NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	12/12/2024 9:52:54 AM AEDT
Date Accepted for Filing:	12/12/2024 9:53:07 AM AEDT
File Number:	VID312/2021
File Title:	MINNIE MCDONALD v COMMONWEALTH OF AUSTRALIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Federal Court of Australia VID 312 of 2021

District Registry: Victorian Registry

Division: General

Minnie McDonald Applicant

and

Commonwealth of Australia Respondent

FUNDER'S OUTLINE OF SUBMISSIONS

A. PRELIMINARY

Purpose of intervention

1. On 10 October 2024, the applicant, Minnie McDonald, as the representative applicant in this representative proceeding (**Applicant**), filed an interlocutory application (**IA**) seeking an order pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (**Act**) that the settlement of the proceeding upon the terms set out in the Settlement Deed dated 30 August 2024 (**Deed**) be approved by the Court. The key features of the Deed are set out in the Applicant's submissions filed on 24 October 2024 (**AS**).[1] The parties have agreed to settle the claims of the Applicant and group members for *up to* $202 million (**Settlement Sum**) inclusive of costs.

2. LLS Fund Services Pty Ltd (ABN 51 637 975 213) as Trustee for Litigation Lending Fund is, in a co-funding agreement with Litigation Lending Services Limited (ABN 18 129 188 825), the litigation funder of the proceeding (**LLS**).

3. Consistent with the ordinary practice of this Court in respect of applications for settlement approval, by Order 24 of the orders made on 16 September 2024 (**September Orders**), LLS was granted leave to intervene on the Settlement Approval Application.[2] In these submissions, LLS seeks only to make submissions in relation to the fairness and reasonableness of the proposed settlement to the extent that it impacts the funding

[1] AS [20] to [25]; see also: Conrad Affidavit at [27] – [38].
[2] Order 21 of the September Orders.

commission and mechanism for payment of that funding commission and reimbursement of its insurance premium that is effected by the Deed and the settlement distribution scheme (Schedule 1 to the Deed) (**SDS**)[3]and sought by the Applicant in the IA.[4]

4. LLS submits that the Court should make proposed order 9 of the IA as sought by the Applicant, which order includes approval of:

    a. a funding commission paid to LLS of an amount equalling 20% of the gross funds paid by the Commonwealth under the Deed (the total amount of which is a presently unknown)[5] to be calculated as the sum of both the Settlement Funds and the Costs Sums (as those terms are defined in the Deed[6]) (**the Commission)** and

    b. the reimbursement for premiums in the amount of $1,045,000 paid by LLS for the 'after the event' insurance policy taken out by LLS with AmTrust Europe Limited. The policy insures LLS in respect of part of the adverse costs risk that it indemnified the Applicant against in the proceeding (**ATE Policy Reimbursement**).[7]

Evidence

5. LLS relies upon the affidavit of Stephen James Conrad affirmed on 29 October 2024 (**Conrad Affidavit**). Confidentiality is sought over parts of the Conrad Affidavit, as set out in Schedule 1 to the Conrad Affidavit. Confidentiality is addressed in Section E of these submissions.

B. APPLICABLE LEGAL PRINCIPLES

Power under s 33V of the Act

6. The making of the orders sought requires the Court to make a common fund order (**CFO**) pursuant to s 33V of the Act. While payment of the Commission and ATE Reimbursement is provided for in the Deed and the LFA, it cannot be determined (either

[3] Schedule 1 to the Deed.
[4] Prayer 9 of the IA.
[5] Given the operation of the Deed, the total amount paid for the CFO can only be known after the end of the registration period, which by Order 6 of the September Orders is 31 August 2025.
[6] Conrad Affidavit at [27] to [28].
[7] LLS will also support such orders as the Applicant seeks at the Second Approval Hearing listed for 17 December 2024 which provide for the reimbursement of the Applicant's legal costs and disbursements.

by reference to a specified rate or agreed amounts) or paid out of the Settlement Sum without the approval of the Court.

7. This Court may make a CFO at settlement approval time and the power to make such orders in the context of settlement approvals is well established.

8. Following the decision of the High Court in *BMW Australia Ltd v Brewster*[8], which dealt with "Commencement CFOs" formerly made early on in Part IVA proceedings under s 33ZF of the Act and cognate State legislation, the question arose as to whether the High Court's reasoning was applicable to CFOs made at the end of proceedings (termed "**Settlement CFOs**"). The Full Court of this Court in *Elliott-Carde v McDonald's Australia Ltd* [9] unanimously held that this Court has power under s 33V(2) of the Act to make a CFO at the stage of settlement approval.[10]

Principles applicable to setting CFO rate

9. A CFO may ultimately be awarded either because it is fair, reasonable and in the interests of all group members, in the context of approval of the proposed settlement (s 33V(1)); or because it is just (s 33V(2)). Some authorities focus only on the 'just' criterion in s 33V(2),[11] and for present purposes there is no practical difference. That is because whether the Court should approve a CFO, and in what amount, is ultimately a question to be guided by factors such as those non-exhaustively set out in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*.[12] But the exercise of that power starts with the proposition that a litigation funder (here, LLS) has provided funding, and that funding has benefited the class.

