Non-Participating Group Members under the [Deed of Company Arrangement] are likely to be significantly less than was indicated in the estimate provided in the First Notice (see in particular the table at paragraph 15 of the First Notice) and in the Report to Creditors dated 16 March 2018.
>
> 12. Secondly, as discussed above, the funding equalisation order will result in [R]egistered [G]roup [M]embers paying less in funding costs to the funders under the proposed settlement of the class actions.

> 13. Nonetheless, whether Non-Participating Group Members will be better off participating in the proposed settlement (as opposed to claiming under the [Deed of Company Arrangement] process only) will still depend on:
>
> (a) the final total number of registrants in the settlement process, and the relative numbers of Funded [Group Members] and Non-Funded [Group Members];
> (b) the value of the convertible notes at the time of any distribution (which, despite the revised update above, remains uncertain); and
> (c) the amount of the plaintiffs' legal costs approved by the Court as being reasonable and payable by [G]roup [M]embers participating in the Class Actions Settlement. A copy of the independent costs report that will be considered by the Court in deciding this can be accessed at [email address].
>
> 14. As disclosed in the First Notice, the plaintiffs seek $6 million in legal costs. If approved in full, the plaintiffs' costs together with any approved funding equalisation order could significantly reduce the amount of cash available to [G]roup [M]embers participating in the Class Actions Settlement. Alternatively, the Court may decide only to approve part of the plaintiffs' costs, in which case the reduction in cash available to [R]egistered [G]roup [M]embers will be smaller. Therefore it cannot be guaranteed that [G]roup [M]embers who participate in the Class Actions Settlement will be better off than Non-Participating Group Members who lodge a proof of debt as part of the [Deed of Company Arrangement] process only. That depends on the matters set out in [13] above." (My emphasis)

125 The terms of the Third Notice, including the words I have emphasised, were agreed by all parties; including the Contradictor.

126 In light of the matters disclosed in Mr McGowan's affidavit of 30 March 2020, and the matter stated in Mr Armstrong's and Mr Chalke's submissions of 1 April 2020, to which I return below, the passages I have emphasised in paragraph 14 of the Notice understated the risk to Non-participating Group Members of deciding to participate in the settlement, rather than proving in the SurfStitch Deed of Company Arrangement.

Mr McGowan's affidavit of 30 March 2020

127 On 30 March 2020, Mr McGowan affirmed a further affidavit.

128 Mr McGowan included in his affidavit a "Table 3B". He said:

> "Table 3B sets out the proportion of the settlement funds likely to be available for distribution to [G]roup [M]embers, which I have determined by applying

> [certain identified assumptions] save that I have applied the commission rates set out in [the Funders' Litigation Funding Agreements]."

129 Mr McGowan's assessments were made assuming either that all Group Members, who proved in the Deed of Company Arrangement and were thereby Admitted Subordinated Claimants, registered as Group Members and directed the Administrators to transfer their Deed of Company Arrangement entitlements into the Settlement Pool and thereby participated in the Settlement; or that only half of them did.[23]

130 Mr McGowan summarised the result of his calculations,[24] assuming a 100% registration rate, in his Table 3B.

131 In supplementary written submissions received after the hearing, and in response to enquiries I made of the parties, Mr Armstrong and Mr Chalke stated that there was an error in his table so far as concerned the effect of the Vannin Litigation Funding Agreement and produced a corrected table.

132 Mr McGowan's calculations, prior to and after correction, predicted that the Funders would recover all of the commission to which they were entitled under their Litigation Funding Agreements, that there would be a shortfall of funds available for Costs[25] and, most significantly, that there would be no return to Group Members.

133 Mr Armstrong submitted that although Mr McGowan's affidavit of 30 March 2020 set out what the result would be if the Funders enforced their entitlements under their Litigation Funding Agreements "this is not what was

[23] As set out in f/n 6 above, the current estimate of the cash available for distribution to Admitted Subordinated Claimants is made on the basis that, in fact, 76.2% of that value available will flow into the settlement pool available for distribution to Continuing Group Members.
[24] Which here assumed that all Group Members who proved in the Deed of Company Arrangement and were thereby Admitted Subordinated Claimants directed the Administrators to transfer their Deed of Company Arrangement entitlements into the Settlement Pool and thereby participate in the Settlement.
[25] Then assessed at $6.5 million.

being sought" and "did not reflect the application that was expected to be made" and "was simply telling the Court what the worst case scenario is".[26]

134 Further, in their submissions on 1 April 2020, made two days after Mr McGowan's affidavit, Mr Armstrong and Mr Chalke said:

> "12. The plaintiffs have calculated the likely residual settlement funds that will be available for distribution to [Continuing Group Members] were the Court to make an [Funding Equalisation Order]. Those calculations are set out in [Mr McGowan's affidavit of 30 March 2020] …
>
> 13. The calculations are based on an assessment of the losses suffered by [G]roup [M]embers undertaken by McGrath Nichol (McGrath Nichol Report), which McGrath Nichol determined by applying the loss assessment formula that appears as a confidential annexure to the originally proposed settlement distribution scheme.
>
> 14. The application of an [Funding Equalisation Order] will result in all of the value in the settlement fund being paid to the funders.
>
> 15. That conclusion does not militate against a [Funding Equalisation Order]. The [Funded Group Members] entered agreements for litigation funding for complex litigation. The agreements were performed. To the extent any fruits were obtained, they stand to the benefit of both [Funded Group Members] and [Unfunded Group Members]. The [Funded Group Members] now have a contractual obligation to remunerate the Funders for the heavy risks the Funders bore in accordance with their bargains. It would be unfair for [Unfunded Group Members] to enjoy the fruits of the litigation without contributing to both the legal and financial costs that were incurred.
>
> 16. The circumstance that the litigation ended on disappointing terms does not displace that consideration. The [Funded Group Members] ought not be left to bear alone the costs that were incurred." (My emphasis)

135 What was being put here was that, first, the entire value of the Settlement would go to the Funders. Second, the argument was put that this was the Funders' contractual right and the Funded Group Members' contractual obligation, and that Unfunded Group Members should not, in effect, be entitled to a "free ride".[27]

[26] T172.2.

[27] Not the language here used by Mr Armstrong and Mr Chalke, but an expression used by the High Court in *Brewster* at [88].

136 I find those submissions impossible to reconcile with Mr Armstrong's oral submission that the result foreshadowed in Mr McGowan's calculations was not "what was being sought".

137 I put that to Mr Armstrong in submissions. We had this exchange:

> "HIS HONOUR: No, but what you said before, that what Mr McGowan appears to have said in his 30 March affidavit was not what was contemplated. What I'm saying is that as I read, and as I still read your [1 April 2020 submission], that appears exactly to be what contemplated.
>
> ARMSTRONG: And your Honour, we accepted that criticism can be made. In my submission …
>
> HIS HONOUR: But how else do I read it? An application resulting in all the value of the settlement funds being paid to the funders, and then you go on to say, well, that's too bad, and there's reasons for that, which you explained.
>
> ARMSTRONG: Yes. Yes, the short point in response to that is that by the time the application came before the Court, we - in fact, long before the application came before the Court, we corrected this and made clear that the funders were not seeking the full value of the commission." (My emphasis)[28]

138 The time when "we corrected this" was in August 2020. I return to this below.

139 In an affidavit sworn on 23 November 2020, served in response to the enquiries I made of the parties following the October 2020 hearing, Mr McGowan said that the calculations in his 30 March 2020 affidavit:

> "44. … were intended to show the effect if the strict terms of the [Litigation Funding Agreements] were applied …. they reflected what I considered to be a worst-case scenario in which there were no concessions from the Funders as to the commission rates to be applied to their funded clients, and if costs were allowed at the amounts then claimed."

