IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2020 02588

LYNDEN IDDLES & ANOR — Plaintiffs

v

FONTERRA AUSTRALIA PTY LTD & ORS — Defendants

JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	28 February 2023 and 23 June 2023
DATE OF JUDGMENT:	20 September 2023
CASE MAY BE CITED AS:	Lynden Iddles & Anor v Fonterra Aust Pty Ltd & Ors
MEDIUM NEUTRAL CITATION:	[2023] VSC 566

GROUP PROCEEDING — Settlement of group proceeding — Approval of settlement under s 33V of the *Supreme Court Act 1986* (Vic) — Settlement fair and reasonable — Group proceeding funded by litigation funder — Common fund order sought — Appropriate to make common fund order — Funding commission of 27.5% allowed — Cost of after the event insurance disallowed — Reimbursement of fair, reasonable and proportionate legal costs allowed — Allow $30,000 in favour of lead plaintiffs.

GROUP PROCEEDING — Common fund order — Whether power to make common fund order — *Botsman* confirms power in s 33V(2) of the *Supreme Court Act 1986* (Vic) to make common fund order at point of settlement — *Botsman v Bolitho* (2018) 57 VR 68 applied.

PRACTICE AND PROCEDURE — Special referee — Costs — Adoption of report — Report of the special referee adopted except in relation to the period after 21 February 2023 with the assessment of costs for that period to be referred back to the special referee for further report — *Supreme Court (General Civil Procedure) Rules 2015* (Vic), rr 50.03 and 50.04 — *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* (2009) 25 VR 119 applied, *Rowe v Ausnet Electricity Services Pty Ltd (No 9)* [2016] VSC 731 referred to.

COSTS — Conditional costs agreement — Agreement not in plain language — Does not identify basis on which uplift fee is to be calculated — Costs agreement void — Uplift fee not

recoverable — *Legal Profession Uniform Law*, ss 181(2)(a), 182(3)(a), 185(1) and (3) — *Russells v McCardel* [2014] VSC 287; *Wills v Woolworths Group Pty Ltd* [2022] FCA 1545, considered.

COSTS — Costs of approval hearing allowed out of settlement sum — Costs of further hearing relating to adoption of costs referee's reports not allowed out of settlement sum — Costs of that hearing incurred for benefit of law practice — *Reiter Brothers Exploratory Drilling Pty Ltd* (1994) 12 ACLC 430; *Thackray v Gunns Plantations Ltd (No 2)* [2011] VSC 417; *Re PPI Corporation Pty Ltd* [2014] VSC 366; *Re Custometal Engineering Pty Ltd* [2018] VSC 726; *Sons of Gwalia Ltd v Margaretic* (2006) 232 ALR 119; *Shao v One Funds Management Limited* [2023] VSC 251, distinguished.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	First hearing: Mr L Armstrong KC with Mr M Guo and Ms P Kelly Second hearing: Dr O Bigos KC with Ms N Lenga	Adley Burstyner
For the Defendants	First hearing: Mr R Heath KC with Ms L Dawson	Arnold Bloch Leibler
For the Intervenor	First and second hearing: Mr W Edwards SC with Mr O Nanlohy	William Roberts Lawyers
For the Objector	First hearing: Mr N Comben (self-represented)	None

TABLE OF CONTENTS

HIS HONOUR:

1 The plaintiffs, Lynden and Geoffrey Iddles, are dairy farmers. They bring this proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) ('the Act') on their own behalf and on behalf of all persons (including companies):

(a) who supplied milk to Fonterra[1] from 1 July 2015 to 30 June 2016 ('2015 season') from farms in Victoria, New South Wales, Tasmania or South Australia pursuant to a 'Fonterra Australia Milk Supply Handbook' (but not the Fonterra Australian 'Milk Supply Handbook – Wagga Wagga') and/or a Fonterra Australia 'Exclusive Milk Supply Agreement'; and

(b) who, as at 5 May 2015, continued to supply milk, or had committed to supply milk, during the 2015 season.

2 The plaintiffs claim that when Fonterra reduced the farmgate milk price ('FMP') for the 2015 season on 5 May 2016 ('the May 2016 Price Decrease'),[2] it breached its contracts with them and with the group members. They allege that between 29 June 2015 and 5 May 2016 Fonterra engaged in misleading or deceptive conduct and unconscionable conduct contrary to the *Australian Consumer Law* ('ACL') set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) in relation to its milk price announcements, and in implementing the May 2016 Price Decrease. The plaintiffs claim compensation for themselves and for group members who suffered loss arising from the alleged conduct.

3 Fonterra denies liability for the claims by the plaintiffs and group members. It also disputes the losses claimed by the plaintiffs and group members.

4 The group proceeding was due to be heard at a trial listed to commence on 15 November 2022.

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1 Fonterra Australia Pty Ltd, Fonterra Milk Australia Pty Ltd and Fonterra Brands (Australia) Pty Ltd (together, 'Fonterra').

2 This is also referred to as the 'Stepdown' in the settlement distribution scheme.

5 Pursuant to a settlement agreement dated 4 November 2022 ('Settlement Agreement'), the plaintiffs and Fonterra agreed on terms for a settlement of the group proceeding.

6 Pursuant to the Settlement Agreement, Fonterra has agreed to pay $25m ('the settlement sum') to the plaintiffs and group members, inclusive of costs, without admission of liability. The Settlement Agreement is subject to Court approval.

7 These reasons concern the plaintiffs' application for approval pursuant to s 33V of the Act. Section 33V is in the following terms:

> **Settlement and discontinuance**
>
> (1) A group proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court.

8 The Settlement Agreement provides that, where a group member owes money to Fonterra under a Fonterra Australia Support Loan ('FASL'), that balance will be deducted from any compensation paid to that group member. Where the balance of a group member's loan exceeds that group member's entitlement to compensation, the outstanding FASL balance will be waived by Fonterra.

9 The Settlement Agreement provides that, upon approval by the Court, the plaintiffs and group members release Fonterra from all claims made in this proceeding and in proceeding S ECI 2020 03513.

10 The proceeding has been funded by a litigation funder, LLS Fund Services Pty Ltd as Trustee for Litigation Lending Fund 1 ('the funder'). The Settlement Agreement provides that the parties to the agreement, being the plaintiffs, their solicitors, the funder and Fonterra, will do all things reasonably necessary for an application for orders in the nature of a Common Fund Order ('CFO') for payment to the funder firstly as reimbursement of legal costs, including insurance premiums, and secondly of a funding commission out of the settlement sum.

11 The authors of *Class Actions in Australia* set out the definition of a CFO as follows:[3]

> A "common fund order" is an order made on the application of a representative party who is in an existing contractual relationship with a litigation funder that requires group members to contribute pro rata to the funder a percentage of the common fund that comprises any moneys recovered through settlement or judgment in their favour, regardless of whether the group member has entered into a funding agreement with the funder. The liability to the funder is discharged as a first priority from any moneys recovered.

12 While not conditions precedent to the Settlement Agreement, the agreement contemplates that Court approval will be sought for payment from the settlement sum of the following items before distribution of the balance to the plaintiffs and group members:

(a) the reimbursement to the funder of legal costs, including insurance premiums;

(b) the funding commission;

(c) the plaintiffs' reasonable unpaid legal costs (including any uplift) and disbursements of and incidental to the proceeding;

(d) the plaintiffs' reasonable legal costs (including any uplift) and disbursements of and incidental to the application for settlement approval;

(e) the reasonable legal costs and disbursements of the administrator of administrating the settlement distribution scheme ('SDS'); and

(f) any other payments as approved by the Court.

13 When determining whether it is appropriate to approve the settlement, it is necessary to consider four issues:

(1) Whether the settlement is fair and reasonable as between the plaintiffs and the defendants, having regard to the interests of the group members considered as a whole.

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[3] Damian Grave, Ken Adams, and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 3rd ed, 2022) 660, [14.140].

(2) Whether the arrangements for sharing the settlement sum between the plaintiffs and group members and the provisions of the Settlement Agreement and the SDS are fair and reasonable as between the plaintiffs and group members who are bound by the settlement.

(3) Whether the Court has power to make a CFO and, if so, whether such an order should be made.

(4) Whether the proposed deductions from the settlement sum, including the funder's commission and the legal costs, both paid and unpaid, and the funder's costs of ATE insurance should be allowed.

14 At the hearing on 28 February 2023, I announced that I was satisfied that the proposed settlement is fair and reasonable as between the interests of the plaintiffs and defendants and that the distribution arrangements for the settlement sum, including in relation to the FASLs, were reasonable as between the plaintiffs and the group members and as between all group members.

15 On 28 February 2023, I expressed my thanks to the lead plaintiffs, Lynden and Geoffrey Iddles, for the important role played by them in the proceeding on behalf of the group members. As stated on that occasion, I consider that the payment in their favour of $30,000 from the settlement sum in recognition of their role is appropriate.

16 Following the hearing on 28 February 2023, there remained for consideration what further deductions should be allowed from the settlement sum, whether the Court has power to order a CFO, and, if so, whether the deductions sought by the plaintiffs, their solicitors and the funder should be permitted pursuant to a CFO. At that time, it was agreed by the parties that the determination of the question of jurisdiction to make a CFO should be deferred until after delivery by the Full Federal Court of its decision in *Elliott-Carde v McDonald's Australia Ltd* ('*McDonald's*'), at that time scheduled to be heard on 6 March 2023. Further evidence was to be filed addressing various issues relating to legal costs proposed by the plaintiffs as deductions from the settlement sum pursuant to a CFO.

17 On 14 April 2023, I made orders approving the settlement of the class action with reasons to follow so that the administration of the SDS could commence.

18 On 22 May 2023, I adjourned the further hearing of the application to 23 June 2023, anticipating that, by that time, the reserved decision in *McDonald's* may have been handed down. On 19 May 2023, further written submissions were filed in *McDonald's* in which the Commonwealth Attorney-General has intervened in response to a s 78B *Judiciary Act 1903* (Cth) notice. A decision in *McDonald's* has not yet been handed down.

19 On 19 June 2023, the plaintiffs and the funder informed the Court that they considered there should be no further delay in the finalisation of the outstanding issues. The Court was informed that to proceed with a hearing would reduce the prospect that multiple payments to group members would need to be made, meaning greater efficiency and the avoidance of unnecessary costs.

20 On 23 June 2023, I received further evidence and submissions in relation to legal costs and disbursements following the provision of a further report by the Court-appointed costs Special Referee ('the referee').

21 Having given consideration to the issues noted in paragraph 13, I have formed the following opinions, some of which, as I have mentioned, were communicated in open Court on 28 February 2023:

(a) The proposed settlement is fair and reasonable as between the interests of the plaintiffs and group members and the interests of the defendants.

(b) The proposed arrangements for sharing the settlement sum and also the provisions of the Settlement Agreement and SDS, and concerning the FASLs are fair and reasonable as between the group members.

(c) It is within the power conferred on the Court by ss 33V and 33ZF of the Act and it is appropriate to make a CFO. It is appropriate to allow the following deductions from the settlement sum on that basis:

(i) a payment to the plaintiffs of $30,000;

(ii) funder's commission of 27.5%;

(iii) legal costs and disbursements are to be deducted from the settlement sum in accordance with the reports of the referee as to costs, whose reports I adopt, including in relation to the various contested costs issues discussed in these reasons. That is the position concerning legal costs and disbursements referable to the period up to 21 February 2023; and

(iv) the costs of the referee.

(d) It is not appropriate to allow the funder's costs of ATE insurance.

(e) It is appropriate that certain legal costs of the plaintiffs incurred after 21 February 2023 together with the costs of the further hearing and of the administration of the Settlement Agreement and the SDS be paid with the quantification of those costs to be referred to the referee for further report. It is appropriate to refer the matter for further report because there have been some factual developments that are relevant to the quantification of costs that have occurred since the referee completed her most recent report. If the referee is either unwilling or unable to determine those amounts; such amounts in relation to post 21 February 2023 costs, and also the costs of the referee, are to be determined by the Costs Court acting consistently with the applicable legislation and in accordance with these reasons.

Settlement Approval: the principles to be applied

22 In *Botsman v Bolitho* ('*Botsman*'),[4] the Court of Appeal said that s 33V of the Act confers two distinct but related powers upon the Court. The first, in s 33V(1), power to approve the settlement. The second, in s 33V(2), power to approve the distribution of payments.

[4] [2018] VSCA 278; (2018) 57 VR 68, 111 [200] (Tate, Whelan and Niall JJA).

23 In *Australian Securities and Investments Commission v Richards*,[5] the Full Court of the Federal Court (Jacobson, Middleton and Gordon JJ) said:[6]

> The role of the Court is important and onerous … It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises.

24 The s 33V task requires a consideration of whether the settlement is in the interests of all group members and whether it is fair and reasonable having regard to the claims of the group members who will be bound by it if approved.

25 As Stevenson J observed in *Quirk v Suncorp Portfolio Services Ltd (No 2)*,[7] the question of whether the settlement is reasonable *per se* cannot be separated from ancillary questions concerning the approval of funding and legal costs.[8] The evaluation of whether a settlement is fair and reasonable 'must be carried out by reference to what all group members obtain in their hands following the resolution of their individual claims in the event that the settlement is approved'.[9]

26 In *Murillo v SKM Services Pty Ltd* ('*Murillo*'),[10] John Dixon J emphasised that reasonableness requires an assessment of whether the aspect of the settlement under consideration is within the range of reasonable decisions:[11]

> The practical approach to resolution of whether a settlement is 'fair and reasonable' involves identifying 'any features of a settlement that are obviously unreasonable or unfair.' The court does not 'second-guess' or go behind the plaintiff's legal representative's tactical or other decisions, but satisfies itself that the decisions are within the range of reasonable decisions in the known circumstances and the reasonably perceived risks of the litigation.

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5 [2013] FCAFC 89.
6 Ibid [8] (citations omitted).
7 [2022] NSWSC 1457.
8 Ibid [18].
9 Ibid, quoting *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289, [2] (Lee J).
10 [2019] VSC 663.
11 Ibid [32] (citations omitted).

27 Earlier, in *Williams v FAI Home Security Pty Ltd (No 4)*,[12] Goldberg J listed factors which will often require consideration in cases such as the present:[13]

(a) the amount offered to each group member;

(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 independent 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; and

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

The facts

28 The events that occurred giving rise to the group proceeding can be shortly stated.

29 The 2015 season was from 1 July 2015 to 30 June 2016.

30 In late June 2015, just before the beginning of the 2015 season, Fonterra informed farmers who had agreed to supply it with milk pursuant to either the Fonterra Australia Milk Supply Handbook or the Fonterra Australia Exclusive Milk Supply Agreement that the opening FMP for the coming season (expressed as 'dollars per kilogram milk solids' or '$kg/MS') ('Opening Price') was $5.60.

31 The information provided by Fonterra in relation to the Opening Price of $5.60 was accompanied by a forecast range of the predicted average annual price at the end of the season of $5.80-$6.00 ('Closing Range').

32 The plaintiffs allege that the Opening Price was calculated by Fonterra as a weighted average of the aggregate of the farmer specific FMPs that Fonterra expected to pay to

12 [2000] FCA 1925; (2000) 180 ALR 459.
13 Ibid 465, [19].

all farmers over the course of the coming season and that, pursuant to the terms of the agreement with the farmers, the Opening Price was to be Fonterra's considered estimate for the season. They allege that it was a term of the agreement that prices paid from time to time during the season may be increased as a result of Fonterra's bi-monthly reviews ('Step-ups'), but that increases were not guaranteed. They allege that it was also a term that any price decreases would be implemented only where warranted, with prospective effect, upon reasonable notice, further or alternatively in reasonable amounts.

33 Fonterra's Opening Price was the same as that of one of its major competitors, Murray Goulburn. On 27 April 2016, Murray Goulburn announced it was revising its forecast FMP price from $5.60 to a range between $4.75 and $5.00.

34 On 5 May 2016, Fonterra announced the May 2016 Price Decrease with immediate effect. Fonterra cut its weighted average annual 2015 season price to $5.00.

35 Although the May 2016 Price Decrease was a reduction in price from $5.60 to $5.00, because the price reduction operated as an average price across the season as a whole, to achieve that outcome meant that Fonterra would cut the actual price paid to farmers for the supply of milk in May and June 2016, the last two months of the 2015 season, to around $1.91 (comprising $1.16 fat and $2.89 protein).

36 The timing of the May 2016 Price Decrease meant that it impacted disproportionately upon farmers with autumn calving cows ('autumn calvers') whose milk production peaked in the final two months of the season.

37 Anticipating the impact on farmers with autumn calvers; at the same time it announced the May 2016 Price Decrease, Fonterra announced a loan program — the Fonterra Australia Support Loans or FASLs. Under the FASL program, farmers could apply for loans of up to 60c/kg/MS based on actual milk supplied to Fonterra in May and June for the 2015 season. The FASL scheme operated as a loan to individual farmers who took out the loans which were repayable over three years from the start of the 2017/2018 season.

38 On 13 May 2016, Fonterra announced additional support measures for farmers with autumn calvers, the effect of which Fonterra alleged was to pay those farmers an additional $2.50kg/MS for milk supplied in May and June 2016 ('Autumn Offset Payments').

39 On 10 May 2017, Fonterra announced that it would make an additional payment of 40c/kg/MS to eligible suppliers ('Additional 40c Payment').