10. The *Money Max* factors (set out in paragraph [90]) of the judgment) relevant to assessing fairness and reasonableness of the rate of the funding commission which is sought include:

---

[8] (2019) 269 CLR 574 (***Brewster***).
[9] (2023) 301 FCR 1 (Beach, Lee and Colvin JJ) per Beach J at [170], per Lee J at [423] and per Colvin J at [504].
[10] *Galactic Seven Eleven Litigation Holdings LLC v Davaria & Ors* (2024) 302 FCR 493; [2024] FCAFC 54 per Murphy J at [32], Lee J agreeing with Murphy J at [136] and Colvin J at [142]; see also: *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501; [2020] FCAFC 183 (Middleton J, Moshinsky J, Lee J)
[11] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 at [48] per Murphy J (***Uren***).
[12] (2016) 245 FCR 191; [2016] FCAFC 148 per Murphy, Beach and Gleeson JJ (***Money Max***).

a. the information provided to class members as to the funding commission;

b. a comparison of the funding commission with funding commissions in other Pt IVA proceedings and/or what is available or common in the market;

c. the litigation risks of providing funding in the proceeding, assessed without hindsight bias, and recognising that the Funder took on those risks at the commencement of the proceeding;

d. the quantum of adverse costs exposure that the Funder assumed, again recognising that assumption of risk was done at the commencement of the proceeding;

e. the legal costs expended and to be expended by the Funder;

f. the amount of the settlement, and the proportionality of the commission bearing in mind the risks assumed by the Funder;

g. class members' likely recovery "in hand" under any pre-existing funding arrangements;

h. any substantial objections made by class members in relation to any litigation funding charges.

11. The Court has also recognised that the 'approval of funding commission rates should not become a "race to the bottom" and funding rates should provide an appropriate reward for the risk undertaken by a litigation funder'.[13] The making of a CFO is "consistent with general equitable principles that a person who benefits from another's efforts in producing a fund is obliged to provide **appropriate value** in return, as is reflected in the underlying principle that it would be inequitable for the person who has created or realised a valuable asset, in which others claim an interest, 'not to have his or her costs, expenses and fees incurred in producing the asset paid out of the fund or property created'"[14] (emphasis added).

---

[13] *Court v Spotless Group Holdings Ltd* [2020] FCA 1730 at [78]-[79] per Murphy J (***Spotless***); *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374 at [12] per Beach J (***Sirtex***).
[14] *Klemweb Nominees Pty Ltd v BHP Group Ltd* (2019) 369 ALR 583; [2019] FCAFC 107; at 610-611 [130]; *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 per Lee J at [37] (***Swann Insurance***).

12. The concern to avoid a "race to the bottom" and to provide appropriate value in return for a funder takes on arguably greater importance where the claim in issue was a substantially risky proceeding seeking compensation for historical wrongs and the vindication of the rights of a vulnerable minority. LLS submits that the involvement of litigation funders in enabling difficult, novel and complex public interest litigation to proceed should be encouraged by recognising the financial commitment made with appropriate reward for such risks. If already discounted rates are subject to further discount by the Courts, this could negatively on impact decisions to fund social justice litigation in the future.[15]

13. In summary, based on the *Money Max* factors, LLS seeks the orders sought for the following reasons.

    a. The matter required litigation funding and is unlikely to have proceeded without the involvement of LLS.

    b. At the time that funding was agreed, the case had significant litigation risks.

    c. Notwithstanding those risks, LLS determined to fund the proceeding as an important social justice case and did so at a discounted rate of 20% on the gross settlement sum.

    d. The funding commission proposed is low compared to market rates for funding and the same as the rate approved by the Court in the Queensland Stolen Wages Case.

    e. The 20% commission rate is the rate contained in the litigation funding agreement and was disclosed to all group members and to the Respondent prior to and following the proposed settlement.

    f. LLS has expended significant cost to prosecute group member claims in the proceeding, and continues to expend cost and time in ensuring as many group members are able to share in the proposed settlement.

[15] Conrad Affidavit at [158].

g. There is continued uncertainty as to the ultimate outcome for LLS in financial terms even with approval of the proposed rate.

h. The group members will still obtain a significant percentage "in hand" of the Settlement Sum and the deduction under the proposed funding commission rate of 20% is proportionate.

i. There have been no objections to the orders sought by the Funder.

j. The funding has benefitted all group members.

k. The reimbursement of ATE Insurance has been notified to group members and is fair and reasonable, particularly having regard to the low funding commission rate. That is, the combined return of the funding commission and the reimbursement of ATE costs is unlikely (in all likely scenarios) to provide LLS with a disproportionate return.

14. These reasons are set out in more detail below.

C. FACTORS SUPPORTING THE FAIRNESS AND REASONABLENESS OF THE ORDERS SOUGHT

The matter required litigation funding

15. It is not controversial that the proceeding required funding in order to be commenced and prosecuted. Ms Antzoulatos deposes that it is unlikely that it would have been commenced without the support of a litigation funder,[16] and therefore it would have been unlikely that group members would have received anything at all if LLS had not provided funding. Indeed, this case was brought to the Applicant's solicitor by LLS.[17] LLS has been a driving force in funding difficult class action claims which have sought redress for historical wrongs perpetrated against first nations peoples in Australia during the 20th century.[18]

[16] Antzoulatos Affidavit at [198].
[17] Conrad Affidavit at [62].
[18] LLS has to date funded: *Pearson v State of Queensland* (**Queensland Stolen Wages Case**), *Mervyn Street v State of Western Australia* (**WA Stolen Wages**), *Ellis v Commonwealth of Australia* [2023] NSWSC 550 per Beech-Jones CJ at CL.

16. No other law firm or funder sought to issue proceedings. There was no multiplicity dispute or fight for carriage.[19]

17. As set out in more detail below, the case was novel, complex and risky and was not seen by LLS as commercially attractive from a traditional financial perspective.[20] The evidence of Mr Conrad is that the matter received an unusual amount of internal scrutiny and there were significant difficulties obtaining approvals to fund the matter on the basis of its risk profile.[21] Nevertheless, LLS determined to fund the proceeding, at a discounted rate, by reason of its importance from a social justice perspective.[22]

18. The fact that LLS funded the proceeding, which enabled it to proceed when it otherwise likely would not have been commenced, is a factor that ought be recognised in making the orders sought.