140 Mr McGowan also said:

> "47. At the time of my 19 and 30 March affidavits I expected that the Funders would moderate their claims for commission, to rates lower than the rates that would apply according to the strict terms of the [Litigation Funding Agreements]. There were ongoing discussions with the Funders, as a result of which I expected that the commission rates that they would offer to accept would be lower than the 'blended rate' set out in the calculations included in my 19 March affidavit. I was confident, even then, that the full Vannin

[28] T173.40-174.2.

multiplier would not be enforced. However, those discussions had not been concluded, in part because the Funders were still grappling with the costs-disallowances proposed in Ms Harris's Special Referee reports. Those reports were difficult to understand and to reconcile with each other. For example:

> (a) there were apparently internal inconsistencies in Ms Harris' report of 29 November 2019, and inconsistencies between that report and the earlier reports she had provided in this proceeding; and
>
> (b) it was unclear how she had determined the costs allowed in each of the scenarios set out in her supplementary report of 6 December 2019. In order to resolve that uncertainty, it was necessary to reverse engineer her calculations.

48. Resolving that uncertainty took time, and involved various inquiries of Ms Harris. The Banton Group reviewed these reports in detail to try to understand and assess them. The [F]unders were unable and unwilling to reach a concluded position as to the (lower) commission rate they were prepared to offer until those uncertainties were resolved.

49. I expected there was likely to be some trading-off in the Funders' positions, as between costs-reimbursement and commission, but both sides of that equation were unresolved at the time I affirmed my affidavits of 19 March, 30 March and 26 May 2020. Indeed, the negotiations with the Funders only resolved, with the Funders agreeing a reduced 25% commission, on 18 August 2020."

141 There is no such suggestion in Mr McGowan's affidavit of 30 March 2020.

142 Mr McGowan's evidence of 23 November 2020 is unchallenged, no doubt because it was served after the close of oral submissions, albeit as I have said, in response to my enquiries.

143 In the circumstances, I must accept that, as he has deposed, Mr McGowan did expect that the Funders would, in due course, "moderate" their claims for Commission.

144 But the only explanation available for Mr McGowan's 30 March 2020 prediction that the "settlement funds likely to be available to Group Members", would be zero, and Mr Armstrong's and Mr Chalke's strident 1 April 2020 justification of that result can be that, as things then stood, the Funders had not moderated their claims for Commission.

145 That would explain why the plaintiffs' solicitors altered cl 6(a) of the Third Notice to make clear that the Funder's Commission was proposed to be "at a rate determined by applying the terms of the relevant funding agreement", rather than at some "moderated" rate[29].

146 In these circumstances, and as Mr Donnellan submitted:

> "[W]hile it may be accepted that the plaintiffs' representatives could not have been certain that the Court would approve their proposed cost reimbursement and funding orders prior to the approval and distribution of the further notice, this is (with respect) beside the point. Those were the orders that the plaintiffs were seeking and indeed advocated for [in] the March and 1 April materials. The plaintiffs' representatives were aware from 30 March (prior to the distribution of the further notice) that such orders would result in [G]roup [M]embers being in a worse position as this is precisely what Mr McGowan predicted in his 30 March affidavit."

Did these matters render the Third Notice misleading?

147 These matters rendered misleading, if not false, the statements in the Third Notice that:

(1) if the plaintiffs' proposals were approved in full, the plaintiffs' costs together with any approved Funding Equalisation Order "could" significantly reduce the amount of cash available to Group Members; and

(2) it could not be "guaranteed" that Group Members who participated in the settlement would be better off than those who lodged a proof of debt as part of the Deed of Company Arrangement process.

148 As things stood at 30 March 2020 and 1 April 2020, the settlement approval then sought would have meant that:

(1) there would be no cash available to Group Members; and

[29] See [121] above

(2) Group Members would be worse off by participating in the Settlement than proving as part of the Deed of Company Arrangement process.

149 As I explain below, in August 2020, the Funders did moderate the claim for Commission and agreed to be paid a Commission lower than that to which they were entitled under the Litigation Funding Agreement.

150 Mr Donnellan accepted that the effect of the revised proposal, which is now reflected in the table at [37] above, was that the statements in the Third Notice were "no longer misleading".

151 Apart from the statement in Mr McGowan's 23 November 2020 affidavit that I have set out, there is no evidence before me as to the circumstances in which, by August 2020, the Funders agreed to moderate their claims for Commission.

152 As things stood on 30 March 2020 and 1 April 2020, it would have been open to the plaintiffs' legal advisors to restore the matter to the list, inform the Court that as things then stood, no funds would be available to Group Members, including the Non-participating Group Members and that a revised form of notice was desirable.

153 It would also have been open to the Contradictor to draw these matters to the Court's attention. The Contradictor accepted that he "did not appreciate immediately the significance of the supplementary materials" but stated that "nothing in the covering email serving the materials on the contradictor drew attention to the plaintiffs' very significant change in position or to the fact that this rendered misleading the plaintiffs' previous representations".[30]

154 This did not occur, and on 8 and 9 April 2020, the Third Notice was distributed.

[30] Contradictor's Further Submissions at [22].

Distribution of the Third Notice

155 On 8 and 9 April 2020, the plaintiffs' legal advisors emailed the Third Notice to 1,490 Group Members, including 1,017 Non-participating Group Members: that is, persons identified from the SurfStitch register as satisfying the group definition but who have not yet registered to participate in the settlement. On 15 April 2020, on Gadens' instructions, Link Market Services sent a hard copy of the Third Notice to a further 2,229 Non-participating Group Members for whom Gadens did not have an email address. Thus, Gadens caused the Third Notice to be sent to some 3,719 Group Members including 3,246 Non-participating Group Members.

156 In his affidavit of 14 May 2020, Mr McGowan said that as a result of what he described as "a campaign" of contacting Non-participating Group Members, a total of 902 Group Members registered to participate in the Settlement, and that of those 902 Group Members, 424 had registered "as part of the Further Registration Process".

157 Mr McGowan deposed that he was surprised at the number of hitherto Non-participating Group Members who so agreed to participate in the settlement following receipt by them of the Third Notice.

158 I have received detailed submissions as to the process that the plaintiffs' solicitors followed to cause the Third Notice to be distributed.

159 However, I am not persuaded it is fair to characterise their conduct as "soliciting" or "corralling" participants in the Settlement.[31]

160 I accept the submission that the plaintiffs' solicitors' were seeking to implement the orders made on 23 March 2020 and that this task proved complex and time consuming; not least because of the then recent Covid-19 restrictions. However, that task was carried out without informing the recipients of the Third Notice that, as things then stood, and unless the

[31] Cf the Contradictor's submission recorded at [115] above

Funders moderated their claim for Commission, it was not in the interests of Non-participating Group Members to participate in the Settlement.

Mr McGowan's 26 May 2020 affidavit

161 On 26 May 2020, Mr McGowan affirmed a further affidavit in which he set out the likely returns to the Participating Group Members. He deposed that there were now 912 Continuing Group Members, including 626 Unfunded Group Members, 424 of whom had registered following receipt by them of the Third Notice.

162 Again, Mr McGowan described this as a "summary of the funds likely to be available for distribution to [G]roup [M]embers after the application of a [proposed Funding Equalisation Order]".

163 Mr McGowan's calculations of the Funders' Commission were made in accordance with the Litigation Funding Agreements. There is no mention in this affidavit of the prospect of the Funders "moderating" their claims for Commission.

164 Again, in submissions, Mr Armstrong and Mr Chalke stated that there was an error in this table and produced a corrected table.

