

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S CI 2017 03007

LEEANNE CREESE

Plaintiff

v

LIFE FOR ALL CREATURES LIMITED (ACN 096 549 003)

Second Defendant

REGISTRAR OF TITLES

Third Defendant

ROGER LEONARD BUTCHER (in his capacity as
Executor of the Deceased Estate of Anne Hamilton-Byrne)

Fourth Defendant

GEOFFREY JOHN BENJAMIN DAWES (in his capacity as
Executor of the Deceased Estate of Anne Hamilton-Byrne)

Fifth Defendant

JUDGE: Moore J
WHERE HELD: Melbourne
DATE OF HEARING: 8 October 2021
DATE OF JUDGMENT: 29 March 2022
CASE MAY BE CITED AS: Creese v Life for All Creatures
MEDIUM NEUTRAL CITATION: [2022] VSC 153

PRACTICE AND PROCEDURE - Application for approval of settlement of group proceeding - Personal injury claims brought by members of 'The Family' for abuse suffered as children - Whether terms of settlement fair and reasonable - Whether settlement distribution scheme fair and reasonable - Whether claim for legal fees and disbursements fair and reasonable - Settlement approved - *Supreme Court Act 1986* (Vic) Part 4A.

APPEARANCES:

| | | |
|-------------------|----------------|-------------------|
| | <u>Counsel</u> | <u>Solicitors</u> |
| For the Plaintiff | Mr A Fraatz | Mills Oakley |

For the Defendants

No appearance

Pearce Webster Dugdales



HIS HONOUR:

- 1 This judgment concerns an application under s 33V of the *Supreme Court Act 1986* (the **Act**) for approval of a proposed settlement of a group proceeding brought against the executors of the estate of the late Anne Hamilton-Byrne, who died on 13 June 2019, and Life for All Creatures Ltd (**LFAC**), a company of which Ms Hamilton-Byrne was formerly a director and which was once known as ‘Hamilton-Byrne Ltd’.¹
- 2 There has been significant public commentary in the media over recent years about Ms Hamilton-Byrne’s role and activities in leading a group known as ‘The Family’. Those alleged activities have, however, been the subject of very little consideration by the courts. In a case concerning whether an unincorporated association was in existence prior to the transfer of a parcel of land in Ferny Creek in 1968, Mandie J referred to the holding of regular meetings of small groups of people known as ‘The Family’ from about 1964.² Ms Hamilton-Byrne was ‘influential’ with those who attended these meetings held at a house in Ferny Creek on every Thursday and Sunday; the number of attendees gradually increased.³
- 3 The group of people known as ‘The Family’ who started meeting in Ferny Creek from about 1964 came to include children. In this proceeding, the fourth and fifth defendants, the executors of Ms Hamilton-Byrne’s estate (the **executors**), admit that a group of children ‘under the care’ of Ms Hamilton-Byrne were known as The Family and that this group included the plaintiff, for at least some of her childhood.
- 4 The plaintiff, who was born on 14 July 1968, alleges that she lived with Ms Hamilton-Byrne from birth until she was about 17 years old and that she believed that she was her daughter. The plaintiff alleges that, for most of her childhood, she resided at a property in Lake Eildon known as ‘Kai Lama’ and other locations as directed by Ms Hamilton-Byrne, including a property known as ‘Winbirra’ in the Dandenongs.

¹ LFAC was known as ‘Hamilton-Byrne Ltd’ between 18 April 2001 and 17 April 2002. Ms Hamilton-Byrne was a director between 18 April 2001 and 3 April 2004.

² *Kibby v Registrar of Titles & Anor* [1999] 1 VR 861 [18].

³ *Ibid* [18].

5 The plaintiff brings this proceeding on her own behalf and on behalf of certain group members. They are defined as persons who are, or believe themselves to be, children of Ms Hamilton-Byrne and who suffered personal injury as a minor in the course of being brought up by her, including at Winbirra and at Kai Lama, as a result of an act or omission by Ms Hamilton-Byrne, her servants and/or agents, in the period in and between 1968 and 1987 (the **group members**).

6 The plaintiff alleges that, throughout this period, she and each of the group members were subject to cruel and inhumane treatment by Ms Hamilton-Byrne and/or servants or agents acting on her behalf and at her direction. The abuse to which she alleges she and the group members were subject included the deprivation of food for extended periods of time as a means of control and/or punishment; assault; torture by holding heads under water in a bucket; the provision of LSD and mushrooms causing hallucinations; failing to provide adequate education; raising children in virtual isolation from the outside world; requiring the taking of non-prescribed medication; failing to provide medical attention for serious illness including dysentery; instructing adults to administer violent punishments; administering large quantities of tranquilisers; and denying access to normal social interaction with other children and adults (the **abuse**). The plaintiff also alleges that she was subject to specific assaults, including assault with a knife and assault in a manner calculated to humiliate.

7 The plaintiff claims that she and the group members have suffered psychiatric injury as a result of the abuse. She claims damages against the executors.

8 The plaintiff and the group members also seek orders under s 172 of the *Property Law Act 1958* setting aside the following two transfers of land.

- (a) A transfer dated 19 June 2009 and registered on 18 February 2010 by which Ms Hamilton-Byrne, the registered proprietor of a property at 1445 Mount Dandenong Tourist Road, Olinda (the **1445 property**),⁴ transferred to herself an

⁴ Being the land described in Folio of the Register Volume 10962, Folio 794 and Folio 795.

estate for life in the property and then to LFAC, the fee simple in remainder expectant upon determination of the life estate.

- (b) A transfer dated 19 October 2008 registered on 10 December 2010 by which Ms Hamilton-Byrne, the registered proprietor of a property at 1447 Mount Dandenong Tourist Road Olinda,⁵ transferred the said property to LFAC absolutely.

LFAC is the second defendant in this proceeding.

- 9 Both of these transfers of land (referred collectively hereafter as the **Olinda property transfers**) were made for no consideration. The plaintiff alleges that they are voidable because they were made with an intention to defraud her and the group members.

Proposed settlement

- 10 On 16 December 2020, the plaintiff filed a summons seeking approval of an in-principle settlement of the proceeding reached with the defendants on 15 October 2020. The agreement ultimately finalised between the parties, the operation of which is subject to Court approval pursuant to s 33B of the Act, is recorded in a settlement agreement dated May 2021 (the **Settlement Agreement**).

- 11 In support of her application for approval, the plaintiff relies on the following materials:

- (a) a confidential opinion of Tim Tobin SC and Andrew Fraatz of counsel dated 12 August 2021 (**counsel's confidential opinion**);
- (b) affidavits of James Tobin, the plaintiff's solicitor, sworn on 15 December 2020, 29 March 2021 and 16 August 2021; 1 October 2021; and
- (c) a costs report prepared by Cate Dealehr of Australia Legal Costing Group dated 4 May 2021 (the **Dealehr Costs Report**).

⁵ Being the land described in Folio of the Register Volume 11229, Folio 763.

Confidentiality orders have been made in respect of parts of the above documents.

- 12 On 21 December 2020, the Court made various orders including about the manner in which group members were to be given notice of the proposed settlement of the proceeding. The orders also dealt with the registration of group members for the purposes of participation in the proposed settlement.
- 13 In accordance with the orders made on 21 December 2020, the plaintiff and seven other people have registered as group members (the **registered group members**). Three people have either opted out of membership of the group, or have been excluded from the group by operation of the orders made on 21 December 2021.
- 14 The Settlement Agreement provides for LFAC and the executors to pay \$600,000 (the **settlement sum**) to the plaintiff and the registered group members, with that sum to be paid to the plaintiff's solicitors as follows:
- (a) \$300,000 to be paid within 30 days after Court approval of the settlement; and
 - (b) \$300,000 to be paid upon the date 6 months after Court approval of the settlement, or the date of settlement of the proposed sale of the 1445 property, whichever is earlier.
- 15 Under the Settlement Agreement, payment of the settlement sum is secured by a charge, a caveat over the 1445 property and a judgment in default clause. It also provides that, upon settlement being approved by the Court and subject to the defendants' payment of the settlement sum, all claims in the proceeding are fully and finally settled and the plaintiff, on her own behalf and on behalf of the group members, releases the defendants from all claims as a result of, or arising out of, or in connection with, directly or indirectly, the subject matter of the proceeding. This includes the claims that five of the group members have against the executors, or the estate of Ms Anne Hamilton-Byrne, in connection with a proceeding brought by them under Part IV of the *Administration and Probate Act 1958*.⁶

⁶ Proceeding No S ECI 2020 02646.

16 In addition to an order approving the Settlement Agreement, the plaintiff also seeks an order that the Court approve the distribution of the settlement sum among the registered group members in accordance with a Settlement Distribution Scheme (the **Distribution Scheme**). The Distribution Scheme provides for the settlement sum to be distributed as follows:

- (a) payment of the plaintiff's approved legal costs, including the costs of administering the Distribution Scheme;
- (b) payment of \$15,000 to the plaintiff to compensate her for undertaking the role of lead plaintiff (the **reimbursement payment**); and
- (c) the distribution of the balance of the settlement sum, together with any accrued interest, to registered group members on an equal basis.

17 As to subparagraph (a) above, the plaintiff also seeks an order that the Court approve an amount of \$400,000 toward payment of the plaintiff's costs and disbursements.

18 Under the Distribution Scheme, the entitlement of registered group members to a distribution under the proposed settlement is to be assessed by reference to information and documentation already provided to the plaintiff's solicitors, Mills Oakley Lawyers, subject to a discretion of the scheme administrator to request further information or documentation and to reject any aspect of any claim. The Distribution Scheme provides for the appointment of Mr James Tobin, a principal in the class actions department of Mills Oakley Lawyers, to act as administrator of the Scheme.

19 At the hearing for approval, counsel for the plaintiff confirmed that the effect of the above provisions of the Settlement Agreement and the Distribution Scheme is that, if approved, it is estimated that each registered group member would receive no less than \$23,000 compensation.⁷

⁷ Other than in relation to the plaintiff who would receive an additional \$15,000 as noted in [16(b)] above.

Legal principles

20 Section 33V of the Act provides that a group proceeding may not be settled without the approval of the Court. In *Australian Securities and Investment Commission v Richards*,⁸ the Full Court of the Federal Court referred to the ‘protective’ role of the court in considering the approval of group proceedings to which it assumed a role ‘akin to that of a guardian, not unlike the role a court assumes when approving infant compromises’.⁹ It is to be noted that, under the Act, unless the Court is satisfied that it is just to do so, an application for approval of a settlement of a group proceeding must not be determined unless notice has been given to group members.¹⁰

21 The principles which govern applications for approval of settlements of group proceeding are well established. In a statement of principle which has been followed in many subsequent cases, in *Matthews v AusNet Electricity Services Pty Ltd*,¹¹ Osborn JA stated that ‘[t]he critical questions raised by an application for approval of the settlement are:

- (a) whether the proposed settlement is fair and reasonable as between the parties having regard to the claims of the group members; and
- (b) whether the proposed settlement is in the interests of group members as a whole and not just in the interests of the plaintiff and the defendants.¹²

22 In *Rowe v AusNet Electricity Services Pty Ltd*,¹³ Emerton J (as her Honour then was) observed that:

In substance, these questions require the court to consider whether the settlement is fair and reasonable as between the parties and whether it is fair and reasonable as between the recipients of the settlement sum (the beneficiaries of the Scheme), namely the plaintiff and the group members.