The case involved significant litigation risk

19. There is no doubt that this case involved significant litigation risk, and this was recognised from the outset of LLS' involvement in the proceeding.[23]

20. Mr Conrad gives evidence of the approach LLS usually takes in considering opportunities for litigation funding, including a close analysis of risk, and explains that such an approach was undertaken in this case.[24] However, what he notes is that the process undertaken here was unusual in its length and depth by reason of the difficulties identified with the case.[25]

21. He deposes that LLS' involvement with this proceeding arose out of working with Shine lawyers in investigating stolen wages cases in other jurisdictions. Funding for the investigation was initially agreed in November 2018 and finally authorised for the proceeding in June 2021.[26] However, he sets out in his affidavit that this proceeding was considered five times by LLS' independent Case Assessment Committee (**CAC**) over 10

[19] Conrad Affidavit at [100].
[20] Conrad Affidavit at [70]-[90].
[21] Conrad Affidavit at [70]-[99].
[22] Conrad Affidavit at [65]-[66] and [135].
[23] Conrad Affidavit at [67] and [72]-[74].
[24] Conrad Affidavit at [51]-[60] and [70] – [90].
[25] Conrad Affidavit at [90].
[26] Conrad Affidavit at [92] – [93].

months.[27] At each of the first four CAC meetings, the CAC determined to request further information from the Applicant's lawyers. At the fifth CAC meeting it was determined that the CAC could not recommend funding of the proceeding, however, because of LLS' commitment to funding first nations' social justice cases, the CAC determined to leave the final funding decision to the LLS Board.[28] During the process identified above, multiple opinions of counsel were obtained and further information was sought.

22. Particular risks for the case which LLS identified included:

    a. While there was a factual basis for the claims - there were significant forensic challenges in proving liability and quantum given the historic nature of the subject matter of the claims.

    b. There were difficulties associated with interpreting historic legislation and highly complex questions as to forum, statutory interpretation, trusts, fiduciary duties, and constitutional law. There was significant novelty associated with the proposed breach of fiduciary claims, including whether the money dealt with or held by the respondent was held on trust.

    c. The *Racial Discrimination Act* claim was novel, and ultimately, given it sought to apply the RDA to the failure or omission of the respondent to create and implement a reparations scheme.

    d. None of these risks were obviated by the settlement of the Queensland Stolen Wages Case. In this respect the CAC considered there could be no certainty as to how the Commonwealth would respond in this proceeding.

23. Many of these issues were raised in the respondent's defence.[29]

24. In addition to the legal risks identified, Mr Conrad identifies that in 2020, during the CAC process, there was some regulatory risk and uncertainty around the availability of common fund orders.[30]

[27] Conrad Affidavit at [76] – [89].
[28] Conrad Affidavit at [89].
[29] Defence to FASOC filed on 24 May 2024; see: Sections J, K & L.
[30] Conrad Affidavit at [101]-[107].

25. A special resolution of unitholders in Fund 1 to vary the investment mandate and continue Fund 1's funding of the claim in June 2021 also did not succeed, indicating that investors in LLS fund considered the risk profile of the case to be beyond the risk parameters for funding proceedings set by Fund 1.[31]

26. Ultimately, while not making a funding recommendation, the CAC left it open to the Board of LLS to determine to fund the proceeding in its absolute discretion from LLS' balance sheet – which it did.

27. The significant risks associated with the proceeding as perceived at the time that funding was agreed are demonstrated by the slow and difficult internal processes at LLS set out above (see paragraphs [20] to [26]). While litigation risks should not be considered with hindsight bias, it is worth noting that risks identified back in 2018-2021 are similar to those now identified in the Applicant's Counsels' Confidential Opinion (**Confidential Opinion**) as to the reasonableness of the proposed settlement.[32] In other words, recognition of those risks was valid both at the outset and at settlement of the proceeding.

28. At the time it agreed to fund the proceeding, LLS took on the following risks.[33]

    a. The risk of losing the proceeding entirely and therefore losing any money it had expended on legal costs and disbursements (along with the money on any adverse costs insurance premiums) – at the time that funding was obtained, the budget for legal fees was $10.5 million and adverse cost insurance premium was around $1 million.

    b. The risk that costs to trial could be beyond that budget and whilst Shine Lawyers had agreed to fund any budget overruns, they may request further funding from LLS to conduct this (noting that ultimately the Agreed Costs are up to $15 million when the matter settled well before trial);

    c. The risk of bearing an adverse costs order over and above any risk covered by insurance, which given the complexity and time expended in the proceeding was likely to be significant. The ATE Policy insured LLS up to $5,000,000. That

[31] Conrad Affidavit at [94] – [98].
[32] Confidential Opinion of William Edwards KC, Alexander Edwards, Melia Benn and Julian Brezniak which is Exhibit VA-2: Tab 1 to the Antzoulatos Affidavit, see particularly Sections F and G.
[33] Conrad Affidavit at [139].

would have left a further amount to be met from LLS' balance sheet in the event of an adverse costs order on a party party basis (i.e. accounting for a costs order of approximately 70% of the Respondent's costs).

d. the risk of a "walk away" offer in which the parties bore their own costs, or a very low quantum recovery, or settlement which was no more than money expended;

e. uncertainty as to the time it would take to resolve the proceeding.

29. Instead of funding these proceedings, LLS could have funded alternative proceedings with fewer known and obvious risks, including commercial claims, insolvency actions or other class actions where higher commission rates could have been sought. It could also have invested its funds elsewhere.

Despite the significant risks, LLS determined to fund the proceeding at a discounted rate of 20%

30. Mr Conrad gives evidence that when the funding rate of 20% was first determined in November 2018, the typical commission rate that was required by the LLS Board was 20% - 35% of the gross resolution sum. In fact, LLS' position at that time was that it was not prepared to fund any Australian class action at a rate below 20% of the resolution sum.[34]

31. The rate of 20% was, therefore, an already discounted rate.

32. The 20% rate was also consistent with the rate that had been agreed in the Queensland Stolen Wages case (and ultimately approved).[35] Mr Conrad says that this case was, in fact, considered to be riskier than the Queensland Stolen Wages case (Queensland Stolen Wages had a strong breach of trust claim which was not evident in the NT case). Nevertheless, the same 20% rate was retained.

