IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2021 04360

William Lay — Plaintiff

v

Nuix Limited (ACN 117 140 235) — Defendant

S ECI 2021 04391

Daniel Joseph Batchelor — Plaintiff

v

Nuix Limited (ACN 117 140 235) — Defendants
(& Ors according to the Schedule attached)

S ECI 2022 00735

Stella Stefana Bahtiyar — Plaintiff

v

Nuix Limited (ACN 117 140 235) — Defendants
(& Ors according to the Schedule attached)

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	16 June 2022; further mention on 18 July 2022; further submissions filed on 5, 15 and 20 July 2022
DATE OF RULING:	23 August 2022
CASE MAY BE CITED AS:	Lay v Nuix Ltd; Batchelor v Nuix Ltd; Bahtiyar v Nuix Ltd
MEDIUM NEUTRAL CITATION:	[2022] VSC 479

PRACTICE AND PROCEDURE — Group proceedings — Multiplicity of proceedings — Competing carriage motions — Where plaintiffs in two of the proceedings jointly seek consolidation, joint representation and stay of the other proceeding — Whether consolidation in the best interests of group members — Whether joint representation in the best interests of group members — *Supreme Court Act 1986* (Vic) s 33ZF — *Wigmans v AMP Ltd* (2021) 270 CLR, *Perera v GetSwift Ltd* (2018) 263 FCR 92, *Klemweb Nominees Pty Ltd v BHP Group Ltd* (2019) 369 ALR 583, *Fuller v Allianz Australia Insurance Ltd* (2021) 65 VR 78 — Consolidation granted — Stay granted — One firm to be appointed as solicitors on the record.

GROUP PROCEEDINGS — Costs — Application for a Group Costs Order — Costs to be calculated as a percentage of the amount of any award or settlement recovered —Whether proper evidentiary basis to make the proposed GCO — Judicial discretion in open-textured legislation — Principles to be applied — *Supreme Court Act 1986* (Vic) s 33ZDA — *Allen v G8 Education Ltd* [2022] VSC 32, *Fox v Westpac; Crawford v ANZ* [2021] VSC 573, *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 — Application dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff in the Lay Proceeding	Mr R May	Shine Lawyers
For the Plaintiff in the Batchelor Proceeding	Mr LWL Armstrong QC Mr M Guo	Phi Finney McDonald
For the Plaintiff in the Bahtiyar Proceeding	Mr WAD Edwards Mr E Batrouney	Banton Group
For Nuix	Mr M Darke SC Mr J Entwisle	Gilbert + Tobin
For Macquarie Capital and Macquarie Group Limited	Mr R Craig QC Ms J Findlay	Herbert Smith Freehills
For the Fourth, Fifth and Sixth Defendants in the Bahtiyar Proceeding	Mr S Marks QC Ms M Szydzik	Jones Day
For the Seventh Defendant in the Bahtiyar Proceeding	Dr C Parkinson SC	Corrs Chambers Westgarth
For the Eight Defendant in the Bahtiyar Proceeding	Ms N Gollan	Watson Mangioni Lawyers
For the Ninth Defendant in the Bahtiyar Proceeding	Mr G Rich SC Ms A Campbell	Arnold Bloch Leibler

TABLE OF CONTENTS

HER HONOUR:

Part A: Introduction and background

1 This ruling concerns three overlapping representative proceedings against common defendants **Nuix** Limited and **Macquarie Capital** (Australia) Limited. The issue before the court is how the multiplicity problem is to be solved.

2 Nuix, a company listed on the Australian Stock Exchange, produces and sells data processing technology, investigative analytics and intelligence software and related services. In late 2020, Nuix issued a prospectus in support of an initial public offering of its shares and was admitted to the ASX. Macquarie Capital was an underwriter of the offer under the prospectus and is a subsidiary of Macquarie Group Limited.

3 On 19 November 2021, William **Lay**,[1] a shareholder in Nuix, issued a group proceeding under Part 4A of the ***Supreme Court Act*** *1986* (Vic) against Nuix, alleging that it had made misleading representations or omissions in its initial public offering prospectus and in market disclosures, and failed to comply with its continuous disclosure obligations as an ASX-listed company, breaching relevant provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). On 23 November, 2021 Daniel **Batchelor**, also a shareholder in Nuix, issued similar proceedings against Nuix and Macquarie Capital and Macquarie Group Limited (**Macquarie Entities**). Three and a half months later, on 13 May 2022, Stella **Bahtiyar** issued a further overlapping proceeding against Nuix, the Macquarie Entities, and 6 individual directors.

4 The three proceedings concern substantially the same claims arising out of the same factual substratum and represent essentially the same open class of shareholders in Nuix.[2] Lay is represented by **Shine** Lawyers, Batchelor by Phi Finney McDonald

---

1 For convenience, and with no disrespect intended, the plaintiffs are referred to hereafter by their surnames.

2 While there is substantial overlap in the definitions of group members in each of the proceedings, the relevant claim periods are not identical. Group members in the Lay proceeding are persons who acquired shares in Nuix between 18 November 2020 and 30 May 2021; in the Batchelor proceeding, between 4 December 2020 and 29 June 2021; and in the Bahtiyar proceeding, between 18 November 2020 and 31 May 2021.

(**PFM**) and Bahtiyar by Banton Group.

5 Batchelor and Lay seek orders consolidating their proceedings and permitting their solicitors to jointly appear on the record for the represented class. The consolidated action would be funded jointly by their respective litigation funders, Woodsford Litigation Funding 13 LLP and Woodsford Group Limited (together, **Woodsford**) and LLS Australia Funding Pty Ltd and Litigation Lending Services Limited (together, **LLS**). In the alternative (which is not their preferred course), they have proposed[3] consolidation of the proceedings, with both Batchelor and Lay appointed as plaintiffs and the same joint funding arrangement, but with only one solicitor on the record.[4] Bahtiyar seeks to have the other proceedings stayed and, for the purposes of conducting the proceeding, seeks a Group Costs Order (or **GCO**) under s 33ZDA of the *Supreme Court Act*. Banton Group have entered into a litigation funding agreement to assist them to finance the costs of conducting the proceeding.

6 The issues arising in respect of both the multiplicity contest and Bahityar's application for a Group Costs Order are inter-related. The essential rationale for the Group Costs Order and for Bahityar's bid for carriage of the proceedings is that that funding model would entail lower costs and thus yield higher net damages and therefore a better outcome for group members. The related submission was that a Group Costs Order has structural advantages when compared to third-party funding because it affords certainty, protecting against costs blow-outs, as well as transparency and simplicity in respect of costs. Bahtiyar criticised the Lay and Batchelor proposal as being cumbrous and complex, exposing group members to the added costs that would be entailed in the appointment of two law firms.

7 Lay and Batchelor said that their proposed terms were either comparable to or better than Bahtiyar's terms. They criticised the Bahtiyar offering because of the absence of evidence supporting the financial viability of the funding proposal, particularly given

---

3 The alternative approach to consolidation was submitted in response to directions from the Court, discussed below.

4 Between them, Lay, Batchelor, their respective solicitors and funders have agreed that if one solicitor is appointed, that firm may engage the other as its agent to undertake legal work for the purposes of the proceeding. That arrangement is discussed further below.

the large number of defendants joined to that proceeding. The defendants variously submitted that Bahtiyar had not established the basis for a Group Costs Order, given the absence of any real evidence of the financial support for the funding of the proceeding. Bachelor, Lay and the defendants all said that the Bahtiyar proceeding was late and rushed, having been issued some three months after the other proceedings, on a generally indorsed writ later substituted on a statement of claim that had been "adapted" from the claim in the Batchelor proceeding. Ultimately, Nuix supported the alternative proposal for the Lay and Bachelor proceedings (consolidation with one solicitor on the record) and the Macquarie Entities supported consolidation with two solicitors on the record. By and large the other defendants adopted Nuix's position.

8 For the reasons set out below:

(a) The Bahtiyar proceeding will be permanently stayed.

(b) The Lay and Batchelor proceedings will be consolidated with both Lay and Batchelor remaining as plaintiffs.

(c) Shine will remain on the record as the solicitors for the consolidated proceeding.[5]

9 Some of the parties' evidence was subject to claims for confidentiality and was filed in redacted form.[6] A **confidential schedule** to these Reasons (provided to the plaintiff parties but not the defendants[7]) describes some of that evidence. The need to proceed in this way arises from the nature of the material and the issues in contest, as is apparent from the analysis below. The essential point is that the parties disclosed material for the purposes of their applications that, if openly described, may reasonably risk affording the defendants an unfair tactical advantage in the litigation. Despite claims for confidentiality, in order to sufficiently set out my reasoning it has

---

5 For the reasons discussed below, the proposed agency arrangement between Shine and Phi Finney McDonald need not be the subject of court orders.

6 Pursuant to orders made under *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rule 28A.06.

7 The schedule itself only makes such reference to confidential material as I have considered strictly necessary, noting that the solicitors for the plaintiff parties are, in effect, competitors in this context.

been necessary to refer to some parts of the confidential evidence in these Reasons.

Part B: Governing principles — Multiplicity

10 The principles governing applications of this kind are well settled.

11 There is no provision in Part 4A of the *Supreme Court Act* that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. A foundational element of the design of Part 4A is that a representative plaintiff has a choice as to whether to bring proceedings on behalf of *some or all person*s who have claims arising out of the same, similar or related circumstances, and group members may opt-out of proceedings.[8] The result is that overlapping representative proceedings may be commenced against the same defendant.[9] The commencement of a subsequent *bona fide* class action against the same defendant on overlapping subject matter is not of itself, vexatious, oppressive or an abuse of process.[10]

12 That proposition must be understood in light of an equally foundational principle, which is that a multiplicity of proceedings is not to be encouraged. Competing representative proceedings may be inimical to the administration of justice.[11]

13 Accordingly, while multiple representative proceedings against the same defendant on overlapping subject matter do not constitute an abuse of process, they present a "problem for courts to solve".[12] As the High Court said in *Wigmans*, the legislation poses, but does not answer, the multiplicity question.[13]

14 Courts deploy a range of tools in answering the question, including the staying of one or more proceedings, consolidation of proceedings, the closing of one class and

---

8 *Supreme Court Act 1986* (Vic) s 33C.

9 *Perera v GetSwift Ltd* (2018) 263 FCR 92, 125–6 [146] (***GetSwift***); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, [34]–[36].

10 *Wigmans v AMP Ltd* (2021) 270 CLR 623 (***Wigmans***).

11 Ibid 666 [106].

12 *Wigmans* (2021) 270 CLR 623, 655–6 [77], 666 [106]; *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 68 [9]; *Fuller v Allianz Australia Insurance Ltd* (2021) 65 VR 78, 83 [12] (***Allianz***).

13 *Wigmans* (2021) 270 CLR 623, 655–6 [77].

running closed and open classes in parallel and adopting a "wait and see" approach.[14] Consolidation is the tool most commonly deployed to address the problem of multiplicity.[15] The question of whether the solicitors for the plaintiffs in consolidated proceedings should be permitted to jointly appear on the record is discussed below.