The court must be independently satisfied of the fairness and reasonableness of the proposed settlement. It will not be sufficient to simply assess whether the opinions expressed by the plaintiff’s legal advisers appear on their face to be reasonable. Furthermore, the almost complete absence of substantive objections to the settlement cannot relieve the court of its obligations.

⁸ [2013] FCAFC 89.

⁹ Ibid [8].

¹⁰ *Supreme Court Act 1986* (Vic) s 33X(4).

¹¹ [2014] VSC 663 (*Matthews*).

¹² Ibid [34].

¹³ [2015] VSC 232, [50]–[51], omitting citations.

Nevertheless, the assessment which the court is able to make can ultimately be no more than one which confirms whether or not the proposed settlement is within the range of fair and reasonable outcomes. Importantly, in making such an assessment, the relative prospects of success can only be broadly gauged.¹⁴

23 The authorities establish that the words ‘fair and reasonable’ are used as a composite expression and, as a matter of ‘practical judicial approach’, invite the identification of ‘any features of a settlement that are obviously unreasonable or unfair’.¹⁵ It has been observed that there will rarely, if ever, be a case in which there is a unique outcome which should be regarded as the only fair and reasonable one.¹⁶ Instead, ‘[r]easonableness is a range’, and the question for the Court is whether a proposed settlement is within that range.¹⁷ In considering that question, it is not the Court’s function to ‘second guess’, or to go behind, the tactical or other decisions made by a plaintiff’s legal representative, but to satisfy itself that those decisions are within the range of reasonable decisions in the known circumstances and the reasonably perceived risks of the litigation.¹⁸

24 Although not prescriptive, in many cases for the approval of a settlement of a group proceeding, the Court will consider the following factors identified by Goldberg J in *Williams v FAI Home Security Pty Ltd*:¹⁹

- (a) the amount offered to group members;
- (b) the prospects of success in the proceeding;
- (c) the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer;
- (d) the terms of any advice received from counsel and from any expert in relation to the issues which arise in the proceeding;
- (e) the likely duration and cost of the proceeding if it continued to judgment;

¹⁴ Ibid [50]–[51].

¹⁵ *Darwalla Milling Co v F Hoffman–La Roche (No 2)* (2006) 236 ALR 322 (*‘Darwalla’*), [39]. Referred to with approval in *Hawker v Powercor Australia Ltd* [2019] VSC 521 (*‘Hawker’*), [11], [13] and *Murillo v SKM Services Pty Ltd* [2019] VSC 663 (*‘Murillo’*), [32].

¹⁶ *Darwalla* (n 15) [50]. Referred to with approval in *Hawker* (n 15), *Camping Warehouse v Downer EDI (Approval of Settlement)* [2016] VSC 784 and *Matthews* (n 11).

¹⁷ *Murillo* (n 15) [31] (omitting citations), referring to *Darwalla* (n 15) [40], [50].

¹⁸ *Murillo* (n 15) [32] and the authorities cited therein.

¹⁹ (2000) 180 ALR 459, 465 [19].

(f) the attitude of the group members to the settlement.

25 Justice Goldberg adopted the nine-factor test identified by the United States Court of Appeal for the Third Circuit in *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*:²⁰

... to help district courts structure their final decisions to approve settlements as fair, reasonable and adequate as required by Rule 23(e) [which requires court approval for settlement of class actions]. See *Girsh v Jepsen* 521 F.2d 153 at 157 (1975) (3rd Cir). Those factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.²¹

In appropriate cases, these factors may be employed as a useful guide, but they are not to be adopted as rigid tests.²²

Is the proposed settlement fair and reasonable as between the parties?

26 Superficially, it is not immediately apparent that the Settlement Agreement embodies a settlement which is fair and reasonable between the parties. Given the serious nature of the abuse which is alleged and the damage said to have been caused by it to the plaintiff and the group members, a settlement sum of \$600,000 for eight group members appears to be a very modest amount. At a general level, assuming the group members succeeded in establishing liability in relation to the abuse claims, depending on their individual circumstances and the damage suffered as a result of the abuse, it is not unreasonable to expect that the total quantum of those claims might be in the range of \$1.5-3 million.

27 This preliminary impression is, however, apt to mislead as it is uninformed by a number of unique features of this litigation. When regard is had to the particular recovery and litigation risks which arise in this matter, which are considered below, I

²⁰ 55 F.3d 768 (3rd Cir. 1995), 785.

²¹ *Ibid* [19].

²² *Murillo* (n 15) [36], and the authorities there cited.

am satisfied that the Settlement Agreement is within the range of fair and reasonable settlements.

28 The first important feature of this proceeding to emphasise is that, in my assessment, in the event that the proceeding remained on foot, there is a very real prospect that the proceeding against the executors would be stayed. This arises as a result of a summons issued by the defendants on 15 May 2020 in which they seek, amongst other relief, orders staying the proceeding. The hearing of that summons was deferred until a date after the scheduled mediation in this proceeding; it was in the context of that mediation that the in principle settlement of the proceeding was reached. In the event that the Settlement of Agreement is not approved, the summons will remain to be heard and determined.

29 The stay application is to be viewed having regard to established principles²³ and the provisions of the *Limitation of Actions Act 1958*. Certain amendments to that Act which commenced operation with retrospective effect on 1 July 2015 have the effect that there would be no limitation period for a cause of action founded on the death or personal injury of a person resulting from an act or omission in relation to the person, when the person is a minor and the abuse is physical or sexual abuse.²⁴ However, s 27R which was inserted by these amendments, also provides as follows (emphasis added):

27R Interaction with other powers of court

Nothing in this Division limits –

- (a) in the case of the Supreme Court, the court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or
- (b) in the case of a court other than the Supreme Court, the court's implied jurisdiction or statutory jurisdiction; or
- (c) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.

Example

²³ See the discussion generally in *Connellan v Murphy* [2017] VSCA 116.

²⁴ *Limitation of Actions Act 1958* s 27O.

This Division does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

30 Although a defendant bears a heavy onus to justify the grant of a stay of a proceeding which ordinarily is only granted in exceptional circumstances,²⁵ there are a number of powerful considerations which arise in this case which collectively provide strong support for a contention that it would be manifestly unfair, or otherwise bring the administration of justice into disrepute, to permit the plaintiff's claims to proceed to trial.

31 First and most significantly, because Ms Hamilton-Byrne died on 13 June 2019, the executors are not able to obtain instructions from her to defend the claims. Further, I was informed that, when the proceeding was commenced on 1 August 2017, Ms Hamilton-Byrne was in care and suffering from dementia and other medical conditions. Ms Hamilton-Byrne's death and her apparent incapacity for some years prior, provides the executors with a strong footing to argue that the proceeding against them should be permanently stayed as they are deprived of the opportunity to properly respond to the allegations in the statement of claim.

32 The prospect that the defendants might succeed in their application for a stay is strengthened by the fact that, as indicated by a *dramatis personae* prepared by the plaintiff's solicitor in August 2020,²⁶ many other individuals who might be relevant witnesses in the proceeding are also deceased. This is unsurprising given the fact that the abuse claims concern events which occurred between 34 and 53 years ago. I consider that the substantial elapse of time in circumstances where Ms Hamilton-Byrne, as the central person in the plaintiff's case, is unavailable to provide instructions to the executors, means that the defendants have good prospects of success in persuading the Court to stay the proceeding in relation to the claims brought against the executors.

²⁵ *Connellan v Murphy* [2017] VSCA 116, [54].

²⁶ Affidavit of James Patrick Tobin dated 31 August 2020, exhibit JPT-16.

33 However, even if the plaintiff succeeded in resisting the stay application, it can be reasonably anticipated that complex legal and evidentiary issues are likely to arise in establishing Ms Hamilton-Byrne's civil liability for the abuse allegedly inflicted on group members by senior members of 'The Family'. There is force in the concerns expressed about this issue in counsels' confidential opinion. These concerns are additional to the risks often associated with establishing causation in historical abuse claims. In my assessment, they constitute a further substantial risk to the prospects of the plaintiff and the group members establishing liability against Ms Hamilton-Byrne for the abuse alleged.

34 The next critical feature of this litigation which militates in favour of the view that the Settlement Agreement is within the range of reasonable settlements is that, even if the plaintiff and the group members succeed in resisting the application for a permanent stay *and* assuming that they succeed in obtaining judgment against the executors in relation to the abuse claims, the estate does not have funds to satisfy any such judgment. The Inventory of Assets and Liabilities filed by the executors in relation to the grant of probate for Ms Hamilton-Byrne's will records that she has no assets outside of Victoria and, within Victoria, a personal estate (and no real estate) valued at \$259,319.35, with liabilities of \$42,709.34. The plaintiff's solicitor has deposed that these remaining funds of Ms Hamilton-Byrne's estate have been applied to her care and to her legal fees.

35 It is apparent then that, even if the plaintiff and group members succeed in establishing liability against the executors of the estate of Ms Hamilton-Byrne, the estate will not be able to meet any award of damages; in monetary terms, the judgment will be worthless. This observation is of equal force in relation to the value of the claims made against the estate by the five registered group members who have made claims under Part IV of the *Administration and Probate Act 1958*. The financial position of the estate also means that, self-evidently, there is no meaningful prospect of the plaintiff securing a better settlement with the estate than that which is currently before the Court.

36 In light of the financial position of the estate, the prospect of the plaintiff and the group members securing an award of damages capable of being satisfied will depend upon the success of their claims against LFAC under s 172 of the *Property Law Act 1958* to set aside the Olinda property transfers.

37 Section 172(1) of the *Property Law Act 1958* provides that:

- (1) Save as provided in this section, every alienation of property made, whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

38 Consistent with the terms of s 172(1), to succeed in their claims against LFAC, the plaintiff and the group members will need to establish that the Olinda property transfers were effected 'with intent to defraud creditors' and that the plaintiff and the group members are persons 'thereby prejudiced'.

39 The meaning of these words in the analogue NSW legislation²⁷ were considered by the High Court in *Marcolongo v Chen*²⁸ in which the majority stated that the provision should 'receive a liberal construction in effecting their purpose of suppressing fraud'²⁹ and that the term 'defraud' is to be understood as if it read 'delay, hinder or [otherwise] defraud'.³⁰

40 *Marcolongo* was considered by Sloss J in *Deputy Commissioner of Taxation v Haritos* in the context of s 172 of the *Property Law Act 1958*.³¹ After referring to the above observations by the High Court, her Honour also observed as follows:³²

Further, in *Marcolongo*, their Honours in the majority also noted that whilst the concept of 'defraud' does not extend to encompass equitable or constructive fraud, it does not require a finding of actual dishonesty in the sense of an actual intention or purpose of causing loss. Rather, they said, it was necessary to

²⁷ *Conveyancing Act 1919* (NSW) s 37A.