165 Both Mr McGowan's original, and the revised calculations, predicted that there would be sufficient funds to pay the Funders' Commission in accordance with their Litigation Funding Agreements on a "low", "mean" or "high" scenario;[32] that there would be a shortfall of the funds available to pay Costs (assuming costs at $6.5 million) on a "low" and "mean" scenario; and that there would be no funds to distribute to Group Members otherwise than if the "amount available" was "high".[33]

166 This showed that, as Mr McGowan then calculated matters, the 424 Group Members who had registered following delivery of the Third Notice had gained

[32] Recalling that this depended on whether the Convertible Notes proved to be of value.
[33] That is, if the Convertible Notes were at the maximum of their estimated value.

nothing by registering in the Settlement. Indeed, such new registrants were worse off than they would have been had they not registered to participate in a Settlement and, instead, proved in the Deeds of Company Arrangement.

167 It also showed that, by reason of the influx of registrants following the "campaign", the statements in the Third Notice that the plaintiffs' Costs, if approved, "could" significantly reduce the amount of cash available to Participating Group Members and that it "could not be guaranteed" that Group Members would be better off by participating in the Settlement, had been shown to have been seriously awry.

Vacation of settlement approval hearing

168 The application for approval of the Settlement was to be heard by Ball J on 22 May 2020. That date was vacated on 15 May 2020 by reason of the late service by the plaintiffs of material challenging the adoption of the costs assessment reports. These reports were prepared by Ms Elizabeth Harris, a referee appointed by the Court, by order made on 3 October 2019, to report as to the reasonableness of the Costs.

169 I return to Ms Harris's reports below.

170 For present purposes, the point is, that but for the vacation of the 22 May 2020 date, the matter would presumably have proceeded on the basis of Mr Armstrong's and Mr Chalke's submissions[34] and Mr McGowan's calculations; and approval of the Settlement sought on the basis that it was likely that the Settlement Pool would be exhausted by the Costs and Commissions and of the Continuing Group Members receiving nothing.

The Contradictor's submissions of 23 July 2020

171 On 23 July 2020, the Contradictor filed his submissions. Mr Donnellan was highly critical of the proposed Funding Equalisation Order and Cost claims.

[34] As set out at [134] above.

172 He submitted:

> "4. The proposed settlement now before the Court has a number of unusual features, not the least of which being that, if approved, the entire value of the settlement fund will be paid to the [F]unders. As far as the [C]ontradictor is aware, this result will be unprecedented in representative proceedings in this country." (Emphasis in original)

173 Mr Donnellan continued:

> "59. The proposed [Funding Equalisation Order] is sought pursuant to s 173(2) and s 183 of the [*Civil Procedure Act*] with the stated intention of seeking to equalise funding costs as between [Funded Group Members] and unfunded [Continuing Group Members] by 'deducting the [Funded Group Members] Obligations [under the [Litigation Fund Agreement]] from the cash and Convertible Notes available for distribution in the CAS Pool (after deduction of Reimbursable Costs from the cash) prior to any other distribution to [Continuing Group Members]'.
>
> 60. While it is generally appropriate that [Funded Group Members] not be left solely with the burden of funding the proceeding in the event that settlement is approved, as discussed above, the proposed [Funding Equalisation Order] in this case does not achieve the aim of alleviating [Funded Group Members] of that burden. The proposed order is of no benefit to the [Funded Group Members] as, whether or not it is made, they stand to receive no return under the proposed settlement on the terms proposed by the plaintiffs." (My emphasis)

The revised proposal

174 During August 2020, the plaintiffs' solicitors announced what amounted to a moderation by the Funders of their claim for Commission. There was debate before me as to whether this occurred as a result of Mr Donnellan's submissions of 23 July 2020.

175 As I set out above,[35] in his affidavit of 23 November 2020, Mr McGowan said that discussions with the Funders concerning the moderation of their fees has been ongoing.

176 In that affidavit Mr McGowan also deposed:

[35] At [140].

> "We did not need the Contradictor's submissions to point out the unattractiveness of the scale of costs and even the discounted rates of commission, relative to the settlement funds available. That is why:
>
> > (a) prior to and since the 2019 settlement, I was particularly concerned to ensure that the [Funded Group Members] received some net return from the settlement amount. I spent the next 10 months or so trying to negotiate a position where that was achieved. I negotiated with the [F]unders in relation to their commission rates, and the other plaintiff lawyers as to their costs. My firm agreed not to press its entitlement to an uplift, and to reduce its costs claim further. I personally have not been charging for almost all of my time for a year. I have negotiated hard on disbursements. I can say with confidence that all plaintiffs' lawyers and [F]unders were very aware of the need to keep all such costs and commission well under the $6.5 million figure and were doing all they could to achieve that; and
> >
> > (b) I had gone to such efforts, in my affidavits from 19 March onward, to keep the Court informed about our evolving estimates as to possible distribution outcomes, depending on the changing information about the value of the Convertible Notes, the ongoing costs, the number and composition of [Continuing Group Members] and the [Deed of Company Arrangement] participation rates."

177 Nonetheless, the timing of the announcement of the revised proposal does suggest that Mr Donnellan's submissions had some influence on Mr McGowan's negotiations with the Funders.

178 Thus, on 20 August 2020, Mr McGowan affirmed a further affidavit in which he referred to his 30 March 2020 affidavit and said that in that affidavit he had:

> " … deposed to an assessment of the amounts that would be deducted from the available settlement fund if the Court were to make a funding equalisation order (FEO) based on the strict application of the terms of the funding agreements entered into between the [F]unders and some [G]roup [M]embers."

179 Mr McGowan continued by stating that Vannin "did not and does not intend" to and that International Litigation Partners "will not" press for Commission in accordance with their entitlements under their Litigation Funding Agreements.

180 This was the first indication Mr McGowan had given that the Funders would "moderate" their claims for Commission.

181 Although Mr McGowan deposed that, in his 30 March 2020 affidavit, he had made a calculation based upon the "strict application" of the terms of the Funders' Litigation Agreements, for the reasons I have explained, there is no such indication in that affidavit.

182 Mr McGowan's recalculations of the effect of the proposed Funding Equalisation Order are set out in a revised table:

Table 3A.1 – FEO (90% DoCA Cash and Convertible Notes), losses discounted

		Low $m	**Mean $m**	**High $m**
A	DoCA Cash + Notes	2.46	4.7	6.95
B	Amount available ((A x 0.9) + 6.5[36])	8.71	10.73	12.76
C	Less ILP Commission	0.44	0.55	0.64
D	Less Vannin Commission	0.83	1.02	1.21
E	Gross settlement funds available for distribution (B - C - D)	7.45	9.17	10.91
F	Less plaintiffs' costs ($6.27m)	1.18	2.90	4.64

183 That table has now been further revised to the effect that I have set out at [37] above.

184 Mr Armstrong and Mr Chalke served reply submissions on 21 August 2020, the day after Mr McGowan affirmed his 20 August 2020 affidavit.

185 In those submissions, Mr Armstrong and Mr Chalke said:

> "24. … In our supplementary submissions dated 1 April 2020 we stated that the practical effect of an [Funding Equalisation Order] applying the strict terms of the funding agreements would be to exhaust the settlement fund. That is not what is proposed. In particular, the plaintiffs do not propose that Vannin's "costs multiplier", or that proportion of International Litigation Partners' commission determined as a percentage of legal costs, be applied in giving

[36] The Chubb contribution of $6.5 million

> effect to the proposed [Funding Equalisation Order]. Rather the proposal is that the percentage commission rates in the Vannin [Litigation Fund Agreement] be applied to the [Funded Group Members] in both proceedings, namely 25% of the gross amounts recovered by those [G]roup [M]embers. That itself is less than the commission rates under the [International Litigation Partners' Litigation Fund Agreement] of between 35% and 40%. The effect is the equalisation of relatively modest amounts of commission, across the overall settlement sum." (My emphasis)

186 Although, here, Mr Armstrong and Mr Chalke characterised what they had said in their 1 April 2020 submissions as a statement of the "practical effect of [a Funding Equalisation Order] applying the strict terms of the funding agreements", it was more than that.