15 It is apparent from this list of possible approaches that in fashioning a solution the Court is not required, come what may, to eliminate all consequences of the fact that multiple proceedings have been issued against the same defendant. As the Full Court of the Federal Court said in *Perera v* ***GetSwift*** *Ltd*,[16] the object of the legislation is facultative, not restrictive, and in permitting a more efficient dispute resolution through group proceedings, Part IVA "does not insist on the *most* efficient means of dispute resolution".[17]

16 The Court's task is to ensure that justice is done in the proceedings, being astute to protect the interests of group members.[18] It is necessary for the court to determine which arrangement, including which proceeding should go ahead if one is to be stayed, would be in the best interests of group members.[19]

17 As the New South Wales Court of Appeal said in *Wigmans,* there are various permutations and there is, and should be, an inherent flexibility as to how the vice of multiplicity should be handled.[20] Each solution may be unsatisfactory in one way or another. As the Full Court of the Federal Court has observed, there is no one right answer to questions that arise in this context and no "silver bullet" solution to a problem that may require weighing incommensurable and competing considerations, about which judges may take different views.[21] As Lee J said in *Klemweb Nominees Pty Ltd*, fastening upon a remedial response to competing class actions involves "an evaluation, and not a calculus", and it is inevitable that different judges may weigh

---

14 *GetSwift* (2018) 263 FCR 92, 105 [44].
15 *Wigmans v AMP Ltd* (2019) 103 NSWLR 543, 556 [54] (*Wigmans NSWCA*).
16 (2018) 263 FCR 92.
17 Ibid 126 [148] (emphasis in original). Part IVA of the *Federal Court Act 1976* (Cth) is in almost identical terms to Part 4A of the *Supreme Court Act 1986* (Vic).
18 *Wigmans* (2021) 270 CLR 623, 667–8 [109], 670 [116]–[117].
19 Ibid 649 [52].
20 *Wigmans NSWCA* (2019) 103 NSWLR 543, 547 [8]–[9].
21 *GetSwift* (2018) 263 FCR 92, 151–2 [274].

different considerations differently.[22]

18 The judicial task in this context has been described as applying a multifactorial analysis by reference to all relevant considerations.[23] Previous cases have identified a number of factors which may be relevant to a greater or lesser extent in resolving a multiplicity problem by comparing sets of competing proceedings, namely:

(a) the competing funding proposals, costs estimates and net hypothetical returns to group members;

(b) proposals for security;

(c) the nature and scope of the causes of actions advanced (and the relevant case theories);

(d) the size of the respective classes;

(e) the extent of any book-build;

(f) the experience of legal practitioners (and funders) and the availability of resources;

(g) the state of progress of the proceedings;

(h) the conduct of the representative plaintiffs to date;

(i) the degree of expedition with which the respective parties have approached the proceedings;

(j) the order of filing (although there is no rule or presumption that the proceeding filed first in time should necessarily be preferred, and this consideration is less relevant where the competing proceedings have been commenced within a short time of each other).[24]

---

22 *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Ltd* (2019) 369 ALR 583, 593 [48]–[49] (***Klemweb***).

23 *Wigmans* (2021) 270 CLR 623, 651 [60].

24 See ibid 667 [107]. In *Wigmans*, the carriage contest had been decided by the primary judge (who was

19 Lists such as this are useful tools for organising concepts and categories of information, provided they do not detract from the essential nature of the exercise for which they are employed. The exercise is an evaluative one, in which all relevant considerations should be weighed. As the High Court emphasised in *Wigmans*, the factors that might be relevant to managing competing group proceedings cannot be exhaustively listed and will vary from case to case.[25] In some cases, a significant distinguishing feature might by comparison render some or all other factors irrelevant or insubstantial. In other cases, there will be little to distinguish between the proceedings. The inquiry in each case will be highly fact-sensitive.

20 In emphasising the structural advantages to group members of a Group Costs Order, Bahtiyar submitted:

> The importance of the these structural features of the GCO is that even if modelling shows that a CFO[26] may be 'ahead' on some scenarios, that is not decisive. It is one thing for other courts to decide carriage disputes on the basis that one proceeding or another is likely to be more financially beneficial to group members - as regularly occurs in the Federal Court and the Supreme Court of NSW. It is another thing to decide carriage disputes on the basis that when on plaintiff is operating within the structural advantage of certainty which can be provided by a GCO. It is far from obvious, in those circumstances, that the factors which those other courts have found relevant in the multifactorial analysis on a carriage dispute should be accorded the same weight. At the very least, their expression in decision of other courts, is incomplete and cannot be uncritically applied to a situation where what is being considered has very different features.[27]

21 I do not read that submission as contending that comparing the features of a GCO-

---

upheld by the Court of Appeal) primarily by reference to the competing funding proposals, costs estimates and net hypothetical returns to group members. It had been assumed, given the position the parties had taken, that there was no real basis to distinguish between the ability and experience of the legal practitioners. The question before the High Court was whether a subsequently issued representative proceeding was *prima facie* vexatious and oppressive in circumstances where a representative proceeding was already pending in respect of the same controversy in which the same relief was available. A majority of the Court held that it was not, and that there was no error in applying a multifactorial analysis. In that context, the Court observed that no party had submitted that the factors considered by the primary judge (factors (a)–(i) above) were irrelevant save for the competing funding proposals: at [109]. See also *GetSwift* (2018) 263 FCR 92.

25 *Wigmans* (2021) 270 CLR 623, 667 [109]. See also *CJMcG Pty Ltd (as trustee for the CJMcG Superannuation Fund) v Boral Limited (No 2)* (2021) 389 ALR 699, 704 [14].

26 "CFO" is a reference to a "common fund order" such as discussed in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574. The comparison for which the reference is employed, is a comparison between funding models, namely a Group Costs Order (sought by Bahtiyar) and third-party litigation funding (obtained by Lay and Batchelor), in respect of which an order equitably distributing the funding burden between group members would be sought at the conclusion of the proceedings.

27 Bahtiyar's submissions, [5] (citations omitted).

funded proceeding with a differently-funded proceeding requires the application of any new principle, and nor would I accept such a submission. As successive courts have emphasised, comparing the characteristics of overlapping proceedings requires a fact-sensitive evaluation in which all relevant factors must be considered. The structural characteristics of the funding models in competition here are undoubtedly relevant in that evaluation.

22 Finally, where a proposal to resolve a multiplicity problem affects the defendant, its interests are also relevant. The interests of funders and law firms acting in representative proceedings are not.[28]

23 It is convenient to now set out the facts and relevant evidence before considering Bahtiyar's application for a Group Costs Order and the multiplicity question.

Part C: History of the proceedings

24 Nuix announced its 2021 half-year results in late February 2021. Shortly thereafter, PFM commenced an investigation into the viability of a claim against Nuix. Shine commenced its investigation in April 2021. Banton Group commenced its investigation in May 2021. During 2021, the firms each continued their investigations. On 19 November 2021, Lay issued proceedings in this Court. On 23 November 2021, Batchelor issued proceedings in this Court.[29] The Bahtiyar proceedings were issued on 9 March 2022.

25 In late November 2021, Ms Amanda Banton, principal of Banton Group, had become aware that Shine and PFM had each issued proceedings against Nuix in this Court. Ms Banton's evidence as to the events between November 2021 and March 2022 was, in substance, as follows:

(a) Banton Group had anticipated commencing a class action against Nuix (and possibly other defendants) in the Federal Court. Banton Group had identified

---

28 See, eg, *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 68–9 [9]–[12], 72 [28]; *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1, 7–8 [14]–[18].

29 Lay issued a writ and statement of claim; Batchelor issued a generally indorsed writ and subsequently filed a statement of claim on 24 February 2022.

a potential litigation funder for the proceedings.

(b) In early December 2021, Banton Group entered into a retainer with a shareholder in Nuix who had expressed an interest in commencing proceedings against Nuix, and was a resident of Queensland. Banton was retained to commence a class action against Nuix, and other defendants if appropriate, subject to the procurement of satisfactory litigation funding arrangements.

(c) Shine wrote to Banton Group in late November 2021 and again on 19 January 2022 to enquire as to whether Banton Group was still contemplating issuing proceedings. Banton Group responded to Shine in mid-December 2021 to advise that they were intending to commence proceedings against Nuix, "in short order", and on 27 February 2022 to say that they anticipated confirming their position by early February 2022. By 19 February, Ms Banton was aware that the Lay and Batchelor proceedings had been listed for a joint case management conference in this Court.

(d) By late February 2022, Ms Banton had formed the view, following discussions with litigation funders, that Banton Group would not be able to obtain third-party litigation funding to commence proceedings in the Federal Court. Ms Banton said that it had become apparent to her that the litigation funder she had identified as a likely funder for proceedings against Nuix would not commit to funding "due to uncertainties caused by the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (**2021 Bill**)[30] and in the context of two other proceedings having been filed in the Supreme Court of Victoria". As Ms Banton described it, considerable efforts to obtain third-party litigation funding without a Group Costs Order were made, and

[30] As Ms Banton set out in her evidence, the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* was introduced into Federal Parliament on 27 October 2021. According to Ms Banton's evidence, several litigation funders, by whom she was retained, had expressed concerns about the viability of litigation funding should the bill be passed in its then-proposed form. The bill did not pass before the last sitting day of parliament in 2021, and, in or about February 2022, the then Attorney-General stated that it would not be pursued before the 2022 Federal Election.

were unsuccessful.

(e) During late February 2022, Ms Banton considered the option of commencing a class action in Victoria, where the Lay and Batchelor proceedings had been commenced, "having regard to the interest of the individuals and entities who had registered their interest with Banton Group to become members of any class action proceedings commenced". Ms Banton considered that a Group Costs Order may provide an alternative means of funding such a proceeding. She formed the view that it would not be appropriate for a Queensland-resident plaintiff to commence proceedings in this Court.

(f) In early March 2022, Ross Garland, a partner of Banton Group, had discussions with Stella Bahityar (a Nuix shareholder and resident of Victoria) about whether she wished to become a representative plaintiff in proceedings against Nuix (and other defendants if relevant). Ms Banton's evidence was that she was informed by Mr Garland that Ms Bahityar had decided to become a plaintiff "on the basis that the anticipated proceedings would be brought against a broader group of defendants than the other two competing proceedings" and that Ms Bahtiyar had said that "the proceedings may achieve a better outcome for her and other claimants if an appropriate group costs order percentage was sought in her proceedings". Ms Banton said in her evidence that, "in the circumstances, Banton Group decided to prosecute the proceedings on behalf of group members by way of seeking a Group Costs Order in the Supreme Court of Victoria".

(g) On 9 March 2022, Banton Group entered into a retainer agreement with Ms Bahtiyar. The agreement is described as an "interim agreement". Relevantly, it provides that Banton Group will commence a class action against Nuix and, if appropriate, other defendants, and will then work towards obtaining a Group Costs Order. If a GCO is not obtained, Banton Group may terminate the retainer. If they intend to do so, they will first seek Ms Bahityar's instructions to discontinue the proceeding. If a GCO is obtained, Banton Group

and Ms Bahtiyar will enter into a new agreement (the terms of which were produced to the Court).

(h) Ms Banton's evidence was that she is not prepared to have Banton Group continue to undertake these proceedings on a no-win, no-fee basis beyond the hearing of the GCO and multiplicity applications because "the risk and cost to the firm is too great when compared with the comparatively limited reward of proceeding pursuant to that approach".

(i) On 9 March 2022, the Bahtiyar proceeding was commenced in this Court.

26 The evidence of Ms Bahityar was relevantly that she had been made aware of the Lay and Batchelor proceedings in early March 2022, and that:

> I agreed to be lead plaintiff in proceedings against the defendants in a class action against Nuix, Macquarie and certain directors and officers of Nuix. I understand that these proceedings might be able to achieve a better outcome for group members if an appropriate group costs order percentage was sought by me in these proceedings.

27 Ms Bahityar also said in her evidence that she is of the view that the making of a Group Costs Order will result in a fair outcome for herself and group members because the costs of prosecuting the class action will be "capped" and there will be no other deductions from any resolution sum, for legal costs or commissions, and a GCO will provide group members with a greater level of transparency and certainty in respect of the costs of the proceeding. Furthermore, Ms Bahtiyar believes that the proposed GCO, with a tiered structure (fixing the rate at not greater than 30%[31]), will better align the interests of the solicitors and group members because there will be no incentive for delay and wasted costs. Ms Bahityar was not willing to be a plaintiff in the proceeding in the absence of either a Group Costs Order or Banton Group agreeing to act on a speculative basis and has no means to pay the costs of the action or adverse costs, herself.

---

[31] The rate of 30% was a maximum rate specified in Ms Bahiyar's retainer with Banton Group.

Part D: Funding for the proceedings

The Lay and Batchelor proceedings

28 Lay and Batchelor have obtained a joint funding proposal by their respective funders, LLS and Woodsford.

29 After PFM had completed due diligence in respect of a potential claim against Nuix, it conducted a tender process in order to source competitive funding terms for the funding of the Batchelor proceeding. The process included four litigation funders competing in a "reverse-auction" process. PFM selected Woodsford which was, in its assessment, the funder who offered the most advantageous terms for group members. Woodsford is funding the Batchelor proceedings pursuant to a registered managed investment **scheme**.[32] Consequent upon PFM and Shine reaching agreement to seek orders for consolidation, it is intended, should the Lay and Batchelor proceedings go forward, that the Woodsford scheme be adjusted to accommodate that consolidation.