²⁸ (2011) 242 CLR 546 ('*Marcolongo*').

²⁹ *Ibid* [20].

³⁰ *Ibid* [19].

³¹ (2014) 287 FLR 136 ('*DCT v Haritos*').

³² *Ibid* [221]-[223].

show ‘an intention to hinder, delay or defeat creditors and *in that sense* to show that accordingly the debtor had acted dishonestly.’³³

The nine ‘badges’ of fraud as they were called by Lord Hatherley LC in *Allen v Bonnett*,³⁴ are commonly applied as a useful ‘check list’ for detecting the presence of fraud. Relevantly for present purposes those ‘badges’ include:

- ...
- (3) Secrecy of transfer;
- (4) Conveyance made *pendente lite*;
- ...
- (6) Unusual statements of fact in the deed (so a statement that the deed is made without any fraudulent intent is a suspicious circumstance);
- ...
- (8) False statements in the deeds; and
- (9) Inadequacy of consideration.³⁵

An intention to defeat creditors is usually sought to be inferred from the circumstances in which the property is alienated.³⁶ Although intent must be found as a fact, it need not be the sole, nor predominant, intent. It may exist concurrently with a genuine and good faith intention to dispose of property.³⁷ In ascertaining intent, the critical period to examine is the period leading up to the date of the transfer and the critical mind is that of the transferor. Where that transferor is a corporate entity, the critical mind is that of the person controlling the transferor’s actions in effecting the transfer.³⁸

41 As to the words ‘any person thereby prejudiced’ in s 172(1), Sloss J referred with approval to Owen J’s observations in *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*:³⁹

It is not necessary that the disposition affects creditors as a class generally; it is sufficient if one or some creditors are adversely affected. In this context ‘creditor’ is not confined to those to whom a debt is (at the time of the disposition) presently due and owing. It extends to impending liabilities and future creditors ...

³³ *Marcolongo* (n 28) 558 [32] (French CJ, Gummow, Crennan and Bell JJ) where their Honours endorsed the statement made by Blanchard and Wilson JJ when considering the comparable New Zealand legislation in *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433, 456-457 (emphasis in original).

³⁴ (1870) LR 5 Ch App 577, 579.

³⁵ Denis Lane McDonnell and John George Monroe, *Kerr on the Law of Fraud and Mistake* (Sweet & Maxwell, 7th ed, 1952) 350-365.

³⁶ *Petrovic v R* [2014] VSCA 99, 11 [27].

³⁷ *Marcolongo* (n 28) 565 [57] (French CJ, Gummow, Crennan and Bell JJ); *Cannane v J Cannane Pty Limited (In Liq)* (1998) 192 CLR 557 (‘*Cannane*’), 579 [58] (Gummow J), 593 [92.5] (Kirby J).

³⁸ *Marcolongo* (n 28) 566 [64] (Heydon J).

³⁹ *DCT v Haritos* (n 31) [227], citing *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1, 798-799 [9146].

To the same effect, in *Talacko v Talacko*, McDonald J stated that '[a]n applicant under s 172 of the *Property Law Act* does not need to be a creditor, merely a person prejudiced by the alienation'.⁴⁰

42 The plaintiff's pleaded case indicates that she will invite the Court to infer that the Olinda property transfers were made with an intent to defraud creditors by reason of the following circumstances. Prior to and around the time of the Olinda property transfers, which were made for no consideration, Ms Hamilton-Byrne was a defendant in four proceedings brought by her children and grandchildren in this Court in which damages for abuse was sought arising from Ms Hamilton-Byrne's conduct as head of and administrator of 'The Family'. In that regard, LFAC has admitted in its Defence that:

- (a) An adopted child of Ms Hamilton-Byrne, Annouree Crawford, sought damages against her in proceeding No 6577 of 2004. LFAC pleads that this proceeding was settled on or about 20 July 2006 on the basis that Ms Hamilton-Byrne would pay Annouree Crawford \$325,000, and that the amounts required to be paid by Ms Hamilton-Byrne under the terms of settlement were paid in full.
- (b) Ms Hamilton-Byrne's granddaughter, Rebecca Cook-Hamilton, sought damages against Ms Hamilton-Byrne in proceeding No 6005 of 2007. LFAC pleads that this proceeding was settled on or about 27 June 2008 on the basis that Ms Hamilton-Byrne would pay to Ms Cook-Hamilton \$100,000 and \$50,000 in respect of her legal costs, and that the amounts required to be paid by Ms Hamilton-Byrne under the terms of settlement were paid in full on or before 31 July 2008.
- (c) In proceeding No 03561 of 2010, commenced on or about 29 June 2010, Charlotte Jane James sought damages against Ms Hamilton-Byrne. LFAC pleads that this proceeding was settled on or about 1 June 2011, on the basis

⁴⁰ [2015] VSC 287, [235].

that Ms Hamilton-Byrne would pay Ms James \$30,000, together with her costs of the proceeding on a party-party basis.

- (d) In proceeding No 03561 of 2010, commenced in or about March 2010, Robert Rosanove sought damages against Ms Hamilton-Byrne. LFAC pleads that this proceeding was settled on or about 2 August 2011 on the basis that Ms Hamilton-Byrne would pay Mr Rosanove \$30,000.

43 In the context of these earlier proceedings, the plaintiff contends that, at the time of the Olinda property transfers, it was foreseeable that Ms Hamilton-Byrne would be involved in further similar litigation involving her children and grandchildren. It is further pleaded that, at the time of the Olinda property transfers, any plaintiff in impending or future proceedings against Ms Hamilton-Byrne was a prospective creditor of Ms Hamilton-Byrne and, insofar as they are entitled to damages, a person prejudiced by the Olinda property transfers.

44 Although the above matters provide an arguable basis for the plaintiff and the group members to have the Olinda property transfers set aside, that claim faces a number of significant hurdles having regard to the material filed by LFAC in the proceeding to date.

45 In its defence, LFAC has pleaded that, after the Olinda property transfers, Ms Hamilton-Byrne remained the registered proprietor of two properties in Ferny Creek. It is pleaded that these properties were then transferred by her in arms-length sales to third parties in 2012 and 2014 respectively, for a total consideration in excess of \$800,000, which funds were received by Ms Hamilton-Byrne at about that time. LFAC also pleads that, after the Olinda property transfers, Ms Hamilton-Byrne owned significant personal property including jewellery and cash. Other aspects of the affidavit evidence filed by LFAC referred to in counsels' confidential opinion which could also be relied upon by LFAC to establish facts inconsistent with the inference of fraud.

46 The existence of other available assets held by Ms Hamilton-Byrne at the time of the Olinda property transfers, together with the subsequent transfer of properties at arms-length for proper consideration, and Ms Hamilton-Byrne's apparent willingness to liquidate assets to settle earlier claims, present as real obstacles to the plaintiff establishing the necessary inference of fraud in relation to the transfers in question. A further difficulty is that, at the time of the Olinda property transfers, any causes of action the plaintiff or group members had (insofar as they were based on personal injury) were statute barred by operation of ss 27E and 27I of the *Limitation of Actions Act 1958*. For all of these reasons, the plaintiff's prospects of success in relation to the claim under s 172 of the *Property Law Act 1958* are reasonably be viewed as being doubtful.

47 Having considered the contents of counsels' confidential opinion, I also consider that there is little realistic prospect of the plaintiff obtaining a more favourable settlement with LFAC.

48 There are other considerations which support a conclusion that the proposed settlement is fair and reasonable as between the parties. As is apparent from the above discussion of the risks which attend the plaintiff's case, the trial is likely to involve some difficult and contested legal and factual issues. Counsel for the plaintiff estimates that the trial would proceed over 10-15 days. That estimate appears to be a reasonable one and, if realised, would result in substantial legal costs. Settlement of the proceeding will avoid these further costs.

49 Consistent with the Court's orders, all group members have been directly informed about the proposed settlement by email and by ordinary pre-paid post. I am satisfied that group members have been given proper notice of the application for approval of the proposed settlement. Having been given notice of the proposed settlement, none of them have maintained any objection to the settlement.⁴¹ This is a matter of

⁴¹ One of the group members initially lodged an objection to the settlement, which objection was subsequently withdrawn as it had been lodged by mistake.

particular significance which militates in favour of approving the proposed settlement.

50 Relatedly, the proposed settlement is advanced at a relatively late stage in the proceeding which has been on foot since 2017. In that period, extensive investigative steps have been undertaken by the plaintiff's solicitors in relation to the claims made in the proceeding. Numerous interlocutory steps have been taken and the defendants have filed many affidavits including in relation to the stay application. The parties are accordingly well-placed to make an informed assessment of their prospects of success and the risks associated with proceeding to trial.

51 Approval of the settlement will also likely generate consequential advantages to the group members in the nature of the 'incidental advantages' identified by Osborn JA in *Matthews v Ausnet Electricity Services Pty Ltd*: 'considerations of finalisation; avoidance of continuing personal anxiety, stress and suffering; advancement of payment; and containment of costs'.⁴² These considerations resonate loudly in this matter. All litigation involves a measure of stress and anxiety which can be avoided by settlement. However, in this case, the nature of the allegations relating to the abuse involve distressing and deeply personal issues; giving evidence at trial is very likely to be productive of acute stress and anxiety for group members. For the same reasons, there is likely to be heightened interest in group members dealing with the legal matters raised in this proceeding to finality.

52 Even if the plaintiff succeeds at trial, the possibility of an appeal, and accordingly further delay in finalizing the group members' claim, must also be borne in mind. The possibility of an appeal also arises in relation to the defendants' stay application in the event that that application is refused. After any appeal, it would still remain for group members to bring forward their individual claims for trial. The observations of Emerton J in *Rowe v AusNet Electricity Services Pty Ltd* are apposite in that regard:⁴³

Furthermore, even if the plaintiff were successful on appeal, only the common issues and Dr Rowe's own damages would be finally determined by the

⁴² *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [308].

⁴³ [2015] VSC 232, [68].

proceeding. Each group member would then need to prove loss and damage individually, along with any matter falling outside the common questions or otherwise requiring individual inquiry and determination. Some group members may have difficulty proving their claims, particularly given the effects of trauma on memory and the likely loss of records. Difficulties may also arise in the light of the many complexities in the types of claims made by group members. Some may require expert evidence and/or complex legal argument. This would have to be funded by the individual group member.

53 A further matter which weighs in favour of the approval of the proposed settlement is that it is likely that group members will receive distribution under the Distribution Scheme within a relatively short period after approval of the proposed settlement. Group members will receive their entitlements from the first payment of \$300,000 due under the Settlement Agreement which is required to be paid within 30 days of Court approval.

54 For the above reasons, having regard to the group members' claim, I am satisfied that the proposed settlement embodied in the Settlement Agreement is fair and reasonable as between the parties. I am fortified in that view by the views expressed by counsel and the plaintiff's solicitor about the proposed settlement.

Is the proposed settlement fair and reasonable as between group members?