187 In their 1 April 2020 submissions, Mr Armstrong and Mr Chalke sought to justify the position there stated by reference to the Funded Group Members "contractual obligations to remunerate the Funders for the heavy risks the Funders bore" and the unfairness of Unfunded Group Members enjoying the fruits of litigation without contributing to the costs incurred.

188 Mr Armstrong submitted orally that Mr McGowan's 20 August 2020 affidavit and the 21 August 2020 written submissions were "needed to correct what had been said previously" and "sought to clarify" those matters.[37]

189 In my opinion, this understates matters. Mr McGowan's 20 August 2020 affidavit and the 21 August 2020 written submissions involved a significant change in the *inter se* Settlement proposed; Vannin did not press enforcement of its Cost Multiplier Clause and each of the Funders proposed a 25% commission, which was very much less than specified in the Litigation Funding Agreements and very much less than had hitherto been proposed as part of the *inter se* Settlement.

190 However, the 21 August 2020 submissions made clear what was proposed and by when and reflects the proposal of the subject of submissions before me.

[37] T179.23.

191 Mr Donnellan accepted that "the revised proposal substantially redresses the direct prejudice suffered by the new registrants as a result of the misleading aspects of the [Third] notice".[38]

192 However, Mr Donnellan submitted that the plaintiffs' "belated abandonment of the "strict [Funding Equalisation Order] application" complicated the settlement approval application and caused "increased costs and delay" including the costs incurred since the October 2020 hearing. I will return to the question of costs below.

193 What can be said is that:

(1) the plaintiffs' solicitors caused the Third Notice to be distributed to Group Members, including Non-participating Group Members, without drawing to their attention that, on the strict application of the Funders' Litigation Funding Agreements they would be better off not participating in the Settlement;

(2) the result was that 424 hitherto Non-participating Group Members joined the Settlement, and forewent participating in the Deed of Company Arrangement, in circumstances where the prejudice they would otherwise have thereby suffered is only now alleviated by the Funders' belated agreement to moderate their claims to Commission; and

(3) it is likely, if not inevitable, that many of those 424 post-March registrants would not have agreed to join the Settlement, and would instead have participated in the Deed of Company Arrangement, had their attention been drawn to the matter in (1) above.

194 Mr Armstrong and Mr Chalke submitted that if, in that circumstance, "some further redress" should be provided to the 424 hitherto Non-participating Group Members, an order to this effect would suffice:

[38] Contradictor's further submissions dated 24 November 2020 at [38].

> "Any deductions from the CAS Pool in respect of costs and commissions in excess of $6.5 million shall be paid from the entitlements of the [Continuing Group Members] other than [Continuing Group Members] who registered after 30 March 2020."

195 Mr Donnellan said of that proposal that it:

> "(a) would largely redress any direct prejudice suffered by the March registrants due to the misleading aspects of the further notice and the failure of the plaintiffs' solicitors to advise [Non-participating Member Groups] of the risks of registration; but
>
> (b) would not take proper account of the effect of the increased costs and delay attributable to the plaintiffs' maintaining its application for a strict [Funding Equalisation Order] from 5 March to 20 August 2020, and the plaintiffs' belated adoption of the revised proposal. Accordingly, if the plaintiff's proposed order is made the Court should also not allow recovery of any costs incurred since the October settlement hearing."

The Costs incurred

196 As is reflected in the tables I have set out above, the plaintiffs seek approval of a Settlement which includes deduction from the Settlement Pool of an amount for Costs.

197 Mr McGowan's calculations assumed a total deduction of $6.5 million for costs.

The reference to Ms Harris

198 By an order made on 3 October 2019, the Court appointed Ms Elizabeth Harris as a referee, pursuant to Uniform Civil Procedure Rule 20.15, to prepare a report in relation to the reasonableness of the Costs of the plaintiffs' applications for approval of Settlement.

199 Ms Harris produced a report dated 29 November 2019 which incorporated three earlier reports that she had prepared as an expert witness for the plaintiffs.

200 There was a dispute as to the extent to which Ms Harris' report should be adopted.

201 It was common ground that the relevant principles in relation to the adoption of a report were stated by McDougall J in *Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd.*[39]

202 It was agreed that, for present purposes, the relevant principles are that:

(1) an application that a report not be adopted is not an appeal;

(2) the discretion to not adopt a report should be exercised consistently with the purpose of the "referee" process;

(3) where the report reflects a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a predisposition to accept the report;

(4) where the report reveals some error of principle, patent misapprehension of the evidence, or is arbitrary or influenced by improper considerations, then there would arise reasons for rejecting it;

(5) referees should give sufficient reasons to enable the parties and the Court to know the report is not affected by the flaws described in (d) above;

(6) where the party challenging the report contends that the reasons in the report are not adequate because there was very significant evidence against the referee's findings with which the referee did not at all deal, examination of the evidence may be undertaken to show that the reasons were in fact inadequate because they omitted any reference to the very significant evidence; and

(7) insofar as the subject matter of dissatisfaction with a report is a question of law, or the application of legal standards to established

[39] [2005] NSWSC 784 at [7].

facts, a proper exercise of discretion requires the judge to consider and determine the matter afresh.

203 The particular challenges to Ms Harris's reports involved propositions that Ms Harris had made errors of principle or had not given sufficient reasons for a number of her conclusions.

204 I will turn now to the particular challenges made. A number of the challenges made in written submissions were not pressed orally. I will deal only with those challenges that were pressed.

The challenges to adoption of Ms Harris's reports

Gadens

KPMG work

205 McConnell's solicitors, Gadens, investigated whether McConnell should bring a claim against SurfStitch's auditors, KPMG.

206 No such claim has been brought and the proposed Settlement reserves such rights as Group Members might have against KPMG.

207 In her report of 28 August 2018, Ms Harris referred to the Commercial List Response filed by Mr Cameron and said:

> "The Cameron Commercial List Response alleges concurrent wrongdoers, giving rise to possible third-party proceedings. These include KPMG. I have excluded work undertaken investigating possible claims against third parties by filtering for the words: 'KPMG'…"

208 In her 29 November 2019 report, Ms Harris said:

> "10. I have also formed the view that some of the costs relating to possible claims against third parties, namely KPMG as the SurfStitch auditors, should form part of the plaintiffs' costs. For that reason, it is necessary for me to revisit my first reports and consider what part of the excluded costs should now be allowed."

209 Ms Harris was evidently referring to the passage from her 28 August 2018 report that I have set out at [207] and had reconsidered her conclusion that costs associated with investigating a claim against KPMG be "excluded" and now was of the opinion that "some of" those costs should be allowed.

210 Later in her report, Ms Harris said:

> "35. The settlement agreement reserves the right for the plaintiffs to bring claims against KPMG.
>
> 36. In my first McLellan [sic] report, I expressed the opinion that the work relating to the investigation of claims against KPMG was the plaintiffs' cost of the proceeding. In part, this was because the Cameron [C]ommercial [L]ist [R]esponse alleged concurrent wrongdoing including KPMG. Also, the [International Litigation Partners'] funding agreement defines the scope of costs to include claims against third parties – definition of "investigations" and "matter" in Schedule 1.
>
> 37. However, the settlement agreement specifically excludes claims against third parties, and in my opinion, the later work undertaken in relation to KPMG in 2019 was undertaken in a different context – to consider initiating separate proceedings against KPMG. I consider that these are not costs of the McConnell or Nakali proceedings. Gadens have maintained a separate file for this work, including the fees of counsel and an expert advising on the possible claim."