33. Mr Conrad's evidence is that that rate (which never changed) was a lower end rate, despite the risks, because LLS recognised the social justice implications of the case, especially given the vulnerable circumstances of prospective group members. LLS acknowledged

[34] Conrad Affidavit at [65].
[35] Conrad Affidavit at [66]; *Pearson v State of Queensland (No 2)* [2020] FCA 619 per Murphy J at [22(b)] (***Pearson No 2***).

the importance of ensuring that prospective group members, who already faced significant disadvantage, should not be further burdened by excessive deductions if any compensation was ultimately paid by the respondent. The discounted commission reflected LLS' commitment to supporting causes that serve the broader societal good, particularly when it involves advocating for those who face significant socio-economic disadvantage and may not be able to seek redress for wrongs suffered alone.[36]

A funding commission and 20% rate is as agreed and has always been disclosed

34. The terms of the agreement with the Applicant are contained in a Litigation Funding Agreement entered into on 11 May 2021 and exhibited to the Antzoulatos Affidavit.[37]

35. Relevantly, that agreement provides that:

    a. LLS is to fund the Project Costs which include legal costs and disbursements, adverse costs, any adverse costs insurance premium and any GST;

    b. Upon resolution, the Applicant agrees to pay to LLS (a reimbursement of) the Project Costs plus the LLS Commission;

    c. The LLS Commission is 20% of the Claim Proceeds;

    d. Claim Proceeds refers to the *gross value* of any money received on settlement including costs and any money received as part of a claims resolution process.

36. Group members were notified of LLS' role in funding the proceedings, and the fact that it would seek a 20% funding commission in the "opt-out" materials approved by the orders of Murphy J made on 22 February 2022 (**opt out orders**). The opt out notice[38] included the following.

    If the Commonwealth pays you money, you may need to pay Litigation Lending Services a commission from your payment, plus your share of what it costs to run the case.[39]

[36] Conrad Affidavit at [65].
[37] Exhibit VA-4: Tab 4 to the Antzoulatos Affidavit at pp. 907 to 953.
[38] Annexure A to the opt out orders.
[39] Opt out notice, pg. 7.

37. The advertisement[40], which was required to be published at least twice in the NT News and the Katherine Times[41] by the Applicant's lawyers to bring the opt out process to the attention of group members, said:

> "*A company called Litigation Lending Services is paying for the case to be brought… You will only have to pay something if at the end of the case you get money from it. If the Commonwealth pays money to claimants, including you, Litigation Lending Services will seek a maximum commission of 20%, plus what it costs to run the case to be deducted from that money before it is distributed, so that everyone who benefits from the class action contributes to those costs.*"

38. The Deed of Settlement specifically contemplates payment of the amount approved by the Court of a funding commission. As is clear from the opt out notice, all parties were aware of the proposed 20% funding commission contained in the LFA at the time the Deed was entered into.

39. The main notice of proposed settlement (**settlement notice**)[42] foreshadowed to group members that LLS would seek a CFO and reimbursement of the ATE costs:

> *'First, a litigation funder called "Litigation Lending Services" or "LLS" paid for a lot of the legal costs and carried other financial risks of bringing the class action. The Court will be asked to approve a commission payment to the funder of 20% of the amount the Commonwealth pays under the settlement. That means that if the Commonwealth pays the maximum settlement of $202 million, then the 20% commission would be $40.4 million. In addition to its commission, LLS will also be seeking payment of $1,045,000 for the cost of insurance. If the Court is satisfied that such deductions are fair and reasonable, they will be deducted from the settlement fund.* '[43]

40. There is no suggestion that the process of distribution of the settlement notice of the proposed settlement miscarried.[44]

41. That the 20% is taken from both the Costs Sums and the Settlement Sums (as defined in the Deed) is consistent with the definition of Claim Proceeds in the LFA. LLS specifically contemplated that these costs would be included in its calculation and provided as such in the LFA. In other words, any recovery of costs was included in LLS' pricing of its commission rate. This is not unusual, as settlements can be expressed as "all in" from which costs are then deducted[45] or, as is the case here, as separate payments from a

[40] Annexure C to the opt out orders.
[41] Annexure F to the opt out orders.
[42] Approved pursuant to order 1 of the September Orders.
[43] Annexure A to the Settlement Notice Orders (Main Notice), pg. 5.
[44] Antzoulatos Affidavit at [71] – [78].
[45] See e.g. *Rowe v Ausnet Electricity Services Pty Ltd* [2015] VSC 232

settlement fund with funds set aside as a contribution to a party's costs and other amounts set aside for other purposes[46]. The intention of the LFA is clearly to cover all such costs in the percentage commission assessment regardless of how any settlement is structured.

LLS has expended significant cost and time

42. As at 28 October 2024, LLS has:

    a. expended a total of $9,082,576.99 so far in legal costs and disbursements (excluding ATE) funding this proceeding;[47] and

    b. been issued with a draft invoice from Shine totalling $712,131.95 for work up until 30 September 2024 and is likely to be paid in November 2024.[48]

    Together these amounts ($9,794,708.95) are a significant amount of money. They are funds LLS put entirely at risk. If the matter had proceeded to trial, it would undoubtedly have put even more funds at risk.

43. LLS has also expended money on ATE Insurance premiums. Submissions relating to reimbursement for that amount are set out below (at paragraphs [73] to [80]).

44. There has now been a request from Shine for further funding from LLS in the amount of ~$9.4 million. This request is currently being considered by LLS.[49]

45. In addition to the financial contributions, Mr Conrad sets out in his affidavit non-monetary contributions LLS has made including attending preservation of evidence hearings held on country in July 2023, attending the mediation, having full time legally qualified staff to assist with management of the proceeding and engaging with LLS' extensive and unique networks in order to disseminate information regarding the settlement of the proceeding to communities in the Northern Territory. [50]

46. LLS is of course incentivised to maximise registrations, but it also wants the settlement to reach as many group members as possible.[51] LLS has not sat idly by providing only

[46] See e.g. *Kamasaee v Commonwealth* [2017] VSC 537
[47] Conrad Affidavit at [114].
[48] Conrad Affidavit at [114].
[49] Conrad Affidavit at [115].
[50] Conrad Affidavit at [127] – [130].
[51] Conrad Affidavit at [131].

capital to the successful settlement of the proceedings. Taken together, these significant contributions weigh in favour of the orders sought being granted.