55 As stated by Nichols J in *Lenehan v Powercorp Australia Ltd* in determining whether a proposed settlement is fair and reasonable as between group members, the Court should examine:

... the internal workings of the settlement and consider whether there is any differentiation between the treatment of individual group members and, in particular, their entitlement to an award. If differentiation exists, then it is necessary to determine whether that differentiation is fair and reasonable.⁴⁴

56 The key features of the Distribution Scheme which the plaintiff seeks that the Court approve are outlined in [16]-[19] above. As I have noted, one aspect of the Distribution Scheme is the appointment of Mr Tobin as administrator of the Scheme. Before considering further the other important features of the Distribution Scheme, it is appropriate to record my satisfaction that, having regard to his qualifications,

⁴⁴ [2020] VSC 159, [25] (references omitted).

professional experience and his involvement in this proceeding, Mr Tobin is an appropriate person to administer the scheme.

57 The following specific aspects of the Distribution Scheme fall to be considered in determining whether the proposed settlement is fair and reasonable as between registered group members:

- (a) the deduction of 'Common Benefit Legal Costs' from the settlement sum prior to distribution to group members;
- (b) the quantum of the 'Common Benefit Legal Costs';
- (c) the plaintiff's reimbursement payment;
- (d) the making of payments to Registered Group Members only;
- (e) the basis of the entitlement to participate in the settlement; and
- (f) the proposed equal distribution to group members.

Deduction of costs from the settlement sum

58 The Distribution Scheme provides that, prior to any distribution to the plaintiff and group members, 'Common Benefit Legal Costs' are to be paid from the settlement sum.⁴⁵ The Common Benefit Legal Costs are defined in the Distribution Scheme as:⁴⁶

[P]rofessional fees and disbursements incurred by Mills Oakley, including the cost of the assessment by Cate Dealehr, in relation to the proceeding and the assessment of Group Member claims for the purposes of mediation and preparation for trial, and in connection with obtaining Court Approval of the settlement of the proceeding, and which have been assessed by Cate Dealehr, an independent costs consultant appointed by the Court on 21 December 2020, and approved by the Court.

59 The costs of administering the Distribution Scheme also form part of the Common Benefit Legal Costs.⁴⁷ Administration costs are defined as:⁴⁸

⁴⁵ Clause 9.2 of the Distribution Scheme.

⁴⁶ Clause 1.1 of the Distribution Scheme.

⁴⁷ Clause 13.1 of the Distribution Scheme.

⁴⁸ Clause 1.1 of the Distribution Scheme.

[d]isbursements (including the costs of any expert advisors and barristers) and costs incurred by the Administrator in connection with the administration of this Scheme, including assessing Group Member claims and administering the Scheme. These costs have been assessed by an independent costs consultant and shall form part of the Common Benefit Legal Costs approved by the Court.

60 As I have noted, the plaintiff seeks an order that the Court approve \$400,000 as the amount to be fixed in respect of the plaintiff's costs and disbursements.

61 Before addressing whether this amount in respect of costs is fair and reasonable, it is necessary to first consider whether it is fair and reasonable that the plaintiff's costs be deducted from the settlement sum. The effect of that proposal is that registered group members will contribute to the payment of the plaintiff's costs on an equal basis.

62 The deduction of the plaintiff's legal costs from the settlement sum is consistent with the terms of a conditional costs agreement entered into by the plaintiff with Mills Oakley under which it was agreed that her costs would be deducted from any settlement sum received. As to the sharing of legal costs by all registered group members on an equal basis, I consider that feature is fair and reasonable in the circumstances for the reasons explained by Gordon J in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* which are equally apposite to the circumstances of this case:⁴⁹

... That proposal is not of concern. The legal costs were incurred and achieved a settlement for all group members. The group members who did not sign a LCA with Slater & Gordon should not be entitled to receive a windfall by reason of their refusal to sign a LCA. To put the matter another way, the legal costs are fixed. Those legal costs should be borne by those who benefitted from those legal costs being incurred – the group members as a whole.

Quantum of legal costs

63 As I have noted, the plaintiff seeks an order that the Court approve an amount of legal costs capped in the sum of \$400,000; that is the proposed amount of the Common Benefit Legal Costs under the Distribution Scheme.

⁴⁹ [2013] FCA 626, (*Modtech*) [24].

64 The principles which govern the approval of the costs of a representative proceeding were comprehensively set out by Nichols J in *Lenehan v Powercor Australia Ltd.*⁵⁰ Her Honour stated as follows:⁵¹

9. The Court's function in scrutinising a claim for costs by the plaintiff and his solicitors is protective. Group members ordinarily benefit from the legal work undertaken by the plaintiff's solicitors in conducting and settling the proceeding and are typically required to pay a proportionate share of the plaintiff's costs. However, they have no control over the costs incurred during the conduct of proceeding and the information available to them about costs (including information that would allow them to effectively scrutinise a claim for costs) is generally limited. As Murphy J put it in *Petersen*, group members suffer a significant information asymmetry in this regard.
10. The Court must be satisfied that the costs claimed are reasonable in all of the circumstances and proportionately incurred.
11. The proportionality measure looks to the relationship between the costs incurred and the value and importance of the subject matter in issue. The requirement for proportionality as it concerns legal costs generally is expressed in s 172 of the *Legal Profession Uniform Law* (Vic) (the **Uniform Law**) and in s 24 of the *Civil Procedure Act 2010* (Vic). It is a forward looking assessment which compares the cost of the work with the benefit that could reasonably be expected from the work, at the time at which the work was performed.
12. The Court may be satisfied as to the amount of costs that is reasonable and proportionate, in any one of a number of ways.
13. As Moshinsky J observed in *Camilleri*, the precision with which a court will require a plaintiff to justify the quantum of costs incurred for the benefit of group members will vary according to the circumstances of the case. Thus, "a very large costs sum might readily be approved in a settlement following a lengthy trial, while an apparently modest costs sum might require more exacting validation if it is associated with a modest sized proceeding and represents a significant proportion of the overall settlement sum".
14. Sufficient evidence must be tendered so as to enable the Court to make an assessment as to whether the costs were reasonably and proportionately incurred.
15. Evidence on this question commonly comes from an independent solicitor or costs consultant or from an independent referee on a formal reference under the rules of Court; and at times with assistance from a contradictor. Even where an independent expert is appointed it is, however, the Court and not the expert who is required to determine whether the costs are reasonable.

⁵⁰ [2020] VSC 82.

⁵¹ *Ibid* [9]-[21], citations omitted.

- 16 In *Matthews*, Osborn JA observed (citing *Re Medforce*) that the principles approving solicitor and client costs in this context are similar to those relevant to fixing a liquidator's remuneration. There, at minimum, what is required is a statement of the work undertaken, together with an expenditure account sufficiently itemised to enable the charges made to be related to the work done.
- 17 It is recognised that a balance should be struck, affording the Court sufficient information to discharge its function, without the assessment itself significantly diminishing the corpus of the settlement funds.
- 18 What is reasonable and proportionate will vary from case to case. Factors commonly considered in this assessment include:
- (a) the reasonableness of the terms of the fee agreements and whether the costs actually charged have been calculated in accordance with those agreements;
 - (c) whether any significant portion of the fees charged have been inappropriately or unnecessarily incurred;
 - (d) whether the work in a particular area or in relation to a particular issue was undertaken efficiently and appropriately;
 - (e) whether the work was undertaken by a person of an appropriate level of seniority and whether the charge out rates were appropriate having regard to the seniority of the practitioners and the nature of the work undertaken;
 - (g) whether the tasks and associated charges were appropriate having regard to the nature of the work and the time taken to complete the work.
- 19 Considerations of this kind might be characterised as broadly reflecting the requirements of s 172 of the Uniform Law which applies to costs generally.
- 20 Ordinarily, the plaintiff's costs of the proceeding will have been incurred and charged pursuant to an agreement between the plaintiff and his or her solicitors. Often, the plaintiff's solicitors will also have entered costs agreements with at least some group members. Accordingly, those agreements will inform the assessment to be made by the Court on an application for approval of the costs of a representative proceeding, on settlement. A logical starting point for assessing the reasonableness of the costs claimed is to establish what costs have actually been incurred and pursuant to what terms.
- 21 However, costs agreements inform rather than determine the Court's assessment of the quantum and nature of costs to be approved. The Court may consider the reasonableness of the terms of the costs agreements. The considerations relevant to an exercise of the power to approve costs on a settlement of a representative proceeding are not limited to what is permitted by the costs agreement. The question remains whether in the Court's assessment the costs are reasonable and

proportionate. The costs agreement may itself assist in evidencing reasonableness.

65 The Dealehr Costs Report is the principal evidence before the Court about the reasonableness of the plaintiff's costs. Ms Dealehr is a solicitor and an experienced legal costs consultant with extensive experience in relation to the assessment of costs in representative proceedings. On 21 December 2020, the Court made orders appointing her as an expert to enquire into and to report to the Court as to whether the plaintiff's claimed legal costs up to and including the hearing of the application for settlement approval orders and of the administration of the Distribution Scheme were fair and reasonable, as to both the work done, and the amount claimed.

66 The Dealehr Costs Report was produced pursuant to this order. It is a detailed and thorough analysis of the plaintiff's legal costs for which approval is sought. The approach used by Ms Dealehr in her assessment of the legal costs was to categorise and assess each item of work performed by reference to rates agreed under the relevant costs agreement, using a gross sum cost methodology. In undertaking this task, she was provided with Mills Oakley's records of time ledgers and disbursements in relation to their work for the plaintiff. I am satisfied that the analysis and methodology used by Mr Dealehr in her report was appropriate.

67 In Ms Dealehr's opinion, the plaintiff's fair and reasonable legal costs, including disbursements, up to and including the approval of the proposed settlement, are in the range of \$486,085.26-\$511,085.26. In reaching this conclusion, the following features of Ms Dealehr's analysis are of significance:

- (a) Ms Dealehr considered that the costs agreement entered into by the plaintiff with Mills Oakley was void because of non-compliance by Mills Oakley with various requirements imposed by the *Legal Profession Uniform Law 2014* (Vic). In her view, a number of those failures were serious and, as a consequence, Mills Oakley would not be entitled to the uplift fee provided for under the costs agreement which the plaintiff had entered into. Under the costs agreement, Mills Oakley could charge an uplift fee of up to 25% of legal costs, including

- paid disbursements. In her assessment of the plaintiff's fair and reasonable legal costs, Ms Dealehr therefore disallowed this 25% uplift fee.
- (b) Notwithstanding her opinion that the costs agreement entered into by the plaintiff was void, Ms Dealehr was of the view that the hourly rates for legal work specified in it were fair and reasonable and were a proper basis for calculating Mills Oakley's professional fees.
 - (c) In determining the reasonableness of Mills Oakley's professional fees, Ms Dealer applied a five-step methodology which she had developed over her years of practise.⁵² Pursuant to that analysis, she disallowed 72.6 hours of professional work, representing an amount of \$14,203.75, which she identified as being non-claimable for various reasons. She also discounted Mills Oakey's fees by \$10,786.60 in relation to particular activities.⁵³
 - (d) With those adjustments, Ms Dealehr concluded that Mills Oakley's costs were fair and reasonable in all of the circumstances and that the cost and time spent across the various phases of the litigation accorded with the cost and time spent in other litigation in matters of comparable size, nature and complexity.
 - (e) Ms Dealehr analysed the reasonableness of the disbursements incurred by Mills Oakley in the proceeding which were in a total amount of \$94,034.73, the large majority of which were counsels' fees. Ms Dealehr found all of these disbursements to be reasonable, and also allowed a modest uplift in respect of junior counsel's fees in accordance with a costs agreement which had been entered into. She concluded that the total amount of reasonable disbursements was \$100,043.10.