211 Here, Ms Harris appears to be saying that, notwithstanding what she had said in the passage set out at [208] above, the "later work" to which she referred should not be allowed.

212 It appears that, applying this reasoning, Ms Harris disallowed Gadens' costs of $41,662.91 on this account.

213 Mr Armstrong did not address the chain of reasoning I have set out at [207] to [212] but, rather, submitted that Ms Harris had made an error of principle because she assumed that work that did not lead to a positive claim against KPMG was not allowable.

214 I do not see any error of principle here. Ms Harris has formed a view that as investigations into a possible claim against KPMG did not lead to proceedings being commenced against the firm then, as a matter of judgment, the relevant

costs (the "later" costs) were not reasonably incurred in relation to the plaintiffs' applications for approval of the settlement. No criticism was made of Ms Harris's adoption of $41,662.91 as the figure to be deducted on account of this "later" work.

215 I am not persuaded to reject this part of Ms Harris's report.

Supervisory work

Generic time records

216 In her 28 August 2018 report, Ms Harris said:

> "I have identified generic time entries such as 'attendance', 'considering issues arising', 'reviewing materials' and 'file administration' to the value of $38,471.00 (inc GST). These should be disallowed."

217 Ms Harris gave no reasons for this conclusion.

218 As Mr Donnellan submitted, Ms Harris doubtless has extensive experience in cost assessing and is capable of expressing opinions as to whether generic time entries of the kind referred to were reasonable. But here, she has given no reasons for her very sweeping conclusion.

219 I am not prepared to adopt this aspect of her report.

Costs of signing up claimant

220 Ms Harris disallowed an amount of $39,050.75 for work undertaken in relation to the signing up of "the claimant" (that is, the plaintiff) to the International Litigation Partners' Litigation Funding Agreement and Gadens Legal Costs Agreement.

221 Thus, Ms Harris stated in her report of 28 August 2018:

> "The second type of pre-retaining work is work in signing up the claimant to the [Litigation Funding Agreement] and [Legal Costs Agreement]. In my opinion, this work is not chargeable to the claimants, as it only benefits either [International Litigation Partners] or Gadens."

222 I do see this as an error of principle. As Mr Armstrong pointed out, it was necessary that the "claimant", McConnell, be signed up as the lead plaintiff for its benefit, and for the benefit of all Group Members it represented. Ms Harris should have allowed this amount.

223 I do not propose to adopt this aspect of Ms Harris's report.

Administrative work

224 Ms Harris disallowed an amount of $28,000 to account for costs relating to administrative work, including monthly reporting to the Funders.

225 In her 29 November 2019 report, Ms Harris said:

> "I have identified costs relating to administrative work, including monthly reporting to [F]unders, to the value of $28,000 which is not recoverable."

226 Again, Ms Harris has given no reasons for this conclusion. I see substance in Mr Armstrong's submission that reporting to Funders is an ordinary cost incurred in the context of a funded class action.

227 I do not propose to adopt this aspect of Ms Harris' report.

Global deductions

228 In her 28 August 2018 report, Ms Harris considered what disallowances should be made in relation to Gadens' fees concerning the Funders' Legal Costs Agreement and Litigation Funding Agreements.

229 Ms Harris opined:

> "Whilst I have been able to undertake specific calculations as to disallowances in respect of LCA/LFA work, I cannot undertake specific calculations in relation to other aspects without undertaking a full review of the time records and I do not consider that the time and cost of such an exercise reflects the balance required in providing information to the Court and the costs of the provision of such information. Accordingly, based on my experience in solicitor/own client taxations of costs, have applied an overall percentage reduction, having regard to the level of work and costs associated with work where there is likely to be reductions.

> Having regard to all of the above, it is my opinion that a reduction of 6% of the total professional costs excluding Cameron and possible Third parties would reflect the likely reduction on a solicitor/own client taxation."

230 Ms Harris disallowed an amount of $75,147.20 on this account.

231 It may be, as Ms Harris has stated, that the time and cost of undertaking "a full review of the time records" might be onerous, and perhaps out of proportion to the amounts involved.

232 However, the conclusion expressed by Ms Harris appears to be quite arbitrary.

233 I do not propose to adopt this aspect of Ms Harris's report.

234 Ms Harris expressed a similar view in relation to the fees charged by Gadens in relation to what the parties described as the "co-counsel arrangement" with Squire Patton Boggs.

235 As the plaintiffs did not seek to justify engagement of Squire Patton Boggs as "counsel", I do not propose to interfere with Ms Harris' conclusions in relation to that matter.

Duplication

236 Ms Harris produced a report dated 3 October 2018, dealing with duplication of work between the solicitors acting for McConnell, Gadens, and those acting for Nakali, Johnson Winter Slattery.

237 Ms Harris opined:

> "Based on the assessment outlined in detail below, it is my opinion, based on my experience, that the costs incurred in the McConnell and Nakali proceedings relating to work which was duplicated by reason of both Gadens and [Johnson Winter Slattery] undertaking the same tasks are in the order of $332,937.50."

238 In her 29 November 2019 report, Ms Harris noted that:

> "Whilst no formal consolidation order has been made, the two proceedings have been informally treated as such by the Court since July 2018, with replica orders being made in each proceeding."

239 In their costs submissions, Mr Armstrong and Mr Chalke accepted that:

> "Prior to the informal consolidation eluded to by Ms Harris, the proceedings were competing actions, and there was no cooperation between the parties."

240 Mr Armstrong and Mr Chalke submitted that it was not apparent from Ms Harris' November 2019 report whether she had made any deduction for what she had earlier identified as duplicated costs. However, in the absence of some correction in her November 2019 report to what she had opined in her 3 October 2018 report (and none was drawn to my attention) I assumed that Ms Harris maintained her view that there had been duplicated costs to the extent that she stated.

241 I see no error of principle here. Ms Harris' opinions were matters of judgment, admittedly expressed by her in her 3 October 2018 report on a "broad brush basis", but not otherwise challenged before me.

242 I can see no reason not to adopt this aspect of her report.

Johnson Winter Slattery

243 There were three matters in Ms Harris' November 2019 report in relation to which she did not allow costs for work conducted by Johnson Winter Slattery, the solicitors retained by Nakali.

244 First, Ms Harris disallowed administrative costs in the amount of $20,000. I do not propose to adopt this aspect of Ms Harris's report for the same reason as I have set out in relation to Gadens' corresponding costs.

245 Second, Ms Harris disallowed $65,000 of the $87,877 incurred in relation to a change of solicitors from Quinn Emanuel to Johnson Winter Slattery. In reply submissions, Mr Donnellan accepted that these fees should not have been disallowed.

246 Finally, Ms Harris made a global deduction of 3% to account for various categories of costs incurred by Johnson Winter Slattery which she opined were not recoverable. Ms Harris disallowed an amount of $40,614 on this account. As is the case with the corresponding deductions made in respect of Gadens' fees, my opinion is that Ms Harris has not set out her reasons for making these deductions.

247 I do not propose to adopt this aspect of Ms Harris's report.

Squire Patton Boggs

248 Ms Harris disallowed costs charged by Squire Patton Boggs on a number of bases. Firstly, that there was no implied retainer by the plaintiffs of Squire Patton Boggs before the entry by McConnell into a written retainer on 22 February 2019. Secondly, on the basis that some of the work done by Squire Patton Boggs was for the benefit of the Funders and not of Group Members.