30 The proposed arrangement was documented in the law firms' respective costs agreements with their plaintiffs, the scheme constitution (and associated product disclosure statements), a Finance Agreement between the Woodsford entities, the LLS entities, the plaintiffs and the responsible entity for the scheme, and a document entitled, "Terms of Engagement" which deals with the appointment of the lawyers and the payment of legal costs.

31 In response to the Court's directions, PFM and Shine put forward an alternative arrangement for consolidation (involving only one firm of solicitors on the record). The consolidation proposals differed in their structure in relevant respects, which is discussed below. However, in monetary terms (commission amounts, basis of charging and distribution of funds and so on), the consolidation proposals were substantially the same. I have considered the documented funding arrangements in some detail but will only refer to relevant parts of them. For the purposes of comparing the funding arrangements between the Lay and Batchelor proceedings on the one hand and the Bahtiyar proceeding on the other, it suffices to say that:

---

32 The Woodsford – Nuix – Litigation Funding Scheme (ARSN 655 927 521).

(a) The funders LLS and Woodsford will jointly fund the proceedings.[33]

(b) Woodsford Group Limited guarantees the performance by the Woodsford funding entity of all of its obligations under the agreement. Litigation Lending Services Limited guarantees the performance by the LLS funding entity of all of its obligations under the agreement.[34]

(c) The funders fund "Action Costs", which includes lawyers (i.e. solicitors') fees and third-party costs, each up to a specified dollar amount, and separately, insurance premiums or other insurance related costs up to a specified dollar amount. The costs limit may be increased by the funders in their discretion.[35]

(d) The funder will pay 75% of the *lawyers' fees* up to the monetary limit. Lawyers' fees that fall outside of those limits (i.e. 25% of the fees recorded, and all fees that exceed the monetary limit) are deferred and payable from gross proceeds (moneys recovered in the action) only. That is, they will be carried by the solicitors on a no-win, no-fee basis.[36] Third-party costs are not subject to a 75% limit, only an overall costs limit.

(e) The lawyers are entitled to a 25% uplift on that part of their fees, if any, that is deferred. There is an agreed budget for the proceeding covering solicitors' fees and disbursements.[37] By reference to the budget, it is apparent that a proportion of the budgeted lawyers' fees will exceed the agreed costs limit for funding of solicitors' fees. The budget is prepared against three different scenarios (early settlement, mid-term resolution and very late resolution), and the quantum of fees varies accordingly.[38]

(f) The funding is to be paid in tranches, on provision by the solicitors of funding

---

33 See the confidential schedule.
34 Litigation Finance Agreement, [32].
35 Litigation Finance Agreement, [1], [3], [4], [5]. See the confidential schedule.
36 Terms of Engagement, [6.3].
37 However, any uplift on conditional fees is limited by reference to any resolution sum received by group members: the lawyers will only charge an uplift fee if group members would receive at least 70% of the resolution sum and, even then, only to the extent that those fees do not result in group members receiving less than 70% of the resolution sum. See the confidential schedule.
38 Terms of Engagement, [6.3]. See the confidential schedule.

notices, which may be served monthly during certain phases of the litigation.[39]

(g) The plaintiffs are indemnified in respect of adverse costs.[40]

(h) The funders will obtain after the event (**ATE**) insurance in respect of adverse costs.[41]

(i) The funders' success fee is 16% of recovered proceeds up to AU $50 million plus 10% of proceeds above AU $50 million, split between the funders in proportion to their liability to fund the costs of the action, which proportions are set out in the finance agreement.[42]

(j) If there is a settlement of the proceeding (or the claims advanced in it) or a judgment or order in favour of the plaintiffs, the plaintiffs will seek orders approving the settlement and distribution of the settlement or judgment sum, and that the proceeds be paid in a specified order of priority. The premise of the scheme then is that costs of the litigation are first repaid from any recovered amount (in the priorities specified) and then the group members are to receive the remaining sum.[43]

32 As to the structure of the arrangements, the alternative consolidated proposal (the arrangement that I have determined will go forward) has the following elements (reading the scheme as applicable to Shine, as the appointed law firm):

(a) Each of Lay and Batchelor have retained their respective firms to conduct the proceedings, by written retainer agreements. Batchelor will now also retain Shine to act for him as joint plaintiff to conduct the proceedings. Batchelor will

---

39 Litigation Finance Agreement, [3]–[4].

40 Litigation Finance Agreement, [3.2.1]; [4.1.2]. See the confidential schedule.

41 Litigation Finance Agreement, [6], [10]. See further as to security for costs below.

42 Litigation Finance Agreement, [1], [5], [11.3.2.2].

43 Litigation Finance Agreement, [11]. The order of priority is first (*pari pasu* and *pro-rata)* to the responsible entity (for any fees and third-party costs due in respect of the operation of the litigation funding scheme); to the funders in reimbursement of costs paid by them for the litigation in accordance with the finance agreement; to any ATE insurer for costs paid by them (for example in relation to an interim award of adverse costs); second (*pari pasu* and *pro-rata)*, to the funders for their success fee, to the layers for any deferred fees and uplift and the ATE insurer for any unpaid premium; third, to the plaintiffs and group members for any expenditure reasonably incurred on behalf of the represented group; fourth, to the claimant group in accordance with a distribution scheme approved by the court.

not terminate his retainer with PFM, but PFM will not undertake any further work[44] pursuant to that retainer agreement.

(b) The funders appoint Shine to provide legal services to the plaintiffs and group members in accordance with the retainer agreements and the Terms of Engagement, to prosecute the proceeding and advise each of the group members. Subject to the requirements of any law or court order, Shine agrees to act consistently with the terms of their retainers with the plaintiffs, the Finance Agreement and the litigation funding scheme.[45]

(c) Shine will charge lawyers' fees by reference to time reasonably and properly spent at the hourly rates outlined in its retainer agreement, subject to its rights to increase those rates, and is entitled to be reimbursed by the funders for third-party costs that are incurred in accordance with the Finance Agreement.[46]

(d) The plaintiffs will assist Shine to diligently progress the claims and prosecute the proceeding.[47]

(e) The funders may jointly give day-to-day instructions to Shine on all matters concerning the claim and the proceeding, but the plaintiffs can override any instruction given by the funders. Shine will consult the funders for their recommendation in respect of major decisions relating to legal work required for the determination of issues of fact and law common to group members.[48] Shine will ensure that the claimants and funders are given all necessary information in order to facilitate informed instructions and to comply with their obligations under the Terms of Engagement and Finance Agreements.[49] The provisions for the involvement of the funders are further discussed below.

(f) Shine will inform the funders of the names of the individual lawyers and

---

44 Meaning any further work for which costs are recoverable in the proceeding.
45 Litigation Funding Agreement, [7]; Terms of Engagement, [32].
46 Terms of Engagement, [5.1]–[5.3].
47 Litigation Funding Agreement, [8].
48 Litigation Funding Agreement, [14].
49 Terms of Engagement, [4].

experts who will undertake legal work in connection with the proceeding.[50]

(g) Shine may retain solicitors who are not employed by Shine, under an Agency Retainer for the purposes of providing legal services in connection with the proceeding. If Shine retains agent solicitors under an Agency Retainer then the professional fees reasonably charged to Shine by the agent solicitors pursuant to that retainer will be treated as lawyers' fees for the purposes of the Terms of Engagement. Third-party costs reasonably incurred by the agent solicitors pursuant to the performance of the Agency Retainer and charged to Shine will be treated as disbursement for the purposes of the Terms of Engagement.[51]

33 Shine intends to engage PFM under an Agency Retainer as contemplated by the Terms of Engagement.[52] The principals of Shine and PFM, Mr Allsopp and Mr Finney, each said in their evidence that in the event that only one firm was appointed to act for the class and the other firm was engaged as an agent to undertake work for the proceeding, that the Lay and Batchelor plaintiffs, and Shine and PFM have mutually agreed that, at the time of any resolution of the proceeding, the plaintiffs will seek court approval to recover from any resolution sum the Batchelor plaintiff's reasonable costs to which PFM may be entitled in accordance with the Batchelor retainer up, up to the date of the determination of the carriage contest. That is, they intend to seek court approval for past costs of both Shine and PFM. This issue is discussed further below.

34 Shine Lawyers was established in 1976 and is a wholly-owned subsidiary of Shine Justice Limited (**SHJ**), an ASX-listed company. The most recent financial statements for SHJ disclose that as at 31 December 2021 the company had total current assets of $281.7m and net assets of $262m with cash and cash equivalents of $43m. SHJ and Shine Lawyers are party to a deed of cross guarantee (produced to the Court). By that deed, they (relevantly) each covenant with the deed trustee, for the benefit of creditors,

---

50 Terms of Engagement, [3.1].

51 Terms of Engagement, [3.1], [5.5], [6.3.1].

52 The alternative proposal was put in terms of the firm appointed to appear on the record, engaging the other firm.

that they guarantee to each creditor[53] payment in full of any debt in accordance with the deed; and the trustee holds the benefit of the covenants and commitments upon trust for each creditor. The deed is enforceable in respect of a debt of Shine Lawyers upon its winding up or six months after a resolution or order for winding up. Any revocation of the deed requires, among other things, public notice to creditors.

35 PFM was commenced in 2017. There was no evidence, on this application, of its financial resources.

36 The audited financial statements for Litigation Lending Services Limited (the entity that guarantees the obligations of the LLS funding entity in the Litigation Finance Agreement discussed above) as at 30 June 2021 disclosed total current assets of AU $11,671,279, net assets of $9,466,155 and cash and cash equivalents of $9,439,553.

37 The published accounts for Woodsford (the entity guaranteeing the obligations of the Woodsford funding entity in the Litigation Finance Agreement discussed above) as at December 2020[54] disclosed total current assets of GBP 56.365 million, net assets of GBP 24.055 million and cash and cash equivalents of GBP 23.75 million.

38 Woodsford has secured an ATE insurance policy with **AmTrust** Europe Limited in respect of the Batchelor proceeding. The audited financial statements for AmTrust as at 31 December 2021 disclosed total assets of GBP 1,257,011,000 and cash at bank and in hand of GBP 62,050,000. The policy itself was not in evidence. Mr Finney gave evidence as to its terms. It will incept on the earlier of the Court ordering that the Batchelor proceeding is to continue or the Nuix entities serving a defence to the claims in respect of which Woodsford remains the funder. The policy would apply to a consolidated proceeding. The liability limit under the policy was in evidence.[55] Mr Finney's evidence was that he had been informed by a director of Woodsford that, in the event that an increase in the amount of cover was required, the funders would

---

53 A creditor is defined as a person who is not a group entity and to whom now or at any future time a debt (whether now existing or not) is or may at any future time be or become payable. A debt means any debt or claim which is now or at any future time admissible to proof in the winding up of a group entity.

54 More recent financial statements were not produced.

55 See the confidential schedule.

seek additional insurance coverage.[56] The Litigation Finance Agreement imposes obligations on the funder to take all commercially reasonable steps to procure the prompt observance by the insurer of its obligations under the ATE insurance policy.

39 The funders intend to propose deeds of indemnity issued by AmTrust, for the benefit of the defendants, as security for costs in the proceeding, which deeds would be directly enforceable by the defendants against AmTrust, and AmTrust would unconditionally and irrevocably undertaken to consent to judgment being entered against it an Australian court, and to that judgment being registered in an English court.[57]

The Bahtiyar proceeding

40 Bahityar seeks a Group Costs Order in the following terms:

> 1 Pursuant to s 33ZDA(1)(a) of the *Supreme Court Act 1986* (Vic), the legal costs payable to Banton Group, the solicitors for the plaintiff, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceedings, that percentage being calculated based on the amount recovered such that Banton Group shall receive:
>
> (a) 30% (inclusive of GST) of any recovery made exceeding $0 but no greater than $35 million;
>
> (b) 16% (inclusive of GST) of any recovery made exceeding $35 million but no greater than $65 million; and
>
> (c) 12% (inclusive of GST) of any recovery made exceeding $65 million but no greater than $100 million; and
>
> (d) 10% (inclusive of GST) of any recovery made exceeding $100 million.
>
> (together, the **Tiered GCO Rate**)
>
> 2 Pursuant to s 33ZDA(1)(b) of the *Supreme Court Act 1986* (Vic), that the Plaintiff and all group members be liable for payment of the legal costs order pursuant to the Tiered GCO Rate.