⁵² The five steps are as follows: (1) calculate the time spent by each of the legal operators, verify the accuracy of time recorded; (2) apply fair and reasonable rates for operators including GST; (3) classify time spent by phase – task – activity to provide information on the nature of the work undertaken; (4) identify and excise non-recoverable work by reference to costs not claimable; (5) apply any discounts after considering the nature of the work claimed or the way that the work was done.

⁵³ Including clerical work undertaken by solicitors and the attendance of multiple solicitors at hearings.

(f) Ms Dealehr noted that the total legal costs assessed by her were high as a percentage of the settlement sum. She stated that she was not able to properly address the question of whether the costs were proportionate because she did not have access to counsel's confidential opinion and the supporting material relating to the approval application. I consider the question of proportionality below.

68 I accept Ms Dealehr's estimate of the plaintiff's fair and reasonable legal costs as detailed in the Dealehr Costs Report. In my consideration, the analysis undertaken by Ms Dealehr was comprehensive and appropriate to the circumstances of the case.

69 I am satisfied that the amount in respect of legal costs proposed to be deducted from the settlement sum, \$400,000, is reasonable in all the circumstances. It is an amount which is significantly less than Ms Dealehr's estimate of the range of fair and reasonable costs associated with the proceeding and the approval process, which estimate I have accepted. It also includes the legal costs which will be incurred in administering the Distribution Scheme; Ms Dealehr's estimate of \$486,085.26-\$511,085.26 as being the range of the plaintiff's fair and reasonable legal costs did not include those costs.

70 I am also satisfied that the amount of legal costs for which approval is sought is proportionate to the litigation. The meaning of proportionality in relation to costs was explained as follows by Emerton J (as she then was) in *Williams v AusNet*:⁵⁴

In *Yara Australia Pty Ltd v Oswal*, the Court of Appeal held, in effect, that that the concept of proportionality in s 24 is forward looking. For each piece of work, a practitioner must consider whether the cost of the work is in proportion to the factors in s 24(a) and (b), namely the complexity and importance of the issues in dispute and the amount in dispute. Hence, when assessing the expected benefit, the Court's analysis must focus on the expected realistic return *at the time the work being charged for was performed*, not the known return at a time remote from when the work was performed. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved.

As a result, the fact that legal costs may be high in absolute terms or as a percentage of the Settlement Sum is not a proper basis for concluding that legal

⁵⁴ [2017] VSC 474, [110]-[111], omitting citations, emphasis added.

costs are disproportionate. It is necessary to consider whether, at the time the work was being performed, that work was not justified having regard to the complexity or importance of the issues in dispute or the amount in dispute.

71 An assessment of the nature and extent of the legal work undertaken in this proceeding begins with an understanding of the procedural history of the litigation. The proceeding was commenced more than four years ago on 1 August 2017. There then followed interlocutory proceedings and delays relating to the appointment of a litigation guardian for Ms Hamilton-Byrne. Then, in September 2018, the plaintiff filed a summons seeking orders joining LFAC and the Registrar of Titles as defendants in the proceeding; orders to that effect were made on 1 November 2018 and amended pleadings were filed thereafter. After Ms Hamilton-Byrne died on 13 June 2019, the proceeding was delayed while the executors attempted to locate her will and apply for probate. It was then necessary for an application to be brought substituting the executors for Ms Hamilton Byrne as defendants in the proceeding. That occurred by order made on 20 February 2020. On 15 May 2020, the defendants filed their summons to which I have earlier referred in which they sought orders staying the proceeding. The parties filed a substantial volume of affidavit material in relation to that application. Costs were also incurred in relation to the proceedings brought by some of the group members under Part IV of the *Administration and Probate Act 1958*.

72 In addition to the legal costs directly incurred as a result of this procedural history, the plaintiff's solicitor, Mr Tobin, has deposed that significant resources were directed to the preparation of witnesses, discovery, reviewing police records, submitting numerous freedom of information applications and investigating the assets held by Ms Hamilton-Byrne and their availability to satisfy a judgment. Further costs and delays were also incurred because of the historical nature of the alleged abuse and because those allegations did not relate to conduct said to have occurred in an officially sanctioned or regulated setting, but behind a veil of secrecy which shrouded the activities of 'The Family'. For example, Mr Tobin deposed to difficulties encountered by the plaintiff and group members in accessing information about their time in 'The Family'. These difficulties gave rise to further work associated with

locating documents and evidence relevant to the plaintiff and the group members' time as members of 'The Family'.

73 Various media reports published prior to the commencement of this proceeding indicated that Ms Hamilton-Byrne held substantial assets; some reports suggested she had assets worth \$20 million, others suggested they were worth in excess of \$50 million. On the basis of his instructions about the quantum of the assets held by Ms Hamilton-Byrne, as well as information obtained by Mr Tobin about the value of the Olinda properties, Mr Tobin expected to be able to recover damages in the proceeding, in addition to recovering the plaintiff's costs from the defendants. Mr Tobin has also deposed that significant resources were directed to investigating the existence of these assets and their availability to satisfy a judgment, including because of Ms Anne Hamilton-Byrne's use of aliases to hold assets.

74 In light of the above considerations, I am satisfied that the work undertaken by Mills Oakley was not only reasonable having regard to the particular complexities associated with the claims made by the plaintiff and the group members, but that those costs were also proportionate to the litigation, in the sense that they were justified having regard to the expected realistic returns from the litigation anticipated when the work was undertaken. On the information known prior to the commencement of the proceeding, the solicitors for the plaintiff could reasonably have anticipated that there would realistically be sufficient funds to meet a judgment for the plaintiff and the group members as well as their legal costs. The fact that, in the end, it is discovered that Ms Hamilton-Byrne's estate is relatively meagre in value, is not a proper basis to conclude that the work undertaken by the solicitors was not justified. Such an approach would impermissibly bring the benefit of hindsight to a consideration of the issue of proportionality and ignore the fact that this proceeding is very difficult litigation involving the alleged historical abuse of minors said to have been committed in the particularly unusual setting of a cult. It is also not to be overlooked that the plaintiff's solicitors have elected to substantially discount their

professional costs below the amount which, in her expert opinion to the Court, Ms Dealehr considered to be fair and reasonable.

Plaintiff's reimbursement payment

75 The Distribution Scheme provides for \$15,000 to be paid to the plaintiff prior to distribution of the balance of the settlement sum.⁵⁵ Counsel submitted that this payment, referred to as the 'reimbursement payment' in the Distribution Scheme, is intended to compensate the plaintiff for the time, inconvenience and burden associated with taking on and discharging the obligations of the lead plaintiff and attending to matters on behalf of group members.

76 The appropriateness of such payments was first acknowledged by Jessup J in *Darwalla*.⁵⁶ His Honour considered that it was:

...prima facie reasonable that particular parties who have sacrificed valuable time and incurred expenses in the interests of prosecuting this proceeding on behalf of group members as a whole should be able to look to the corpus of the settlement sum for some degree of compensation and reimbursement.⁵⁷

However, his Honour also emphasised that the absence of a 'scale' governing such payments meant that a conservative approach should be adopted to the quantification of such payments and that consideration should be given to whether some of the time or expense in question related to issues that were specific to the representative's personal claim, or concerned issues raised for the benefit of the group overall.⁵⁸ Similar reservations and the need for a conservative approach were reiterated by Gordon J in *Modtech*.⁵⁹

77 Mr Tobin has deposed that the plaintiff expended considerable time and effort and incurred incidental disbursements in conducting this proceeding. She participated in two mediations, provided instructions to her legal representatives and attended conferences. She was also instrumental in making contact with group members.

⁵⁵ Clause 9.2(b) of the Distribution Scheme.

⁵⁶ *Darwalla* (n 15).

⁵⁷ *Ibid* [76].

⁵⁸ *Ibid* [80]-[93].

⁵⁹ *Modtech* (n 49) [71].

Mr Tobin estimated that the plaintiff spent a total of up to approximately 200 hours on these and other tasks relating to the proceedings.

78 In Mr Tobin's assessment, the benefits obtained by the plaintiff in carrying the burden of this proceeding in the above ways was to the advantage of all group members. Although the amount of the proposed reimbursement payment was not calculated by reference to any loss of wages, Mr Tobin informed the Court that the amount was an appropriate reflection of the time the plaintiff had invested in this proceeding. Further, he deposed that the amount was appropriate because the subject of the proceeding was traumatic and required the plaintiff to recount a number of incidents which would necessarily have been distressing for her.

79 I accept Mr Tobin's evidence. Although in some cases a distinction is drawn between the time spent by a representative plaintiff for the benefit of a class as a whole and the time spent for the plaintiff's own benefit, in this case, such a distinction is of limited utility because there is a substantial overlap between the benefit to the group of the time spent by the plaintiff in the various activities related to the proceeding and the benefits which might accrue to the plaintiff individually from those efforts. This is because the nature of the loss allegedly suffered by the plaintiff is common with the loss alleged to have been suffered by the other group members; the preparation of the plaintiff's claims therefore directly benefitted the other members of the group.

80 If the Settlement Agreement is approved, none of the group members will have had to undergo the burden undertaken by the plaintiff in this proceeding. Further, in accordance with the Distribution Scheme, the other members of the group will avoid any further burden associated with establishing their own individual loss and damage. It is accurate to say that the outcome for the group will have been achieved in large measure by the plaintiff's preparedness to dedicate her time and energy to the proceeding.

81 Finally, my conclusion that the reimbursement payment is fair and reasonable having regard to the interests of the group members as a whole is also reinforced by two other

important matters. First, the payment is relatively modest. Secondly, the proposed payment has been notified to group members in the approval notice; no group member has objected to the payment.

The making of payments to registered group members only

82 Under the Distribution Scheme, only group members registered with Mills Oakley pursuant to orders of the Court made on 21 December 2020 are entitled to receive distributions from the settlement sum.⁶⁰ It is significant that, although only registered group members may receive compensation under the Distribution Scheme, under the proposed settlement, all group members will release the defendants from any liability that they may have to them arising from the abuse.

83 I consider that this difference in the treatment of the two cohorts of group members to be fair and reasonable for the following reasons. First, the confinement of the right to participate in the settlement to registered group members is consistent with the orders made by the Court in this proceeding and the manner in which the proceeding has been conducted to date.⁶¹ Secondly, group members have been given reasonable notice of the requirement to register their claims if they wished to claim compensation in any settlement and they have been provided with a fair opportunity to so register.