249 The plaintiffs did not press their complaints about the opinions expressed by Ms Harris on these questions.

250 What remained was a global reduction of 9% that Ms Harris gave to Squire Patton Boggs' work, that Ms Harris accepted was not duplicative of Gadens' work.

251 Mr Armstrong informed me that the work that Squire Patton Boggs was doing related to assisting Gadens in relation to matters of insolvency and cost modelling, areas where Squire Patton Boggs evidently has special expertise.

252 However, unlike her conclusions in relation to Gadens and Johnson Winter Slattery, Ms Harris gave reasons for her admittedly "broad brush deduction" of 9%.

253 Mr Armstrong and Mr Chalke developed written submissions to the effect that Ms Harris's conclusions were not reasonable or apt.

254 However, these are matters of judgment. In circumstances where Ms Harris has given reasons for her conclusion, I am not persuaded that I should reject it.

Conclusion concerning Ms Harris's reports

255 Subject to the matters I have set out above, I propose to adopt Ms Harris' reports.

256 Ms Harris reported that the plaintiffs had incurred costs of a little under $6 million to November 2019.

257 In relation to the fees charged by Gadens,[40] Ms Harris allowed an amount of $2,983,399.01.

258 Gadens has resolved not to press its entitlement, under its Agreement to an uplift and therefore seeks to recover $2,572,950.68, rather than the $2,983,399.01 that Ms Harris allowed.

259 To that figure, there should be added the following amounts that reflect the extent to which I do not propose to adopt Ms Harris' report, adjusted to reflect the amount now sought in view of Gadens' decision not to pursue the uplift:

(1) $31,885[41]

(2) $31,240[42]

(3) $22,400[43]

(4) $75,147[44]

TOTAL $160,672

[40] For McConnell.
[41] See [216] – [219] above.
[42] See [220] – [223] above.
[43] See [224] – [227] above.
[44] See [228] – [233] above.

260 Therefore, the total amount of Gadens' reasonable costs to November 2019 is $2,733,622.68.

261 In relation to Johnson Winter Slattery[45] Ms Harris allowed costs of $1,647,402.47 to November 2019.

262 In light of my conclusions concerning the adoption of Ms Harris' report, the following amounts should be added to that figure:

(1) $20,000[46]

(2) $65,000[47]

(3) $40,614[48]

TOTAL $125,614

263 Therefore, the total amount of Johnson Winter Slattery's reasonable costs to November 2019 is $1,647,402.47 + $125,614 = $1,773,016.47.

264 Ms Harris also allowed a figure of $187,153 for the fees of Squire Patton Boggs, who provided consultancy work in relation to aspects of the proceedings.

265 Therefore, the total for the plaintiffs' reasonable legal fees to November 2019 is $2,572,950.68[49] + $160,672[50] + $1,647,402.47[51] + $125,614[52] + $187,153[53] = $4,693,792.15.

[45] For Nakali.
[46] See [244] above.
[47] See [245] above.
[48] See [246] above.
[49] See [258] above.
[50] See [259] above.
[51] See]261] above.
[52] See [262] above.
[53] See [264] above.

266 Ms Harris has expressed no opinion as to the plaintiffs' costs since 29 November 2019.

267 In their submissions of 23 November 2020, Mr Armstrong and Mr Chalke said that the costs incurred by the plaintiffs' solicitors since November 2019 to that date totalled $971,804.69.

268 Mr Armstrong and Mr Chalke implored me not to impose upon the parties the further costs delay of another referral, let alone taxation in relation to these costs.

269 Instead, Mr Armstrong and Mr Chalke and suggested a discount of 19% in relation to certain elements of that figure (said to be the approximate proportion of Ms Harris' total disallowances up to November 2019) and a discount of 50% in relation to other elements of the costs said to reflect "both 'taxation risk' and the 'recoverability risk'" associated with those costs.

270 Mr Donnellan, in his reply submissions, did not cavil with this proposal, which I propose to adopt.

271 The result is to reduce the claim for post-November 2019 costs to 23 November 2020 to $688,526.11.

272 In their submissions of 23 November 2020, Mr Armstrong and Mr Chalke estimated that the costs likely to be incurred after that date, being then unbilled work in progress, estimated counsels' fees and the costs of administering the settlement distribution, as allowed for by Ms Harris,[54] would be $293,553.16. Again, Mr Donnellan did not cavil with this figure.

273 I therefore conclude, leaving aside the question of proportionality, that the total amount of reasonable costs incurred by the plaintiffs' solicitors will be $4,693,792.15 + $688,526.11 + $293,553.16 = $5,675,871.42; rounded to $5.67 million.

[54] At $200,000.

Are the Costs disproportionate?

274 The total value of the Settlement Pool is not yet known but is likely to range from $8.31 million to $11.55 million, depending in large part on whether the Convertible Notes proved to be of any value.

275 Assuming that the Convertible Notes do not prove to be of value, and that the Settlement Pool is thus $8.31 million, the costs of $5.67 million constitutes some 68% of the value of the Settlement Pool.

276 As Mr Donnellan pointed out, judicial oversight of costs is an important part of the Court's role in the approval of settlements and proceedings brought under Part 10 of the *Civil Procedure Act* and its analogues,[55] particularly in "open class" representative proceedings.[56]

277 The Court's role is to:

> "…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'."[57]

278 Although the reasonable Costs incurred in these proceedings represent a high proportion of the Settlement Pool, I accept that there is substance in Mr Armstrong's and Mr Chalke's submissions that here:

(1) the case on "liability" was strong;

(2) having commenced the proceedings, the plaintiffs took almost immediate steps to secure a copy of the relevant insurance policy;

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[55] eg Murphy J *Peterson Superannuation Fund Pty Ltd v Bank of Queensland* [2018] FCA 1842; 132 ACSR 258 at [87]-[89].
[56] *Botsman v Bolitho* (2018) 57 VR 68; [2018] VSCA 278 at [220] (Tate, Whelan and Niall JJA).
[57] *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [91] (Murphy J), citing *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311 at [61]; *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626 at [32] (Gordon J); and *Newstart 123 Pty Ltd v Billabong International Limited* [2016] FCA 1194 at [14] (Beach J).

(3) having been provided with a copy of the insurance policy, and faced with the Administration of the SurfStitch companies, the parties moved to secure a settlement of the proceeding; and

(4) most of the costs in the action were incurred in connection with the attempts to settle it, reflecting the complexities associated with the Administration; the entry into the Deed of Company Arrangement, the involvement of Chubb and what Mr Armstrong and Mr Chalke described as the "bedevilling uncertainties as to the value of the Convertible Notes and the residual cash".

279 However, I think there was also substance in Mr Donnellan's submissions that the delay between 30 November 2019 and 20 August 2020 during which time, according to Mr McGowan, the plaintiffs' legal advisers were seeking to negotiate with the Funders for a moderation in their claims for Commission, have contributed to the costs incurred.

280 Much of the October 2020 hearing before me was devoted to this question and almost all of the inquiries that I made of the parties in November 2020 related to this question.

281 Further, as I set out below, the costs incurred in the unsuccessful application before me to dispense with the opt out notices[58] and the belated service of evidence challenging Ms Harris's reports[59] have also added to the costs incurred.

The Commissions sought

282 The "moderated" commissions now sought by the Funders are set out in the table at [37] above. They represent something in the order of 15% of the

[58] See [293]-[304] below.
[59] See [311]-[316] below.

Settlement Pool whether at the "low", "mean" or "high" rates set out in that table.[60]

283 Mr Donnellan did not criticise these moderated rates as Commission.

Has there been disentitling conduct?