40 Fonterra alleges that the average FMP ultimately paid by it for the 2015 season was at least $5.66kg/MS or alternatively $5.36kg/MS, or in the further alternative $5.13kg/MS; the difference between $5.13 and $5.36 being accounted for by the Autumn Offset Payments, and the difference between $5.36 and $5.66 being accounted for by the Additional 40c Payment.

The proceeding

41 The plaintiffs commenced the proceeding on 17 June 2020. They did so following the entry by them into a litigation funding agreement ('LFA') with the funder and their solicitors and the entry into a costs agreement with their solicitors ('CA'), both signed on 15 June 2020.

42 The Funding Information Summary Statement dated 17 July 2020 informed group members that, under the LFA:

(a) the funder would pay 70% of the solicitors' time-based charges plus expenses properly incurred by them, such as barristers' fees, witness costs and Court fees;

(b) the funder would provide any security for costs that might be ordered by the Court and pay any adverse costs orders; and

(c) if there was a settlement of claims covered by the class action or judgment resulting in compensation being payable to the plaintiffs and group members, then the plaintiffs, the solicitors and the funder would seek orders from the Court including for the payment of commission in favour of the funder.

43 On 28 May 2021, the Court made orders providing for an opt-out process. The class notice provided group members with information about the funding arrangements and provided an opt-out form for farmers to complete if they decided to opt-out. 74 opt-out notices were later received.

44 The pleadings for trial comprise the amended statement of claim dated 8 September 2020, Fonterra's amended defence dated 16 June 2022, and the plaintiffs' reply to the amended defence dated 17 August 2022. If the proceeding had not settled, the estimate was for a trial with a duration of approximately 20 days.

45 The plaintiffs plead three different causes of action. The first, a claim for breach of contract, relying on terms that are alleged to be express and to be implied in both the Fonterra Australia Milk Supply Handbook and the Exclusive Milk Supply Agreement. Fonterra denies that the terms alleged are either express or to be implied. The second cause of action, a claim for misleading or deceptive conduct in contravention of s 18 ACL. Fonterra denies engaging in misleading or deceptive conduct. The third, a claim for unconscionable conduct contrary to s 21 of the ACL. Fonterra denies the unconscionable conduct claim.

46 The settlement was negotiated shortly prior to the trial. It was arrived at following a mediation on 13 October 2022 by Mr Finkelstein AO KC as mediator. In principle settlement was reached on 20 October 2022 and was later documented in the Settlement Agreement.

47 The settlement was achieved after the expenditure by the funder of $3,206,736.31 on legal costs and disbursements up to 30 November 2022. There was additional legal worked carried out by the plaintiffs' solicitors, Adley Burstyner, which was unfunded. The funder was required to provide security for costs throughout the course of the proceeding which it did via the provision of a series of undertakings. The first undertaking on 27 August 2020 in the amount of $200,000; the second undertaking on 13 August 2021 in the amount $900,000; the third undertaking on 14 February 2022 in

the amount of $240,000; and the fourth undertaking on 28 July 2022 in the amount of $700,000.

48 On 18 November 2022, the Court appointed the referee, Catherine Mary Dealehr, to report on:

(a) the amount of legal costs that the Court should approve as fair, reasonable and proportionately incurred, to be deducted from the settlement sum; and

(b) an estimate as to the costs that would reasonably be incurred during the Settlement Administration process.

49 On 2 December 2022, group members were sent a Court approved notice of the proposed settlement. The notice was also published in a number of regional newspapers. The notice provided details of the settlement and of each of the proposed deductions from the settlement sum.

Objections to the Settlement

50 The class is identified as comprising approximately 1,000 dairy farmers. As at 28 February 2023, almost 600 farmers had registered to participate in the settlement. None of the group members who had registered and whose registration has been accepted prior to 28 February 2023 lodged objection to any aspect of the proposed settlement.

51 During the hearing of the approval application, which was livestreamed, I directed that persons who are group members be afforded another 14 days to register to participate. That is because the settlement effects a release in favour of Fonterra by all group members but only confers an entitlement to share in the benefits of the settlement upon those who register.

52 During the approval hearing, senior counsel for the lead plaintiffs urged those who had not yet registered to take up the extended opportunity to do so. I endorsed those remarks.

53 The only objection to the proposed settlement was from Mr and Mrs Comben whose registration as a group member had not been accepted. Mr Comben swore two affidavits. Mr Comben and his wife both attended the approval hearing.

54 At the outset of the approval hearing, there was a dispute as to whether Mr and Mrs Comben, who last supplied milk to Fonterra in early January 2016, meet the criteria for a group member. As the definition of group members includes farmers who not only supplied but had committed to supply milk to Fonterra after 5 May 2016, and as Mr and Mrs Comben had changed their herd to autumn calvers, whether or not they qualify to be group members is not clear cut.

55 During the hearing, discussions between the Combens and the legal practitioners for the parties resulted in a practical procedure being agreed to so as to deal with the unresolved issue of the Combens' eligibility to participate in and be bound by the settlement. A regime for the exchange of factual information, an assessment of eligibility by the plaintiffs' solicitor, Mr Burstyner, the proposed scheme administrator, and a right to appeal his decision if not favourable to Mr and Mrs Comben provides a fair and practical way of dealing with the position of Mr and Mrs Comben.

Evidence in support of the approval application

56 At the approval hearing on 28 February 2023, the plaintiffs relied on the following documents:

(a) Affidavit of David Burstyner affirmed 4 November 2022 ('First Burstyner Affidavit');

(b) Affidavit of Natasha Monique Vassallo sworn 9 December 2022;

(c) Affidavit of David Burstyner affirmed 16 December 2022 ('Second Burstyner Affidavit');

(d) Plaintiffs' submissions dated 31 January 2023;

(e) Affidavit of Geoffrey Kenneth Iddles sworn 23 February 2023;

(f) Affidavit of Lynden Iddles sworn 23 February 2023;

(g) Affidavit of David Burstyner affirmed 27 February 2023 ('Third Burstyner Affidavit');

(h) Affidavit of David Burstyner affirmed 27 February 2023 ('Fourth Burstyner Affidavit'); and

(i) Plaintiffs' supplementary submissions dated 27 February 2023.

57 The defendants relied on their submissions dated 17 February 2023 and the affidavit of Matthew David Lees sworn 17 February 2023.

58 The funder relied on their submissions dated 15 February 2023 and the affidavit of Stephen James Conrad affirmed 16 February 2023, as well as submissions and affidavits filed by the plaintiffs. Following the hearing, the Court received further submissions from the funder dated 25 March 2023 in relation to ATE insurance costs.

59 Prior to the approval hearing, the Court also received two reports from the referee; the first dated 24 February 2023, the second dated 27 February 2023.

60 At the 23 June 2023 costs hearing, the plaintiffs and the funder relied on the following additional materials:

(a) Costs Report of Suzanne Maree Ward dated 20 April 2023 ('Ms Ward's report);

(b) Affidavit of David Burstyner affirmed 20 April 2023 ('Fifth Burstyner Affidavit');

(c) Affidavit of Geoffrey Kenneth Iddles sworn 20 April 2023;

(d) Third Report of Catherine Mary Dealehr dated 8 May 2023;

(e) Intervener's submissions dated 15 June 2023;

(f) Plaintiffs' submissions dated 15 June 2023;

(g) Affidavit of David Burstyner affirmed 16 June 2023 ('Sixth Burstyner Affidavit'); and

(h) Affidavit of David Burstyner affirmed 23 June 2023 ('Seventh Burstyner Affidavit').

61 On 8 September 2023, David Burstyner affirmed a further affidavit in support of an amendment to the calculation annexure to the SDS to correct a minor error that had been identified. That issue and an application to amend the Scheme to correct the error was foreshadowed in the course of the 23 June 2023 hearing. As indicated at the time, that matter is appropriately determined on the papers.

Confidentiality

62 There is no controversy about the need to make confidentiality orders in relation to parts of the evidence filed in support of the approval application.

63 As was agreed by the parties, the confidential opinion of counsel in support of the approval application is to be the subject of a confidentiality order. Parts of the Second Burstyner Affidavit identified in a draft order prepared on behalf of the plaintiffs which, unless the subject of a confidentiality order, would reveal legally privileged information or information which is confidential are also to be the subject of a confidentiality order.

64 Separately, the details of the defendants' bank account, contained in the exhibit bundle to the First Burstyner Affidavit, are agreed to be kept confidential, as are certain parts of the affidavit of Mr Lees, Fonterra's solicitor. Exhibit MDL-1 to the affidavit of Mr Lees contains confidential information in relation to FASL loan balances in the names of individual group members derived from Fonterra's records. The parties are also agreed that the entire exhibit bundle MDL-2 to the affidavit of Mr Lees should be kept confidential as it contains private and sensitive information in respect of suppliers.

65 Finally, parts of the affidavit of Stephen James Conrad of 14 February 2023, filed on behalf of the funder, are confidential. The relevant parts of the affidavit primarily deal

with confidential deliberations by and on behalf of the funder which, if not the subject of confidentiality orders, would disclose commercially sensitive information relevant to the calculation of commission rates and the funder's internal deliberations.

Assessment of the settlement as between the parties

66 Having read the confidential opinion of counsel having the conduct of the proceeding on behalf of the lead plaintiffs and having reviewed the pleadings, I have no doubt that the Settlement Agreement, which provides for the payment of $25m inclusive of costs to the lead plaintiffs and group members in exchange for releases by all group members, is a fair and reasonable settlement.

67 In evaluating the reasonableness of the settlement, and evaluating the critical question of prospects of success on liability, I take into account that none of the three causes of action relied upon by the plaintiffs, the liability for each of which is denied by Fonterra, are without their difficulties and complexities.

68 The primary claim for breach of contract is one which depends upon a contest as to whether or not there are the express terms alleged and whether or not terms alleged to be implied are to be implied.

69 The first implied term, the 'Overall Price Match Term', is an implied term that Fonterra's average season price would match that of its biggest competitor, Murray Goulburn. The so-called 'Considered Estimates Term' is alleged to be an express term that required Fonterra to set its Opening Price by reference to 'four variables'; market returns, operating costs, business performance and exchange rates, and as an outcome of bi-monthly reviews. Fonterra denies the existence of such a term. The second implied term, the 'Reasonable Step-downs Term', is an implied term which required as a matter of contract that any price decreases were to be justified by reference to changes in the four variables, with prospective effect be effected on reasonable notice, alternatively, in reasonable amounts, so as not to cause uncalled for significant financial difficulty.

70 It is only necessary to identify the contest as to the existence of the express term alleged and to consider each of the implied terms to appreciate the significance of the burden on the plaintiffs. At trial they would be required to satisfy the Court that the express term alleged exists, and as to the terms alleged to be implied, that the criteria for the implication of each such term in accordance with the decision in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[14] is met. The discharge of that burden at trial would not be without its challenges.

71 The second cause of action is a claim for misleading or deceptive conduct, including in relation to pricing representations being representations as to future matters within the meaning of s 4 of the ACL. While the future matters element of the conduct alleged facilitates proof, there are separate issues with this cause of action. Assuming misleading or deceptive conduct to be made out at trial, for the lead plaintiffs and group members to recover would have required that each individual group member establish reliance or change of position as a result of the representations alleged. Proof of reliance or change of position can be difficult. There are many cases where claims for breach of s 18 and its predecessor have failed at the reliance stage. Importantly in a group proceeding of this nature, proof of reliance is a matter for each group member to establish. To do so would be time-consuming and costly. Some group members would succeed in proving the necessary causal link between the misleading conduct and losses sustained, others would not.

72 The third cause of action, unconscionable conduct contrary to s 21 of the ACL, is not a cause of action which is easy to establish. Section 21 contains the statutory prohibition against 'unconscionable conduct'. Section 22 contains a non-exhaustive list of matters to which the Court may have regard in determining whether or not there has been a contravention of s 21.

73 In *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*,[15] the Full Federal Court undertook an analysis of the High Court's reasoning in

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14 (1977) 180 CLR 266, 283.

15 [2021] FCAFC 40; (2021) 285 FCR 133.

Australian Securities and Investments Commission v Kobelt ('*Kobelt*').[16] The Court concluded that *Kobelt* does not require that there must be found to be some form of pre-existing disability, vulnerability or disadvantage of which advantage was taken in order for statutory unconscionability to be made out.[17] However, the task for the Court in determining such a claim was described by Gageler J in *Kobelt* in the context of the mirror provision in s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth):[18][19]

> 87. … The correct perspective is that s 12CB operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. The function of a court exercising jurisdiction in a matter arising under the section is to recognise and administer that normative standard of conduct. The court needs to administer that standard in the totality of the circumstances taking account of each of the considerations identified in s 12CC if and to the extent that those considerations are applicable in the circumstances.

74 As that description demonstrates, there remain a number of factors that may need to be considered in any given case in order to determine whether or not there has been a contravention. The reference by Gageler J to the 'totality of the circumstances' highlights the uncertainty of an unconscionable conduct claim contrary to statute.[20]

75 Considerations such as those to which I have referred concerning liability, combined with a dispute as to the basis of calculation of damages, including whether the Autumn Offset Payments are to be brought to account in calculating damages, means that the certainty of a settlement which takes into account the risks is highly desirable in the interests of group members as a whole.

76 The confidential opinion of counsel discusses these and other issues relevant to the assessment of the risks of succeeding on liability and quantum in a careful and

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16 [2019] HCA 18; (2019) 267 CLR 1.

17 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; (2021) 285 FCR 133, 152 [78].

18 Section 12CB of the ASIC Act concerns the supply of financial services. Section 21 of the ACL concerns the supply of goods or services. The provisions are otherwise identical.

19 *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; (2019) 267 CLR 1, 38 [87].

20 See also more recently *AHG (WA) (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* [2023] FCA 1022, including at [48] (Beach J).

considered manner. The likely best case scenario for the lead plaintiffs and group members, if each of the causes of action is made out, is identified and the sum of $25m being the settlement sum, is identified as a percentage of the best case scenario. The advice is thorough, comprehensive and, most importantly in my opinion, realistic.

77 Adopting the approach to reasonableness to which John Dixon J referred in *Murillo*, I consider that the settlement is fair and reasonable as between the plaintiffs and group members on the one hand and Fonterra on the other.

Assessment of the settlement as between group members

78 I am also satisfied that the SDS, as amended following Mr Burstyner's 8 September 2023 email, makes appropriate arrangements for the sharing of the settlement sum between the lead plaintiffs and group members in a manner that is fair and reasonable having regard to the interests of the group members as a whole.

79 The mechanism for the calculation of group members' losses upon which their respective entitlements to share in the net amount of the settlement sum after deductions (the 'Calculation Protocol') is a simple one. The simplicity of the method does not in any way detract from its appropriateness.

80 The Calculation Protocol estimates the milk revenue net of fees and levies that each participating claimant would have received from between 4 May 2016 to 30 June 2016 (defined in the SDS as the 'Step-Down Period') were it not for the May 2016 Price Decrease, at the fat and protein production volumes in the most recent income estimate made by Fonterra prior to the Step-Down Period ('Counterfactual Revenue'). As originally devised and in place as at 28 February 2023, the estimated volume information relied on as the starting point for the calculation relied on information available to the plaintiffs and their lawyers from Fonterra's records. From that amount the actual milk revenue received by each claimant during the Step-Down Period is to be deducted. That is the case regardless of the processor or processors that the participating claimant supplied during that period.

81 To elaborate briefly, some participating claimants may have elected to supply another processor, such as Murray Goulburn or Bega, after the May 2016 Price Decrease, perhaps in the last month of the 2015 season. Whatever income they derived from that supply is brought to account in calculating that group member's earnings after the May 2016 Price Decrease. That is the case just as income received by other group members from Fonterra in the Step-Down Period is to be brought to account.

82 In the course of the scheme administration, it emerged that, in the case of 320 of 597 group members, the volume of milk actually produced in May and June 2016 exceeded the Fonterra estimates relied upon as at 28 February 2023 as the starting point for the calculation of loss. A number of group members identified this as an issue in their Claim Contribution Notices, contending that the use of Fonterra's estimates as the starting point unfairly understated their losses. Mr Burstyner, in his capacity as scheme administrator, proposed an amendment to the SDS to meet this issue. That is, to provide that the counterfactual revenue is to be defined as follows:

> Counterfactual Revenue = milk revenue for May and June 2016 in the most recent income estimate made by Fonterra prior to the Step-Down Period, *or based on actual production for either or both months if greater for that month than what was estimated,* net of fees and levies.

83 I agree the proposed amendment to the SDS is appropriate and necessary to ensure the settlement is fair and reasonable as between the group members.

84 The Calculation Protocol as amended operates fairly as between group members in relation to the settlement sum. That is achieved by calculating each participating claimant's notional share of the net distribution sum as the proportion that each participating claimant's revenue difference bears to the sum of all participating claimants' revenue differences.

85 No doubt in addition to loss of revenue referable to the Step-Down Period from direct milk revenue losses, farmers across the group would have experienced their own idiosyncratic losses as a result of the May 2016 Price Decrease. Some farmers may have experienced losses from selling stock at reduced prices, others may have incurred additional interest costs as a result of lost revenue, others again may have

incurred expenses in the form of continuing obligations in respect of machinery purchases or other commitments entered into in anticipation of the opening price being maintained that they would not otherwise have entered into were it not for the representations made by Fonterra. Recognising that the SDS does not differentiate between those individual losses and circumstances, I nevertheless consider that the uniformity of approach which the scheme reflects is both reasonable and in the interests of group members as a whole.