84 Thirdly, the factual context from which the claims made in this proceeding emerge means that the plaintiff and the registered group members are likely to be aware of all the people who may be group members. The affidavits made by Mr Tobin in this proceeding indicate that, aside from those persons who have either opted out of

⁶⁰ See definition of 'group member' in clause 1.1 of the Distribution Scheme..

⁶¹ See in particular paragraph 5 of the orders of the Court made on 21 December 2020 which provides as follows:

Pursuant to section 33ZF of the Act and subject to further order:

- (a) any group member listed in Annexure D of this summons shall be deemed to be a registered group member for the purposes of participation in the proposed settlement;
- (b) any group member not listed in Annexure D of this summons who wishes to claim compensation in the proposed settlement of the proceeding must, by no later than 4pm on 5 February 2021, deliver to the plaintiff's solicitors a completed Claimant Registration Notice in the form set out in Annexure B to this order;
- (c) any group member who is not registered in accordance with order 5(a) and/or (b) above shall remain a group member for all purposes, but in the event of the approval of the settlement of the proceeding shall not be permitted to participate in the proposed settlement.

membership of the group or been excluded from the group by Court order, there is only one group member who is not a registered group member. The plaintiff does not know the whereabouts of or have the contact details of that person. Nevertheless, reasonable efforts have been made to make contact with that person. In the circumstances, I accept the submission that, having regard to the advertising, promotion and consultation engaged in by Mills Oakley in relation to the proceeding, there do not appear to be any group members, other than the registered group members, who have claims arising from the alleged abuse who wish to pursue those claims and obtain compensation in relation to them.

Basis of the entitlement to participate in the settlement

85 The key provisions of the Distribution Scheme which deal with the entitlement of persons to participate in the settlement may be summarised as follows.

- (a) The Administrator, in his absolute discretion, shall determine whether or not a registered group member meets the definition of 'group member'.⁶²
- (b) The Administrator also determines the amount of the (equal) entitlement of a registered group member to compensation from the compensation pool,⁶³ except that, in respect of personal injury claims, Mr Tim Tobin SC will consider whether the person has suffered a compensable injury and will notify the Administrator accordingly.⁶⁴
- (c) The distribution made to each registered group member is to proceed on the basis of information contained in the records maintained by Mills Oakley which contain information relating to each group member.⁶⁵ However, the Administrator may require group members to provide further information if,

⁶² Clause 4.3 of the Distribution Scheme and see definition of 'group members' in [5] above.

⁶³ Clause 5.1 of the Distribution Scheme.

⁶⁴ Clause 5.2 of the Distribution Scheme. The Distribution Scheme originally identified Mr Andrew Fraatz, now his Honour Judge Fraatz of the County Court of Victoria, as undertaking this function. Following his Honour's appointment in the period after the hearing of the application for approval of the Settlement Agreement, the solicitors for the plaintiff provided the Court with a revised form of the Distribution Scheme which substituted the references therein to Mr Fraatz with references to Mr Tobin SC. The Distribution Scheme in its revised form was otherwise identical to that originally filed as part of the plaintiff's application for approval.

⁶⁵ Clause 4.1(b).

in the Administrator's opinion, the existing information insufficiently substantiates any claim or part thereof.⁶⁶ The records maintained by Mills Oakley include assessments of each group member's claim in accordance with the provisions of the scheme⁶⁷ and information provided by each group member or otherwise obtained by the Administrator or Mills Oakley.⁶⁸

- (d) The accuracy of the information in the records held by Mills Oakley is deemed to be accepted by each group member, who will not be entitled to amend the information after any approval of the settlement; the Administrator will, however, use reasonable endeavours to ensure the accuracy of the information.⁶⁹ The Administrator may correct any error or omission occurring in the course of administering the scheme.⁷⁰

86 In the circumstances of this proceeding, I accept the submission made on behalf of the plaintiff that it is fair and reasonable that the assessment of registered group members' individual claims should proceed on the basis of information that is currently held by Mills Oakley, noting the Administrator has a limited discretion to seek further information, or to receive additional documentation or information. This is principally because the limited amount of the settlement demands a streamlined and cost efficient method for determining registered group members' entitlements. It is apparent that Mills Oakley holds substantial information in relation to the claims of individual registered group members. The provision of an opportunity for registered group members to provide additional information, or some sort of right of review, would very likely increase the costs associated with the administration of the scheme and thereby further erode the already very limited amount of funds available for distribution.

87 It is also of particular significance that the registered group members, including the plaintiff, have instructed Mills Oakley that they jointly desire that any settlement

⁶⁶ Clause 4.2(a) of the Distribution Scheme.

⁶⁷ Clause 3.3 of the Distribution Scheme.

⁶⁸ Clause 3.2 of the Distribution Scheme.

⁶⁹ Clauses 3.4, 3.5 of the Distribution Scheme.

⁷⁰ Clause 2.5 of the Distribution Scheme.

moneys be distributed equally between them. This significantly diminishes the utility of providing for a more extensive procedure for the assessment of claims, including by reference to the provision of further information by registered group members.

The proposed equal distribution to group members

88 As I have noted, the registered group members have instructed Mills Oakley that they jointly desire that any settlement monies be distributed equally between them. If group members' claims are treated in this way, it is estimated that \$23,125 will be distributed to each of them.

89 Mr Tobin has deposed that, although there are some differences in the experiences of group members, the costs associated with carrying out assessments of quantum would, in all the circumstances, be disproportionate. I accept the force of this observation given the limited amount of funds available for distribution to registered group members and the circumstances where those persons have agreed that distributions should be in an equal amount. The proposal for the registered group members to share the compensation pool equally is fair and reasonable in the circumstances.

Disposition

90 For the reasons I have outlined above, the Settlement Agreement is fair and reasonable and in the interests of group members as a whole. I accordingly approve the settlement and make the orders in the form of the appendix to this judgment.

ANNEXURE 1 - ORDERS OF THE HONOURABLE JUSTICE MOORE OF 29 MARCH

2022

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

S CI 2017 03007

BETWEEN:

LEEANNE CREESE

Plaintiff

and

**LIFE FOR ALL CREATURES LTD (ACN 096 549 003) and
OTHERS**
(according to the schedule)

Defendants

ORDER

JUDGE: The Honourable Justice Moore
DATE MADE: 29 March 2022
ORIGINATING PROCESS: Writ
HOW OBTAINED: Summons filed 15 December 2020
ATTENDANCE: At judgment
OTHER MATTERS: A. This order is signed by the Judge pursuant to r 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

THE COURT ORDERS THAT:

Settlement Approval Orders

1. Pursuant to sections 33V and/or 33ZF of the *Supreme Court Act 1986* (Vic) (**Act**), the Court authorises the plaintiff *nunc pro tunc* on behalf of the group members to enter into and give effect to the "Settlement Agreement" dated October 2020 in relation to Supreme Court Proceeding S CI 2017 03007 (**Agreement**) executed by the plaintiff and the second, fourth and fifth defendants and reproduced at (confidential) exhibit JPT-24 to the affidavit of James Patrick Tobin sworn 16 August 2021, and the transactions contemplated by the Agreement, for and on behalf of the group members.

2. Pursuant to section 33V of the Act, the Court approves:
 - (a) the settlement of the proceeding between the plaintiff and the second, fourth and fifth defendants upon the terms set out in the Agreement; and
 - (b) the distribution of the Settlement Sum among the registered group members in accordance with a settlement distribution scheme (**Scheme**) being Annexure A.
3. Mr James Patrick Tobin is appointed Administrator of the Scheme (the **Administrator**)
4. Pursuant to sections 33X and 33Y of the Act, the Court approves the content of the 'Notice of Settlement Approval to Registered Group Members' (**Settlement Approval Notice**) being Annexure B.
5. By 4pm on 13 April 2022, notice of approval of the settlement be given to all group members by the plaintiff, by her solicitors:
 - (a) causing the Settlement Approval Notice to be sent by ordinary pre-paid post to the postal address for each person recorded on the database of group members maintained by Mills Oakley Lawyers, and, where Mills Oakley Lawyers has an email address for the person, to be sent to be sent by email to the person;
 - (b) causing a copy of the Settlement Approval Notice to be published on Mills Oakley Lawyers website; and
 - (c) causing a copy of the Settlement Approval Notice to be provided to the Common Law Class Actions Coordinator to be published on the Supreme Court of Victoria's website.
6. The plaintiff by her solicitors file and serve an affidavit as to compliance with Order 6 by 4:00pm on 27 April 2022.

Legal costs

7. Pursuant to section 33ZF and 33ZJ of the Act, alternatively the inherent jurisdiction of the Court, the amount of \$400,000 be approved toward payment of the plaintiff's costs and disbursements.
8. Within 14 days of the Administrator distributing from Mills Oakley Lawyers' trust account the final balance of compensation entitlements to registered group members, the Administrator file with the Court and email to the Common Law Class Actions Coordinator an affidavit as to the completion of the administration.

9. Following approval of the proposed settlement and upon completion of distributions pursuant to the Scheme, the proceeding be dismissed with no further order as to costs.

Other orders

10. Subject to any further order, all *inter partes* costs orders in the proceeding are vacated.
11. Pursuant to section 33ZF, the plaintiff and the second, fourth and fifth defendants each have leave to apply to the Court for orders in respect of any issue arising in relation to the administration of the Agreement.

DATE AUTHENTICATED: 29 March 2022

.....
THE HONOURABLE JUSTICE MOORE

SCHEDULE OF PARTIES

LEEANNE JOY CREESE

Plaintiff

LIFE FOR ALL CREATURES LTD (ACN 096 549 003)

Second Defendant

REGISTRAR OF TITLES

Third Defendant

**ROGER LEONARD BUTCHER in his capacity
as executor of the deceased estate of
ANNE HAMILTON-BYRNE**

Fourth Defendant

**GEOFFREY JOHN BENJAMIN DAWES in his
capacity as executor of the deceased estate of
ANNE HAMILTON-BYRNE**

Fifth Defendant

Annexure A
Hamilton-Byrne Class Action
LEEANNE CREESE v LIFE FOR ALL CREATURES LTD (ACN 096 549 003) and
OTHERS S CI 2017 03007

SETTLEMENT DISTRIBUTION SCHEME

Approved by the Honourable Justice Moore by orders made on 29 March 2022

BACKGROUND and SUMMARY

This part of the Scheme does not have legal effect but is provided to assist group members to understand how the Scheme will operate.