284 Mr Donnellan drew my attention to the following observations stemming from recent decisions concerning the role of "disentitling conduct" in the Court's exercise of its supervisory role:

(1) The conduct of solicitors concerning their management of the proceeding[61] or involving breaches of duties owed to Group Members (including Unfunded Group Members)[62] will inform the Court's assessment of a fair level of costs reimbursement.

(2) A solicitor's duty in open class representative proceedings includes a duty not to act contrary to the interests of non-client Group Members;[63] and

(3) The Court's powers to make orders approving the distribution of Funds to Funders are "only appropriately exercised where the Funder has consistently acted in the interests of group members, has not unduly enlarged the costs of the proceedings and has materially contributed to the outcome of the claims".[64]

285 These observations are consistent with the power given to the Court in s 173(2) of the *Civil Procedure Act* to make, in the course of approving a settlement of representative proceedings:

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[60] Reflecting, as I have said, the possible value of the Convertible Notes.
[61] Eg *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842 at [158] (Murphy J) where his Honour rejected the suggestion that "the Court should studiously avoid seeking to evaluate or second guess the firm's conduct during the litigation" and that it was "necessary to give close consideration to the way the firm conducted the case".
[62] Eg *Bolitho v Banksia Securities Ltd* [2019] VSC 653 at 199 (Dixon J); and *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637 at [472] ("*Cantor v Audi Australia")*.
[63] *Dyczynski v Gibson* [2020] FACFC 120; 146 ACSR 13 at [378]-[379] (Lee J, with whom Murphy and Colvin JJ substantially agreed).
[64] *Cantor v Audi Australia* at [468].

> "…such orders as are just with respect to the distribution of any money … paid under a settlement …"

286 Mr Donnellan submitted that the Plaintiffs, those advising them, and the Funders had engaged in "disentitling conduct" in a number of ways.

Resistance in July 2018 to provision of notices to Group Members

287 The first was the plaintiffs' 4 July 2018 to dispense with provision of notice to Group Members of the Deed of Company Arrangement Settlement.

288 In making this application, the plaintiffs' sought, in effect, as a condition precedent to settlement approval, an order dispensing with the giving of notice to Group Members of the settlement approval application.

289 This application was allied to the Plaintiffs' 4 July application to dispense with giving Group Members notice of their entitlement to opt out of the class action.

290 The basis upon which the 4 July 2018 application was sought was that, were the application to dispense with giving opt out notices to be successful, there would be no point in giving Group Members notice of the settlement application.

291 However, that may be, the plaintiffs did not press the order dispensing with notice to Group Members and, as I have set out, notice was given on 9 August 2017 in the form of the First Notice.

292 In these circumstances, I do not consider the plaintiffs' short-lived application to dispense with giving Group Members notice as being conduct relevant to the terms on which the settlement should be approved.

Application to dispense with opt out notices

293 The next item of "disentitling conduct" to which Mr Donnellan pointed was the unsuccessful application by the plaintiffs for an order under s 183 of the *Civil Procedure Act* dispensing with the provision of notice to Group Members

under s 175(1)(a) of the *Civil Procedure Act* of their right to opt out of the proceedings before the date fixed under s 162(1) of the *Civil Procedure Act*.

294 As I have set out above,[65] on 15 November 2018, I dismissed that application on the basis that s 183 of the *Civil Procedure Act* was not available to make such an order.

295 Mr Donnellan submitted that the application was "inappropriate", "unnecessary" and a "huge gamble" in that it relied "only" upon the decision of Jacobsen J in *Vernon v Village Life Limited*[66] and in the face of the "fairly strong statutory language" in s 162(1) of the *Civil Procedure Act*.

296 Mr Donnellan submitted (as he had before me during the opt out application) that Jacobson J's decision was made in the absence of a contradictor and was apparently inconsistent with more recent Federal Court authority (albeit not authority precisely on point).[67]

297 However, Jacobson J's decision was then the only decision directly on point and was one in respect of which his Honour said he had given "careful consideration".[68]

298 I held that the more recent Federal Court authority had persuaded me that Jacobson J's decision in *Vernon* was plainly wrong and that I should not follow it.

299 Mr Donnellan accepted that the application was arguable but submitted that it was risky and, rather than agitating an "uncertain question", the more conservative course should have been followed to get the matter "wrapped up".

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[65] At [95].
[66] [2009] FCA 516 ("*Vernon*") and referred to in my judgment of 15 November 2018 at [47]-[52].
[67] *Ceramic Fuel Cells (in liq) v McGraw–Hill Financial Inc* (2016) 245 FCR 340; FCA 401 at [63]; *Perera v GetSwift Ltd (No 2)* [2018] FCA 909 at [278]*; Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289 at [32]; *Kadam v MiiResorts Group 1 Pty Ltd (No 5)* [2018] FCA 1086 at [79]; *Webb v GetSwift Ltd* [2018] FCA 783 at [20].
[68] *Vernon* at [57].

300 The stated justification for the application at the time, and before me on this application, was to protect the position of Funded Group Members and avoid "free riders" benefitting from the settlement without contributing to funding costs.

301 Mr Donnellan submitted that the effect of the application was also to cause a delay in the resolution to these proceedings as, otherwise, Mr Donnellan submitted, it was likely that the Deed of Company Arrangement settlement would have been approved long before now.

302 The application certainly resulted in the plaintiffs incurring costs that had not incurred for the benefit of Group Members generally. It is also, obviously, true that the application was unsuccessful. But I am not able to conclude that the application was made unreasonably or that any criticism can be directed to those advising the plaintiffs in recommending that it be made.

303 There has been a delay of around two years since I rejected the application. In the meantime, Chubb has been joined to the proceedings, and has agreed to contribute an amount equal to approximately 80% of the cash that is available in the Settlement Pool. Further, much of the delay between November 2018 and now has been caused by events other than an unsuccessful application; in particular the decision of the High Court in *Brewster*, and the vacation of the 22 May 2020 hearing date for the approval of the Settlement.

304 I see the plaintiffs' decision to make the opt out application as being a matter potentially relevant to the proportionality of the costs, but not disentitling conduct such as would warrant wider intervention.

The events following the 23 March 2020 notice to Group Members

305 Mr Donnellan's submissions on disentitling conduct focused on the events following delivery of the Third Notice to the Group Members on 23 March 2020.

306 As I have said, Mr Donnellan described the plaintiffs' solicitors' conduct in this regard as "egregious".[69]

307 I think that overstates matters.

308 However, as I have set out above,[70] although the Third Notice warned Group Members that the plaintiffs' costs, together with any approved Funding Equalisation Order, "could" reduce "significantly" the amount of cash available to Group Members and, although it "could not be guaranteed" that Group Members would be "better off" by participating in the Settlement rather than proving in the Deed of Company Arrangement:

(1) as at 30 March 2020, Mr McGowan's calculations showed that if the Funders enforced their entitlements under the Litigation Funding Agreements (and, for the reasons I have set out above there was no suggestion at that time they would not), the Costs and implementation of the proposed Funding Equalisation Order would consume the Settlement Pool and leave nothing for Group Members; so that Group Members would be worse off by participating in the Settlement than in proving in the Deed of Company Arrangement; and

(2) as at 26 May 2020, the position was confirmed in all but one somewhat optimistic scenario,[71] notwithstanding doubling of the Group Members participating in the Settlement.

309 As I have said,[72] it would have been open to the plaintiffs' solicitors, and Mr McGowan in particular, to have restored the matter to the list, informed the Court of the position as it then stood and raised with the Court the desirability of sending a further notice to Group Members, particularly Non-participating

[69] See [114] above.
[70] At [124].
[71] That the Convertible Notes will realise their maximum projected value
[72] See [152] above.