41 Section 33ZDA(2) provides that, if a Group Costs Order is made:

> (a) the law practice representing the plaintiff and group members is liable

---

56 See the confidential schedule as to the costs of obtaining ATE insurance.

57 See the confidential schedule.

to pay any costs payable to the defendant in the proceeding; and

(b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the court may order the plaintiff to give.

42 Banton Group was established by Ms Banton in 2020. Ms Banton's evidence was that the firm is an incorporated legal practice with limited liability pursuant to a scheme approved under professional standards legislation, that is solvent. There was no other evidence of Banton Group's financial resources.

43 Ms Banton set out in her evidence the budget that she has set for the proceeding, emphasising that it is difficult to estimate costs accurately at this stage of the litigation.[58]

44 Ms Banton's evidence was that Banton Group would enter into a financing agreement with "an entity related to or affiliated with International litigation Partners Pte Ltd" (**ILP**) to facilitate Banton Group meeting its obligations under the proposed GCO, including in respect of any adverse costs ordered against the plaintiff in the proceeding. By the time the multiplicity contest came on for hearing, that arrangement was at least partly documented.[59] The documented arrangement was in evidence in the form of a summary of terms and conditions (cashflow finance facility terms sheet) of 1.5 pages in length, dated 15 June 2022, which provided as follows:

(a) The parties to the agreement are Banton Group and the "lender" who is identified as ILP "or nominated entity". In a schedule to the terms sheet, it is stated that the anticipated nominated entity for the present proceeding is Equite Capital No. 5 Pte Ltd (**Equite No. 5**).

(b) The lender will make available a cashflow facility to lend Banton Group "sums up to the facility amount". The facility is a non-recourse loan to Banton Group whereby the advances made under it will only be repayable by Banton Group from any payment received by Banton Group or a related entity pursuant to a

58 See the confidential schedule.

59 The terms sheet was executed the day before the hearing.

Group Costs Order or "similar order" made by the Court in relation to an approved project.

(c) The facility amount is "up to AUD$30 million" unless otherwise agreed in writing. Under that facility the lender will make advances to Banton Group in respect of "approved projects", which means any legal proceedings agreed in writing between Banton Group and the lender from time to time. The approved projects include, but are not limited to, those listed in the schedule. The schedule names the current proceeding (*Bahtiyar v Nuix Ltd & Ors*) and *McCullagh ANO v Cudeco Ltd*, a proceeding issued in the Federal Court.[60] No information was provided, on this application, about the McCullagh proceeding. Evidently, it was being conducted by the Banton Group.

(d) Funds are to be advanced upon receipt by the lender of drawdown notices. The lender agrees to advance sums up to the notional equivalent of a stated percentage[61] of Banton Group's costs incurred each month at Banton's usual hourly rate, and sums up to 100% of Banton Group's disbursements on the same basis, together with sums equivalent to any ATE insurance premiums or the amounts of any other form of security ordered by the Court or the amount of any adverse costs orders. Banton Group defers the balance of its fees, which are to be recovered from any amount recovered against the defendants in the proceeding.

(e) All proceeds received *by Banton Group* in the proceeding are to be applied in a specified order of priority, including to the financier to repay its advances.

45 No terms were in evidence in respect of the funder's role in the proceedings, its entitlement to receive information or give instructions, or otherwise.

46 Bahtiyar did not rely on any evidence of the financial position of the "anticipated nominated entity", Equite No. 5. Nuix tendered a company search dated 16 June 2022,

---

60 The anticipated nominee in respect of the McCullagh proceeding is named as Equite Capital No. 4 Pte Ltd.

61 See the confidential schedule.

which revealed that it was registered on 19 May 2022 in Singapore with SGD $100 paid-up capital. Its sole director is Christopher Banton, the brother of Ms Banton.

47 Bahityar relied upon some evidence concerning the financial position of ILP.

48 Paul Lindholm is a director of Altrax Pte Ltd, which is the authorised representative for ILP and its "group of litigation funding companies". Mr Lindholm relevantly said in his evidence that:

(a) ILP or an entity related to ILP will be Banton Group's financier in these proceedings. As discussed, the intended funding entity is Equite No. 5.

(b) Mr Lindholm has arranged litigation funding for a number of representative proceedings in Australia (I infer, through entities that are associated with ILP), some of which have settled.

(c) The ILP Group has net assets including cash, in Australia, in excess of the amount stated in his evidence, in respect of which he sought an order for confidentiality.[62] He said that "all of that cash is earmarked for litigation funding". He also said that the ILP Group has in excess of a nominated amount[63] invested in proceedings currently before the Australian courts, and in those proceedings "the financier" (I infer, whichever ILP-associated entity is the financier for those proceedings) has complied with its financial obligations to the respective plaintiffs.

(d) ILP Group has "significant moneys" in excess of the amount stated in Mr Lindholm's evidence, "on trust with Banton Group to pay invoices and security for costs as required and … those moneys will be topped up as necessary".[64]

(e) Mr Lindholm said that "should the court allow the plaintiff's GCO application,

62 See the confidential schedule.
63 See the confidential schedule.
64 See the confidential schedule.

the financier will fulfil its obligations under the Financing Agreement".

(f) Mr Lindholm had initially conferred with Ms Banton in relation to the possibility of arranging third-party litigation funding for proceedings then anticipated to be commenced in the Federal Court but was concerned about the matters mentioned in Ms Banton's evidence (the 2021 Bill and fact that two proceedings had already been commenced in the Supreme Court). A Group Costs Order would, however, provide to the funder a greater degree of certainty as to the return available to it than the alternative which was affected by the uncertainty surrounding the availability of a common fund.

49 No financial statements for the ILP Group or any of its member entities (including ILP itself or Equite No. 5) were produced. The structure of the ILP Group was not otherwise described.

50 Ms Banton gave general evidence about the "financier", which was defined as an entity related to or associated with ILP, and which in context appeared to refer to entities associated with the "ILP Group". She said that the financer is part of a group of companies who acquire capital from several funding participants around the world for investment in litigation, has funded a number of securities class actions in Australia, and has, in those cases, "always put up security for costs in the form and in the amounts ordered by the court".

51 In respect of the moneys on trust mentioned in Mr Lindholm's evidence, Ms Banton gave substantially similar evidence. Neither of them described the trust (its terms, its beneficiaries or any other detail) beyond that general evidence. Ms Banton said that moneys on trust would be "topped up as necessary".

52 As to security for costs, Banton Group's preference is to provide security by way of an undertaking from the firm. Ms Banton's evidence was that, if required, Banton Group would and could obtain an ATE insurance policy in respect of adverse costs, with a view to the insurer providing a deed of indemnity to the defendants. Ms Banton produced a letter from a director of **Litica** Ltd which stated that, based on the materials

provided, Litica would be prepared to provide adverse costs insurance for the proceeding. Litica is a specialist ATE insurer registered in England and Wales, backed by a centralised fund with assets of GBP 2.957m. No proposed policy limit was mentioned in the letter or otherwise in evidence.[65]

53 Nuix submitted that, because of the scant detail provided on Bahityar's GCO application, it was impossible to know whether the proposed funding arrangements would comply with reg 7.6.04 of the ***Corporations Regulations 2001*** (Cth). That matter is discussed below.

Part E: Comparative costs modelling

54 The parties (Lay and Batchelor on the one hand and Bahityar on the other) modelled the costs that would be incurred in conducting the proceedings on the competing funding models, making a number of assumptions for that purpose. The Lay and Batchelor plaintiffs presented a joint set of modelled outcomes. The modelling had two principal components, namely projected or assumed damages (recovery) amounts and projected or assumed costs expenditure, for the purposes of the Lay/Batchelor third-party funding model.

55 The costs estimates were a function of the solicitors' budgets (which were provided to the court with some detail but not set out here) which were aligned with varying assumptions concerning the point at which the proceeding might resolve (the premise being the earlier the resolution the lower the costs bill; although, as a general proposition, the expenditure of costs in litigation does not necessarily correspond directly with the effluxion of time). As both parties said and as must be accepted, it is not possible to make an informed assessment, at this point, about when the proceedings will resolve, and whether that resolution will be by settlement or judgment. Practitioners can and do make educated judgments about these things, but at an early stage in the proceedings those assessments must and do encompass a wide range of possibilities. For the Lay and Batchelor proceedings, the funders' commission was added to the estimated costs, to arrive at a total costs figure of each scenario. For

65 See the confidential schedule.

the purposes of the comparison, the costs component of the Group Costs Order (applicable to the Bahtiyar proceeding) is a simple percentage of the assumed recovery amount.

56 Because the expenditure of costs will vary broadly according to the stage at which the proceeding is resolved, the parties modelled their costs comparison under "early resolution", "mid resolution (settlement at mediation)" and "judgment" scenarios. Projected costs expenditures (and the relevant GCO percentage) were allocated against nine different nominated resolution sums. That exercise produced a table depicting the value of the costs estimate for the Lay and Batchelor proceedings on the one hand and the Bahityar proceeding on the other.

57 The modelling was presented by the parties in a number of different iterations, reflecting the parties' changing positions which occurred as a result of the parties "re-bidding" as it were by modifying their proposals in response to the opposing party's offer (Bahtiyar modifying the GCO rate and Lay and Batchelor modifying their funders' commission rates respectively). The form in which the parties presented their materials rendered the exercise of attempting to compare costs on a like-for-like basis extremely time-consuming and more complex that it ought to have been. A **costs comparison table** setting out the parties' numbers in a form that makes the comparisons as explicit as possible, is set out in the confidential schedule.[66]

58 The outcome is a series of scenarios in which there is a costs value (expressed in dollars) for the Bahityar proceeding and a costs value for the Lay and Batchelor proceeding, which can be compared. The interaction of two key integers — the amount for which the proceedings are likely or assumed to resolve (whether by settlement or judgment) and the stage of the litigation at which the proceedings will resolve — will determine which are the most meaningful points of comparison on the grid. To illustrate the point, the table that appears in the confidential schedule, is in

[66] See the confidential schedule. The costs comparison table is made confidential because it sets out the costs estimates for the Lay and Batchelor proceedings at different points in the litigation, which is not information to which the defendants would be privy.

the following form.

	Early Scenario		Mid Scenario (mediation)		Judgment Scenario	
Resolution Sum	**Bahtiyar (GCO)**	**Lay/Batchelor (costs + funders' commission)**	**Bahtiyar (GCO)**	**Lay/Batchelor (costs + funders' commission)**	**Bahtiyar (GCO)**	**Lay/Batchelor (costs + funders' commission)**
$xx	$xx	$xx	$xx	$xx	$xx	$xx
$xx	$xx	$xx	$xx	$xx	$xx	$xx

59 It is apparent by reference to the confidential costs comparison table, that at certain recovery amounts and resolution points, the projected costs impost is greater under the third-party funding model than were a GCO to be made, and, at others, it is greater on a GCO basis than for third-party funding.

60 Under the third-party funding model (in which costs increase, although not in a linear fashion, as the litigation progresses) an earlier resolution produces lower costs than for later resolution. In some scenarios, where it is assumed that the proceeding will resolve "early", the costs are lower under third-party funding than under a GCO. However, if one concentrates on the mid resolution and judgment scenarios, the GCO model consistently produces lower costs than third-party funding. It also produces lower costs at the lower end of the spectrum of assumed settlement amounts. Overall, it is apparent that the GCO model produces lower costs in a wider range of scenarios (more than twice as many), both in terms of recovered amounts and the stage of resolution.

61 It is not possible on the material before me to make an informed assessment of the likelihood of any particular scenario materialising. It is not possible to tell how likely it is that the proceeding will settle or go to judgment, if it settles, when it will settle, or to realistically assess any settlement or damages recovery amount.

62 The solicitors for Batchelor on the one hand and Bahtiyar on the other gave confidential opinions in relation to the potential quantum of the claims. Mr Finney

set out a detailed explanation of the steps involved in calculating quantum, which are, broadly, assessing the share price inflation at various points during the claim period (for which there are a number of alternative methodologies), estimating the proportion of affected shareholders likely to participate in the claim, and applying discounts for litigation risk (relevant to the quantum of any settlement). Ms Banton said that she had briefed an expert to assess the quantum of the claim. Her evidence set out an approximate total value for the claims of group members (the number that had been determined by Ms Banton's expert), but without setting out any reasoning or rationale for the expert having reached that result. While Mr Finney and Ms Banton were agreed about the likely proportion of shareholders who could be expected to participate in the claim, there was a significant difference between them concerning the undiscounted base loss assessment. It is not presently possible to draw any sensible conclusions about that difference. That integer will be significant in any assessment of the likely quantum of the claim.