- A. By an agreement executed by counterparts in May and August 2021 (**Agreement**), the plaintiff and the defendants agreed to settle Supreme Court of Victoria Proceeding No. S CI 2017 03007, subject to the approval of the Court. The Court approved the settlement on 29 March 2022.
- B. This Scheme establishes a procedure for distributing between Group Members the settlement sum to be paid by LFAC and the Executors (**Settlement Sum**).
- C. Under the Agreement, the Settlement Sum is payable by LFAC and the Executors:
 - (a) as to \$300,000, within 30 days after Court Approval;
 - (b) as to \$300,000, upon the earlier of the date 6 months after Court Approval or the date of settlement of the proposed sale of a property owned by LFAC at 1445 Mt Dandenong Tourist Road, Olinda.
- D. This Scheme is to be read with reference to the Agreement.
- E. This Scheme provides for:
 - (a) the procedure for assessing the individual claims of Group Members;
 - (b) the entitlement of each Group Member to a distribution from the Compensation Pool.
- F. Mr James Tobin, a principal in the Class Actions Department of Mills Oakley (**Mills Oakley**) will act as Administrator of the Scheme.
- G. To assist the Administrator manage this Scheme:
 - (a) instructions and supporting documentation provided to Mills Oakley by or on behalf of Group Members to date will provide the basis of assessments under this Scheme;
 - (b) the Administrator, at his discretion, may request additional information in relation to whether or not a person is a Group Member.
 - (c) if the Administrator does not receive a response to any request for further information within 14 days, he will assess that person's entitlements in accordance with the information in his possession.

- H. Assessment of claims of Group Members relating to a personal injury as a result of cruel and inhumane treatment by Anne Hamilton-Byrne and/or her servants or agents during the period from 1968 to 1987 have been or will be considered by a barrister experienced in personal injury law. The assessment of the Group Member's entitlement for personal injury will be made by the Administrator having regard to any such assessment.
- I. The Administrator will be assisted by Mills Oakley and will be entitled to recover the reasonable administration costs of this Scheme including reasonable costs related to the assessment of Group Members' loss and damage. Such costs have been assessed by an independent costs consultant and will form part of the Common Benefit Legal Costs which are subject to approval by the Court.
- J. Group Members who seek specific legal advice, or require other work beyond the routine information-gathering and assessment tasks undertaken by the Administrator, will be entitled to retain other solicitors as they wish but at their individual cost.
- K. The Court will have ongoing supervision over the implementation of this Scheme.
- L. The operative provisions of this Scheme are set out below.

OPERATIVE CLAUSES

1. Interpretation

- 1.1 In this Scheme, the following terms have the meanings defined (clause references are references to the clauses of this document unless otherwise specified):

Administration Costs means the disbursements (including the costs of any expert advisers and barristers) and costs incurred by the Administrator in connection with the administration of this Scheme, including assessing Group Member claims and administering the Scheme. These costs have been assessed by an independent costs consultant and shall form part of the Common Benefit Legal Costs approved by the Court.

Administrator means James Tobin, a principal in the Class Actions Department of Mills Oakley, or another person appointed by the Court as Administrator of the Scheme.

Agreement means the settlement agreement executed by the plaintiff and her legal representatives and Life For All Creatures Ltd (ACN 096 549 003), Roger Leonard Butcher and Geoffrey John Benjamin Dawes in their capacity as executors of the deceased estate of Anne Hamilton-Byrne dated 19 May 2021.

Assessment Entitlement means the amount of the equal entitlement of a Group Member to compensation from the Compensation Pool calculated in accordance with clause 6 of this Scheme.

Claimant Records means a database or other records constructed by or on behalf of Mills Oakley to contain the information for each Group Member and any information required to identify the Group Member, including names, addresses and telephone numbers.

Claims means all manner of actions, suits, causes of action, arbitrations, debts, dues, costs, claims, demands, verdicts and judgements either at law or in equity or arising under statute and whether or not the facts, matters or circumstances giving rise to those Claims are known to any Group Member at the date of the conclusion of the Scheme.

Common Benefit Legal Costs means professional fees and disbursements incurred by Mills Oakley, including the costs of the assessment by Cate Dealehr, in relation to the proceeding and the assessment of Group Member claims for the purposes of mediation and preparation for trial, and in connection with obtaining Court Approval of the settlement of the proceeding, and which have been assessed by Cate Dealehr, an independent costs consultant appointed by the Court on 21 December 2020, and approved by the Court.

Compensation Pool means the Settlement Sum less Common Benefit Legal Costs and less the Reimbursement Payment.

Court means the Supreme Court of Victoria.

Executors means Roger Leonard Butcher and Geoffrey John Benjamin Dawes in their capacity as executors of the deceased estate of Anne Hamilton-Byrne.

Group Member means a person defined as a group member in paragraph 4 of the Further Amended Statement of Claim filed in the Proceeding on 13 March 2020 and who:

- (i) has registered with Mills Oakley and is identified in the List of Registered Group Members set out at Appendix 1 of the Agreement; or
- (ii) has delivered to Mills Oakley a completed claim registration notice pursuant to orders of the Court made on 21 December 2020.

LFAC means Life For All Creatures Ltd (ACN 096 549 003).

Mills Oakley means Mills Oakley Lawyers.

PI Claim/s means personal injury claim/s of Group Members as defined in paragraph 4(b) of the Further Amended Statement of Claim filed in the Proceeding on 13 March 2020.

Plaintiff means Leeanne Creese.

Proceeding means *Creese v Life For All Creatures Ltd & Ors*, Supreme Court of Victoria, Proceeding No S CI 2017 03007.

Reimbursement Payment means the payment made to the plaintiff in the sum of \$15,000, as approved by the Court.

Scheme means the terms of this Settlement Distribution Scheme as approved by the Court.

Settlement Approval means the making of orders granting approval of the terms of settlement of the Proceeding and the Scheme by the Court pursuant to section 33ZF of the *Supreme Court Act 1986* (Vic) including provisional approval by the Court (subject to determination of any objections to the Scheme).

Settlement Date means 19 May 2021.

Settlement Distribution Fund means a controlled moneys account as defined in the *Legal Profession Act 2004* to be established by Mills Oakley with Westpac to hold moneys for the purpose of the Scheme, and where the context admits, will include a reference to all moneys in the account.

Settlement Sum means the amount of AUD\$600,000.00, plus any interest accruing on that amount in the Settlement Distribution Fund.

- 1.2 Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise:
- (a) the singular includes the plural, and the converse also applies;
 - (b) a gender includes all genders;
 - (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
 - (d) a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;
 - (e) a reference to dollars and \$ is to Australian currency;
 - (f) a reference to anything done by any person includes a reference to the thing as done by a director, officer, servant, agent, personal representative or legal representative if permitted to be so done by law or by any provision of the Agreement or this Scheme.

2. Scheme Administrator

- 2.1 The Settlement Distribution Fund shall be administered and applied by the Administrator. The Administrator, at his discretion, may utilise the services of and may in administering the Settlement Distribution Fund or Scheme as applicable delegate any power under this Scheme to any persons employed or engaged by him including barristers or other experts and rely upon their work, information and opinions.
- 2.2 In acting as Administrator (including any incidental functions) the Administrator's obligation is to do so properly on behalf of the Group Members as a whole.
- 2.3 Neither Mills Oakley, the Administrator nor any person employed by Mills Oakley will act as the lawyer for any individual Group Member in relation to his or her claim under the Scheme in relation to that Group Member's individual claim for compensation under the Scheme.
- 2.4 Following Settlement Approval and payment of the Settlement Sum in accordance with the Agreement, the Administrator shall hold the moneys in the Settlement Distribution Fund subject to and in accordance with the terms of this Scheme.
- 2.5 Notwithstanding anything elsewhere contained in this Scheme, the Administrator may at any time correct any error, slip or omission occurring in the course of his administration of the Scheme.

3. Group Member Information

- 3.1 The Administrator shall maintain the Claimant Records and use reasonable endeavours to ensure the accuracy of the information they contain.
- 3.2 The Claimant Records shall contain the information for each Group Member provided by the

Group Member or otherwise obtained by the Administrator or Mills Oakley.

- 3.3 The Claimant Records shall include assessments of each Group Member's claim in accordance with the provisions of this Scheme.
 - 3.4 The accuracy of the information in the Claimant Records shall be deemed to be accepted by each Group Member. The Administrator shall use reasonable endeavours to ensure the accuracy of the information recorded in the Claimant Records.
 - 3.5 Subject to clause 3.6, a Group Member shall not be entitled to amend the information contained on the Claimant Records after the Settlement Date.
 - 3.6 The Administrator may, in the Administrator's absolute discretion, request and/or take into account additional documentation or information in relation to a Group Member's claim.
-

4. Information Held by Administrator and Basis of Assessment

- 4.1 Subject to clause 4.2:
 - (a) for the purpose of the administration of this Scheme, information provided by Group Members or other persons and held by the Administrator may be relied upon as accurate by the Administrator, in his absolute discretion, when administering the Scheme; and
 - (b) each Group Member's distribution from the Compensation Pool will proceed on the basis of the information contained in the Claimant Records.
 - 4.2 If in the Administrator's opinion, the information held in the Claimant Records or provided by any Group Member or otherwise:
 - (a) insufficiently substantiates the claim or part of a claim made by a Group Member or other person, the Administrator, in his absolute discretion, may by written notice require the Group Member or other person to provide and verify by a further declaration or otherwise such further information as the Administrator may require. If the Group Member or other person does not provide the further information in the form requested, within 14 days of such a request being made, the Administrator may determine that the claim or part of the claim as the case may be is not eligible for any distribution from the Compensation Pool;
 - (b) is sufficient notwithstanding that some information may not be included, the Administrator, in his absolute discretion, may accept it as complete.
 - 4.3 The Administrator, in his absolute discretion, shall determine whether or not a person who has delivered to Mills Oakley a completed claim registration notice pursuant to orders of the Court made on 21 December 2020 meets the definition of group member in paragraph 4 of the Further Amended Statement of Claim filed in the Proceeding on 13 March 2020.
-

5. Assessment of Individual Entitlements for Personal Injury (PI) Claims

- 5.1 Within 14 days after Settlement Approval, the Administrator shall determine the Assessment Entitlement for each Group Member.
- 5.2 In respect of PI Claims:
- (a) Each Group Member's information contained in the Claimant Records and any supporting documentation has been or will be provided to Mr Tim Tobin SC who is experienced in personal injury law.
 - (b) Once Mr Tobin SC receives the information, he will consider whether a Group Member has suffered a compensable injury and if in his opinion there is such injury, notify the Administrator within 14 days or such longer period as the Administrator considers in his absolute discretion to be warranted for any individual Group Member.
 - (c) Mr Tobin SC may at his sole discretion confer with the Group Member.
 - (d) The assessment of Mr Tobin SC referred to in 5.2(b) above will be limited to an assessment of whether a Group Member has suffered a compensable injury.
-

6. Calculation of Entitlements to the Compensation Pool

- 6.1 Because the Compensation Pool is less than the total amount claimed by the Group Members, the Administrator must determine each Group Member's entitlement to a proportion of the Compensation Pool. The formula for calculation of that Assessment Entitlement is that each individual Group Member who has suffered a compensable injury will be compensated by an equal amount.
- 6.2 Each Group Member's proportion of the Compensation Pool for distribution will be calculated using the following distribution formula:

$$\textit{Compensation Pool} / \textit{Number of Group Members} = \textit{Assessment Entitlement}$$

7. Assessment Entitlement Notices

- 7.1 A Group Member will be advised in writing of their respective Assessment Entitlements prior to distribution.
- 7.2 A Group Member will have 10 days, from the date of issue of their Assessment Entitlement, to notify the Administrator of any administrative error, slip or omission in the Assessment Entitlement.
- 7.3 In the event of a notification under clause 7.2, the Administrator shall:
- (a) undertake a review of the Assessment Entitlement for the purposes of identifying or considering any administrative error, slip or omission;
 - (b) at his sole discretion make a determination as to whether an administrative error, slip or omission has occurred; and
 - (c) within 10 days issue a further Assessment Entitlement either correcting the

administrative error, slip or omission or confirming the original Assessment Entitlement.