86 One of the reasons the SDS is in the interests of group members as a whole is that it relies upon an appropriate starting point and brings to account revenue received which is consistent in terms of its composition with the Fonterra records based counterfactual revenue or actual production for the two months, whichever is the greater, as the starting point. It is, in effect, a before and after Step-Down Period calculation. It has the benefit of simplicity and reliability in the sense that both the Fonterra opening position (or the actual milk production of the group member) and the after position of individual group members reflected in their income from milk production is readily and easily ascertainable. To seek to bring into account the individual circumstances of group members, including losses referrable to matters such as those to which I have referred, would be cumbersome, would likely not be cost-effective, and would be very time-consuming. To do so would also be to move away from a common basis of calculation of entitlement across the group which is one of the significant advantages of the SDS.

87 The SDS provides that if a group member is dissatisfied with the calculation of their notional share of the net distribution sum, then they may deliver to the administrator a 'Dispute Notice' and the administrator shall conduct a review and, if the administrator declines to adjust the assessment, he shall refer his decision for review by junior counsel. That is, junior counsel who has been involved throughout this proceeding and is familiar not simply with the legal issues, but also with the types of factual issues that may arise. In his affidavit dated 8 September 2023, Mr Burstyner reported that no Dispute Notice or review under the SDS has been pursued.

88 There is one aspect of the Settlement Agreement and SDS that requires specific consideration. That concerns the FASLs. To the extent group members have outstanding loans to Fonterra as part of the FASL scheme, those debts are to be repaid out of that group member's entitlement. That is not controversial. What might be regarded as controversial is the fact that if a group member's entitlement is less than the sum that the group member owes to Fonterra pursuant to a FASL, as part of the settlement, that group member's loan will be treated as having been discharged. There are approximately 28 suppliers, including the lead plaintiffs, with an outstanding balance on their FASL. Confidential information was presented in an exhibit to the affidavit of Mr Lees concerning both the average level of the FASL debts and also concerning the lead plaintiffs.

89 The group of persons, including the lead plaintiffs, who have outstanding balances on their FASLs, will receive an additional benefit from the settlement. Given the circumstances of the FASLs which directly arise out of and came into being as a response to the May 2016 Price Decrease, I do not consider that the additional benefit received by those group members means that the settlement is other than fair and reasonable as between group members. I am fortified in that view by the fact that while some disquiet has been expressed in relation to this issue, none of the group members lodged a formal objection to this aspect of the SDS.

What allowance should be made in favour of the lead plaintiffs?

90 It is important to recognise the importance of the role undertaken by Lynden and Geoffrey Iddles as the lead plaintiffs and to be aware of the significant toll the performance of that role has taken upon them.

91 To assume the burden of lead plaintiffs must not have been an easy decision for Mr and Mrs Iddles. Neither of them had previously been involved in any court proceedings anything like this proceeding.

92 On 5 May 2016, when Fonterra gave notice of the May 2016 Price Decrease, Mr and Mrs Iddles were multi-generational dairy farmers, both aged 63. They had supplied Fonterra and its predecessors with milk for approximately four decades.

93 In Mr Iddles' affidavit, he describes how, on 17 June 2016, he first became aware of a potential case against Fonterra when he met with Mr Burstyner at a farmers' meeting at Shepparton, held to discuss the impact of the May 2016 Price Decrease. He attended two further meetings with the solicitors in Melbourne in 2017. Prior to the second such meeting, he and his wife agreed they would be willing to be the lead plaintiffs for the class action. They attended further meetings between 2018 and February 2020 with solicitors, a litigation funder and junior counsel. On each occasion, a round trip of approximately six hours was involved from their home at Strathmerton. Generally on those visits they stayed at their daughter's home.

94 As part of performing their role as the lead plaintiffs, Mr and Mrs Iddles were involved in providing details of their losses and expenses arising from the May 2016 Price Decrease. They were required to work with their farm adviser to complete loss information and to provide information about their financial records, cattle sales, tax returns and general farming business. They spent many hours in this type of preparatory work before the proceeding was issued. They were involved in collating documents and making an affidavit of documents. They were required to respond to requests for further discovery from Fonterra's lawyers and to work with lawyers to prepare and then finalise witness statements for filing with the Court. Mr Iddles estimates that, including attending mediation, he spent approximately 156 hours directly involved in meetings, work and travel concerning the proceeding.

95 There was, in addition, a personal element which took its emotional toll on both Mr and Mrs Iddles. Mr Iddles participated in a four hour video session and other communications with a forensic psychologist retained as the plaintiffs' expert witness. In September 2022, Mr Iddles was required to meet with an expert psychiatrist retained on behalf of Fonterra.

96 Mr Iddles has given evidence that he found the driving to and from Melbourne and attending meetings with the legal advisers quite exhausting. He found the demands from Fonterra's lawyers regarding his medical history, personal financial planning and succession planning, and the conference with Fonterra's forensic psychologist to

be stressful. At times it wore him down, and at times the impact of acting as one of the two lead plaintiffs caused Mr Iddles to become emotional, particularly when preparing his witness statement. He also felt responsible for the other farmers who had registered for the class action and he ruminated about whether he and his wife were doing enough for the case.

97 I am not surprised that Mr Iddles found the litigation process very stressful.

98 I accept Mrs Iddles' evidence that for the last five and a half years the Iddles' family life has revolved around this case. The May 2016 Price Decrease impacted not only Mr and Mrs Iddles, but also their sons who took over the farm, one of whom prepared a witness statement. I accept that the prospect of attending court and being required to give evidence and to be cross-examined caused a great deal of anxiety to Mrs Iddles, who had never previously been in a courtroom.

99 The notice of proposed settlement to group members informed them that Mr and Mrs Iddles would ask the Court to approve payment of $30,000 for the time, inconvenience and stress that they incurred in bringing the action on behalf of the group members. There has been no objection to the approval of that amount. I am confident that if group members had read the detail of the involvement of Mr and Mrs Iddles in the proceeding, the work that they performed and understood the emotional burden that Mr and Mrs Iddles took upon themselves in the interests of the group members, they would appreciate that the amount of $30,000 is a modest sum indeed to compensate them personally.

100 I have no hesitation in determining that $30,000 is an appropriate allowance in favour of Mr and Mrs Iddles.

Can and should a Common Fund Order be made?

101 The notice of the proposed settlement advised group members that a 27.5% deduction for funding commission would be sought on a 'common fund' basis. That is so that all group members pay a share, regardless of whether they have signed a litigation funding agreement.

102 The most direct consideration of the question of power to make a CFO at the point of settlement is found in *Botsman*. *Botsman* was an appeal against an order approving settlement of a group proceeding. The unanimous judgment of the Court confirms the power in s 33V to approve a CFO for funder's commission. The Court of Appeal held that the settlement sum as a whole was fair and reasonable.[21] However, the approval of the funder's commission and legal costs payable from the settlement sum was not permitted to stand.

103 Given the recent controversy that has arisen in the Federal Court where the relevant legislation is not in identical terms to s 33V, it is appropriate to set out the reasoning of the Court of Appeal in *Botsman* concerning the power to make a CFO at some length:[22]

> 210. Group proceedings exist to avoid a multiplicity of actions and are attractive to group members because it may not be feasible, for economic or other reasons, for a putative plaintiff to run his or her claim as a single proceeding. Many group proceedings will only be brought and prosecuted with the underwriting of a funder engaged in a commercial enterprise.
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> …
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> 214. Unless bound by a funding agreement, and in the absence of a Court order under s 33V(2), a group member will have no obligation to pay any share of the costs or litigation funding charges in bringing the proceeding to completion by settlement or judgment. The inevitable scope for group members to 'free ride' leads to the potential for unfairness and injustice.
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> 215. The injustice exists because some group members will stand to obtain windfall gains, that is, benefit from the litigation without meeting the costs of bringing the proceeding or bearing the risks of failure. Further, the funder may not recover its outgoing, let alone return a profit, if it is limited to recovering from funded members.
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> 216. In order to overcome that potential unfairness, and because a funder may regard its contractual entitlements from funded group members as inadequate or inappropriate, the courts have approved payments to funders out of the settlement sum. As mentioned above, two models have been deployed: fund equalisation and common fund orders. In

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21 *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68, 73 [6], 137–138 [341]–[347] (Tate, Whelan and Niall JJA).

22 Ibid 113 [210], 113–114 [214]–[216], 141–142 [371]–[372], 142 [374], 143 [379]–[381], 144–145 [389], 145 [391] (citations omitted).

every case, the court must have an eye on the quantum of any commission and how it is to be borne.

…

The statutory provisions

…

371. As already observed, s 33V(1) contemplates that the Court will make an order approving the settlement of the claims brought in the group proceeding. Subsection 33V(2) deals with the Court's power to approve the distribution of money paid under the settlement. The two provisions confer two distinct powers.

372. The power in s 33V(2) given to the Court to make such orders 'as it thinks fit' with respect to the distribution of any money, including interest, paid under a settlement is a broad one. It logically succeeds the approval of the settlement under s 33V(1) and has a different focus.

…

374. In some cases, the funder may seek no more than the payment of its contractual entitlements under a funding agreement. In other cases, and the present is an example, the funder will seek a payment in the form of a common fund order and the source of any right in the funder for payment will be the terms of the court order. …

…

379. It is important to add that, under s 33V of the *Supreme Court Act,* a group proceeding may not be settled without the approval of the Court. It follows that any agreement to settle is not enforceable without the approval of the Court. Further, it will often be the case that the funder is not seeking to rely on the funding agreement (especially where not all group members have subscribed to a funding agreement) but rather seeks the intervention of the court to make a common fund order or a fund equalisation order to overcome the problems that may arise if a funder is confined to relying on the contractual terms of the funding agreements into which it has entered. In those circumstances, references to the freedom to contract and the difficulties of the court altering contractual promises needs to be qualified.

380. It may readily be accepted that the determination by a court of an appropriate level of commission to be paid to a funder raises significant issues of policy and power. In respect of power, Lee J has noted the difficulty in finding within the general powers of ss 33Z and 33ZF a power to interfere with and vary funding agreements. Central to his Honour's concern is the difficulty in a court altering a litigation funding agreement which reflects a common enterprise with a shared economic purpose.

381. Those concerns do not arise in circumstances where the funder is not seeking to enforce or obtain the benefit of the funding agreement and the relevant deed of settlement for which approval is sought is couched

> in terms which impose an obligation to pay the amount approved by the court. In our view, ss 33V(2) and 33ZF provide the necessary power.
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> …
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> 389. The construction of s 33V that we favour, which permits the Court to approve the settlement by making the approval orders but declining to approve payment of the commission or legal costs in the amounts sought, better reflects the statutory scheme.
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> …
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> 391. Whether this Court can or should approve a settlement before considering whether it should approve, under s 33V(2), the distribution of any money paid under a settlement depends on a number of factors which are informed by the organising principle that underpins s 33V. Important to the resolution of that question will be the terms of the funding agreement and the terms of settlement. However, it must be remembered that what is being sought is the exercise of two statutory powers.

104 Section 33V(2) of the Victorian legislation is in slightly different terms to s 173 of the *Civil Procedure Act 2005* (NSW) and s 33V of the *Federal Court of Australia Act 1976* (Cth). Section 33V(2) provides that, if the Court gives approval, it may make such orders 'as it thinks fit' with respect to the distribution of any money. The other two statutes provide that the Court may make such orders 'as are just'. I agree with the observations of Ward P in *Augusta Pool 1 Uk Ltd v Williamson*,[23] that the distinction between the two statutory provisions 'may be more seeming than real'.[24]

105 At the time of the original approval hearing, there was thought to be uncertainty about whether or not this Court had power to make a CFO. The uncertainty arose from a decision of the Federal Court in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)* ('*Davaria*').[25] In *Davaria*, O'Callaghan J held that the reasoning of the majority of the High Court in *BMW Australia Ltd v Brewster* ('*BMW*'),[26] where it was held that s 33ZF did not support the making of a CFO at a preliminary stage of proceedings, pointed 'clearly enough to the conclusion that there is similarly no power to make a common fund order upon settlement under s 33V(2)' of the Federal legislation.[27]

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23 [2023] NSWCA 93.
24 Ibid [77].
25 [2023] FCA 84.
26 [2019] HCA 45; (2019) 269 CLR 574.
27 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84, [183].

106 The decision in *Davaria* is at odds with other decisions of single judges of the Federal Court, including in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)*[28] and *Hall v Arnold Bloch Leibler (a firm) (No 2)*.[29] The decision in *Davaria* is inconsistent with dicta in the earlier decision of the full Federal Court in the same proceeding,[30] and with views expressed by the New South Wales Court of Appeal in *Brewster v BMW Australia Ltd* ('*Brewster*')[31] concerning the effect of the decision in *BMW* on the question of power to make a CFO.

107 In *Brewster*, Bell P, with whom Bathurst CJ and Payne JA agreed, made the following observations:[32]

> 38. The factual context of a settlement being presented to the Court for approval is very different to the situation, at the commencement or an early stage of litigation, where the Court is asked to approve an order nominating a particular percentage or commission which a funder may extract from any settlement ultimately reached or judgment ultimately given, when that sum is not known and the attitude of group members towards the settlement is also unknown. Moreover, at the point of settlement, *ex hypothesi*, the Court making the order will not be concerned with whether the litigation will be funded going forward or the risks which may be entailed in providing funding. Those risks will have been taken and be spent. The Court will be armed with "hard" information rather than speculative possibilities as to key integers, by reference to which its discretion may be exercised to approve a settlement and make any orders with respect to distribution (including to third parties such as solicitors administering any settlement fund): *cf BMW (HC)* at [68].
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> …
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> 41. The majority judgments in *BMW (HC)* do not say expressly that s 173 precludes a court from making an order of the kind contemplated by the separate question and, on my analysis, with the possible exception of the judgment of Gordon J at [141], do not by implication or necessary inference require such a conclusion to be reached. Whether or not a majority of the High Court *would* reach such a conclusion is a matter of speculation which is not appropriate for this Court to engage in, especially in the evidentiary vacuum which exists in the current case cf *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [419]. It should be noted in this context that the decision in *BMW (HC)* was one made by reference to the terms of a notice of motion seeking an identified

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28 [2020] FCA 1885; (2020) 385 ALR 625, 629 [15] (Lee J).

29 [2022] FCA 163, [24] (Beach J).

30 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501, 504 [11], 509–512 [31]–[42] (Lee J, Middleton J agreeing at 502 [1], Moshinsky J agreeing at 503 [4]).

31 [2020] NSWCA 272.

32 Ibid [38], [41], [43].

> actual order that had been sought in the underlying proceedings. That is not so in this case.
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> …
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> 43. To the extent that the plurality in *BMW (HC)* made observations at [85]–[90] about "common fund orders" under a heading "Common fund orders and funding equalisation orders", those observations are to be understood in the context of the common fund order that was being considered by the Court in that case and the different source of statutory power which it was contended authorised the making of such an order at the outset of the proceedings.

108 The approach to CFOs discussed by the Court of Appeal in *Brewster* has been adopted in later cases by single judges of the Supreme Court of New South Wales when making CFOs, of which *Haselhurst v Toyota Motor Corporation Australia Ltd*,[33] and *Quirk v Suncorp Portfolio Services Ltd (No 2)*[34] are recent examples.

109 As held by the Court of Appeal in *Botsman*, by which I am bound, I proceed on the basis that s 33V(2) confers power to make a CFO as part of the approval of a settlement. There is no uncertainty so far as the law of this State is concerned. I note that the decision of the Victorian Court of Appeal in *Botsman* is consistent with the analysis by the New South Wales Court of Appeal in *Brewster*.

110 I consider this to be an appropriate case to make a CFO pursuant to s 33V(2).

111 As observed by the Court of Appeal in *Botsman*, unless bound by a funding agreement, in the absence of an order under s 33V(2), a group member will have no obligation to pay any share of the costs or litigation funding charges in bringing the proceeding to completion by settlement or judgment.[35]

112 In this case if a CFO were not made, the whole of the burden of the costs and litigation funding would fall on Mr and Mrs Iddles, the only persons who have entered into a funding agreement.

113 The circumstances that gave rise to these proceedings and the nature and magnitude of the individual claims made by the lead plaintiffs on their own behalves and on

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33 [2022] NSWSC 1076, [50]–[51] (Rees J).
34 [2022] NSWSC 1457, [43]–[44] (Stevenson J).
35 *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68, 113 [214] (Tate, Whelan and Niall JJA).

behalf of the group members are such that, unless there was a funder prepared to fund the proceeding, I doubt there would have been a single proceeding. The costs would have been too high for individual group members and the potential adverse consequences too dire.

114 The funder has borne the risk that the proceedings would fail, in which event it would have had to bear the costs as well as meeting adverse costs orders in favour of Fonterra. For the reasons discussed below, I consider that in this case the commission rate sought by the funder of 27.5% of the settlement sum is appropriate.

115 It would be unfair on the lead plaintiffs for them to be required to bear the burden of the funder's commission and the costs of the proceeding. It would be unrealistic for that to occur in circumstances where, were it not for the actions of Mr and Mrs Iddles, their solicitors, and the funder, there would be no settlement sum for group members to share.

116 To make a CFO ensures the unfairness and injustice of which the Court of Appeal in *Botsman* spoke, an unfairness from group members getting a 'free ride',[36] does not arise. Just as the benefits of the settlement sum are to be shared in a fair and reasonable way between group members, by making a CFO, the reasonable costs of obtaining those benefits are shared fairly and reasonably.