Group Members informing them of that position. It would also have been open to the Contradictor to adopt the same course.[73]

310 As it turned out, in August 2020 the Funders moderated their claim for Commission with the result that, as the Contradictor accepts, the direct prejudice to the 424 post-March 2020 registrants in the settlement has been addressed.

311 The fact remains that that those 424 post-March registrants were denied the opportunity to make an informed decision as whether to participate in the Settlement, as opposed to proving in the Deed of Company Arrangement.

The challenge to adoption of Ms Harris's reports

312 I have set out above[74] the challenge made by the plaintiffs to the adoption of Ms Harris' reports and my conclusions in relation to that challenge. Mr Donnellan submitted that the late service of evidence challenging Ms Harris' reports, which led to the vacation of the 22 May 2020 hearing date for the approval of the Settlement, itself constituted disentitling conduct.

313 That evidence comprised affidavits by Mr McGowan, Mr Scarcella from Johnson Winter Slattery, and Ms Amanda Banton, formerly a partner at Squire Patton Boggs, now a partner at Banton Group. Those affidavits were served on 25 and 26 May 2020. Around the same time the plaintiffs served submissions from Mr Armstrong and Mr Chalke on the question of Costs.

314 Mr Donnellan pointed to the fact that the belated application to challenge Ms Harris's costs came at a time when on Mr McGowan's analysis, the entire Settlement Sum would be consumed by the Funders' Commission and the Costs, save in the scenario to which I have referred above.[75]

[73] See [153] above.
[74] At [205] to [273].
[75] At [165].

315 The plaintiffs incurred costs in the order of $125,000 in mounting their challenge to Ms Harris' report.

316 Mr Donnellan accepted, however, that the asserted disentitling conduct here was "at the low end of the range".

317 I do not see the plaintiffs' late service of evidence to challenge Ms Harris's reports as itself being disentitling conduct. However, the costs thereby incurred, to the extent that the challenge has been unsuccessful, and the costs that must have been incurred by the vacation of the May 2020 hearing date, are matters relevant to the proportionality of the amount of costs claimed.

On what terms should the settlement be approved?

318 As I have said,[76] it is common ground that the Settlement *inter partes* should be approved.

319 The dispute is as to whether the Settlement is reasonable *inter se*, which involves consideration of the quantum of the Commissions and Costs claimed.

320 The Commissions claimed total $1.21 million and represent a figure in the order of 15% of the cash component of the Settlement Pool. They appear to me to be reasonable. As I have said, Mr Donnellan did not submit they were not.

321 Mr Donnellan's principal submission was that I should make an order having the effect that Group Members retained 50% of the cash component of the Settlement Pool (ie $8.31 million x 50% = $4.155 million + the Convertible Note entitlements).

322 Mr Donnellan submitted:

[76] See [57]-[61] above.

> "An order to this effect would spread the burden of the risks of a 'disappointing' recovery between the Funders and Group Members and leave Group Members broadly in the same position they would have been in had a winding up of SurfStitch occurred in March 2018."

323 I see a number of difficulties with this submission.

324 First, I do not see why the result of these proceedings should put Group Members in the same position as they would have been in had they proved in a winding up of SurfStitch.

325 Second, it appears to assume an acceptance of *all* of Mr Donnellan's submissions as to "disentitling conduct".

326 The result of making such an order would be that the Funders would recover only 60% of their Commissions and reasonable Costs and, assuming that their Commissions are reasonable, would leave only some $2.945 million for Costs being a little over half of the actual reasonable Costs ($5.67 million).[77]

327 I do not think that the manner in which the plaintiffs' legal representatives and the Funders have conducted this litigation warrants that result.

328 However, the fact remains that the reasonable Costs incurred are very large when compared to the Settlement Pool.

329 After taking account of the Commissions payable to the Funders, and assuming the Convertible Notes prove to be of no value, the gross settlement fund for distribution is $7.1 million.[78] Costs of $5.67 million are almost 80% of that figure. If the Convertible Notes prove to be at the "high" end of their estimated value, the gross settlement fund for distribution is $9.88 million.[79] Costs of $5.67 million would represent some 67% of that figure.

330 Costs thus represent a very high proportion of the funds otherwise available to Group Members. I accept that, to a large extent, this is the product of the

[77] See [273] above.
[78] See the Table at [37] above.
[79] Ibid.

complexities that have been involved in the plaintiffs' legal advisers' attempts to settle the proceedings. I have set out those matters above.

331 Leaving aside the costs incurred in the opt-out dispensation application, and in the belated service of material challenging Ms Harris's report, my principal concern about the costs incurred, and generally, arises from the events between the revelations in Mr McGowan's 30 March 2020 affidavit and the announcement in Mr McGowan's 20 August 2020 affidavit of the Funders' agreement to moderate their claim for Commission.

332 This caused the incurring of extra costs and caused further delay.

333 It also, as I have said, had the potential to deprive some or all of the 424 post-March registrants from making an informed decision about participating in the Settlement, as opposed to proving in the Deed of Company Arrangement; and very likely had the result that some of those 424 parties had agreed to participate in the Settlement when, properly informed, they would not have.

334 As Mr Armstrong and Mr Chalke explained,[80] if the amount to be deducted from the Settlement Pool for Costs and Commission exceeds $6.5 million, those 424 registrants will be worse off by having participated in the settlement than proving in the Deed of Company Arrangement.

335 The order proposed by Mr Armstrong and Mr Chalke would go some way to alleviate that position. To repeat, the order proposed is that:

> "Any deductions from the Settlement Pool in respect of Costs and Commission in excess of $6.5 million shall be paid from the entitlements of the Continuing Group Members other than the Continuing Group Members who had registered after 30 March 2020."

336 Mr Armstrong and Mr Chalke submitted:

> "That is the form of order that provides appropriate redress to the March Registrants. All the other [Continuing Group Members], whether funded or unfunded, and whether they registered in December 2019 … or at any time

[80] See [117] and [118] above.

> earlier, ought fairly be required to contribute *pro rata* to reimbursing the Funders for costs paid, to pay the Funders' concessional commission.[81] Those 'pre-March [Continuing Group Members]' were not in any respect misled. The circumstances of litigation as entered on disappointing terms is a reflection of the value of their claims, and specifically the value of the defendants … It is not a reason for denying the Funders' reimbursement of the costs they outlaid pursuant to their bargain with the Funded Group Members, or remuneration for the risk they took in supporting the litigation."

337 I see the force of that submission.

338 However, I think a fairer way to protect the interests of Group Members as a whole, and particularly the post-March registrants who would have been better off to prove in the Deed of Company Arrangement were Costs and Commission to exceed $6.5 million, is to cap the amount recoverable by the Funders for Commission and Costs at $6.5 million.

339 This was one of the suggestions advanced by Mr Donnellan. Mr Armstrong and Mr Chalke did not suggest in their responsive submissions that this was not an available result, in the sense of one beyond the Court's power.

340 Taking account of the Funder's Commissions totalling $1.21 million, this would leave $5.23 million available to the plaintiffs for Costs. I think that sufficient in the circumstances.

341 It would also ensure that the post-March registrants were not prejudiced by their decision to join the settlement.

342 Overall, my conclusion is that to approve the Settlement on this basis is the just and fair result to all parties concerned.

343 I invite the parties to confer and agree on the orders needed to give effect to this conclusion. I will also hear submissions as to any further steps necessary to bring these proceedings to an end.

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[81] Which I understood to be a reference to the moderated commissions in Mr McGowan's affidavit of 20 August 2020.