- 7.4 The accuracy of an Assessment Entitlement shall be deemed to be accepted by a Group Member and shall be final under the Scheme if the Group Member has not notified the Administrator of any administrative error, slip or omission in the Assessment Entitlement within 10 days of the date of issue.

8. Group Member's Obligations, Indemnities and Reimbursement of Statutory Benefit Receipts

- 8.1 Each Group Member shall act honestly, and do all things necessary to ensure that any agent or representative of the Group Member acts honestly, in anything done in or for the purposes of participating in this Scheme and any person discharging any function or office created by this Scheme shall be entitled to rely upon the honesty of the thing done.
- 8.2 Payment of compensation pursuant to this Scheme may be subject to obligations under statutes and regulations. Accordingly, each Group Member indemnifies the Administrator in respect of all such obligations, including but not limited to payments or repayments relating to the Australian Taxation Office, Social Security, Medicare, Worker Compensation or any other statutory benefits paid to or for the benefit of the Group Member under this Scheme.
- 8.3 If a Group Member has a legal obligation, whether by reason of statute, contract or otherwise, to an agency, compensation payer or insurer to pay or repay a sum from the amount payable to the Group Member under this Scheme, the Group Member shall, as a condition of its entitlement to receive payment, indemnify the Administrator in respect of any and all such obligations.
- 8.4 Without limiting any other obligation or discretion of the Administrator under this Scheme, for the avoidance of doubt the Administrator may make such adjustments or withholdings from any payment otherwise due to a Group Member pursuant to this Scheme as may be necessary to comply with any statutory or regulatory obligation to pay or refund any amount to a statutory or other agency.
- 8.5 Where the agency administering any State or Federal scheme notifies the Administrator in writing that any amount is payable to the agency from any payment payable to a Group Member under this Scheme, the Administrator:
- (a) shall pay the said amount to the agency prior to any final distribution of the balance of the Group Member's entitlements pursuant to this Scheme;
 - (b) shall notify the Group Member of the payment to the agency; and
 - (c) without affecting any other privilege or immunity under this Scheme, shall have no further obligation to the Group Member in respect of the said amount;

but nothing in this section shall affect any right the Group Member or the agency might have against each other in respect of the said amount.

9. Distribution of Compensation Pool

- 9.1 The Compensation Pool shall be allocated between Group Members on an equal basis.

9.2 Prior to final distribution from the Settlement Distribution Fund, the Administrator will cause:

- (a) Common Benefit Legal Costs as approved by the Court to be paid to Mills Oakley;
- (b) the Reimbursement Payment as approved by the Court to be paid to the Plaintiff.

9.3 If after the final distribution of the Compensation Pool to Group Members:

- (a) any amount remains or is held in the Compensation Pool; or
- (b) any cheque remains un-presented for a period of 90 days or such further period that the Administrator otherwise deems appropriate;

the amount shall be distributed equally to Group Members.

10. Immunity from Claims

10.1 The completion of distributions made pursuant to clause 9 (including distributions made by cheques that remain un-presented for 90 days) shall satisfy:

- (a) all Claims made by Group Members (including the Plaintiff) in the Proceeding; and
- (b) any Claims made by Group Members (including the Plaintiff) arising out of or relating in any way to the facts, matters or circumstances set out in the pleadings in the Proceeding or any matter that is the subject of the Proceeding or has been the subject of the Proceeding.

10.2 Upon final distribution of the Settlement Distribution Fund in accordance with this Scheme, the Administrator shall have no further liability in respect of the Settlement Sum, the Compensation Pool or the implementation of this Scheme.

10.3 Without limiting any other provision for immunity in this Scheme, the Administrator in relation to this Scheme shall have the same immunities from suit as attach to the office of a judicial officer of the Court.

11. Disclosures to Agencies and Insurers

11.1 Where necessary or reasonable for the purposes of this Scheme or compliance with any statutory or contractual obligation owed by, or in respect of any compensation payable to any Group Member, the Administrator may release to:

- (a) a statutory or other agency;
- (b) an insurer; or
- (c) the Australian Taxation Office;

details of a Group Member's name, address, identifying particulars, tax file number and any Assessment Entitlement relating to the claim.

12. Supervision by the Court

- 12.1. The Administrator may refer any issues arising in relation to the Scheme to the Court for determination or advice.
- 12.2. Any costs incurred in any such referral to the Court made by the Administrator shall be deemed to be a part of the Administration Costs.

13. Administration Costs

- 13.1. Fees payable in respect of work performed by or on behalf of the Administrator pursuant to this Scheme shall form part of the Common Benefit Legal Costs as assessed by an independent costs consultant and payment of those costs to the Administrator will be subject to approval of the Court.
- 13.2. Notwithstanding any other provision of this Scheme, and without reducing any other rights which the Administrator might have, any costs, expenses, taxes, levies, duties, charges, fees or other imposts or obligations arising in connection with the administration of this Scheme (including without limitation the creation, retention, investment or disbursement of any part of the Settlement Distribution Fund) incurred by the Administrator over and above the Administration Costs will be borne by the Administrator.
- 13.3. Nothing in this Section shall affect any rights or obligations as between a solicitor and client of that solicitor in respect of costs incurred pursuant to any retainer or costs agreement between the solicitor and that client.

14. Notice

- 14.1. Any notice or document to be given (or delivered) pursuant to this Scheme shall be deemed to be given (or delivered) and received for all purposes associated with this Scheme if it is:
 - (a) addressed to the person to whom it is to be given; and
 - (b) either:
 - (i) delivered, or sent by pre-paid mail, to that person's postal address (being, in respect of any Group Member, the postal address recorded in the Claimant Records, as obtained from or directly from the Group Member);
 - (ii) sent by fax to that person's fax number (being, in respect of any Group Member, the fax number provided by the Group Member) and the machine from which it is sent produces a report that states that it was sent in full; or
 - (iii) sent by email to that person's email address (being, in respect of a Group Member, the email address provided by the Group Member), and a server through which it is transmitted produces a report that states that the email has been sent to the inbox of the specified email address.
- 14.2. A notice or document that complies with clause 14.1 will be deemed to have been given (or delivered) and received:
 - (a) if it was sent by mail to an addressee in Australia, three (3) clear business days after

being sent;

- (b) if it is sent by mail to an addressee overseas, five (5) clear business days after being sent;
- (c) if it is delivered or sent by fax, at the time stated on the report that is produced by the machine from which it is sent; and
- (d) if it is sent by email, at the time it is sent.

14.3. The Administrator's address, fax number and email address shall be as set out below unless and until the Administrator notifies the Group Members otherwise:

Attention: James Tobin

Hamilton-Byrne Class Action Proceeding

Mills Oakley Lawyers

Level 6/530 Collins Street

Melbourne Vic 3000

Fax: (03) 9605 0933

Email: caldwell@millsoakley.com.au

15. Time

15.1. The time for doing any act or thing under this Scheme may be extended by order of the Court.

Annexure B

**SUPREME COURT OF VICTORIA
HAMILTON-BYRNE CLASS ACTION**

CREESE

v

LIFE FOR ALL CREATURES LTD & ORS

(S CI 2017 03007)

IMPORTANT NOTICE

**NOTICE OF APPROVAL OF SETTLEMENT OF HAMILTON-BYRNE CLASS
ACTION**

This Notice relates to a class action commenced in the Supreme Court of Victoria on behalf of children of Anne Hamilton-Byrne (deceased) who suffered personal injury as a result of cruel and inhumane treatment by Anne Hamilton-Byrne and/or her servants or agents during the period from 1968 to 1987 (**Hamilton-Byrne Class Action**).

The Supreme Court has ordered that this notice be provided to inform registered group members that a settlement of the Hamilton-Byrne Class Action has now been approved by the Court.

You are receiving this notice because you have registered with Mills Oakley Lawyers, the plaintiff's solicitors, as a group member in the class action. This notice is provided to you further to the Notice of Proposed Settlement distributed in January 2021.

1. Settlement of the class action

The defendants to the class action are:

- (a) Life For All Creatures Ltd, a company to whom Anne Hamilton-Byrne transferred two properties in Olinda in 2010;
- (b) Roger Leonard Butcher and Geoffrey John Benjamin Dawes in their capacity as executors of the deceased estate of Anne Hamilton-Byrne.

The parties have agreed to a settlement of the class action, under which defendants have agreed to pay \$600,000.00 (**Settlement Sum**) inclusive of the plaintiff's legal costs, without any admission of liability. The terms of the settlement of the proceeding are set out in a settlement agreement that has been signed on behalf of the plaintiff and the defendants.

On 29 March 2022 the Supreme Court approved the settlement. The Court approval means that the settlement becomes binding on you and all other persons who fall under the definition of group member in the proceeding.

2. Distribution of the Settlement Sum

Settlement Distribution Scheme

The Court has also approved a Settlement Distribution Scheme (**Scheme**) which details the process for assessing registered group member's entitlement to compensation and for distributing the Settlement Sum between them.

The Scheme provides for the lead plaintiff (Ms Creese) to receive a payment of \$15,000.00 from the Settlement Sum which is intended to compensate her for the personal burden of being the lead plaintiff, a role which has benefitted all Registered Group Members. This amount is in addition to any amount the lead plaintiff may be entitled to by way of compensation for loss suffered as a result of her treatment as a child by Anne Hamilton-Byrne.

Persons who have registered and who meet the definition of 'group member' will receive an equal proportion of the Settlement Sum once the payment to Ms Creese and legal costs have been deducted. You will be contacted by Mills Oakley Lawyers in relation to your compensation entitlement under the Scheme in due course.

Legal Costs

The plaintiff's legal costs payable to Mills Oakley Lawyers, including the costs of administering the Scheme, have been assessed by an independent costs solicitor and approved by the Court, and will be paid from the Settlement Sum. You will not have any additional liability for the plaintiff's legal costs.

3. Address for questions

If you have any questions about the settlement or this notice, you can contact Mills Oakley Lawyers at any time, or seek your own independent legal advice.

Contact details for Mills Oakley Lawyers

Att: Sophie Caldwell
Hamilton-Byrne Class Action
Mills Oakley Lawyers
Level 6, 530 Collins Street
Melbourne Vic 3000
Telephone: (03) 9670 9111
Email: caldwell@millsOakley.com.au

CERTIFICATE

I certify that this and the 49 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Moore of the Supreme Court of Victoria delivered on 29 March 2022.

DATED this 29th day of March 2022.



.....
Associate