117 In this case the potential for orders for the payment of commission to the funder and for the reimbursement of costs to be made was notified to group members along the way. Those who did not wish to participate, whether on account of dissatisfaction with these arrangements or otherwise, had the opportunity to opt out and 74 persons did so. Of the approximately 600 group members who registered to participate as at 28 February 2023, none voiced their opposition to the making of a CFO.

118 The making of a CFO will have the consequence that, from the $25m settlement sum, which is inclusive of costs, the funder's commission of $6,875,000 and legal costs of

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36 Ibid.

$3,984,264 as discussed below will be deducted, in addition to the allowance of $30,000 which I have determined is to be made in favour of the lead plaintiffs.

119 Taking the maximum amount claimed for legal costs from 21 February 2023 and of the administration of the scheme ($468,771) (which is to be the subject of further report by the referee or determination by the Costs Court as discussed below) into account and allowing a further $30,000 as a provisional sum to cover the cost of the further work by the referee (together with the amounts in paragraph 118, a total of $11,388,035) will leave an amount of no less than $13,611,965 available for distribution to group members. That sum represents a minimum of 54.4% of the $25m settlement sum which will be distributed amongst the group members, including the lead plaintiffs, giving comfort that in this case, which involves not insignificant risks, a CFO where all group members bear the commission and costs burden, irrespective of whether or not they have signed a funding agreement, is appropriate.

120 For the reasons discussed, I consider this an appropriate case to make a CFO.

The proposed deduction of 27.5% funder commission from the settlement sum

121 Group members have been on notice from an early stage about how the proceeding has been funded. The Funding Information Summary Statement dated 17 July 2020 informed group members that the LFA provided for a remuneration rate of 25% to 30%.

122 The notice of the proposed settlement informed the group members that an order would be sought that 27.5% of the settlement sum or $6.875m be paid as commission to the funder, reflecting the risks it took in supporting the litigation. The notice advised that the plaintiffs would not have been willing or able to run the class action without financial support from a litigation funder. I accept the accuracy of that statement.

123 While it is relevant that no group member has objected to the proposed 27.5% deduction for the funder's commission, the fact no person has objected does not mean that the rate of commission sought must or should be allowed.

124 In accordance with the description of the Court's role on an application of this type in *Australian Securities and Investments Commission v Richards*,[37] the Court has a duty to scrutinise all proposed deductions, including the funder's commission.

125 In *Botsman*, the Court of Appeal said as follows concerning the commission rate:[38]

> 217. In *Money Max*, the Full Court of the Federal Court …
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> 218. … identified a number of relevant, but not determinative, considerations to assess whether a proposed funding commission rate should be approved. It is important to recall that, in that case, the Court was being invited to determine a funding commission rate early in the proceeding and in advance of settlement. It was in that context that the Court identified the following matters as relevant.
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> (a) whether the funding commission rate had been agreed by sophisticated group members and the number of such group members who had agreed;
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> (b) the information provided to class members as to the commission;
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> (c) a comparison of the commission with commissions in other group proceedings and the broad parameters of the funding commission rates available in the market;
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> (d) the litigation risks of providing funding in the proceeding, to be assessed prospectively and avoiding 'hindsight bias';
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> (e) the adverse cost exposure that the funder assumed;
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> (f) the legal costs expended and to be expended, and the security for costs provided, by the funder;
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> (g) the amount of any settlement or judgment;
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> (h) any substantial objections made by class members in relation to any litigation funding charges; and
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> (i) the likely actual recovery for group members under any pre-existing funding arrangements.

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37 [2013] FCAFC 89, [8].

38 *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68, 114–115 [217]–[218] (Tate, Whelan and Niall JJA) (citations omitted).

126 There are a number of reasons why I consider the 27.5% rate of commission advocated for by the funder and supported by the lead plaintiffs is appropriate:

(a) first, I consider that 27.5% reflects a reasonable and realistic rate of return to the funder having regard to the risks which it accepted upon entry into the LFA, some of which are discussed above;

(b) second, it is relevant to have regard to the period of time over which the outlays funded by the funder, the funder's investment, was at risk and to have regard to the level of funding required to have been outlaid, including so as to meet orders for the provision of security for costs;

(c) third, 27.5% is a rate within the range of commission which the Funding Information Summary Statement advised was provided for in the agreement between the funder and the plaintiffs;

(d) fourth, 27.5% is less than the rate of commission to which the funder was entitled pursuant to the LFA having regard to the timing of the settlement;

(e) fifth, evidence of commission rates charged by litigation funding entities in representative proceedings in 2020 shows a range of approximately 20%–29%. 27.5% is within that range but, more importantly, most of those actions were shareholder class actions and not 'bespoke' proceedings such as this proceeding where the risk profile is different;

(f) sixth, the confidential evidence of Mr Conrad and of Mr Burstyner concerning the lack of willingness on the part of other funders to share in the risk or to undertake to fund the proceeding supports the reasonableness of the rate of commission sought; and

(g) seventh, the confidential evidence of Mr Conrad concerning the funder's process of evaluating the risk; its required and anticipated rate of return and its expected costs outlay at the time of agreeing to fund the proceeding supports the making of such an order.

Is after the event (ATE) insurance to be reimbursed in addition to the funder's commission?

127 The funder submitted that the ATE insurance costs were contemplated in the LFA. It submitted that the amount of $1,045,000 paid by it as the premium for ATE insurance is a reasonable cost for it to have incurred and one for which it should be reimbursed in addition to commission of 27.5%. In support of that submission, it cited the lack of competition or willingness from other funders to take carriage of the litigation, the factual and legal complexity of the proceedings and the comparatively low group member registration. It submitted that, without the ATE insurance, it would have sought a higher commission because of the higher risk it would have assumed or 'perhaps not have funded the proceeding at all'.

128 The Funding Information Summary Statement dated 17 July 2020 clearly stated that the funder would both provide security for costs and pay any costs order that might be made against the plaintiffs. It further stated that, in return, if compensation is payable, the funder would seek an order for the payment of a success fee for having carried the financial risk to conclusion. The Funding Information Summary Statement did not suggest that in addition an order would be sought for the cost of reimbursement of ATE insurance, the costs of a premium paid by the funder to secure indemnity against adverse costs orders that might be made.

129 The funder appropriately drew the Court's attention to the decision in *Court v Spotless Group Holdings Ltd* ('*Spotless*').[39] In *Spotless*, Murphy J determined that, while the litigation funders were entitled to claim the costs of obtaining ATE insurance under the relevant funding terms,[40] doing so might reduce the appropriate rate of funding commission:[41]

> During the settlement approval hearing I expressed a preliminary view that if Funders wished to recover the expenses associated with providing an adverse costs indemnity (the ATE premiums and stamp duty) and providing security for costs (the Deeds of Indemnity) by deduction from the Settlement Fund, they should not be permitted at the same time to rely upon the cost of putting up security for costs and their exposure to the risk of an adverse costs order to justify the percentage funding rate they sought. In my view the Funders should

39 [2020] FCA 1730.
40 Ibid [89].
41 Ibid [96].

> not be able to have it both ways. I considered that those aspects of the Funding Terms reduced the costs and risks which the Funders assumed, and pointed towards allowing a funding rate lower than the 22.5% funding rate the Funders' seek.

130 The funder submitted that *Spotless* is distinguishable from this proceeding because:

> [W]hile LLS seeks the reimbursement of the premiums paid and owing in respect of the ATE Policy separately from a funding commission of 27.5%, the evidence discloses that the funding commission was not set to absorb adverse costs risks or the costs of procurement of the ATE Policy, but rather to represent a reasonable return for the capital invested in the case. Thus, the risk associated with the setting of the funding commission was predominantly related to the general merits risks of the case, and (to a lesser extent) the difficulty in group member registration and uncertainty regarding CFOs… and was not inclusive of the adverse costs risk or costs of security. LLS is not seeking, *contra* the position in *Spotless*, to "have it both ways."

131 Following the hearing, the funder drew the Court's attention to the more recent decision in *Eckardt v Sims Ltd* ('*Sims*'),[42] where the question of what allowance is appropriate for ATE insurance was considered in the context of funding equalisation orders. After considering the Federal Court cases involving both CFOs and funding equalisation orders, Wigney J expressed his agreement with the following statement by Black J in *Williamson v Sydney Olympic Park Authority* ('*Williamson*'),[43] a funding equalisation order case:[44]

> It seems to me that the question for the Court is not whether the ATE costs in isolation from the Funder Commission, or the Funder Commission in isolation from the ATE costs, are unduly high, but whether the totality of the Funder Commission and ATE costs are so high that the settlement documented by the Settlement Deed and SDS (as distinct from the HoA, which does not provide for their payment) are not reasonable unless they reduced.

132 The funder submitted that the task for this Court is unchanged following the decision in *Sims*:

> [I]t continues to be necessary to consider the reimbursement of ATE insurance premiums in the proceeding on a case by case basis, and also separately consider proportionality of the sums sought to be deducted from the settlement sum as a whole, as is frequently and ordinarily the case in settlement approval applications in which a CFO is sought.

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42 [2022] FCA 1609.

43 [2022] NSWSC 1618.

44 Ibid [83], quoted with approval in *Eckardt v Sims Ltd* [2022] FCA 1609, [38].

133 Although the remarks made by Black J in *Williamson*, and endorsed by Wigney J in *Sims*, are in the context of funding equalisation orders, I agree with Black J that a relevant consideration is whether the overall amount to be received by the funder is not reasonable. I also agree with the funder's submission that the cost of ATE insurance and whether or not it should fall within the rate of commission or should be allowed in addition to commission must be determined on a case by case basis.

134 The rate of the funder's commission, at 27.5%, which I have determined should be allowed, represents $6,875,000 in commission. If the cost of the ATE insurance premium were to be allowed, the percentage of the settlement sum to be paid to the funder would increase to 31.68%. To allow a further $1,045,000 to be deducted from the $25m settlement sum would be to permit a deduction in favour of the funder which, taken together with the $6,875,000 commission, is not reasonable.

135 I consider that an allowance of $6,875,000 as commission includes an appropriate allowance on the facts of this case for the funder's costs of doing business and accepting the funding and adverse costs risks. The commission rate of 27.5% already reflects that other funders had determined not to fund these proceedings. I consider that ATE insurance premium costs are part of the 'costs of doing business'. As the funder's submissions accurately state, the premium was paid in respect of 'adverse costs risk'. That risk is part of the risk agreed to be borne by the funder.

136 The funder chose to manage the adverse costs exposure aspect of the risk that it agreed to accept by paying a premium to a third party rather than by bearing that aspect of the risk itself. To allow the premium, in addition to the commission, would be to permit further compensation for the risk assumed for which 27.5% commission is fair and reasonable.

137 Particularly in light of the manner in which the funder's commission was initially outlined to the group members, which made no reference to an additional claim for reimbursement of the cost of ATE insurance premiums, it would not be fair and reasonable to deduct a further amount from the settlement sum for ATE insurance.

That is not to say the choice made by the funder to incur the premium for ATE insurance was other than a reasonable choice. However, it was the funder's choice driven by its own view about how best to manage an aspect of the risk it agreed to assume.

The administration of the SDS

138 I am satisfied that the SDS, which identifies the lead plaintiffs' solicitor, Mr Burstyner, as the administrator and incorporates power for the administrator to refer to the Court any issues arising in relation to the SDS, is appropriate. The plaintiffs submit that it is efficient to have the solicitor who has run the case since inception, and who is familiar with dairy farming operations and the revenue calculations across the Fonterra group, act as the administrator. I agree.

139 Clause 10 of the SDS provides that the administrator shall be remunerated from the Settlement Distribution Fund for work done by him (including delegates and administration staff) and reimbursed for any disbursements reasonably incurred by him in connection with the SDS. Questions concerning the costs of the settlement administration are addressed separately below.

The legal costs claims

140 The Court's role when approving the deduction of legal costs in a representative proceeding was described by Murphy J in *Earglow Pty Ltd v Newcrest Mining Limited* as follows:[45]

> The Court has a supervisory role in relation to costs paid by class members and should scrutinise costs in the settlement approval process. The Court should satisfy itself that the arrangements in relation to legal costs meet any relevant legal requirements, contain reasonable and proportionate terms relative to the commercial context in which they were entered, and that the costs and disbursements are in accordance with the terms of the relevant agreements and are otherwise 'reasonable'.

141 The 2 December 2022 notice to group members advising of the application for approval informed them that legal costs were likely to be in the order of $4.95 million.

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45 [2016] FCA 1433, [91] (citations omitted).

142 The arrangements between the funder, the lead plaintiffs and the solicitors provided for the payment by the funder to the solicitors of 70% of their costs and disbursements.

143 In her first report, adopting the stepped approach to assessment described below, the referee calculated the total reasonable professional fees of the solicitors as follows:

Description	**Amount**
Amount of professional fees pursuant to claimable rates (STEP TWO)	$1,998,905.87
Less reductions - non-claimable (STEP FOUR)	$88,960.03
Less reductions - discounts (STEP FIVE)	$31,813.10
Sub-Total Reductions	**$120,773.13**
Professional fees (STEPS ONE - FIVE)	**$1,878,132.74**

144 The referee calculated the uplift fee on the unfunded portion of the fair and reasonable legal costs, if such an uplift fee were to be allowed by the Court, as follows:

Description	**Amount**
Professional fees allowable (STEPS ONE - FIVE)	**$1,878,132.74**
Professional fees paid by the funder LLS	$1,590,587.85
Professional fees subject to uplift	$287,544.89
Uplift (25%)	**$71,886.22**

145 The referee also considered the reasonableness of disbursements, concluding as follows:

> It is my opinion that the amount of the Lead Plaintiffs' fair and reasonable legal costs (including GST) up to 30 November 2022 calculated on a fair, reasonable and proportionate basis is as follows:
>
> **TABLE 1 – LEAD PLAINTIFFS' FAIR & REASONABLE LEGAL COSTS UP TO 30 NOVEMBER 2022**

DESCRIPTION	**REPORT REFERENCE**	**AMOUNT ALLOWABLE**

Professional Fees	Table 12	$1,878,132.74
Disbursements	Table 13	$1,741,096.48
TOTAL LEGAL COSTS		**$3,619,229.22**

146 Because the first two reports of the referee were received only a short time prior to the initial hearing, the solicitors and the funder were given time to consider the reports and to respond. The determination of the amount to be deducted for legal costs and disbursements was deferred until a later hearing.

147 Prior to that later hearing, held on 23 June 2023, the plaintiffs filed and served Ms Ward's report, being the Costs Report of Suzanne Maree Ward dated 20 April 2023. The referee responded to Ms Ward's report in her third report.

148 The plaintiffs submitted that the referee's reports should be adopted in part but not adopted in other parts. At the 23 June 2023 hearing the plaintiffs provided a table ('the costs table') which summarised the costs claimed and the referee's disallowance (inclusive of GST).

ITEM	CLAIMED		REFEREE ALLOWS		VARIANCE	
	Prof fees (AB rates)	**Disb'ts**	**Prof fees (lower HA rates)**	**Disb'ts**	**Prof fees**	**Disb'ts**
1. County Court	$80,754	$12,023	$0	$0	$80,754	$12,023
2. Multiple activities	$31,136	$3,207	$0	$0	$31,136	$3,207
3. 5 May 16 to 1 May 19 (D Burstyner deficient time records)	$543,549 ($494,135 plus GST of $49,414)	n/a	$137,500	n/a	$406,049	n/a
4. Costs 5 May 2016 to 30 Nov 22	$2,008,512	$1,733,658	$1,851,925	$1,733,658	$156,587	$0
	$2,663,951	**$1,748,888**	**$1,989,425**	**$1,733,658**	**$674,526**	**$15,230**
5. Settlement approval 1 Dec 22 to 20 Feb 23	$99,873	$97,817	$90,864	$97,817	$9,009	$0
6. Settlement approval 21 Feb to 28 Feb 2023 (includes Referee's costs of $55,000)	$26,288	$122,500	$34,819	$171,435	$-8,531	-$48,935
7. Settlement approval 1 March 2023 to 23 June 2023	$100,852	$86,842	NIL	$36,987.5	$100,852	$49,855

8. Uplift on unpaid professional fees (25% x unpaid $1,240,348)	$310,087	n/a	n/a	n/a	$310,087	n/a
9. Referee's costs	n/a	$17,500	n/a	$17,500	n/a	n/a
	$3,201,051	**$2,073,547**	**$2,115,108**	**$2,057,398**	**$1,085,943**	**$16,150**
10. Administration costs incurred to 22 June 2023	$61,888	$41,747	$62,647	$18,249	$40,470	$65,923
11. Estimate of future administration costs	$41,228	$42,426				
	$103,117	$84,172	$62,647	$18,249	$40,470	$65,923
SUB-TOTALS	**$3,304168**	**$2,157,719**	**$2,177,755**	**$2,075,647**	**$1,126,413**	**$82,073**
TOTALS		**$5,461,887**		**$4,253,402**		**$1,208,486**

149 There are a number of contested costs issues requiring determination, some of which are reflected in specific items in the costs table and others of which emerged from submissions and the hearing. The main items in contest are as follows:

(a) what allowance should be made for unrecorded time prior to commencement of the proceeding (item 3 in the costs table). The amount contended for is $543,549, being $494,135 plus GST. The referee allowed $137,500;

(b) whether in calculating solicitors costs, the costs charged for staff 'seconded' from Harwood Andrews to Adley Burstyner should be allowed at the rate claimed by Adley Burstyner or should be restricted to a 'pass through' of the costs charged to Adley Burstyner for those staff by Harwood Andrews (reflected in various items in the costs table, including item 4);

(c) whether the discount adopted by the referee of 25% for 'multiple activities' (item 2 in the costs table) should be applied;

(d) whether an allowance should be made in favour of Adley Burstyner of a 25% uplift on Adley Burstyner's professional fees not paid by the funder (item 8 in the costs table);

(e) whether the professional costs and disbursements relating to a separate proceeding in the County Court involving the lead plaintiffs (the 'debt recovery

proceeding') (item 1 in the costs table) should be allowed and deducted from the settlement sum;

(f) whether the costs assessed by the referee for settlement administration, including future costs, should be allowed or whether a greater amount than assessed should be allowed; and

(g) whether the costs of the 23 June 2023 hearing should be disallowed as found by the referee or whether those or costs or part of them should be allowed.