Part F: Parties

63 As noted earlier, the Lay proceeding is brought against Nuix, and the Batchelor proceeding is brought against Nuix and the Macquarie Entities. Bahityar advances her claim against Nuix and the Macquarie Entities as well as six other defendants (certain directors and officers of the corporate defendants) who are presently not defendants to the Lay or Batchelor proceedings (**director defendants**). Three of the director defendants have retained the same solicitors, and the remaining three have each sought their own representation. In total, the director defendants account for four additional sets of solicitors on the record in the Bahtiyar proceeding.

64 The Lay and Batchelor plaintiffs, in their proposed consolidated statement of claim, foreshadowed joining as a defendant Daniel **Phillips** (the eighth defendant in the Bahtiyar proceeding) and abandoning the claims against Macquarie Group Limited. Furthermore, the solicitors each said, in substance, that they would keep under review the question of who were the appropriate defendants to the claim. This issue is discussed further below.

Part G: Experience of the solicitors

65 Each of the solicitors gave evidence of their experience in conducting group proceedings (personally and in respect of their firms). No party seriously contended that any difference in the depth of their respective experience ought be assessed as an influential factor in determining the multiplicity issue. The other considerations in play can be weighed on that basis and there is no need to say anything further about this issue, in these circumstances.

Part H: Analysis

Group Costs Order — Principles

66 It is convenient to first consider whether Bahtiyar has established a sufficient basis for the exercise of the Court's discretion to make a Group Costs Order. For the reasons now set out, I do not consider that Bahtiyar has done so.

67 The principles governing the application of s 33ZDA were not in dispute. I refer to what is said in *Fox/Crawford,*[67] ***Allen*** *v G8 Education Ltd*[68] and in ***Bogan*** *v The Estate of Peter John Smedley (Deceased).*[69] For present purposes it is helpful to set out some aspects of those principles.

68 Section 33ZDA provides as follows:

> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order —
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
>
> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
>
> (2) If a group costs order is made —
>
> (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and

---

67 *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (***Fox/Crawford***).
68 [2022] VSC 32, [15]–[31] (***Allen***).
69 [2022] VSC 201, [6]–[14]; [101] (***Bogan***).

(b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

(3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

(4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).

(5) In this section —

group costs order means an order made under subsection (1);

legal costs has the same meaning as in the Legal Profession Uniform Law (Victoria).

69 The statutory criterion for the exercise of the power — *that the court be satisfied that it is appropriate or necessary to make such an order to ensure that justice is done in the proceeding* — is open-textured and provides the Court with a large measure of significantly unguided discretion.[70] For the reasons discussed in *Fox/Crawford*, a court should be satisfied, in order to make a Group Costs Order, that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding.[71] For that purpose, a broad, evaluative assessment is required, and the statutory criterion permits a range of meanings and is capable of satisfaction in myriad ways.[72] The evaluative assessment will of course be fact and context specific in each case.

70 As the statutory text makes clear, s 33ZDA facilitates the funding of group proceedings by introducing what might be described as a statutory common fund[73] of three parts: when a Group Costs Order is made, the plaintiff's liability to pay its own legal costs is contingent on recovery of an award or settlement, and the quantum of the costs payable to the legal practice representing the plaintiff and group members is calculated as a percentage of that award or settlement (sub-s 1(a)). An order permitting the calculation of fees in this way must also require that liability for payment of legal costs be shared among all group members (sub-s 1(b)), and, where

70 Ibid [24]; *Bogan* [2022] VSC 201, [13(a)].
71 *Fox/Crawford* [2021] VSC 573, [31].
72 Ibid [30], [33]; *Allen* [2022] VSC 32, [18], [20]; *Bogan* [2022] VSC 201, [13], [19].
73 The descriptor is used for convenience; it does not appear in the text.

such an order is made, the statute shifts the plaintiff's risk of paying adverse costs and any requirement to give security for the defendant's costs to the law practice (sub-s (2)).[74]

71 In that way, the provision addresses and links these things: first, how legal costs may be calculated when a proceeding is funded this way (as a percentage of the award or settlement recovered in the proceeding, as specified in the Court's order); secondly, where a proceeding succeeds, who shares in the liability for the costs of having brought the proceeding (the plaintiff and all group members); third, who bears the financial risks of bringing a group proceeding (the law practice representing the plaintiff and group members).[75]

72 By incorporating the elements it does, s 33ZDA implicitly permits the linking of risk and reward in the calculation of a Group Costs Order. It follows from the text that the calculation of legal costs in the manner permitted by s 33ZDA may properly take into account not only the value of legal services performed, but the assumption of financial risk by the law practice. The policy reflected in the risk–reward model was discussed in the Victorian Law Reform Commission's *Access to Justice – Litigation Funding and Group Proceedings* Report,[76] in response to which s 33ZDA was introduced,[77] in these terms:

> Class actions are an appropriate forum for lawyers to absorb the risks of litigation and be rewarded for this, because the representative plaintiff has a disproportionate exposure to the financial risk of an unfavourable outcome, compared to both the value of their own claim and the exposure of other class members. The risk is a significant disincentive to taking on the role and is only partly mitigated when lawyers act on a 'no win, no fee' basis.[78]

73 A corollary of the statutory model is that it permits the legal practice to benefit from the upside as the damages recovered increase proportionally to the costs incurred. By fixing the calculation of costs in this way, it allows a plaintiff and group members to

---

74 *Fox/Crawford* [2021] VSC 573, [12].
75 Ibid [13].
76 Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) (**VLRC Report**).
77 Explanatory Memorandum, Justice Legislation Miscellaneous Amendments Bill 2019, clause note 5.
78 VLRC Report, [3.67].

mitigate any risk that their compensation, if recovered, will be eroded by costs calculated at a percentage greater than that specified in the GCO.[79]

74 As John Dixon J said in *Bogan*, the financial viability of both the existing funding arrangements and the proposed funding arrangement by a Group Costs Order are relevant considerations in this evaluation. I would add that the significance of the financial viability of the proposed funding arrangement flows from the fact that an essential element of the funding model created by s 33ZDA is the assumption of the financial risk of the proceeding by the law practice representing the plaintiff and group members. On that issue John Dixon J said that *the arrangements by which the law practice proposes to bear or share the financial risk are critical to the financial viability of the proposed GCO, and thus a relevant consideration*.[80]

75 His Honour went on to say that the statutory language "does not invoke any inquiry into the means by which the law practice chooses to fund its obligations".[81] The point of the latter observation was that the fact that the law practice may have an arrangement with a third party to defray its risk does not change the fundamental inquiry for the Court.[82] For clarity, it should be recalled that that issue arose in *Bogan* in a different context to the present case. There, one of the defendants had submitted that the involvement of a third-party funder via an arrangement with the plaintiff's law practice had in effect transformed the application for a GCO into an application for a common fund order (contrary to the High Court's decision in *Brewster*) — a proposition that was rejected.[83] His Honour went on to say that,

> The broad relevance of the arrangements between the law practice and another entity participating in funding the litigation in some way, is that by reference to the costs sharing arrangement, the plaintiffs demonstrate that in circumstances where the initial funding agreement may not prove viable, a group costs order can be regarded as a viable option for the continued financial support for the plaintiffs in the proceeding. *It is also relevant for the funding law practice to show the court that funding the proceeding by a group costs order is viable*.[84]

---

79 *Allen* [2022] VSC 32, [33].
80 *Bogan* [2022] VSC 201, [14].
81 Ibid [101].
82 Ibid.
83 Ibid [99]–[100]; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574.
84 *Bogan* [2022] VSC 201, [101] (emphasis added).

76 For context, I note that in *Bogan* the initial funding arrangement was shown not to be ongoingly viable, thereby raising the prospect that the group members would have no means of vindicating their rights unless a GCO were made. That issue does not arise in this case (and was not said to arise) because, although the Bahityar proceeding does not have an alternative source of funding, the claims advanced in the proceeding are also advanced for the same group members in the Lay and Batchelor proceedings, through which group members may vindicate their rights.

77 Regard to the financial viability of the proceeding needs to be had with an understanding of the fundamental proposition that the essential purpose of s 33ZDA is to reduce barriers to commencing class actions in this Court, thereby facilitating access to justice.[85] I say this because, taken out of context, a requirement that a proceeding in which a GCO is sought be shown to be financially viable might be deployed as a bar to the continuation of the proceeding, perhaps by a defendant seeking a tactical advantage. The observations in this case should not be understood as supporting an outcome in which group members would be left without a vehicle through which to vindicate their rights. As I have said, that circumstance does not arise in this case.

Group Costs Order — Consideration

78 With that background, as noted at the outset, Bahtiyar's principal submission was that the proposed GCO would entail lower costs, and thus yield higher net damages and therefore produce a better outcome for group members, than the Lay or Batchelor proceeding. The related submission was that a Group Costs Order has structural advantages when compared to third-party funding because it affords certainty, protecting against costs blow outs, as well as transparency and simplicity in respect of costs. As emphasised in *Fox/Crawford* and *Allen*, the question whether group members are likely *better off* under a proposed GCO than under another funding arrangement is not a proxy for the statutory test, and the relevance of a comparative analysis will vary from case to case.[86] Bahtiyar's submission, however, correctly

85 See *Fox/Crawford* [2021] VSC 573, [21].
86 *Fox/Crawford* [2021] VSC 573, [51], [135]–[136].

accepted the significance of the comparative analysis *in this case*. Here, the proceeding for which GCO funding is sought is one in which the claims advanced by it are also advanced in competing proceedings, which are differently funded. Although the comparison between the proceedings requires the making of some assumptions, the proposed GCO funding is in this case to be assessed against a real, not hypothetical alternative funding model.

79 The "better off" proposition requires some unpacking.

80 First, I accept that a Group Costs Order carries with it the inbuilt structural benefits or certainty in relation to costs — in that group members are guaranteed that they will pay no more in legal costs than a specified percentage of the recovered amount. Provided that the percentage fixed is appropriate, that guarantee protects against the risk that damages will be substantially eroded by legal costs. As I have said in other cases, I accept that those are substantive benefits.[87] In this respect, the GCO funding model compares favourably with third-party funding in which a funding commission is fixed as a proportion of moneys recovered (or spent) *in addition to* recovery by the funder of the legal costs expended.

81 Secondly, I also accept (without repeating what is said above), that by reference to the modelled outcomes in this case, although I cannot draw any conclusion about the amount at which the proceeding is likely to resolve or when it is likely to resolve, overall, it is apparent that Bahtiyar's GCO model produces lower costs in a significantly wider range of scenarios (both in terms of recovered amounts and the stage of resolution), although not in all scenarios, than the third-party funding proposed by Lay and Batchelor.

82 Bahtiyar's case on *outcome* was directed to lower costs and certainty in respect of costs. The real likelihood of lower costs can be a suitable measure of the litigation vehicle likely to produce the better outcome for group members where the inputs necessary to produce the outcome may be taken to be equal or neutral as between competing or

87 See *Allen* [2022] VSC 32; *Nelson v Beach Energy* [2022] VSC 424.

comparator proceedings. Were all other things equal, those considerations would speak in favour of the Bahtiyar proceeding. It is appropriate to examine the inputs to the outcome in this case where, as I have said, the relevant inquiry concerns two competing sets of real, not hypothetical arrangements.

83 However, all things were not equal. In producing an outcome, the costs impost is one part of the equation, and the wherewithal to fund and conduct the proceeding is the other. Litigation outcomes require not only the containment of costs, but the application of significant resources. Those resources include very significant financial outlays and legal personnel with appropriate skills and experience. The latter was not in issue, but the former was. In seeking to persuade the court to make a GCO, it was for Bahtiyar to demonstrate that the funders who sought to invest in the proceeding, and make a return they judged adequate, could sustain their end of the bargain by supplying adequate resources.