There is uncertainty to LLS as to the ultimate outcome of the Settlement

47. The gross settlement sum (although it cannot presently be calculated) is inclusive of both the Settlement Sums and the Costs Sums (as those terms are defined in the Deed). That is, the Commission is calculated on *both* the funds paid over as compensation to Eligible Claimants, which cannot presently be determined, and the amounts that are likely to be contributed by the respondent towards the Applicant's costs of the proceeding, the Administrator's Costs and the Costs Assessor's Costs.

48. The combined fund created by the Settlement Sums and the Costs Sums (defined in the Deed) could rise to a theoretical total of $202m and therefore the total maximum funding commission which could be paid to LLS is $40.4m. However, as set out in the scenarios in Mr Conrad's Affidavit[52], that will depend on registration numbers. LLS' overall commission if the orders sought are made could range from $15.2 million to $40.4 million.

49. Based on the figures in the Antzoulatos Affidavit[53], it is likely that Eligible Claimants will be between 6,000 and 8,000. This is a commission of $26 million to $33.2 million.

50. LLS submits that when regard is had to the risk it has assumed and the potential variance of the returns it could obtain, (and the delays associated with those variances and calculations) a funding commission rate of 20% is appropriate.

The In Hand Recovery for Group Members is fair, reasonable and proportionate

51. As set out above, by reason of the structure of the proposed settlement and its dependence on registration numbers, the top line number relevant to LLS cannot now be known. However, by reason of the per person nature of the proposed payment scheme, Eligible Claimants and Eligible Deceased Claimants (as defined) will be guaranteed certain payments regardless of registration numbers.

[52] Conrad Affidavit at [144].
[53] Antzoulatos Affidavit: Exhibit VA-1:Tab 1 (at pages 76 and 79 – 80).

52. There are still some uncertainties as to the amount of legal costs to be deducted from the fund. Assuming (in order to be conservative) a further deduction of $11 million (as estimated by Ms Antzoulatos, which LLS does not necessarily accept as fair and reasonable), along with the proposed deduction of ATE insurance premiums and group member reimbursements, group members will likely obtain between 53.68% and 59.39%% of the gross settlement fund (after deductions), depending on those registration numbers. That amounts to between 64.6% and 68.4% of the net settlement proceeds.[54]

53. LLS submits that this is a significant proportion of the fund and rates favourably with funded proceedings. It compares favourably with the 47% median "in hand "returns to group members identified in other class actions.[55]

54. In determining that the proposed settlement was fair and reasonable, both *inter partes* and *inter se* and presumably turning their minds to what that meant "in hand" for group members, both the Applicant and the Respondent had to consider the impact of the proposed funding deduction (despite it being subject to court approval).

55. LLS acknowledges that the total theoretical maximum return to it is a large amount in dollar terms.[56]

56. However, the Court's role in approving deductions from a settlement sum ought be guided by an assessment of what is a fair reward for the work done and risk taken on in funding the litigation which produced the settlement. Proportionality has been mentioned as a relevant factor in a number of Federal Court CFO decisions. In *Money Max*, the Full Court said that any assessment of proportionality must bear in mind the risks that the funder took on, without the benefit of hindsight. Beach J elaborated in *Blairgowrie Trading Co Ltd v Allco Finance Group Ltd (in. liq)*[57], speaking of the proportionality of legal costs:

> Proportionality looks to the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed; at the later time, circumstances may have changed to alter the calculus, but that would not deny that the work performed and its cost was proportionate at the time it was performed. Perhaps the costs claimed can be

[54] Conrad Affidavit at [149] – [150].
[55] *Allen v G8 Education Ltd* [2022] VSC 32 at [72] per Nichols J.
[56] Transcript of the Settlement Notice Hearing on 9 September 2024, T:24-L:27 and T:37-L:4.
[57] *Blairgowrie Trading Co Ltd v Allco Finance Group Ltd (in. liq)* [2017] FCA 330 (***Blairgowrie***).

> compared with the known return, but such a comparison ought not to be confused with a true proportionality analysis. Nevertheless, any disparity with the known return may invite the question whether the costs were disproportionate, but would not sufficiently answer that question.

57. LLS submits that whether one is looking at integers such as legal costs and funding commission separately, or in combination, it is likely to involve error to focus on net returns as a proxy for proportionality. Moreover, crude calculations of percentages 'left in hand' for group members may be misleading when viewed without context.[58] That is especially so when very practical considerations drive settlement decisions. In *Sirtex*[59] Beach J explained that there is no general 'floor' of reasonable percentage return for a class action settlement.

58. Put a different way, even were it the fact that a reasonable funding commission for a very risky case, together with the legal costs expended in prosecuting it consumed a high percentage of the overall settlement (which on the evidence will not be the case on this settlement), that says very little about proportionality.

59. Here, as appears from the confidential material filed by the Applicant, the settlement that was obtained was the best reasonably available for a very difficult and uncertain piece of litigation. The evidence here is that the recoverability of any materially higher judgment, or the enforceability of any materially higher settlement, is highly unlikely.

60. The Court should find that the amounts which are proposed to be paid to the Funder through the Deed (embodying the CFO) are not disproportionate. The Commission component of the CFO is proportionate, including when regard is had to the risks of the proceeding and the absence of any alternative funding in the litigation funding market.

There are no substantive objections

61. According to Ms Antzoulatos, there have not, as yet, been any objections to the proposed settlement.[60]

Funding is for the benefit of all group members

[58] *UGL* at [35].
[59] *Sirtex* at [17] to [19].
[60] Antzoulatos Affidavit at [215].