150 A consideration of the contested issues needs to take place in the context of the Legal Profession Uniform Law (the 'Uniform Law'), Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic). The Uniform Law requires that legal costs are no more than fair and reasonable and that clients of law practices are able to make informed choices, not only about their legal options, but also about the costs associated with those options.[46] In her initial report, the referee concluded that, as a result of several instances of non-compliance by Adley Burstyner with the Uniform Law, the CA between that firm and the lead plaintiffs would be considered void by operation of s 178(1) of the Uniform Law.

Adoption of the referee's reports: the principles

151 Rule 50.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules') is in the following terms:

> **Use of report**
>
> The Court may as the interests of justice require adopt the report of a special referee or decline to adopt the report in whole or in part, and make such order or give such judgement as it thinks fit.

152 The principles to be applied when determining whether to adopt all or part of the report of a special referee are not in doubt. They were set out by the Court of Appeal in *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* ('*Wenco*'):[47]

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46 Uniform Law, s 169.

47 [2009] VSCA 191; (2009) 25 VR 119, 126–127 [17] (Redlich and Bongiorno JJA and Beach AJA) (citations omitted).

(a) First, in exercising the power conferred by r 50.04 to adopt the report of a Referee, the Court has a wide power which is to be exercised 'as the interests of justice require'. This broad mandate should not be the subject of restrictions laid down in advance of judges exercising it. Subject to what follows, it is undesirable to attempt closely to confine the manner in which the discretion is to be exercised.

(b) Secondly, the purpose of rules 50.01 and 50.04 is to provide, where the interests of justice so require, a form of partial resolution of disputes alternative to orthodox litigation. Further, that purpose would be frustrated if the reference were to be treated as 'some kind of warm-up for the real contest'.

(c) Thirdly, insofar as the subject matter of dissatisfaction with a report is a question of law, or the application of legal standards to established facts, a proper exercise of discretion requires the judge to consider and determine that matter afresh.

(d) Fourthly, where a report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a disposition towards acceptance of the report, for to do otherwise would be to negate both the purpose and the facility of referring complex technical issues to independent experts for inquiry and report.

(e) Fifthly, if the referee's report reveals some error of principle, absence or excess of jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding, that would ordinarily be a reason for rejection. In this context, patent misapprehension of the evidence refers to a lack of understanding of the evidence as distinct from the according to particular aspects of it different weight; and perversity or manifest unreasonableness mean a conclusion that no reasonable tribunal of fact could have reached. The test denoted by these phrases is more stringent than 'unsafe and unsatisfactory'.

(f) Sixthly, generally, the referee's findings of fact should not be re-agitated in the Court. The Court will not reconsider disputed questions of fact where there is factual material sufficient to entitle the referee to reach the conclusions he or she did, particularly where the disputed questions are in a technical area in which the referee enjoys an appropriate expertise. Thus, the Court will not ordinarily interfere with findings of fact by a referee where the referee has based his or her findings upon a choice between conflicting evidence.

(g) Seventhly, the purpose of r 50.01 and r 50.04 would be frustrated if the Court were required to reconsider disputed questions of fact in circumstances where it is conceded that there was material on which the conclusions could be based.

(h) Eighthly, the Court is entitled to consider the futility and cost of re-litigating an issue determined by the referee where the parties have had ample opportunity to place before the referee such evidence and submissions as they desire.

(i) Ninthly, even if it were shown that the Court might have reached a different conclusion in some respect from that of the referee, it would not ordinarily be (in the absence of any of the matters referred to in subpara (e) above) a proper exercise of the discretion conferred by r 50.04 to allow matters agitated before the referee to be re-explored so as to lead to qualification or rejection of the report.

153 In the context of group proceedings, in *Rowe v Ausnet Electricity Services Pty Ltd (No 9)*,[48] John Dixon J said that r 50.04 'gives the court wide and flexible discretionary jurisdiction to be exercised in the interests of justice'.[49]

154 It is relevant to note the power of the Court to require a further report from the referee or to remit a matter originally referred for further consideration by the referee. Rule 50.03(2) of the Rules provides:

Report on reference

(2) On the receipt of the special referee's report, the Court—

(a) shall give notice thereof to the parties; and

(b) may by order—

(i) require the special referee to provide a further report explaining any matter mentioned or not mentioned in the report;

(ii) remit the whole or any part of the question originally referred to the special referee for further consideration by that referee or any other special referee;

(iii) vary the report.

155 It is necessary to approach the contested adoption issues bearing in mind the principles referred to in *Wenco*. It is also necessary to deal with those issues which concern costs having regard to the Uniform Law and to the *Civil Procedure Act 2010* (Vic) (the 'CPA'), in particular the obligation in s 24 to ensure that costs are reasonable and proportionate.

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48 [2016] VSC 731.

49 Ibid [5].

The Uniform Law

156 The following sections which form part of Part 4.3 of the Uniform Law are relevant to the contested costs issues:

> **169 Objectives**
>
> The objectives of this Part are—
>
> (a) to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and
>
> (b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and
>
> (c) to provide a framework for assessment of legal costs.
>
> …
>
> **172 Legal costs must be fair and reasonable**
>
> (1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are—
>
> (a) proportionately and reasonably incurred; and
>
> (b) proportionate and reasonable in amount.
>
> …
>
> (3) In considering whether legal costs are fair and reasonable, regard must also be had to whether the legal costs conform to any applicable requirements of this Part, the Uniform Rules and any fixed costs legislative provisions.
>
> (4) A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable if—
>
> (a) the provisions of Division 3 relating to costs disclosure have been complied with; and
>
> (b) the costs agreement does not contravene, and was not entered into in contravention of, any provision of Division 4.
>
> …

174 Disclosure obligations of law practice regarding clients

(1) **Main disclosure requirement**

A law practice—

(a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and

…

(5) **Alternative disclosure for legal costs below higher threshold**

If the total legal costs in a matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (the "higher threshold"), the law practice may, instead of making a disclosure under subsection (1), make a disclosure under this subsection by providing the client with the uniform standard disclosure form prescribed by the Uniform Rules for the purposes of this subsection.

…

(6) **Disclosure to be written**

A disclosure under this section must be made in writing, but the requirement for writing does not affect the law practice's obligations under subsection (3).

…

175 Disclosure obligations if another law practice is to be retained

(1) If a law practice (the first law practice) intends to retain another law practice (the second law practice) on behalf of a client, the first law practice must disclose to the client the details specified in section 174(1) in relation to the second law practice, in addition to any information required to be disclosed to the client under section 174.

…

176 Disclosure obligations of law practice regarding associated third party payers

(1) If a law practice is required to make a disclosure to a client of the law practice under section 174 or 175, the law practice must, in accordance with subsection (2), also make the same disclosure to any associated third party payer for the client, but only to the extent that the details or matters disclosed are relevant to the associated third party payer and relate to costs

that are payable by the associated third party payer in respect of legal services provided to the client.

…

178 Non-compliance with disclosure obligations

(1) If a law practice contravenes the disclosure obligations of this Part—

(a) the costs agreement concerned (if any) is void; and

(b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority; and

(c) the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority or under jurisdictional legislation; and

(d) the contravention is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

…

Division 4—Costs agreements

179 Client's right to costs agreement

A client of a law practice has the right to require and to have a negotiated costs agreement with the law practice.

180 Making costs agreements

(1) A costs agreement may be made—

(a) between a client and a law practice retained by the client; or

(b) between a client and a law practice retained on behalf of the client by another law practice; or

(c) between a law practice and another law practice that retained that law practice on behalf of a client; or

(d) between a law practice and an associated third party payer.

(2) A costs agreement must be written or evidenced in writing.

(3) A costs agreement may consist of a written offer that is accepted in writing or (except in the case of a conditional costs agreement) by other conduct.

(4) A costs agreement cannot provide that the legal costs to which it relates are not subject to a costs assessment.

181 Conditional costs agreements

(1) A costs agreement (a conditional costs agreement) may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.

(2) A conditional costs agreement must—

(a) be in writing and in plain language; and

(b) set out the circumstances that constitute the successful outcome of the matter to which it relates.

…

(8) A contravention of provisions of this Law or the Uniform Rules relating to conditional costs agreements by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

182 Conditional costs agreements involving uplift fees

(1) A conditional costs agreement may provide for the payment of an uplift fee.

(2) If a conditional costs agreement relates to a litigious matter—

(a) the agreement must not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely; and

(b) the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.

(3) A conditional costs agreement that includes an uplift fee—

(a) must identify the basis on which the uplift fee is to be calculated; and

(b) must include an estimate of the uplift fee or, if that is not reasonably practical—

(i) a range of estimates for the uplift fee; and

(ii) an explanation of the major variables that may affect the calculation of the uplift fee.

(4) A law practice must not enter into a costs agreement in contravention of this section or of the Uniform Rules relating to uplift fees.

Civil penalty: 100 penalty units.

…

185 Certain costs agreements are void

(1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this Division is void.

(2) A law practice is not entitled to recover any amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.

(3) A law practice that has entered into a costs agreement in contravention of section 182 is not entitled to recover the whole or any part of the uplift fee and must repay the amount received in respect of the uplift fee to the person from whom it was received.

(4) A law practice that has entered into a costs agreement in contravention of section 183 is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received.

…

199 Costs assessment

(1) Assessments of legal costs are to be conducted by costs assessors, and are to be conducted in accordance with this Part, the Uniform Rules and any applicable jurisdictional legislation.

(2) On a costs assessment, the costs assessor must—

(a) determine whether or not a valid costs agreement exists; and

(b) determine whether legal costs are fair and reasonable and, to the extent they are not fair and reasonable, determine the amount of legal costs (if any) that are to be payable.

Note

A costs agreement can be void under section 178 or 185.

The referee's stepped approach to the assessment of costs

157 The referee undertook a systematic and comprehensive approach to determining a reasonable allowance for the professional fees of the solicitors and the disbursements. It is worthwhile setting out the careful six step approach that she adopted and some of the key conclusions that she reached in her initial report.

Professional fees

158 In her first report, the referee assessed the reasonable professional fees for the period up to 30 November 2022 as $1,878,132.74:

(a) Step One: Calculation of time spent by each operator and verification of data accuracy, including verifying electronic entries from Adley Burstyner pre-LFA and post-LFA data for accuracy, eliminating any duplications or other IT errors. The referee reduced the entries by 43.47 hours to the value of $10,867.50 (excluding GST). At first instance, the referee also disallowed a single entry dated 1 May 2019 claiming the amount of $494,135, which was described as a 'representative entry' for the period prior to May 2019. Although the referee considered that some pre-retainer work was claimable provided it was fairly and reasonably incurred and of a reasonable amount, she considered that the amount claimed was not properly substantiated.

(b) Step Two: Application of claimable rates for each operator. The referee applied reductions to the amounts claimed by Adley Burstyner due to their arrangement with Harwood Andrews where higher fees were sought by Adley Burstyner for the work performed by Harwood Andrews operators than were claimed in that firm's invoices rendered to Adley Burstyner. The referee considered that it was not fair, reasonable or proportionate for Adley Burstyner to charge out employees of Harwood Andrews at rates other than those at which they were charged out by Harwood Andrews.

(c) Step Three: Classification of time spent by Phase – Task – Activity to provide information on the nature of the work undertaken:

(i) Phases: The referee reviewed the time entries and other relevant circumstances to identify ten phases reflecting the steps taken in the proceeding.

(ii) Tasks: The referee identified 30 tasks under 13 phases.

(iii) Activities: The referee identified 'activities' which describe the nature of the work done within the task, such as communication with internal team, communication with the lead plaintiffs, multiple activities, and instructing at court/mediation.

(d) Step Four: Identification of non-recoverable work, being costs for tasks which in the experience of the referee would typically be disallowed by a Taxing Court / Registrar ($88,960.03 in total):

(i) Unidentified: Time recordings that were not sufficiently described so as to identify the work undertaken ($4,845.50).

(ii) Administration: Work of an administrative nature, akin to file management ($8,286.03).

(iii) Costs Agreements: Time recordings which included reference to Adley Burstyner's and counsel's costs agreements ($2,590.50).

(iv) County Court Proceeding: Time recordings which related to the debt recovery proceeding and which was the subject of a separate costs agreement with the lead plaintiffs ($73,238.00).

Those tasks (totalling $88,960.03) were fully discounted and claimed at $0.00.

(e) Step Five: Application of discounts after considering the nature of work claimed or the way work was done ($31,813.10 in total):

(i) Discounts on Tasks:

(A) Bulk Tasks: A 25% discount was applied to time recordings that describe work across multiple phases ($1,716.00).

(B) Funding: The referee identified time recordings that describe work relating to obtaining funding and providing updates to the funder, and allowed those fees on the basis that they were for the benefit of not only the lead plaintiffs but also the group members.

(ii) Discounts on Activities: The referee examined activities which would typically be discounted by the Costs Court and applied the following reductions:

(A) Multiple Activities: A discount of 25% was applied to time entries where multiple activities were present in a single entry ($28,265.60).

(B) Communications with Internal Team: No discount was applied.

(C) Clerical / Non-Skilled Work: No discount was applied.

(D) Multiple Operators Attending Headings: The referee allowed the attendance of two solicitors but disallowed the attendance of a law graduate at two hearings ($759.00).

(iii) Miscellaneous Discounts:

(A) Single Unit Time Recording: The referee did not consider any reduction to be necessary.

(B) Excessive Hours in One Day: The referee reviewed instances where a timekeeper recorded more than 10 hours in a single day,

and identified instances where duplication of work appeared to be likely, she reduced those entries to 12 hours per day ($1,072.50).

(iv) Global Discounts: The referee did not consider it necessary to apply a global discount of the type discussed in *Seven Network Ltd v News Ltd*.[50]

(f) Step Six: Calculation of uplift fee: The referee was of the opinion that Adley Burstyner ought not recover the uplift fee on unfunded professional fees due to non-compliance with the costs provisions of the Uniform Law. The referee noted that, if the Court considers an uplift fee payable, it is only to be calculated based on Adley Burstyner's fair and reasonable fees that remained unfunded. She calculated that, if the Court were to allow an uplift fee on the unfunded fees, the amount for professional fees that she has assessed as reasonable would be increased by $71,886.22.

Disbursements

159 The referee examined the disbursements incurred by Adley Burstyner, including counsel's fees. She assessed the reasonable counsel fees as $1,132,851.67, reflecting a reduction of $19,057.58. In arriving at this figure, the referee disallowed counsel fees in respect of the debt recovery proceeding, a potential contingency fee agreement and an invoice error which resulted in an increased charge. The referee also applied a 25% discount to 'multiple activities'.

160 The referee concluded that the experts' fees ($296,329.50) were reasonably incurred and of a reasonable amount.

161 The referee considered the general disbursements, such as room hire, searches, dairy data request, process servers, couriers and inspection fees and the like, to have been reasonably incurred and of a reasonable amount. The referee disallowed the costs consultant's fees ($9,900.00) on the basis that they advance only the position of Adley Burstyner, legal fees which related to advice on the LFA ($728.21), duplicate filing fees

50 [2007] FCA 2059.

($58.00) and catering ($209.62) and stationary ($3.96) costs on the basis that they are overhead costs of the firm. There were also disallowances in respect of travel ($926.00) and search ($25.30) costs.

Preliminary Matter 1: Construction of the conditional costs letter and the LFA

162 The plaintiffs submitted that the referee erred in construing the CA separately from the LFA. They submitted that the CA and the LFA should be construed as aspects of a single overarching tripartite agreement or, alternatively, that the budget which appeared in the LFA should be construed as part of the CA. They submitted that the referee's approach was flawed and the Court should find that there was an error of principle.

163 It is a question of law as to whether the two contracts should be construed as a single tripartite agreement and whether the CA incorporates all or part of the LFA. As stated in *Wenco*, where the subject matter of dissatisfaction with a report is a question of law, a proper exercise of the Court's discretion in relation to adoption requires me to consider and determine the issue afresh.

164 As the referee stated in her first report:

> On 15 June 2020, the plaintiffs signed AB's costs agreement in the proceeding (**the CA**) which consisted of (i) Letter dated 14 June 2020, (ii) Notifications of rights under the Uniform Law, (iii) Terms and Conditions, (iv) Additional Terms, Disclosures and Information and (v) Acknowledgment page.

165 In her report, Ms Ward, on the other hand, observed that:

> The LFA is defined as the 56 pages that formed the Costs Agreement. The terms LFA and Costs Agreement are used interchangeably in this report and any reference to either term is a reference to all documents that formed part of the Costs Agreement.