84 In other cases, it might be accepted (or not contested) that a firm seeking to persuade the court that it should make a GCO has sufficient resources to meet the obligations it must assume by funding and conducting the proceeding. In this case, that issue was squarely in contest. That being so, the funders (through Bahtiyar) did not put on sufficient evidence to establish that they had the means to fulfill their obligations. They might have done so, but instead, they left their financial arrangements opaque. The following conclusions can be drawn from the evidence set out above in respect of Bahityar's funding proposal:

(a) The costs budget for the Bahtiyar proceeding is described in the confidential schedule. It is revealing nothing confidential to say that it was very substantial — so much could be deduced from the nature of the proceedings and the fact that Bahtiyar has joined nine defendants to the proceeding. In the absence of litigation funding via the proposed financing agreement, Banton Group would be required to fund the action itself. By operation of s 33ZDA, Banton Group would be liable to meet any order for security for costs and any order for adverse costs made against Bahtiyar, although with the prospect of mitigating

that risk by other arrangements.

(b) There was no evidence as to the financial capacity of Banton Group. Ms Banton's evidence (which was not in contest in this respect) is that Banton Group is a solvent law practice which has been in operation since 2020.

(c) Banton Group has entered into a terms sheet with International Litigation Partners Pte Ltd (similar in appearance to a heads of agreement) which, on its face, indicates that the financing agreement for this litigation is intended to be made between Banton Group and Equite No. 5. That funder has agreed to make available to Banton Group a $30 million non-recourse loan for funding "approved projects". There is no limit to the number of projects that may be approved. So far, two projects (i.e. legal proceedings), including the present proceeding (subject to the carriage issue), are approved. For this project, funds would be made available for all relevant expenses save for a nominated percentage of Banton Group's notional fees (which Banton Group would bear on a conditional basis). There was no information whatsoever about the other presently approved project.

(d) Neither Ms Banton nor the funder committed themselves to express an opinion about *why* the Court could be satisfied that the non-recourse loan would be sufficient for the needs of this proceeding having regard to the prospect of o*ther calls* on that funding. It was evidently within their power to have done so, but they did not.

(e) The terms sheet confers on Banton Group a contractual right against the funder Equite No. 5. Bahityar put on no evidence of the assets of Equite No. 5, which evidently is a special purpose vehicle. The company search produced by Nuix revealed that it had SGD $100 paid-up capital and had been incorporated on 19 May 2022.

(f) There was no basis on which to conclude that Banton Group would have recourse to the assets of ILP or any other related entity. There was no basis on

which to conclude that Equite No. 5 had any basis for recourse to the assets of ILP or any other related entity. None was suggested.

(g) Mr Lindholm said that the "ILP Group" has substantial assets, including cash, in Australia. No financial statements were in evidence. The composition of the ILP Group was not described. Mr Lindholm said (and it was not contested) that he had arranged litigation funding for a number of representative proceedings in Australia — I infer, through entities belonging to or associated with the ILP Group — although no detail was provided. It is reasonable to infer that Mr Lindholm and the "ILP Group" have means of accessing funds from investors and has invested successfully in other litigation in Australia. However, none of that established that Banton Group or Bahtiyar, or any particular funding entity had any particular access to any funds through any contractually enforceable arrangements. Mr Lindholm said that should the Court allow Bahityar's GCO application, the financier would fulfil its obligations under the proceeding. Mr Lindholm is not a director of the funding entity. Even accepting the sincerity of that statement, the point is that the financier's obligations, which are unsecured, have the limitations described.

(h) The "trust" that Mr Lindholm and Ms Banton described in the terms mentioned above was not demonstrated to be a trust held for the benefit of Bahtiyar or the group members in this proceeding. There was simply no information about that trust beyond the statements set out above. Again, both Ms Banton and Mr Lindholm might have chosen to give that evidence but they did not do so.

(i) As to security for costs, there was evidence, as set out above, that Banton Group has obtained the agreement of the insurer Litica, to provide adverse costs cover for this proceeding; although, the amount of the offer of insurance (the proposed policy limit) was not put in evidence. Litica has substantial assets.

85 As noted earlier, the statutory funding model created by s 33ZDA accepts a reward for risk relationship. However, while the funders in this case (Banton Group and the

ILP related entities) had judged the return to them under the proposed GCO to be adequate and had sought to obtain the opportunity to make that return pursuant to a Group Costs Order, they put forward evidence in respect of their proposal that left significant gaps and opacities. As I have said, the funder and Banton Group might have chosen to fill those gaps and clarify what was obscure, but they instead remained in relevant respects uncommitted.

86 One aspect of Bahityar's submissions was telling. During oral submissions, counsel for Ms Bahtiyar said that "the court could *impose a condition on the GCO* that [funding] be held separately and set aside within the trust account and allocated to Equite No. 5". A similar submission was made in writing in response to the alternative consolidation proposal proffered by Lay and Batchelor, namely that, "the *court could impose a condition on carriage* that a portion of the group funds be separately set aside within the trust account and allocated to Equite No. 5 to finance this case". Imposing such a condition would in effect involve re-writing the funding terms that Banton Group had agreed with funding entity or entities. It was not for the court to re-cast the terms of the proposed funding which was not otherwise put forward on that basis. That is particularly so where Bahtiyar and Banton Group were not seeking a GCO in order to allow a proceeding to continue in the absence of any other vehicle through which group members could pursue their claims, but on the basis that it was a *better funding arrangement* than its competitor. Furthermore, that proposition raised more questions than it answered. One might ask, rhetorically, *what proportion of what funds might the court order be held separately, in what trust account*? *To whom do those funds belong*? Plainly, an order against a non-party was not seriously suggested. If the submission was meant to imply that the Court ought leave to one side the actual terms of the funding arrangement produced by the negotiating parties and, by order, improve the Bahtiyar offer as it were, then that would not be an appropriate way to approach the issue, in my assessment. If the funders were, for example, willing to set aside moneys specifically for this proceeding (they did not say so in their evidence), then it was within their power to agree to do so and to produce evidence of such an agreement. If it be the case that the funding entities for this proceeding are in fact

entitled to have recourse to the assets of the wider ILP group, then it was within the power of the funders to demonstrate that fact, including by filing evidence over which relevant claims to confidentiality might have been made. They did not do so. Much of the evidence about the proposed funding for the proceeding in effect asked the court to take on trust, the detail of the arrangements. In circumstances where a party is seeking to succeed in a carriage contest by persuading the court to make a Group Costs Order to allow it to conduct the proceedings, the Court is entitled, in looking to protect the interests of group members, to expect that funding parties will make clear the critical elements of their funding model. This is particularly so where, as in this case, the resourcing of the proceedings was squarely in issue.

87 Relatedly, Bahtiyar submitted (also in response to the alternative consolidation proposal proffered by Lay and Batchelor) that she had not sought to put on further evidence in support of her own proposal without leave, but noted that, "should the court wish for further information to be provided, for example to assist the court by further clarifying the details of the financial resources available to Banton Group to conduct the proceeding that can be provided on request". The issue of financial resources had been in issue at least since the other parties filed their submission before the hearing of the application. The issue had been raised in discussion between the Court and counsel for Bahtiyar during the hearing of the application. In that exchange counsel accepted the proposition that the Court could not know, on the evidence, that Equite No. 5 had and right to funds held by members of the ILP group. Bahtiyar did not seek leave to put on further material.[88] It was not for the Court to continue to inquire and invite further submissions in those circumstances.

88 Ms Banton said in her evidence that she had assessed the financial viability of Banton Group conducting the proceeding on a GCO basis and calculated what GCO rate could be *viable for the firm* given relative risks and rewards. Mr Lindholm said that he had been satisfied that a Group Costs Order would provide a greater degree of

[88] In directing the Lay and Batchelor plaintiffs to submit an alternative proposal (discussed below), I also directed that the other parties file any submissions they should wish to file in respect of that proposal, that any party wishing to put on any evidence in response to it would require leave to do so, and that any application for leave would be considered when it was made.

certainty in respect of the *return available to the funder* than an alternative funding model. It was incumbent on those seeking a GCO to establish that it was appropriate or necessary for the Court to make such an order, and, on the basis identified in support of that application, to persuade the Court that it was a better offering for group members.

89 In order to put this analysis in context, the relevant characteristics of the Lay and Batchelor funding proposal (which is same regardless of the consolidation model) are, for the reasons set out above, that:

(a) the funded fees (professional fees and disbursements) are securely funded in that they are guaranteed by entities with substantial assets;

(b) the unfunded professional fees will, in the arrangement that I will approve, be funded by Shine Lawyers, whose obligations are guaranteed by a parent entity with substantial assets. Any agency arrangement between Shine and PFM will not diminish Shine's obligation to conduct the proceedings as the solicitors on the record.

90 Both Lay and Batchelor and Bahtiyar intend to seek to meet requirements to give security for costs by proffering deeds of indemnity by ATE insurers (Bahityar's preference being an undertaking by Banton Group). Bahtiyar's evidence was incomplete, particularly in view of the fact that Bahityar has joined nine defendants to the proceeding, which could result in a substantial security for costs undertaking. I accept that Banton Group would likely obtain ATE insurance for the proceeding, but I cannot say in what amount. At this stage of the proceedings the defendants have indicated that they will seek bank guarantees or funds paid into court. It is not possible to draw any conclusions at that this point as to how the question of security will be resolved.

91 In conclusion, I do not consider that Bahtiyar has established that it is necessary or appropriate to ensure that justice is done in the proceeding, to make a Group Costs Order. A comparatively lower impost of legal costs is undoubtedly a benefit to group

members and an important integer in the production of an outcome. But proof of the other essential integer was wanting when it had been called for. It is the fact that the Bahtiyar proceeding will be stayed, once the GCO is refused, but it was not contested that the claims presently advanced in the Bahtiyar proceeding are also advanced in the Lay and Batchelor proceedings.

The AFSL point

92 Nuix made submissions directed to *Corporations Regulations 2001*, reg 7.6.04. I will deal only briefly with this issue. For the reasons indicated below, given the nature of the submissions, it is not appropriate to express any concluded view about this point. Further, given the conclusions otherwise reached, it is unnecessary to deal with the point.

93 Regulation 7.1.04N(3) (which sits within Division 1 of Chapter 7 of the *Corporations Regulations 2001*) provides that certain interests in a *litigation funding scheme* are taken to be financial products. The consequence is that a person dealing in an interest in such a scheme is required to hold an Australian Financial Services Licence (**AFSL**). Section 911A(1) of the *Corporations Act* provides that a person who carries on a financial services business in this jurisdiction must hold an AFSL covering the provision of the relevant financial service. Carrying on such a business includes providing a financial service, which in turn includes dealing in a financial product.[89] "Dealing in a financial product" is defined as applying for or requiring, issuing, varying or disposing of a financial product or, in relation to interests in a managed investment scheme, underwriting securities or interests.[90] Arranging for a person to engage in such conduct is also dealing in a financial product.[91] Nuix submitted that the arrangements for the funding of the Bahtiyar proceeding are a litigation funding scheme within the meaning of the provision.

94 Nuix submitted that where the relevant financial product is an interest in a litigation funding scheme that involves the law firm applying for a Group Costs Order under

89 *Corporations Act 2001* (Cth) s 761A.
90 *Corporations Act*, s 766C(1).
91 Unless the actions concerned amount to providing a financial product advice *Corporations Act* s 766C(2).

s 33ZDA of the *Supreme Court Act* and sharing part of that order with a litigation funder (as is proposed in this case), the relevant interest may be "issued" in at least one of three ways. First, upon the making of the Group Costs Order on the application of the plaintiff; secondly, by the law firm or funder offering group members the opportunity to register their interest in the class action; and thirdly, where group members are invited to register their interest upon settlement or judgment in favour of the plaintiff. Nuix submits that in each case there is a "dealing" in a financial product as that term is defined in the *Corporations Act*. The consequence is that the person so dealing is required to have an AFSL.

95 Bahtiyar submitted that the proposed funding arrangement was not a litigation funding scheme within the meaning of reg 7.1.04N(3) and could not entail dealing in a financial product. Bahtiyar submitted, among other things, that:

(a) The dominant purpose of the arrangement is to assist the Banton Group in meeting expenses and liabilities in connection with "approved projects" and not to enable group members to seek remedies to which they may be entitled (as required by reg 7.1.04N(3)(a)). Separately, the arrangement between Banton Group and its financier is not a funding agreement as that term ought be construed in the context of the regulation.