62. Given LLS advanced funding to all group members in the open class, it is appropriate to allow a return by reference to the settlement sum, produced for all those group members, whether registered or presently unregistered (i.e., the gross settlement sum).

63. The CFO is a "transparent mechanism for fairly apportioning funding across the group, and straightforward for group members to understand."[61]

The funding commission of 20% is low compared to market rates and the same as the rate approved in the Queensland Stolen Wages Case

64. Mr Conrad gives evidence that at the time that the 20% rate was agreed (2018-2021), it was the lowest rate that LLS was prepared to offer and that it usually sought a rate of between 20-35%.[62]

65. Ms Antzoulatos gives evidence that the rates available for commercial litigation at the time the proceeding was initiated in mid-2021 were 20% to 30% and that based on her experience, she doubts that a better funding rate could have been achieved than the 20% with LLS.[63]

66. Data collated by academic commentators indicates the market rates for class action litigation funding varied from 20% to 35% at the relevant time.[64] In *Swann Insurance*[65] Lee J said that the expert evidence in that case showed that funding commissions of 25% of the gross settlement sums were "towards the middle of the range of rates offered or accepted by funders for class actions in Australia…" and that "speaking very generally, it shows a generally consistent pattern of CFOs being made at around this level."

67. Relevantly, in the portfolio of first nations social justice cases that LLS has funded, a rate of 20% was set. Those cases were.

    a. The Queensland Stolen Wages[66], brought on behalf of Aboriginal persons who allegedly had their wages misappropriated while under the control of the

[61] *Uren* at [68] per Murphy J (there described as an "Expense Sharing Order").
[62] Conrad Affidavit at [65].
[63] Antzoulatos Affidavit at [201].
[64] Conrad Affidavit at [149].
[65] *Swann Insurance* at [25].
[66] *Pearson No 2.*

government. LLS funded the Queensland Stolen Wages in around 2016 at 20%. That rate was approved in 2020.

b. The WA Stolen Wages class action, brought in relation to similar claims to those made in Queensland Stolen Wages. LLS commenced investigative funding of WA Stolen Wages at similar times to the investigative funding for NT Stolen Wages claim and set a similar 20% commission on gross proceeds prior to executing LFA's. Approval of that funding commission is currently before the Court.

c. The NT Stolen Generations class action, which was brought on behalf of members of the Stolen Generation who were removed from their parents and communities as children between the 1930s and the 1970s in the Northern Territory. LLS funded NT Stolen Generations in or around 2018 at a commission of 20% of the gross proceeds. That rate was reduced *by LLS* to achieve a mediated outcome and then at the settlement approval hearing where it sought a CFO of 10.9% because it had agreed to forego a substantial part of its return to achieve a settlement with the Commonwealth in circumstances where:

    i. a Commonwealth Redress Scheme reduced the number of eligible group members;

    ii. the matter settled early before the Commonwealth had filed a defence;

    iii. the returns from the funding commission were realised far sooner than had been budgeted for, and so comparative time the funds committed were at risk was substantially shorter;

    iv. there was a lump sum immediate return which provided for certainty of return without requiring additional funding from LLS;

    v. LLS had paid $656,139.93 to Shine Lawyers as at the date of settlement, and so had not put the budgeted amount of $7,048,926 fully at risk; and

vi. The Commonwealth agreed to refund LLS the full ATE premium ($1,000,000).[67]

68. It follows that NT Stolen Generations can be distinguished on its facts from the present case and is not a relevant comparator for fixing the appropriate rate sought, save to say that a rate of 20% would have likely been sought and would have been fair and reasonable had the case not settled at such an early juncture with comparatively limited capital committed by LLS to prosecuting the group members' claims.

69. LLS draws particular attention to the decision in *Pearson (No 2*). There, His Honour Murphy J affirmed a Commencement CFO of 20% at the s 33V settlement approval hearing.[68] He noted at [269] "*to those uninitiated in large, complex class action litigation, a funding commission of $38 million may be seen as extraordinary and an unwarranted reduction in the amount available for distribution to class members. But having thought carefully on the issue I considered the funding rate under the extant order to be fair and reasonable*." His Honour set out his reasoning as follows at [270]-[274]:

> *First*, the case required LLS to take on substantial costs and risks from the outset of the litigation, when the outcome was far from certain. I have already described the risks on liability and quantum and I need not reiterate them. By the date of the settlement approval orders, LLS had paid $12.65 million in costs and disbursements incurred in the proceeding. If the initial trial on the common issues had proceeded to hearing, LLS's total costs were likely to have been close to $17 million, with further legal costs to be incurred in a later hearing in regard to aggregate damages. Appeals would have also been likely, further adding to those potential costs.
>
> LLS indemnified the applicant and class members in respect of any adverse costs orders made in the proceeding, which indemnity was not capped. Although LLS estimated the quantum of its adverse costs exposure at a lower level, in my view it faced a risk of an adverse costs order in the order of $15 million if the case was ultimately unsuccessful. The evidence is that LLS would meet any such order from its own balance sheet, and it did not lay off that risk through After the Event insurance. Having regard to that expenditure and risk, I was satisfied that the 20% funding rate in the common fund order remained reasonable.
>
> *Second*, the Court accepted in 2017 that a funding rate of 20% of the gross settlement compared favourably with the rates generally offered in the litigation funding marketplace and that, at least in part, LLS offered that rate because of its interest in the social justice aspect of the case: *Pearson* at [24]. In my view 20% of the gross settlement (which equates to approximately 21.58% of the net settlement after deduction of

[67] Conrad Affidavit at [136(a)-(e)].
[68] The Court had made a CFO earlier in the proceedings but prior to the High Court's decision in *Brewster*. That order was valid unless set aside and no party applied to set it aside. Nevertheless, on settlement approval, Murphy J determined not to revisit the order but explained his reasoning as to fairness and reasonableness.