166 In her third report, the referee responded:

> 6. … I disagree with Ms Ward that the terms Litigation Funding Agreement and Costs Agreement are interchangeable. For the purposes of this report, I have further considered the suite of documents relied upon by AB and my opinion as to the nature and interrelationship of the documents is as follows:

> 7. The LFA is 49 pages consisting of a Cover page A, signing page, LLS Funding Agreement with five schedules ((1) Funding Cap & Budgets for Proceedings, (2) Descriptions/Particulars, (3) Conflict of Interest Policy plus Schedule, (4) Progress Report and (5) Standard Lawyer Terms. … At paragraph 42 of my first report, I identified the Costs Agreement as consisting of a (i)Letter dated 14 June 2020, (ii)Notification of rights under the Uniform Law, (iii)Terms and Conditions, (iv)Additional Terms, Disclosures and Information and (v)Acknowledgement page and total seven pages.
>
> 8. … In my experience, one or more terms of a funding agreement can be incorporated into a costs agreement but this must be done clearly and explicitly… It is my reading of AB's letter of 14 June 2020 and the documents themselves that the reference to "attachments" in the AB letter is to the AB attachments being the Notification of rights under the Uniform Law, Terms and Conditions, Additional Terms, Disclosures and Information and Acknowledgement page. It is not a reference to the LFA which is not an attachment but a separate document executed by the Lead Plaintiffs and LLS.

167 At the hearing, the LFA and the CA were presented as one integrated document comprising 56 consecutively numbered pages. The history of the LFA and CA shows that, while two separate agreements involving different (though overlapping) parties, both were sent as one consecutively paginated bundle to Mr and Mrs Iddles for execution.

168 On 14 June 2020, Mr Burstyner sent an email to Mr and Mrs Iddles attaching the 56 page bundle. The covering email said '[a]ttached is the final version of the Litigation Funding Agreement'; '[k]indly sign on pages 2 and 56'.

169 The first page of the bundle is a cover page, followed by an execution page for the LFA. Pages 3–49 comprise the balance of the 'LLS Funding Agreement' as described by the referee in her third report. Pages 50–56 is the CA, with an execution page at page 56 which states '[t]he agreement comprises all of the previous 6 pages'.

170 Mr and Mrs Iddles received independent legal advice in respect of the litigation funding arrangements. On 15 June 2020, they returned signed copies of the execution pages, being pages 2 and 56 of the bundle, as requested in the 14 June 2020 email from Adley Burstyner.

171 I agree with the referee that the CA and the LFA are two distinct agreements. They do not involve the same parties. The parties to the CA are the lead plaintiffs, Mr and Mrs Iddles, and Adley Burstyner. The parties to the LFA are the lead plaintiffs, Adley Burstyner and LLS.

172 Although the CA and the LFA are two different agreements, as will be seen from the discussion below, the CA is both incomplete and incapable of being understood without reference to aspects of the LFA. For example, on the first page of the CA (page 50 of 56 of the document bundle) the following appears under the 'Total Costs' heading:

> We estimate the total costs for the work outlined in the scope of the engagement will be [to be inserted later before signing, as funder asked for a further reduction yesterday so that is still currently being dealt with] … The budget in schedule 1 of the Litigation Funding Agreement details how these costs have been calculated and the tasks involved.

173 In circumstances where the CA makes express cross-reference to the terms of the LFA, even though the CA execution page contains an acknowledgment signed by Mr and Mrs Iddles that the agreement 'comprises all of the previous 6 pages', those parts of the LFA otherwise cross-referred within those 6 pages cannot be ignored when it comes to the proper construction of the CA.

174 In *McVeigh v National Australia Bank Ltd* ('*McVeigh*'),[51] Finkelstein J observed that:[52]

> In some cases it is also permissible to have regard to other instruments. Thus, where several instruments are made as part of one transaction they will be construed together and each will be construed with reference to the other. In *Smith v Chadwick* (1882) 20 Ch D 27 (*Smith*), Jessel MR said (at 62–3):
>
> > that when documents are actually contemporaneous, that is, two deeds executed at the same moment, a very common case, or within so short an interval that having regard to the nature of the transaction the court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to show the meaning of the sentence, and be equally read, although not contained in one deed, but in several parchments, if all the

51 [2000] FCA 187; (2000) 278 ALR 429.
52 Ibid 438 [30].

> parchments together in the view of the court make up one document for this purpose.
>
> The rule applies whether the documents are executed contemporaneously or at different times: see *Norton on Deeds* 2nd ed (1928) at pp 87–9 and the cases there cited. The reason for the rule is that when a series of documents is necessary to give effect to a single transaction each is executed on the faith of the others being executed and each is intended to operate only as part of that transaction and therefore, as a matter of substance, they should be regarded as one: *Manks v Whiteley* [1912] 1 Ch 735 at 754.

175 Similar views were expressed more recently by Gorton J in *Castaway Avenue Pty Ltd v CSC1957 Investments Pty Ltd* ('*Castaway*'),[53] where his Honour considered a written contract of sale between CSC1957 Investments and Castaway Avenue, and a deed that was entered into at or about the same time between those parties and two other parties. Citing *McVeigh,* Gorton J observed that:[54]

> Castaway Avenue submitted that the deed could be construed by reference to the contract of sale because the deed referred to the contract of sale but that the contract of sale could not be construed by reference to the deed. I disagree. I consider that the two documents were sufficiently connected that each may be interpreted by reference to the other. In my view, the two documents should be seen as together recording one agreement (or transaction). The two contractual documents were entered into at or about the same time, and were intended to operate together…

176 The decision in *Castaway* was affirmed on appeal, with the Court of Appeal observing that 'this is a class of case where the two documents should also be treated as constituting one transaction'.[55]

177 I am satisfied that the CA and the LFA are, to use the words of Gorton J, 'sufficiently connected that [at least to the extent there are cross-references] each may be interpreted by reference to the other'. However, I do not agree that the referee erred in construing the CA separately from the LFA or, as was held in *Castaway*, that the CA and the LFA should be construed as a single overarching tripartite agreement.

178 The referee was correct to find that the terms LFA and CA are not interchangeable.

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53 [2022] VSC 547.

54 Ibid [39] (citations omitted).

55 *Castaway Avenue Pty Ltd v CSC1957 Investments Pty Ltd* [2023] VSCA 30, [53].

179 The LFA and the CA are two separate agreements, albeit they are concerned in a general sense with the same transaction and subject matter. The circumstances here are to be distinguished from those in *Castaway* where, for the reasons discussed by the Court of Appeal, the contract of sale and the deed were treated as constituting one transaction.[56]

180 Section 181(2)(a) of the Uniform Law states that a conditional costs agreement must be in writing and in plain language. It is only those parts of the LFA, which itself does not purport to be a conditional costs agreement, to which reference is either expressly made in the CA, or without reference to which anomalous results may arise in the construction of the CA, that reference should be made when construing the CA.

Preliminary Matter 2: Compliance with the Uniform Law

181 The second preliminary matter is whether the CA complies with the disclosure obligations in the Uniform Law.

182 The referee identified several examples of non-compliance by Adley Burstyner with the Uniform Law. In particular, non-compliance with ss 174 and 175 regarding the engagement of Harwood Andrews personnel, and non-compliance with ss 181 and 182 regarding the uplift fee. Non-compliance with these provisions would render the CA void.[57] The plaintiffs take issue with the views expressed by the referee on these matters.

183 As the complaints about the referee's conclusions relate to the application of the Uniform Law to established facts, in accordance with the decision in *Wenco*, it is appropriate for me to consider and determine these matters afresh.

184 For the reasons that follow, I have concluded that:

(a) there has been compliance with s 174 of the Uniform Law. The CA disclosed the basis upon which legal costs would be calculated; that is, relevantly based

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56 Ibid [54], [57]–[60].

57 Pursuant to ss 178(1) and 185(1) of the Uniform Law.

on the higher charge out rates applied to Harwood Andrews personnel. Whether those higher charge out rates are recoverable is a separate question;

(b) because of the peculiar contractual arrangements that governed the making available of Harwood Andrews personnel to Adley Burstyner, no retainer issue arises in relation to s 175 of the Uniform Law;

(c) there has not been compliance with s 181 of the Uniform Law. The CA, even when construed together with the LFA, is not in 'plain language'. It is anything but a document in 'plain language'; and

(d) there has not been compliance with s 182(3)(a) of the Uniform Law. The CA does not properly identify the basis upon which the 25% claimed uplift fee is to be calculated.

185 The CA is void pursuant to s 185(1) of the Uniform Law by reason of contravention of s 181(2) and s 182(3)(a). As provided in s 185(3), and as further discussed below, Adley Burstyner is not entitled to recover the whole or any part of the uplift fee.

Sections 174 and 175: Harwood Andrews personnel

186 Historically, Adley Burstyner, Harwood Andrews and Sladen Legal were three firm names used by Lantern Legal Group Pty Ltd, an incorporated legal practice. In March 2020, Adley Burstyner became an independent law practice. Between March and June 2020, Mr Burstyner and Mr Anderson of Harwood Andrews agreed to the following secondment arrangement:

(a) Daniel Fullerton and other junior personnel (graduate or paralegal) if and when required ('Harwood Andrews' personnel'), would be seconded to Adley Burstyner on an 'as needs' basis;

(b) Harwood Andrews' personnel would work under Mr Burstyner's supervision, including working from home (noting the emergence of COVID-19 around that time);

(c) Harwood Andrews would bill Adley Burstyner for those staff at the following rates:

(i) $350 per hour for Mr Fullerton (senior associate); and

(ii) $230 per hour for junior lawyers (being paralegals or graduates);

(d) 70% of the fees charged by Harwood Andrews' personnel would be paid by Adley Burstyner within 45 days of monthly invoicing and the balance of 30% payable upon a successful outcome. Harwood Andrews would receive an uplift of 25% on its unfunded professional fees on Adley Burstyner recovering such fees; and

(e) Adley Burstyner (contracting as a principal in its own right) was liable to pay Harwood Andrews for fees charged for Harwood Andrews' personnel.

187 The CA identified Mr Burstyner as the principal, and Daniel Fullerton as the senior associate. The 'Additional Terms, Disclosures and Information' included in the CA itself referred to the 'hourly rates' of 'the lawyer responsible … and other staff who may assist', identifying Mr Fullerton's hourly rate as $425 plus GST. No reference was made in the CA to the fact Mr Fullerton was not 'staff' of Adley Burstyner, but was part of Harwood Andrews' staff.

188 The referee considered that Adley Burstyner failed to comply with the costs disclosure requirements in the Uniform Law regarding employees 'seconded' from Harwood Andrews. She considered that the CA did not make it clear that Mr Fullerton was 'seconded' from Harwood Andrews. Instead it suggested he was a senior associate with Adley Burstyner. The referee considered that Adley Burstyner did not comply with s 174(1)(a) of the Uniform Law when disclosing its basis for charging for legal services provided by Mr Fullerton, doing so in the CA in a way that implied that he was part of Adley Burstyner and was being charged out at Adley Burstyner hourly rates.

189 The referee also considered that Adley Burstyner did not comply with the requirement in s 175(1), the obligation to disclose to the lead plaintiffs the basis on which Harwood Andrews' legal costs, those of a 'second law practice', would be calculated and an estimate of their total legal costs.

190 The referee stated that the potential effect of these non-disclosures is that the CA would be considered void by operation of s 178(1) of the Uniform Law. She considered a reasonable lead plaintiff would not agree to paying more for the Harwood Andrews operators' time than was actually incurred.

191 The plaintiffs originally submitted that s 175 has no application. During the hearing, this submission was abandoned, it being accepted that the lead plaintiffs do not fit the description of a commercial or government client. Instead, the plaintiffs submitted that, even if s 175 applies, Adley Burstyner did not retain another 'law practice' as contemplated by s 175. They submitted that the secondment of specific individuals is different to what is contemplated by s 175. Further or alternatively, that Adley Burstyner did not retain Harwood Andrews personnel 'on behalf of a client' but that any such retainer was for the purpose of assisting Adley Burstyner on an 'as needs' basis.

192 They submitted that, if s 175 does apply, Adley Burstyner fulfilled its disclosure obligations by disclosing the information required under s 174 by way of correspondence to LLS and to the lead plaintiffs which disclosed the secondment arrangement. Further, Mr Fullerton's role and hourly rate were disclosed in the CA and the junior personnel rates were disclosed in subsequent emails.

193 Section 174 is concerned with the provision to the client of information disclosing the basis on which legal costs will be calculated. I am satisfied that Adley Burstyner complied with s 174 so far as the Harwood Andrews personnel are concerned. The CA identifies Mr Fullerton as a 'senior associate' and specifies his hourly rate as $425 plus GST. This is the rate that Adley Burstyner has charged Mr Fullerton out at. Whether that rate is recoverable is another question, but this is not a situation where

the CA does not disclose the basis upon which Mr Fullerton's legal costs will be calculated.

194 The same is the case regarding the other Harwood Andrews personnel. Their charge out rates were separately disclosed via email. Section 174(1) of the Uniform Law does not require charge out rates information to be contained in a costs agreement. It requires the information to be disclosed 'as soon as practicable'. The disclosure of rates for other Harwood Andrews personnel via email (satisfying the writing requirement in s 174(6)) does not contravene the disclosure requirement in s 174(1).

195 Section 175 applies where a law practice (here, Adley Burstyner) intends to retain a second law practice on behalf of a client. For the reasons that follow, given the nature of the secondment agreement, I am not satisfied that s 175 applies on the facts.

196 Section 6 of the Uniform Law defines 'law practice' as:

> (a) a sole practitioner; or
>
> (b) a law firm; or
>
> (c) a community legal service; or
>
> (d) an incorporated legal practice; or
>
> (e) an unincorporated legal practice …

197 'Sole practitioner' is defined as 'an Australian legal practitioner who engages in legal practice on his or her own account'.[58]

198 Regardless of whether the Harwood Andrews personnel became employees of Adley Burstyner during the period of their secondment or whether the arrangement was more akin to a labour hire arrangement, a matter to which I will return later, the arrangement was for specified personnel from Harwood Andrews to assist Adley Burstyner for the purpose of the class action. It was not a retainer of Harwood Andrews itself. Specified Harwood Andrews personnel are not sole practitioners or

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58 Uniform Law, s 6.

a law firm as defined by s 6. They do not meet the definition of a 'law practice'. For that reason, s 175 does not apply.

Non-compliance with s 181: Conditional costs agreement not in 'plain language'

199 In the plaintiffs' 15 June 2023 written submissions reference is made to an estimated uplift fee of $522,120, calculated based on its estimate of unfunded (conditional) professional fees as advised in a letter from Adley Burstyner to Mr and Mrs Iddles dated 6 November 2020. In the plaintiffs' costs table summarising the costs claimed, the amount claimed as uplift is $310,087, being 25% of unpaid fees of $1,240,348.

200 When she prepared her first report, the referee disallowed the uplift fee. She did so for the following reasons:

> The uplift fee of $522,120 was identifiable by AB in its CA by cross-referencing the CA and LFA in particular the budget set out in the Schedule 1. In my opinion, AB contravened sub-section 181(1)(a) of the Uniform Law because it did not set out the uplift fee in clear and plain language. It also claimed for pre-issue work that was not associated with the class action such as the satellite County Court proceedings, incorporated fees charged by HA as if they were AB's rates and charged at rates in excess of the rates payable to HA. Accordingly, in my opinion AB cannot claim uplift fees on its unfunded professional fees.

201 Ms Ward considered that the uplift fee should be allowed. She reasoned as follows:

> 34. First, the Plaintiffs retained AB.
>
> 35. Second, the Plaintiffs entered into a conditional costs' agreement with AB.
>
> 36. Third, the Conditional Cost Agreement expressly provides for an uplift of 25% on any professional fees. and estimates and the likely amount of the uplift fee is disclosed in Schedule 1 to the Cost Agreement [see para [81] First Referee Report].
>
> 37. However, after acknowledging these features Ms Dealehr opines at paragraph 81 that the Costs Agreement breaches s181(2)(a) because the uplift fee is not in clear and plain language. I disagree with Ms Dealehr here. Ms Dealehr does not provide any reasons as to why she considers the Cost Agreement language is unclear and obtuse, and why this then means uplift fees cannot be claimed.
>
> …
>
> 43. Based on the guidance of the LIV, I consider the AB Conditional Costs Agreement meets the requirements of clear and plain language within the meaning of the LPUL. In my experience, the Cost Agreement does

all that is required by s181(2)(a) of the LPUL and all that is recommended by the VLSB and LIV. For example, the way the calculation of the uplift fee is calculated, is identified in plain English and generally disclosed in accordance with the LPUL, including quantifying how the uplift is calculated, and the 'sum' of the uplift fee based on the costs estimates. The Cost Agreement also clearly, plainly and unambiguously directs the clients to information they need in Schedule 1.