(b) Neither the funder nor Banton Group is carrying on a financial services business. Nuix's submission relies upon the conduct of Banton Group and not a financier, which is sufficient basis to reject the point. In any event, the "issuing" of a financial product requires conduct by which that product is made available to investors. A Group Costs Order provides the basis upon which the law practice is to be remunerated for its services in conducting litigation. It does not involve conduct by which a financial product is made available to investors. Likewise, the registering of an interest in a class action does not involve "issuing" a financial product at all; it is the process by which interest from potential group members is ascertained.

96 Bahtiyar's primary submission, however, was that the issue ought be put to one side because Nuix had refrained from affirmatively submitting that the proposed arrangements did not comply with the regulations. I accept that submission. Plainly enough, the application of reg 7.1.04N(3) to the circumstances in which a funder provides financial support to a law firm which seeks a Group Costs Order under s 33ZDA would be novel. In this case, Nuix explored the points I have summarised briefly above, but then submitted that it was "*impossible to know whether or not the arrangements entered into between Banton Group, ILP, Equite No 5, and/or any other entity ILP chooses to fulfil the funding commitment will comply with the regulations … because of the scant detail Ms Bahtiyar has disclosed about those arrangements, and the interests that sit behind the proposed funding entities*". Nuix went on to submit that it would appear, on the information available, that the proposed arrangement meets the criteria for a litigation funding scheme and for dealing in a financial product, however, the evidence does not indicate whether the relevant funding entities have an AFSL that would cover the provision of the relevant financial services. If they do not, then the continuation of the scheme "*could* involve a contravention of s 911A of the Corporations Act".[92] In the absence of an affirmative submission by a party that a regulation would be contravened by the arrangements and having regard to the matters raised in the Bahtiyar submissions, I do not consider it is appropriate for the Court to embark on a determination of this issue.

97 The same conclusion applies in respect of Nuix's related submission concerning licence conditions for the holders of Australian Financial Services Licences.

98 Regulation 7.6.04(1)(l) prescribes that a licensee who provides funds or indemnities pursuant to a litigation funding scheme to which regulation 7.1.04N(3) applies must have arrangements in place to avoid conflicts of interest, including by ensuring that the lawyer providing services to the scheme or any immediate family member of that lawyer does not have a financial interest in the licensee. If an immediate family member does have such an interest, the lawyer must stop providing the services or

92 The emphasis is mine.

the family member must relinquish the interest. The proposed funding entity for the Bahtiyar proceedings is Equite No 5. Mr Christopher Banton is the sole director of Equite No 5. He is Ms Banton's brother. Ms Banton is the managing partner of Banton Group and the solicitor on the record for Ms Bahtiyar. Nuix submitted that, on the basis that the funder in the proposed arrangement would be required to hold an AFSL, *it would be a condition of any such AFSL* that the funder take steps to ensure that immediate family members of the lawyers engaged by Ms Bahtiyar do not have a direct or indirect interest in the funder. Nuix said that at present, the precise interest of Ms Banton's family in the funding entities is "unknown and unknowable" by reason of the opacity of the funder's corporate structure.

99 Bahtiyar submitted on this point that the definition of "immediate family member" is as provided by s 9 of the *Corporations Act* and does not extend to Mr Banton.

100 Bahtiyar further submitted that were it the case that regulation 7.1.04N(3) applied and the Bahtiyar proceeding was granted carriage without Banton Group's financier having an AFSL, the consequence would be as set out in s 925A of the *Corporations Act*. That section provides that the client who enters into an agreement with a non-licensee may give notice of rescission of the agreement subject to certain exceptions. Group members in a proceeding in which a Group Costs Order is made do not have an enforceable agreement.

101 Furthermore, Bahtiyar submitted, it is a matter of public record that the Federal government intends to repeal the amendments to the *Corporations Regulations 2001* (introduced in July 2020 by the *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth)), including the specific provisions on which Nuix relies.

102 I have observed earlier in these Reasons that aspects of the proposed funding arrangements were opaque. However, in the circumstances it is unnecessary to further consider this point.

Other considerations

103 Although the refusal of Bahityar's application for a Group Costs Order has the

consequence that the Bahityar proceeding is not in contention for carriage of the proceeding, given the inter-twining of the GCO application and multiplicity issue, it is appropriate to note that the remaining issues do not alter the conclusions expressed above.

104 The structure preferred by Lay and Batchelor, involving two funders and two law firms, has the difficulties discussed below. The alternative structure — proposed by Lay and Batchelor but not preferred by them — alleviates those complexities satisfactorily, in my assessment. I accept that a single law firm with a single funder is attractive, but all characteristics of competing proceedings must be considered in an evaluative way, in relation to one another.

105 The principal difference between the Lay and Batchelor proceedings[93] on the one hand, and the Bahtiyar proceeding on the other, is that Bahtiyar has joined six defendants who are not parties to the Lay and Batchelor proceedings. To put the issue simply, in Ms Banton's evidence (filed confidentially) she set out her reasoning for the joinder of those parties. It is unnecessary to descend to the detail of that evidence but, as discussed in the open hearing of these applications, a primary consideration (but not the only consideration) was the availability of assets against which to execute any judgment obtained for group members in the proceeding.

106 There was a contest between Ms Banton on the one hand and Mr Finney (of PFM) on the other (whose views Mr Allsopp of Shine adopted) in relation to the considerations informing the wisdom of joining parties beyond Nuix, Macquarie Capital and Mr Phillips, to the proceeding. Ms Banton gave evidence as to her reasoning for the joinder of the additional defendants, which, in essence, was that claiming against the director defendants would increase the pool of insurance cover available to group members and would provide certain other strategic advantages. Lay and Batchelor submitted that Bahtiyar had not demonstrated that the joinder of the six additional director defendants would realistically add anything other than additional costs

93 i.e., the proceedings as opposed to the funding models

exposure for the plaintiff and complexity and delay in the proceedings.

107 Each of the solicitors agreed there is a material risk that Nuix might not be able to fully meet a judgment debt if these proceedings are successful, particularly if other proceedings brought against Nuix are also successful. There was insufficient material available to the court to draw any conclusion about the prospect that adding several additional defendants to the proceeding will improve the prospects of recovery. Ms Banton thought that it might; Mr Finney doubted that it would, and both gave reasons for their opinions.

108 Both Mr Allsopp and Ms Banton set out their rationale in respect of whether David Standen, the ninth defendant in the Bahtiyar proceeding, should be joined. Mr Standen submitted in substance that his joinder provides no additional benefit to group members. He submitted that there are no claims made against him that are not already made against the proposed consolidated defendants, and, because his knowledge is the same as those defendants (and, further, attributable to Macquarie Capital), it is unlikely that he would be found liable unless both Nuix and Macquarie Capital are also found liable.

109 It is not possible to resolve that contest in the context of these applications, or to form a view on the available material about whether the greater number of defendants is more likely to enhance or detract from the overall prospects of success of the proceeding. Ultimately, although Ms Banton's evidence explained her evaluation of the forensic merit of the joinder of those parties, Bahtiyar submitted that the issue of which defendants were joined to the proceeding ought be considered a neutral factor in the comparison of the proceedings. I agree.

110 It must be acknowledged, however, that the greater the number of defendants, the greater the complexity in costs, and any security sought in respect thereof, that attend the proceeding. Indeed, this may exacerbate concerns already held in respect of a law firm's financial position and the funding arrangements behind the proceeding.

Part I: Consolidation and solicitors on the record

Consolidation with joint representation

111 Lay and Batchelor sought consolidation of their proceedings on the basis that the consolidated proceeding would be jointly funded by their respective funders LLS and Woodsford, and their solicitors would be jointly appointed as solicitors on the record for the represented class. They made submissions jointly on the multiplicity application. The substance of their submission was focused on the carriage motion, in which they said that their combined offering was superior to the Bahtiyar offering for a collection of reasons including that their funding model was better, their proceeding was somewhat more advanced, compared with Bahityar's "late and rushed" proceeding, and that, if they were awarded carriage, group members would have the advantage of the accumulated expertise of two firms. The subtext of the submission was that consolidation was a solution to the multiplicity problem and that there was no good reason that a consolidation of the proceedings should not also entail the appointment of both firms of solicitors to appear on the record.

112 As noted earlier, it is well established that consolidation of overlapping proceeding is a commonly adopted solution to the problem of multiplicity. Its utility in part derives from the fact that it is a consent-based solution. Well before the enactment of Part 4A and its cognates, courts have looked to the consent of the parties to fashion the means of dealing with the vice of multiplicity of civil suits against a defendant.[94] Because consolidation of overlapping group proceedings is most commonly facilitated by the consent of the parties, it has arisen for consideration in conjunction with the question of whether the legal representatives of the parties should be permitted to jointly appear on the record in a consolidated proceeding in which those parties become joint plaintiffs. As discussed in cases including *Southernwood v Brambles Ltd* and *Fuller v* ***Allianz*** *Australia Insurance Ltd*,[95] there is now a well-established line of cases permitting joint representation where proceedings are consolidated to resolve a multiplicity of group proceedings, subject to the requirement that the future conduct

---

94 *Amos v Chadwick* (1878) 9 Ch D 459, 462–3, cited in *Wigmans* (2021) 270 CLR 623, 297 [99].

95 *Southernwood v Brambles Ltd* (2019) 137 ACSR 540; *Allianz* (2021) 65 VR 78. See also *Thomas v The a2 Milk Company Ltd* [2022] VSC 319.

of the consolidated proceeding is likely to be consistent with the interests of group members and with the overarching purpose of the rules of the Court and the *Civil Procedure Act 2010* (Vic),[96] and not prejudicial to the defendants.[97] It does not follow, however, that merely because the plaintiffs and solicitors in overlapping proceedings agree upon a consolidation regime that the regime will be accepted without further scrutiny. As was discussed in *Allianz*:

> That is not to say that it is necessary to promulgate a fixed or even a *prima facie* rule permitting joint representation in group proceedings. It is only to say that when considering whether to exercise a discretion to allow joint representation in a group proceeding, a relevant consideration may well be the need for the Court to fix upon an appropriate solution to the multiplicity problem, applying the principles discussed. Those circumstances and the specific proposal under consideration, in the context of the evidence before the court, might establish a proper basis for the exercise of discretion, as it does here.[98]

113 A proposal for consolidation with joint representation may well, in a given case, present as a useful tool for resolving the multiplicity problem. As discussed in *Allianz*, I do not consider that there is any doctrinal impediment to permitting such an arrangement. In earlier cases approving of consolidation with joint representation, the solicitors have undertaken to the court to abide by a co-operation protocol. The premise of such a protocol is that the two firms of solicitors act in effect as one, making joint decisions on critical aspects of the litigation, and establishing a litigation committee comprised of a small number of senior lawyers from the firms who have responsibility for decision-making on significant matters.

114 Adherence to such a protocol was proposed here. The proposal that the two law firms work together in that way was not the problem. Once the arrangements were more closely examined, it became apparent that the involvement of litigation funders in the decision-making structure introduced a new degree of complexity that, in my assessment, took the arrangement outside the essential premise of two law firms conducting the litigation and making decisions in a way that closely resembled (although did not entirely replicate) the workings of a single firm.

---

96 *Civil Procedure Act 2010* (Vic) s 7.

97 See, eg, *Klemweb* (2019) 369 ALR 583, 590 [34], 615–17 [155]–[160].

98 *Allianz* (2021) 65 VR 78, 104 [94].

115 The proposed structure was as follows:

(a) Each firm has a retainer agreement with its own client. The funders and clients enter into a Litigation Finance Agreement (the financial terms of which are set our earlier in these Reasons). The funders and the firms have agreed proposed Terms of Engagement. In the hierarchy of arrangements, the Terms of Engagement prevail over the lawyers' engagement with their clients to the extent of any inconsistency, and the Litigation Finance Agreement prevails over all agreements to the extent of any inconsistency.

(b) Relevantly, the Litigation Finance Agreement provides that the funders may give day-to-day instructions to the lawyers on all matters concerning the claims. The instructions of the representative can override those instructions. The lawyers will consult the funder for their recommendations in respect of major decisions regarding legal work required for the determination of all common issues.[99] The funders do not provide legal services.