> approved legal costs) continued to compare favourably with the rates offered in 'standard' class actions. For class actions which settled during the period January 2013 to December 2018 the median funding rate was in the range of 25.5 to 26.0% of the gross settlement: *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 at [10] (Beach J). But the present case is far from a 'standard' class action; it was novel and complex, it involved a high level of risk and uncertainty as to the outcome and it posed unique challenges and expense. Those matters would justify a funding rate above the median, and well-above the 20% set under the common fund order.
>
> *Third*, the evidence tends to show that most class members accept that 20% is a reasonable funding rate. 3,766 class members entered into a funding agreement with LLS and thereby accepted a 20% funding rate, the balance of the participating class members registered to share in the compensation after being informed of the 20% funding rate. Only four class members objected to settlement approval on the basis that the funding commission was excessive, and in my view those objections had little force and displayed hindsight bias. Mr Savo asserted that a 10% funding rate was appropriate but, with respect, that funding rate appeared to be plucked from thin air and it failed to take into account the substantial costs and risks LLS assumed and the funding rates generally available in the litigation funding marketplace. At the outset of this proceeding no commercial litigation funder would have taken on its costs and risks for a funding commission of 10%.
>
> *Fourth*, the $190 million result achieved in the litigation is excellent given the difficulties in the case. It could not have been achieved without the funding provided by LLS and it is important that the courts approve funding rates that "recognise the important role of litigation funding,…are commercially realistic and properly reflect the costs and risks taken by the funder", without hindsight bias: *Money Max* at [120]. I consider the aggregate funding commission of $38 million to be proportionate to the amount recovered in the proceeding and the risks assumed by LLS. It does not constitute a windfall gain for LLS and it results in a reasonable and proportionate outcome for class members. After deduction of litigation funding charges *and* legal costs, class members will receive approximately 73% of the settlement achieved.

70. There are parallels with this proceeding and Queensland Stolen Wages:

    a. similar sums have been expended and similar costs would have undoubtedly been incurred if the matter had gone to trial;

    b. similar quantum has been achieved in a settlement;

    c. the 20% rate identified in *Pearson (No 2)* as having a favourable comparison to the marketplace is the same as this proceeding;

    d. the case was also not a 'standard class action' and justified a rate above the median rate;

    e. there have been no objections to the funding commission; and

f. the result, like in Queensland, is a good result given the difficulties of the case and could not have been achieved without the involvement of the funder.

71. There are also differences with the Queensland Stolen Wages Case:

a. while clearly similar claims, the breach of trust claim was perceived by LLS and Counsel as stronger in the Queensland Stolen Wages Case than in SWNT – the litigation risk was therefore higher;

b. the structure of the settlement in the Queensland Stolen Wages Case (being a lump sum) was markedly different to the variable nature of the SWNT settlement where a per person registration will determine the ultimate quantum of the settlement. This structure in SWNT has added significant cost to the Applicant for registration; and

c. although in this proceeding, LLS did take out ATE Insurance, it was only to the level of $5 million beyond which LLS had to bear the risk of adverse costs. His Honour Justice Murphy estimated in the Queensland proceeding that such adverse costs could reach $15 million. Adopting this assumption, it is likely that LLS was at risk for significant additional adverse costs exposure.

72. LLS submits that this Court should follow the approach in *Pearson (No 2)* and approve the 20% rate. The Commission, even at the highest possible end is proportionate to the risks assumed with a comparable percentage return to group members.

Reimbursement of ATE cost is appropriate

73. LLS has made payments to AmTrust Europe Limited for the ATE Policy totalling $550,000 as an upfront premium and is obliged to pay a further $495,000 to AmTrust Europe Limited as a supplemental premium.[69] This takes the total costs that will be incurred by LLS for costs by way of an ATE Policy to $1,045,000.

74. The ATE Policy reimbursement is provided for in the LFA and is a reasonable cost for LLS to have incurred for the reasons explained above (see paragraph [28]). Moreover, it was incurred for the benefit of the group members.

[69] Conrad Affidavit at [122].

75. As set out in paragraph [36] – [39], above, group members have been on notice that orders would be sought for ATE Reimbursement.

76. Mr Conrad has stated that without the insurance, LLS would have potentially sought a higher funding commission because of the higher risk it would have assumed, or perhaps not have funded the proceeding at all.[70]

77. The law as it presently stands on the reimbursement of ATE costs is inconsistent, and it is difficult to discern a consistent principle applicable to reimbursement of ATE costs in CFO cases.[71]

78. Ultimately, the question of the recoverability of the ATE premium by way of reimbursement ought be regarded as a case-by-case proposition. Here, where the funding commission is set to reflect the risk associated with the investment of capital (the legal costs and disbursements), and that rate is set quite low, and the adverse cost risk is separately recognised and insured against with after the event insurance and where reimbursement of that premium is specifically provided for in the LFA, it is the submission of LLS that it is appropriate to order reimbursement of the ATE insurance premium in addition to the funding commission.

79. In *Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited (Settlement Approval)* [2024] FCA 836, Derrington J said:

> Although obtaining ATE insurance may be regarded as "the cost of doing business", it must be borne in mind, at least in the present case, that the commission combined with the price of the ATE insurance premiums was the price at which the Funder was prepared to take on the risk of funding the proceeding. Undoubtedly, if the cost of ATE insurance was to never be recoverable in addition to commission, the Funder would have simply incorporated that cost into its funding premium. Here, the Funder has instead sought to pass on the price of the insurance to group members without a mark-up or any profit margin. There is transparency to this approach.
>
> …

[70] Conrad Affidavit at [119].

[71] See e.g. *Equity Financial Planners Pty Ltd v AMP Financial Planning Pty Ltd* [2024] FCA 1036 per McElwaine J at [151] to [155]; and *Swann Insurance* at [31] – [33] per Lee J; *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 per Beach J at [74]-[84]; *Spotless* at [89] per Murphy J; *Bradshaw v BSA Ltd (No 2)* [2022] FCA 1440 per Bromberg J at [147] (n.b. *Bradshaw* was a case brought in the "no costs" jurisdiction in the *Fair Work Act 2009* (Cth)); *Swann Insurance* per Lee J at [32]; and *Ghee v BT Funds Management Limited* [2023] FCA 1553 per Murphy J at [147] – [151].