202 In her third report, the referee responded to Ms Ward:

> 16. I refer to paragraph 33 - 36 and disagree with SW that the fundamental features of a compliant costs agreement under the Uniform Law are found in the Fonterra CCA and provide the following reasons why I consider this to be so. At paragraph 36, SW mistakenly states that the CCA expressly provided for an uplift fee on 25% on any professional fees when in fact the CCA expressly provided for an uplift fee at 25% of any unfunded professional fees. However significantly, at no place in the CCA does AB specify the amount of the funded portion under the LFA was to be 70% of professional fees and therefore the unfunded portion was to be 30%. In my opinion the % of the legal fees that is to be funded and unfunded are critical components of the agreement, impacting directly on the Lead Plaintiffs' liabilities for any uplift fee on the unfunded professional fees. I do not consider this was clearly and plainly addressed in the CCA either in form or in content which makes the CCA non-compliant with the mandatory requirements of the Uniform Law.
>
> …
>
> 21. I refer to paragraph 43, and maintain my opinion that the CCA including Schedule 1(i.e. budgets and caps) does not meet the requirements of clear and plain language within the meaning of the Uniform Law. In *Russells Solicitors v McArdel*[59] Justice Bell found in relation to the equivalent provision of Section 182(3)(a) & (b) that "*A basis of calculation is different to an estimate. Lawyers are required to make disclosure to the client in the agreement both of the basis of the calculation of the uplift fee and the fee itself (unless that is not practicable)*". In that case, the Court disallowed the uplift fee entirely due to the failure to properly describe the basis of calculation.

The Costs Agreement

203 The CA states in the body of the Adley Burstyner 14 June 2020 letter (page 51 of 56 of the bundle) that:

> In the event that the fees become payable due to one of the circumstances described above, then an uplift will also become payable, and will be charged, in exchange for us not requiring earlier payment and taking the risks of this agreement and the Litigation Funding Agreement. The uplift will be an

[59] [2014] VSC 287.

> increase amounting to 25% of the fees which were conditional and which have become payable.
>
> An estimate of the total uplift fee is contained the budget in schedule 1 of the Litigation Funding Agreement.
>
> The exact amount of any uplift will be determined by the stage at which the fees become payable, and the work done to that point in time.

204 Although the CA states that the 25% uplift will be calculated on 'the fees which were conditional', it does say what proportion of the overall fees were conditional. Although clause 1 of the LFA contains a number of definitions, no definition of what constitutes 'fees which were conditional' is to be found in the LFA and there is no definition of that expression in the CA itself.

205 The CA refers in the paragraph quoted above to the budget at Schedule 1 to the LFA.

206 The budget in Schedule 1 of the LFA identifies the estimated fees and disbursements associated with each stage of the proceeding. It separates the 'unconditional costs' in one column from the 'AB fees conditional on success (ie: risk share), without 25% uplift' in another column. There is a single line item at the foot of the table described as 'estimated uplift for the purposes of the Legal Profession Uniform Law (being 25% of conditional/risk share fees)', $522,120. The $522,120 figure appears below an entry at the foot of the 'AB fees conditional on success column (ie: risk share), without 25% uplift', with the words 'risk share/conditional costs' and an arrow pointing to an amount of $2,088,481. There is no explanation in Schedule 1 that the 25% is payable only on 30% of the costs, and Schedule 1 contains no note or statement as to that effect, whether a statement in 'plain language' as required by s 181(2)(a) of the Uniform Law or otherwise.

207 There is a reference to 'conditional fees' in item 0 in Schedule 1 of the LFA in the discussion of pre-filing costs that 'conditional fees includes fees deferred by agreement with previous funder (where 50% AB fees paid for some DD work)'.

208 As will be seen later and as identified by the referee, the percentages of the conditional fees for each of the stages in the table in Schedule 1 of the LFA, while not stated in the

table itself, with the exception of the security for costs phase, are not 30%; they range from 36% to 59%. They also include within the $2,088,481 total, $481,359 being the pre-filing costs. The total of the conditional fees of $2,088,481 also does not represent 30% of the total fees, but rather amounts to 41% of the total estimated Adley Burstyner fees of $5,092,563.

209 It is possible to locate an explanation for the 'conditional fees' being 30% of the overall fees within the LFA. However, to locate that explanation, a number of definitions in the LFA, but which are not found in the CA, need to be considered.

210 Page 13 of 56 of the bundle provides that LLS will pay the 'Project Costs'. Project Costs are not referred to in the CA. 'Project Costs', as defined on page 8-9 of 56, exclude the 'Remaining Costs'. The Remaining Costs are defined on page 10 of 56 as:

> (a) the percentage set out in **Item (j) of Schedule 2 of** the reasonable Legal Costs of the Lawyers incurred up to the conclusion of this Agreement for the sole purpose of preparing for, prosecuting and resolving the Proceedings (excluding any Project Investigation) together with any applicable uplift fee…

211 Item J of Schedule 2 of the LFA, at page 31 of 56, to which no reference is made in the CA and which only makes sense when read in the context of the definitions mentioned above, specifies the 'Remaining Costs – Percentage borne by Lawyers' to be 30%. There is no reference to 'Remaining Costs' in the CA.

212 The LFA also includes the following statement at Schedule 5, commencing on page 45, 'Standard Lawyer Terms' at page 47:

> 6.3. Subject to the LLS Funding Agreement, LLS will pay:
>
> 6.3.1. 70% of the reasonable legal fees of the Lawyers incurred up to the termination of the LLS Funding Agreement for the sole purpose of preparing for, prosecuting and resolving the Claims and/or the Proceedings, and for any other work performed at the request of LLS…

Consideration

213 Section 181(2)(a) of the Uniform Law requires that a conditional costs agreement must be in writing and in 'plain language'. Section 182(2)(b) provides that an uplift fee in a

conditional costs agreement must not exceed 25% of the legal costs (excluding disbursements) otherwise payable. Section 182(3) reproduced above is quite prescriptive about information that must be identified and included.

214 The plaintiffs submitted that there has been compliance with s 181(2)(a). They submitted, as is the opinion of Ms Ward, that the terms of the uplift fee were set out in clear and plain language in the CA, when read together with the budget at Schedule 1 to the LFA and Item J of Schedule 2 to the LFA.

215 I accept the submission that the requirement that a conditional costs agreement be evidenced in writing does not mean that the agreement must be contained in a single document. I also accept that the CA sets out the circumstances that constitute the successful outcome of the matter to which it relates. However, I do not accept that the CA is in plain language.

216 Read together, there are parts of the CA and the LFA that can be interpreted as establishing that the 25% uplift fee is calculated based on the conditional fees, being 30% of the total professional fees. To arrive at that conclusion requires the reader to read the definition of 'Remaining Costs' and to have regard to Item J of Schedule 2. That item is not referred to or cross-referenced in the CA.

217 The budget at Schedule 1 to the LFA contains an estimate of the uplift fee for each stage of the proceeding, as well as an overall estimate. However, as earlier mentioned, the uplift fee estimates in the budget at Schedule 1 to the LFA are not calculated based on 30% of the unfunded conditional professional fees. The referee has calculated the percentage of the professional fees which, based on the budget, LLS appears to have agreed to fund as follows:

	Unconditional costs		**AB Fees conditional on success without 25% uplift**	**Dealehr calculations**	
Stages	**Total disb's**	**AB Fees**		**Total AB Fees**	**% funding of AB Fees by LLS**
0. Pre-filing	$23,137.00	$330,605.00	$481,359.00	$811,964.00	41%
1. Costs in connection with	$17,693.00	$22,530.00			

filing, finalising statement of claim and associated work					
2. Filing and onwards: Pleadings -particulars, defence	$157,583.00	$150,830.00	$89,920.00	$240,750.00	63%
3. Security for costs	$43,136.00	$33,845.00	$14,505.00	$48,350.00	70%
4. Discovery	$343,083.00	$917,513.00	$645,037.00	$1,562,550.00	59%
5. Statements and evidence gathering/preparation	$654,030.00	$474,362.00	$262,688.00	$737,050.00	64%
6. Subpoenas – pre-trial and for trial	$51,074.00	$32,180.00	$17,820.00	$50,000.00	64%
7. Mediation	$124,444.00	$113,594.00	$62,906.00	$176,500.00	64%
8. Preparation for trial	$142,868.00	$121,028.00	$67,022.00	$188,050.00	64%
9. Settlement	$80,389.00	$152,307.00	$84,343.00	$236,650.00	64%
10. Trial and court appearances	$1,034,482.00	$363,354.00	$201,216.00	$564,570.00	64%
11. Multi party function	$112,732.00	$95,316.00	$52,784.00	$148,100.00	64%
12. Interlocutory applications not otherwise covered	$112,438.00	$72,276.00	$40,024.00	$112,300.00	64%
13. General care and conduct	$98,827.00	$124,343.00	$68,857.00	$193,200.00	64%
TOTAL PER EXCEL (NOT PDF)	**$2,995,916.00**	**$3,004,083.00**	**$2,088,481.00**	**$5,092,564.00**	**59%**

218 With the exception of the security for costs phase, the portion of the professional fees which are unconditional ranges from 41% to 64%. The total proportion of the budgeted professional fees which are unconditional is 59%. Accordingly, the percentage of the professional fees which are conditional as shown in Schedule 1 (which corresponds to the 'Remaining Costs' as defined in the LFA) and to which the 25% uplift fee applies range from 36% to 59%. The total proportion of the budgeted professional fees which are conditional is 41%. It is not 30% as stated in Item J of Schedule 2.

219 These inconsistencies give rise to two issues: first, whether the CA is 'in plain language' as required by s 181(2)(a). Second, whether the CA identifies the basis on which the uplift fee is to be calculated as required by s 182(3)(a).

The CA is not in plain language

220 The plaintiffs cited the decision of Bell J in *Russells v McCardel* ('*Russells*'),[60] in support of their contention that the plain language requirement of the Uniform Law has been satisfied. In that case, interpreting the predecessor legislation concerning uplift fees which provided the same 'plain language' requirement, Bell J held:[61]

> 5. People engaged in legal proceedings and seeking legal services are typically in a position of unequal bargaining power when negotiating with and choosing a lawyer. While some clients are relatively sophisticated, most have limited knowledge of the law and legal procedures and may be emotionally involved in the case. By contrast, lawyers possess legal expertise as well as the detachment and objectivity which comes from professional training and experience.
>
> 6. That being so, most clients are in a position of vulnerability when it comes to reaching agreement about the fees and disbursements that might be charged under any retainer. Without information expressed in clear and plain language about the extent of their monetary liability, they may find it very difficult to make informed decisions about engaging a particular lawyer or choosing between competing lawyers. All too often the legal costs charged are unexpectedly high; time-consuming and expensive disputes are the unhappy consequence.
>
> 7. Clarity, freedom of informed choice and proportionate legal expenses are important not only for the relationship between lawyer and client but also for the operation of the system of justice. Remembering that lawyers enjoy a statutory monopoly that can only be justified in the public interest, excessive legal costs undermine public confidence in the legal system and present a significant barrier to obtaining access to justice, which is a fundamental human right.
>
> …
>
> 10. The protective policy of requiring disclosure by lawyers and enhancing freedom of informed choice by clients underpins this legislation, reflecting the modern conception that clients are not just clients but also consumers who are typically in a position of negotiating disadvantage, that lawyers are not just professionals but also suppliers of legal services and that the provision of legal services is not just an indispensible ingredient of the system of justice but also a (national) market in which information and bargaining power are imperfectly distributed. In response to increasing concerns about the level of legal

60 [2014] VSC 287, [79]–[80].

61 Ibid [5]–[7], [10]–[11], [75]–[77] (citations omitted).

costs and disputes about this subject, the legislative expression of this policy has evolved over recent years such that the requirements of the Victorian legislation, and its national counterparts, are stronger now than they have previously been.

11. The regulatory scheme is implemented in the Act through a hierarchy of provisions which impose increasingly intensive levels of regulation upon ordinary retainers, costs agreements, conditional costs agreements and conditional costs agreements involving uplift fees, in that order.

…

What is 'clear plain language'?

75. The setting in which s 3.4.27(3)(c)(ii) falls to be applied is a client and a lawyer negotiating over a conditional costs agreement. The purpose of the requirement for the agreement to be expressed in clear and plain language is to enhance the capacity of the client to make a freely informed choice about engaging the lawyer and to understand the terms and conditions on which that might be done. As discussed, the client will typically be in a position of negotiating disadvantage vis-à-vis the lawyer because he or she will probably have limited legal knowledge and a personal stake in the case whereas the lawyer will have legal qualifications and expertise as well as professional objectivity. The requirement is intended to assist in ensuring that this imbalance is redressed as far as possible by (among other things) casting upon the lawyer the obligation to make disclosure in the specified terms.

76. As I read s 3.4.27(3)(c)(ii), considered in the context of the whole of that section and pt 3.4 generally, the requirement for the agreement to be in clear plain language goes to how the language of the agreement is expressed. The requirements in paras (a), (d) and (e) make provision with respect to the substantive content of the agreement and para (b) is a permissive provision which also goes to that content. By contrast, para (c) deals with the form and language of the agreement and how it is to be executed. It must be in writing (sub-para (i)), in clear plain language (sub-para (ii)) and signed by the client (sub-para (iii)). These requirements are different in character to the others in s 3.4.27(3).

77. The ordinary meaning of the word 'clear' is 'distinctly perceptible to the mind … free from confusion, uncertainty or doubt … easily understood … in plain language …' The ordinary meaning of the word 'plain' is 'clear to the mind; evident, manifest or obvious … conveying the meaning clearly or simply; easily understood … free from ambiguity …' In reference to the language in which a document such as a costs agreement is expressed, there is considerable overlap between the meaning of the two words. Taking into account the protective purposes of pt 3.4 and the focus on disclosure in the regulatory scheme, perhaps the expression 'clear plain language' is best understood as a compound adjective or cognate concept encapsulating a requirement that the language of the agreement is clear and plain in the sense that it can easily be understood by the ordinary reader after applying

> reasonable effort. I would therefore agree with the statement of Lasry J in *Smirnios v Byrne (No 2)* that 'the intention of the legislation is that there be a comprehensible disclosure'. In this connection, I do not think that the expression 'clear plain' means anything different to the expression 'clear and plain', although I prefer the latter because it has the advantage of being grammatically correct.

221 I consider the enquiry which is required in order to determine whether the 'plain language' requirement of s 181(2)(a) is satisfied is one that requires a consideration of the CA as a whole, read as previously stated with relevant cross-references and parts of the LFA. That is, so as to determine whether the CA as a whole is 'in plain language'. Adopting the ordinary meaning of the word 'plain' to which Bell J referred in *Russells*: 'clear to the mind; evident, manifest or obvious … conveying the meaning clearly or simply; easily understood … free from ambiguity'.[62]

222 The plaintiffs submitted that the fact none of the budget stages (other than security for costs) nor the total stage amount in Schedule 1 to the LFA set out the 70% which LLS agreed to fund does not render the CA not 'in plain language'.

223 As is recognised in the plaintiffs' submissions, the CA itself does not mention 25% uplift on 30% of the total solicitors fees. The client is required to go to the LFA. Upon arriving at the LFA, the internal inconsistency within the LFA is not a matter of 'accuracy' or 'legal' error as discussed in *Russells*.[63] There is an internal inconsistency leaving the client unclear as to what part of the fees the uplift applies and as to the correct method of calculating the uplift fee. Is the uplift fee to be calculated based on 30% of the total professional fees (per Item J of Schedule 2 to the LFA to be read with the definition of 'Remaining Costs – Percentage borne by Lawyers' in clause 1 of the LFA), or is it to be based on percentages of the total professional fees varying from 36% to 59% depending on the stage (per rows 0 – 13 of the budget at Schedule 1 to the LFA), and/or based on 41% of the total professional fees (per the final row of the budget at Schedule 1 to the LFA) which leads to the stated total of $552,120 for the client?

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62 Ibid [77].
63 Ibid [79]–[80].

224 To say that for the client to navigate through the CA and then the LFA, including to definitions pages and Schedule 2 of the LFA, to which no reference is made in the CA, is quite a task is a gross understatement. The explanation in the CA relates to the portion of fees to which the uplift applies, which must be read together with Schedule 1 to the LFA and Item J of Schedule 2 to the LFA. There is nothing 'clear … manifest or obvious'. The CA effectively requires the client to 'go hunting' for the answer.

225 There is nothing 'plain' about the convoluted provisions spanning across two agreements and many of the 56 pages upon which the plaintiffs and more particularly Adley Burstyner rely in support of an asserted entitlement to charge a 25% uplift on their unfunded professional fees. To borrow from the language of Bell J in *Russells*:[64]

> An ordinary reader, after applying reasonable effort, could not easily understand how the amount of the uplift fee was estimated. This subject is left in a confused and uncertain state by the provisions of … [the CA and the LFA].

226 A plain language statement within the CA itself could have satisfied the plain language requirement in s 181(2)(a) if it said:

- 30% of Adley Burstyner's legal fees (estimated to total $X) are unfunded.
- If there is successful outcome Adley Burstyner will charge an uplift fee not exceeding 25% of those unfunded legal costs.

227 I do not consider that the CA, read together with the LFA, is 'in plain language' as required by s 181(2)(a) of the Uniform Law. I agree with the referee. Pursuant to s 185(1), the CA is void.

Adley Burstyner is not entitled to charge an uplift fee

228 The plaintiffs submitted that the uplift fee is recoverable, even if the CA is void, so long as the requirements of s 182 are not contravened. They relied on *Wills v Woolworths Group Ltd* ('*Wills*'),[65] where Beach J held:[66]

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64 Ibid [88].
65 [2022] FCA 1545.
66 Ibid [33], [68]–[69].