(c) The Agreement provides comprehensive dispute resolution mechanisms.[100] Their mere presence does not suggest the likelihood of conflict; however, the agreement clearly allows for the possibility of two, three or four-way conflict in respect of settlement. The parties are to use their best endeavours to agree, and submit to expert determination by an independent barrister in the event of any dispute.

(d) The cooperation protocol proposed for this litigation is in most respects the same as protocols approved by this court in other matters. Shine is instructed by Lay and PFM is instructed by Batchelor. The firms are to jointly make or respond to any interlocutory application. The firms are to constitute a litigation committee comprising two senior lawyers who make the major decisions and manage the litigation and distribute the work. If they can't agree, then senior

99 Litigation Finance Agreement, clause 14.
100 Litigation Finance agreement, clauses 14, 20.

counsel is to resolve any dispute.

(d) The difference between this protocol and others is that the funders (both sets of them) have a "standing right" to be involved in any discussion or deliberation by the litigation committee in respect of any step in the proceeding. The litigation committee has an overriding duty to the plaintiffs to act in accordance with their instructions.[101] This provision is consistent with the terms of the Litigation Finance Agreement, which provides that the funders can give day-to-day instructions and must be consulted in relation to their recommendations (subject to the client's instructions).

116 The legitimacy of litigation funding is well established in Australia, and as a general proposition the fact that litigation funders have a role in the decision-making process in respect of litigation that they fund, is not of itself, objectionable. However, bringing two third parties who have a right to be consulted and to make recommendations in respect of major decisions in the litigation breaks down and makes more complex the notion of two firms acting as one. That notion has, at its core, the proposition that the lawyers who have the senior decision-making role are members of the firms that give undertakings to the Court to act in accordance with the protocol.[102] The third parties admitted to the inner circle in this proposed arrangement do not give such undertakings.

117 Questions such as this arising in the resolution of multiplicity disputes, must be assessed on the facts of each case, and the difference between a set of arrangements that is appropriate for consolidation and a set of arrangements that is not may be a matter of degree. I accept that, as a general proposition, mature, experienced practitioners and funders (who are often themselves lawyers) can make sound decisions for the benefit of the relevant litigation and therefore ultimately for the benefit of the represented class. However, an important means by which the Court can ensure that the group members' interests are in fact properly safeguarded in an

101 Proposed protocol, clause 5.9.
102 Compare *Allianz* (2021) 65 VR 78, 87–8 [26]–[28], 93 [54], 98–9 [74], [75].

arrangement for the carriage of legal proceedings sanctioned by the Court, is the formal structure governing any joint-representation arrangement.

118 In future applications, particular thought might be given to those structures.

119 I do not consider that the proviso that clients' instructions may override those of the funders to be sufficient to bring the proposed arrangement within the scope of the previous consolidation proposals ordered. In practice, clients give instructions on the advice of their lawyers.

120 Ultimately, no positive reason was advanced to justify the addition of this level of complexity in decision-making, which presents the potential for two clients, two law firms and two sets of funders to disagree. In such an arrangement, the particular participants might well be able to make things work, but the risk and complexity increases with the addition of funders who have particular rights in respect of the proceedings. Furthermore, in this case, adding this structure to the proceedings is not justified by the effective and efficient disposition of the multiplicity contest in the way that it was in *Allianz*.

Consolidation with one firm of solicitors on the record

121 In light of the issues I have described, I directed that Lay and Batchelor submit any individual competing proposals for the carriage of the proceeding. As noted earlier, Bahtiyar was given the opportunity to respond to the material submitted. Lay and Batchelor did not submit competing proposals but proposed the arrangement described earlier in these Reasons.[103] It is proposed that LLS and Woodsford will jointly fund the proceedings. Both Lay and Batchelor will remain as plaintiffs. One firm will appear on the record.

122 Consolidation of the proceedings presents no difficulty of itself, and neither does the appointment of both Lay and Batchelor as plaintiffs. The defendants submitted that no particular reason had been identified to retain both plaintiffs. It is apparent that

---

103 See [31] of these Reasons.

two factors have driven the proposal that both parties remain plaintiffs. The first is that neither party (nor their respective law firms) wish to compete against each other, having first proposed a collaborative arrangement. Although in submissions they acknowledged that consolidation (and more pertinently joint representation by their solicitors) was not assumed, in reality it had been assumed. Firms who enter the fray and seek carriage of the proceeding that the court will direct should go forward, especially when they are jointly aligned against a third firm, ought countenance the prospect that what they jointly propose will be scrutinised carefully by the court, which must consider group members' interests.

123 The second factor is more relevant. Mr Allsopp and Mr Finney each said in their evidence that they did not believe that they could source a more competitive funding proposition than the one that they had negotiated with Woodsford and LLS jointly funding the proceedings. That arrangement contemplates that both Lay and Batchelor will be plaintiffs. It will be recalled that Woodsford originally provided funding to Batchelor, and LLS, to Lay.

124 The joint funding proposal fixes the funders' commission at 16% of gross proceeds up to $50 million, plus 10% of gross proceeds above $50 million. By way of comparison, Batchelor had sourced funding from Woodsford with commission at 22.5% of net proceeds. The original arrangement had been reached with Woodsford after a competitive tender and was, in Mr Finney's assessment, the best obtainable. Although the original Woodsford commission rate and the presently proposed rate are calculated on slightly different bases (the original rate being calculated on net recoveries and the present rate on gross recoveries), I am satisfied that the new rate will represent a better outcome than the original rate. Although it presents only one objective point of comparison, it is consistent with the evidence of Mr Allsopp and Mr Finney, which I accept. Nuix submitted that I am not bound to accept what was proposed. Although I directed that the parties put forward such alternative arrangements as they were prepared to offer, the Court is not in a position to unwind the proposal and re-cast the proposed funding terms, as it were.

125 The terms obtainable on the joint funding rate is a sufficient basis to permit both plaintiffs to remain in the proceeding, thereby accepting the joint funding proposal.

126 Returning to the question of legal representation, as set out earlier, the alternative proposal is that one law firm will appear on the record as solicitors for the joint plaintiffs. Shine and PFM and their respective clients nominated PFM to be the solicitor on the record, although they did not make submissions as to why PFM should be preferred. Their position was that there was no basis to differentiate between the solicitor in terms of competence, experience and resources, in the present circumstances. I have considered that position and, as indicated, take the view that Shine should be the solicitor on the record. That is because the financial resources of Shine were plainly established on the evidence, and in this case the ability of the relevant firm to fund the proceeding was in issue in the respects described earlier. The issue arose in the context of Bahityar's application for a Group Costs Order, but it was relevant to consider Bahityar's funding proposal in the context of the funding proposal in the competing proceedings. Shine, as solicitor on the record, will have responsibility to carry its legal fees to the extent that they are not to be third-party funded. I should not be read as making any finding or suggestion about PFM's financial resources, which were not directly in issue or in contest. The point is simply that Shine's financial arrangements were the subject of positive evidence.

127 The Litigation Finance Agreement for the consolidated proceeding provides that the appointed solicitor *may* retain solicitors, who are not employed by them, under an Agency Retainer for the purposes of providing legal services in connection with the proceeding. On the documents in evidence, the funding for the proceeding and the structures governing the relationships between the plaintiffs, funders and solicitors with carriage of the proceeding, are not predicated on one firm appointing the other as agent to conduct work in the proceeding.

128 Where the engagement of an agent occurs, the professional fees reasonably charged to Shine by the agent solicitors will be treated as lawyers' fees for the purposes of the Terms of Engagement. Third-party costs reasonably incurred by the agent solicitors

pursuant to the performance of the Agency Retainer and charged to Shine will be treated as disbursement for the purposes of the Terms of Engagement.[104]

129 The evidence was that Shine intends to engage PFM under an Agency Retainer as contemplated by the Terms of Engagement. The engagement of an agent solicitor to undertake litigation work is not an unorthodox practice. In this case, the proposed agent, PFM, has particular expertise in this very proceeding. What is contemplated is not wholesale delegation or the *quasi* appointment of two firms on the record. It does not require or invite the multi-headed decision-making process that I have described earlier, in respect of the litigation. Any work undertaken by PFM as agent will be new work (the appointment is not retrospective). The engagement of PFM to undertake work as Shine's agent will, in respect of any part of that work, be subject to Shine discharging its obligations to its clients, including in respect of the need to keep costs reasonable and proportionate. There is nothing about the particular arrangement that is inimical to the interests of group members.

130 In *Allianz*, I rejected the defendants' submission that I should prefer a similar arrangement to the one now proposed in this case, over the proposal that both firms be appointed to the record. I preferred joint representation in that case, on those facts, for the reasons there explained, which did not have the complexity of the present arrangement and which had not been proposed by any party. I will add that, in this case, the proposed arrangement, although it is a private contractual matter, has been disclosed at the outset and does not suffer from lack of transparency in that respect. In *Allianz*, no such arrangement was before the Court; the alternative was put as an undeveloped hypothesis by the defendant. As I have said, these judgments call for an evaluative assessment, and the difference between arrangements may be differences of degree. As successive courts have acknowledged in this context, all solutions to multiplicity might be unsatisfactory in one way or another.

131 There is one matter remaining. The principals of Shine and PFM, Mr Allsopp and Mr Finney, each said in their evidence that in the event that only one firm was

---

104 Terms of Engagement, [3.1], [5.5], [6.3.1].

appointed to act for the class and the other firm was engaged as an agent to undertake work for the proceeding, that the Lay and Batchelor plaintiffs, and Shine and PFM have mutually agreed that, at the time of any resolution of the proceeding, the plaintiffs will seek court approval and recover from any resolution of the Batchelor plaintiff's reasonable costs to which PFM may be entitled in accordance with the Batchelor retainer, up to the date of the determination of the carriage contest. That is, they intend to seek court approval for past costs of both Shine and PFM.

132 That they have been transparent about their intentions is not to be criticised. However, my appointment of Shine and consolidation of the Lay and Batchelor proceedings should not be taken as an endorsement of the proposition that both sets of costs should be understood or taken to be recoverable. Consolidation of proceedings as a solution to the problem of multiplicity requires that the costs of the proceedings in their pre-consolidation state, be considered. What will be recoverable will be a matter for determination upon the resolution of the proceeding, and in the case of a settlement, subject to the approval of the court under s 33V of the *Supreme Court Act*. It may be expected that that assessment, when it is made, will take into account among other things, the nature of the work actually undertaken and the benefit to group members said to have been derived from that work. There is insufficient evidence before me to say anything about the work undertaken to date. Shine, as solicitors on the record, are subject to professional obligations to their clients in respect of costs. All parties and solicitors (including PFM, in undertaking work for the purposes of the proceeding) are subject to the obligations imposed on them by the *Civil Procedure Act 2010* (Vic), including the obligation to use reasonable endeavours to ensure that costs incurred in connection with the proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute. Any future costs assessment can be expected to have regard to the fulfilment or otherwise, of those obligations.

CERTIFICATE

I certify that this and the 53 preceding pages are a true copy of the reasons for ruling of Nichols J of the Supreme Court of Victoria delivered on 23 August 2022.

DATED this twenty-third day of August 2022.

.....

Associate

SCHEDULE

S ECI 2021 04391

BETWEEN

DANIEL JOSEPH BATCHELOR

Plaintiff

and

NUIX LIMITED (ACN 117 140 235)

First Defendant

and

MACQUARIE CAPITAL (AUSTRALIA) LIMITED (ACN 123 199 548)

Second Defendant

and

MACQUARIE GROUP LIMITED (ACN 122 169 279)

Third Defendant

BETWEEN

STELLA STEFANA BAHTIYAR

Plaintiff

and

NUIX LIMITED (ACN 117 140 235)

First Defendant

and

MACQUARIE CAPITAL (AUSTRALIA) LIMITED (ACN 123 199 548)

Second Defendant

and

MACQUARIE GROUP LIMITED (ACN 122 169 279)

Third Defendant

and

JEFFREY LAURENCE BLEICH

Fourth Defendant

and

SUSAN PATRICIA THOMAS

Fifth Defendant

and

IAIN ROBERT LOBBAN

Sixth Defendant

and

RODNEY GRAEME VAWDREY

Seventh Defendant

and

DANIEL PHILLIPS

Eighth Defendant

and

DAVID STANDEN

Ninth Defendant