> The ATE insurance costs ultimately represent a very small proportion of the overall settlement sum. In the circumstances, it is just to allow a deduction of $737,836 for the ATE insurance premium.

80. LLS submits the same approach should be adopted here.

D. DISTRIBUTION

81. The Distribution Model and the Confidential Counsel Opinion propose that payments be made out of the Settlement Fund in tranches. However, the model is silent as to timing or mechanism of those payments and the order of those payments out of any funds set aside for deductions.

82. LLS intends to engage further on the detail of any such payments and the Distribution Model. However, in principle, the position of LLS is as follows:

    a. it accepts that payments out of the Settlement Fund will need to be made in tranches;

    b. it accepts that a Minimum Payment Reserve ought be put aside to ensure an initial payment to Eligible Claimants and Eligible Descendant Claimants as soon as possible and those payment should be made;

    c. it accepts that deductions can then be made from the remainder of the money received into the Settlement Fund progressively from the Respondent;

    d. those deductions will include the Commission, the ATE Premium and any Actual Costs paid by LLS;

    e. those deductions ought to be able to be made promptly on receipt of money into the Settlement Fund from the Respondent; and

    f. a top-up payment can then be paid to Eligible Claimants and Eligible Descendant Claimants from the remainder.

E. CONFIDENTIALITY

83. LLS seeks confidentiality orders, pursuant to s 33ZF and/or 37AF and 37AG of the Act, over parts of the material filed in support of the IA.

84. The starting point is for the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. In this regard,

LLS notes that such orders "are not to be made lightly as the public interest is served by open justice".[72]

85. Relatedly, it is in the public interest that the Court does not make overly broad confidentiality orders in the context of settlement approval applications for group proceedings. In evaluating the confidentiality orders sought, it is a relevant consideration that group members should be able to understand the settlement and how it affects their interests and legal rights. LLS does not seek to claim confidentiality over such information as would impair group members' capacity to be informed of their legal rights and the implications of the settlement.

86. However, where there is a considered claim which relies upon the fact that the information the subject of the claim is privileged, commercial in confidence or commercially sensitive, it is an appropriate and sufficient basis for the grant of a confidentiality order.[73]

87. In the context of settlement approval hearings of group proceedings, there are usual categories of materials or information for which a claim for confidentiality orders is necessary and appropriate.

88. The opinion of the Applicant's counsel as to the reasonableness of the proposed settlement is normally, and necessarily, confidential.[74] In this context, counsel are providing their opinion on the reasonableness of the proposed settlement, including providing a candid opinion on the risks of establishing liability at trial and the likelihood of establishing loss or damage. In this respect, counsel provide the opinion as officers of the court to assist the Court in the exercise of its supervisory jurisdiction under s 33V, rather than as counsel for the Applicant. LLS submit that the Applicant's claims for confidentiality should be upheld.

89. One category of information outside the counsel opinion which is ordinarily the subject of a proper claim for confidentiality is financial or commercial information of the

[72] *Clime Capital Ltd v Ugl Pty Ltd (No 2)* [2020] FCA 257 at [13] (***Clime Capital***); the orders made in *Clime Capital* were made pursuant to ss 37AF and 37AG of the Act.
[73] *Clime Capital* at [15], citing: *Australian Competition and Consumer Commission v Cement Australia Pty Ltd (No 2)* [2010] FCA 1082; *Cyclopet Ptd Ltd v Australian Nuclear Science and Technology Organisation* [2012] FCA 1082 at [7]; *Sportsbet Pty Ltd v State of New South Wales (No 12)* [2010] FCA 62; and *Keyzer v La Trobe University* [2019] FCA 646 at [30].
[74] *Pathway Investments Pty Ltd v National Australia Bank Ltd* (No 3) [2012] VSC 625 at [3] (Pagone J)

litigation funder which has significance beyond the proceeding. This includes information as to:

a. the range of rates offered by the funder in the litigation market by the funder;

b. internal investment decisions and risk assessment methodologies for case assessments, including the criteria for fixing particular rates; and

c. the particular funder's risk appetite for its investment mix.

These types of information can be readily seen as having ramifications beyond the instant case if disclosed publicly. Such information is properly to be kept confidential. Should group members seek access to information that falls within this category, then the Court has power to authorise that group members be permitted to access the confidential information, such requests would appropriately be subject to undertakings to keep the unredacted information confidential.[75]

90. LLS has sought to confine its claims for confidentiality orders to those passages in or exhibits to the Conrad Affidavit[76] that concern:

a. commercial in confidence or commercially sensitive information, including the internal funding process of LLS or its related entities[77], where disclosure of the information may confer an advantage on a competitor; and

b. legal advice/materials that are subject to privilege or where disclosure may compromise the claims of the Applicant and group members in the event that the Court does not approve the proposed settlement.

91. LLS submit that the confidentiality orders sought here fall within the scope of what is proper under s 33ZF and/or s 37AG of the Act.

F. CONCLUSION

92. It is just for there to be, and the Court should exercise its discretion under s 33V to make, substantive orders approving the settlement and the SDS which authorises deductions of Commission in favour of LLS in the terms sought and the ATE Policy Reimbursement.

---

[75] *Botsman v Bolitho* (2018) 57 VR 278; [2018] VSCA 278 at [263] (Tate, Whelan and Niall JJA).
[76] LLS also supports the plaintiffs' claims for confidentiality over materials filed in support of the summons ought to be upheld, to which LLS is a privy by reason of common interest (PS: [6]-[10).
[77] Conrad Affidavit at [10] – [14].

93. There should also be non-publication orders in the terms described at paragraph [90] above.

Date: 28 October 2024

Fiona Forsyth KC
Ah Ket Chambers

Owen Nanlohy
Ah Ket Chambers