> 33. … [E]ven if a costs agreement is found to be void either *in futuro* or *ab initio* due to a failure to comply with the disclosure obligations, the law practice is still entitled to be paid fair and reasonable legal costs (s199(2)). And this could include the payment of an uplift fee on costs the payment of which was conditional on a successful outcome, as such a fee is only statutorily prohibited where a law practice has entered into a costs agreement in contravention of s 182. I will return to this later.
>
> …
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> 68 But even if a costs agreement is found to be void due to a failure to comply with disclosure obligations, the law practice is still entitled to be paid fair and reasonable legal costs (s 199(2)). This could include the payment of an uplift fee on costs the payment of which was conditional on a successful outcome, as such a fee is only statutorily prohibited where a law practice has entered into a costs agreement in contravention of s 182 which was not the case here. So even if the costs agreement was void, that would not necessarily preclude seeking an uplift.
>
> 69 Section 185(3) makes it plain that an uplift fee is only to be denied where the costs agreement was entered into in contravention of s 182, which deals specifically with conditional costs agreements and uplift fees.

229 I proceed on the basis set out by Beach J. Namely, that, unless the CA was entered into in contravention of s 182, in which case s 185(3) prohibits recovery of the uplift fee, the uplift fee may be recoverable. That is, provided the 25% uplift fee claimed on 30% of the Adley Burstyner fees not funded by the funder, if allowed, results in legal costs which are fair and reasonable.

230 The question of whether the uplift fee is fair and reasonable does not arise for consideration if there is a contravention of s 182. The issue that arises in this case is whether the CA identifies the basis on which the uplift fee is to be calculated as required by s 182(3)(a).

231 In her first report, the referee noted that, in her experience, courts 'have not automatically disallowed uplift fees in circumstances where there have been minor failures by Applicant law firms to comply with disclosure provisions'. The referee clarified that statement in her third report:

> Although I identified at paragraph 82 of my first report that Courts in approval applications have not automatically disallowed uplift fees in cases of minor failures, it is my opinion that the failure in this case is substantial.

232 The plaintiffs disagree with the referee. They submitted that the CA complies with s 182(3)(a) because it discloses the basis upon which the uplift fee would be calculated, being 25% of the conditional / risk share fees, and Schedule 1 of the LFA sets out an estimate of the uplift fee. The plaintiffs relied on the decision in *Russells* in which Bell J observed that a 'percentage is a basis of calculation'.[67]

233 In *Russells*, Bell J was addressing a different topic. His Honour was making the point that an *estimate* of the uplift fee must be an amount, and that a percentage is not an amount for this purpose. His Honour was also not concerned with a case such as the present where the uplift fee is not to be applied to 100% of the professional fees but to a percentage only of those fees.

234 Section 182(3)(a) specifies part of what must be identified in a conditional costs agreement. Section 182(3)(b) specifies other matters that must be included.

235 Turning first to s 182(3)(b), Schedule 1 of the LFA identifies $522,120 as the estimated uplift fee. That requirement is satisfied.

236 Turning next to s 182(3)(a), I am not satisfied that the CA identifies 'the basis' upon which the uplift fee is to be calculated. The requirement in s 182(3)(a) that the agreement 'identify the basis on which the uplift fee is to be calculated' requires more than specification of the percentage of the uplift fee at 25%. It requires the clear identification of each and every starting point that provides or constitutes the 'basis' for the calculation. The CA itself fails to identify the 'fees which were conditional' to which the uplift is contended to be applied; in this case 30% of the legal fees. The LFA also does not identify the 'basis'. While the LFA identifies the 'Remaining Costs – Percentage borne by Lawyers' as 30%, in the convoluted manner to which I have referred, requiring the definition of 'Remaining Costs' on page 9 of the bundle to be read with the 30% figure in Schedule 2, Item (j) at page 31 of 56, the uplift fee estimates included in the budget in Schedule 1 at page 26 of 56 cross-referenced in the CA at page 51 of 56 are based on conditional fees which represent percentages which, except

67 *Russells v McCardel* [2014] VSC 287, [39].

in the case of security for costs, are not 30% of the total professional fees. The percentages in Schedule 1 range from 36% to 59% for the various stages. An overall uplift fee estimate is included based on conditional fees representing 41% of the professional fees. Given these irreconcilable internal inconsistencies it cannot be said that the CA and the LFA, taken together, identify 'the basis' on which the uplift fee is to be calculated as required by s 182(3)(a). The LFA identifies three different inconsistent bases: 30%, an average of 41%, or a range of 36% to 59%.

237 There is a further problem when it comes to identifying 'the basis' on which the uplift fee is to be calculated. The entry for pre-filing costs in Schedule 1 includes in the description of stage 0 'conditional fees', 'fees deferred by agreement with previous funder (where 50% AB fees paid for some DD work)'. $481,359 in conditional costs is attributed to this line item. The CA and the LFA do not say how whatever payment was made by the previous funder either is to be or has been brought to account in arriving at 'the basis' on which the uplift fee is to be calculated. The 'basis' on which the amount of $481,359 is calculated and how it relates to Adley Burstyner's 'unconditional costs' is not stated or identified. The description of the stage also includes a reference to counsel fees conditional upon success which, if included in the $481,359, are not fees upon which an uplift is properly payable. The issue is compounded by the entry at the foot of Schedule 1 against various items in different columns including $2,088,481 at the foot of the 'AB fees conditional on success' column, of the statement '[d]oes not account for any fees already invoiced and paid'. It is not clear what fees already invoiced and paid are being referred to and are to be accounted for in some unspecified way.

238 The objects of Part 4.3 of the Uniform Law as stated in s 169(a) include ensuring that clients are able to make informed choices — including about costs. The CA in this case fails to meet that objective. If fails to identify with any clarity the basis of the figure to which the uplift fee is to be applied.

239 Given the contravention of s 182(3)(a), by reason of s 185(3) of the Uniform Law, the claimed uplift fee of $310,087 is not recoverable and is not an allowable deduction from the settlement sum.

Costs prior to commencement of the proceeding

240 While the proceeding was commenced on 17 June 2020, it was preceded by several years of work. The plaintiffs' submissions summarised this work as including:

(a) understanding the nature of the dairy industry and the potential case against Fonterra – this included consulting with potential claimants and industry experts such as farm consultants;

(b) organising potential group members and identifying and meeting with potential lead plaintiffs;

(c) engaging and instructing counsel, including senior counsel, to advise and subsequently draw pleadings;

(d) carefully monitoring, reading and analysing relevant documentation in relation to six related proceedings/inquiries which resulted directly from the decrease in farmgate milk prices and which were all directly relevant to the subject matter of the class action (estimated at between 173 to 205 hours);

(e) from around 30 August 2016 to around 1 May 2019, negotiating litigation funding with several funders. Work performed at the request of litigation funders was required to be done to progress the class action and for the benefit of the class action;

(f) drafting, reading and considering emails. In the relevant period, the email box of Mr Burstyner for the class action shows 2959 emails;

(g) frequent engagement via email, telephone conversations and in person meetings (including interstate) with dairy farmers;

(h) preparing and providing regular updates on the case preparation for the dairy farmers who had registered their interest with Adley Burstyner;

(i) gathering of information and documents from dairy farmers, which was very useful in order to confirm commonality of issues, and identify persons suitable for representative or other roles in the case; and

(j) regularly reviewing material, creating and maintaining working papers, such as the chronology and representations document, and hard and soft copy key document repositories (the master set).

241 Adley Burstyner kept contemporaneous records for the period May 2019 to 17 June 2020. It kept limited contemporaneous records for the period May 2016 to May 2019.

242 The plaintiffs and Adley Burstyner contend that an amount of $494,135 (excluding GST) should be allowed for work performed between May 2016 and May 2019.

Referee's allowance

243 In her first report, the referee disallowed the entire amount of $494,135 sought by the plaintiffs on the basis that such a claim, without proper substantiation, 'would not be recoverable as a single entry covering a period of four years'.

244 The referee noted that the only reference to earlier work that pre-dates the CA and the LFA is the following entry in the budget which relevantly states:

> 0. Pre-filing costs to be billed upon filing, being costs incurred from commencement of the matter. Also includes costs to 25 May 2020 of defending County Court Action. 25% of most of those pre-filing professional AB costs are risk share, in the conditional column, and a small amount of counsel fees conditional upon success too and $199k paid by former funder. See email DB to KM 31 May 2020. Conditional fees include fees deferred by agreement with previous funder (where 50% AB fees paid for some DD work).

245 In respect of pre-filing costs, the budget table in Schedule 1 identified $23,137 for total disbursements, $330,605 in Adley Burstyner unconditional costs and Adley Burstyner fees of $481,359 conditional on success. That implies total pre-filing costs of $811,964 plus disbursements.

246 The referee observed that:

> Pre-retainer costs have been disallowed in class actions when the work conducted by the law firm occurred prior to obtaining signed costs agreements from group members and where it was primarily related to identifying whether the class action would be commercially viable for both the lawyers and the litigation funder.

247 The referee ultimately concluded that some pre-retainer work is claimable, provided it is fairly and reasonably incurred and of a reasonable amount.

248 Prior to the preparation of her third report, the referee was provided with additional material in support of the claim for pre-retainer work. Having regard to the additional material, the referee made an allowance of 250 hours for unrecorded time in respect of work performed between May 2016 and May 2019. The total amount allowed by

the referee in respect of unrecorded time, at Mr Burstyner's rate of $550 per hour, is $137,500.

249 In her third report, the referee explained:

> 26. AB has provided me with the memorandum for the litigation funder dated September 2019 in the initial tranches of materials which I have now considered in light of the claim for the pre-issue work. In that memorandum at Schedule 2, AB estimated its professional fees claimed at 100% for the pre-filing work undertaken (at that stage for the period 2016 – 2019) at $420,540, with counsel's fees at $14,113 and other disbursements at $12,500 (total $447,153) (see **ATTACHMENT A**). This was at a time when DB ought to have better understanding of what the estimated costs incurred to date was, including costs not included in AB's time recording. Eight months later in the budget found at Schedule 1 of the LFA, the amount of the pre-filing work has increased from $420,540 to $811,964 with the addition of a detailed description (albeit unclear) of the pre-filing work. In those eight months, DB was recording his time so the increase in fees might reasonably be assumed to be a change to what was the earlier work undertaken. Even taking into account the inclusion of the County Court proceeding costs in the budget item 0 in the LFA at around $75,000 is not sufficient to explain the change of position by AB as to its estimated pre-issue costs in the LFA.
>
> 27. The methodology adopted by SW does not cross-reference the more reliable time found in the time recording records provided to me by AB which I based my calculations. Those calculations and time entries were provided to SW on 14 April 2023. This included the 94.53 hours where DB recorded time where the activities undertaken by him was categorised by me and available for SW to consider …
>
> 28. Examination of the time recording does identify substantial gaps in the record keeping by DB. The only person recording the time spent on their work in the time recording system up to 18 October 2017 was Annabelle Moylan who recorded 246.2 hours. I acknowledge DB had undertaken substantial pre-issue work prior to 18 October 2017 but the issue of his work has not been dealt with by me until now. …
>
> 29. … To take into account the reasonable fees for work undertaken but not recorded in the proper manner by DB, I have formed the view that it would be reasonable to allow for further time spent and consider 250 hours @ $500 plus GST ought to be allowed. This would equate to $137,500 (including GST)…

Plaintiffs' submissions

250 In their submissions, the plaintiffs explained how the claim made by Adley Burstyner of $494,135 is said to be justified:

> In respect of the earlier period between May 2016 and May 2019, Mr Burstyner did not keep contemporaneous records (save for 134 time entries for the period 14 July 2017 to 29 April 2019). Nonetheless, he estimated that he spent about 5.5 hours per day for 2.5 years (at 220 working days per year), calculated at the rate of $500 per hour, and took 35% of the total (after discounting) to arrive at a figure of $494,135 (excl of GST). He then prepared a comprehensive summary of the work performed during the period 5 May 2016 to 1 May 2019.

251 The plaintiffs contended that when the referee did not accept that assessment and when she determined that $137,500 (inclusive of GST) was a reasonable allowance for unrecorded time, the referee made three key errors.

252 First, the referee's reasoning in concluding that the pre-filing costs in the funding agreement dated 15 June 2020 ($811,964) were over-estimated when compared to a 12 September 2019 document entitled 'First Memorandum to litigation funder – September 2019' ($420,540 excluding counsel's fees) was flawed. Mr Burstyner gave evidence that he 'inserted $420,540 for pre-filing costs to be billed when filing as at around April 2019' but that 'that amount was not updated to reflect the work I had actually done by September 2019, which was in fact a lot higher'. Mr Burstyner did not consider it necessary to calculate an updated figure at that stage, as he expected to have an opportunity to update the figure in due course, which he did prior to the execution of the LFA.

253 In support of this submission, counsel for the plaintiffs drew attention to an attachment to an email dated 28 April 2017 which referred to fees incurred to 31 December 2016 of $422,500. The plaintiffs submitted that this figure was used in the fee estimate provided to the funder in September 2019 but without any updating.

254 Second, the referee did not consider the detailed summary of work prepared by Mr Burstyner, nor the supporting documents. During oral submissions, counsel for the plaintiffs drew attention to a summary exhibited to the Fifth Burstyner Affidavit entitled 'Summary of work performed by David Burstyner in relation to the proposed

Fonterra class action during the period 5 May 2016 to 1 May 2019' ('the Summary'). It was submitted that the referee merely tallied up the total number of hours referred to in the Summary, between 181 and 213 hours, but that she otherwise did not perform any analysis of the Summary. It was submitted that Ms Ward's report, in which she considered the Summary and the 43 supporting documents to assess the amount of work done by Mr Burstyner between May 2016 and May 2019, is to be preferred in this regard. Although Ms Ward assessed a reasonable sum for Mr Burstyner's work during this period as $692,950, only $494,135 (excluding GST) is claimed.

255 The plaintiffs submitted that the referee's criticism of Ms Ward for failing to cross-reference the 134 time entries actually recorded by Mr Burstyner demonstrates a misunderstanding of the evidence because the Summary document builds on, but is not limited to, the 134 time entries.

256 Third, the allowance made by the referee of 250 hours appears to relate only to work performed between 5 May 2016 and 18 October 2017; an arbitrary date only part way through the three year period to May 2019. The plaintiffs submitted that the 250 hours allowed by the referee appears to be based on work recorded by Ms Moylan, who the referee notes recorded 246.2 hours for the period until 18 October 2017.

Consideration

257 There is no dispute that the referee was correct in allowing 94.53 hours relating to 134 time entries kept by Mr Burstyner during the period May 2016 to May 2019. The issue is whether the referee's allowance of an additional 250 hours in respect of unrecorded time, reveals a 'patent misapprehension of the evidence … or manifest unreasonableness in fact finding'.[68] For the reasons that follow, I am not satisfied that it does.

258 The plaintiffs rely on Mr Burstyner's evidence contained in the Summary as to the calculation of the figure of $494,135 (excluding GST):

> 39. Mr Burstyner did not keep contemporaneous records of the time spent in relation to the proposed class action between May 2016 and May

[68] *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* [2009] VSCA 191; (2009) 25 VR 119, [17(e)].

2019. However estimated the time that he spent as best he could, by reviewing the tasks undertaken during the relevant period and the time spent on those tasks. Although the relevant period spanned approximately 3 years, his estimate took into account only a period of 2.5 years.

40. Mr Burstyner's review of the tasks undertaken included:

    (a) reviewing close to 3,000 emails sent and received by Mr Burstyner during the relevant period;

    (b) considering excel spreadsheets that Mr Burstyner created in around January 2017 which contained an estimate of in the amount of $422,500 that he made in early 2017 for work performed from May 2016 to early 2017; and

    (c) reviewing work performed by Mr Burstyner during the relevant period.

41. Mr Burstyner spent much of the period May 2016 to May 2019 working exclusively on the proposed Fonterra class action. At the time he was the only lawyer at Adley Burstyner with class action experience.

42. Mr Burstyner calculated a '**representative entry**' as follows:

    (a) 5.5 hours per day x 220 days per year= 1,210 hours;

    (b) 1,210 hours x 35% = 423.5 hours;

    (c) 423.5 hours x Mr Burstyner's then hourly rate of $500 = $211,750;

    (d) $211,750 multiplied by 2.5 years= $529,375;

    (e) $529,375 less $35,240 (proceeding "unpaid" entries)= $494,135.

43. This calculation is set out in an excel spreadsheet which was provided to Ms Dealehr. (There was an error in the spreadsheet in that the proceeding unpaid entries showed as $3,524, but should have shown as $35,240). On reflection, the deduction for the proceeding entries should have been $50,415, such that the total amount is $478,960.

259 Between approximately four and seven years after the fact, and without the benefit of contemporaneous records, Mr Burstyner has retrospectively estimated the time he spent on the matter between 5 May 2016 and 1 May 2019. Whilst I do not doubt the bona fides of the process undertaken, it is highly subjective and the key assumptions that have been made call into question the efficacy of the process.

260 Mr Burstyner assumed 5.5 hours per day spent on the proposed class action. Although counsel submitted that this was half a business day, I have assumed an average of

7 billable hours per day. 5.5 out of 7 hours equates to roughly 78% of each day; a significant amount of time. Mr Burstyner then makes an adjustment to the product of his calculation by applying a 65% reduction, without any explanation as to why this is an appropriate amount. This immediately casts doubt on the validity of the entire exercise.

261 I agree with the referee that this exercise is 'highly unreliable'. No basis is set out, whether in evidence or elsewhere, to support the adoption of what appears to be a completely arbitrary reduction of 65% from the figure calculated by Mr Burstyner. To adjust a calculated figure by reducing it by 65% demonstrates a lack of any faith in the reliability of the primary calculations. There is no proper basis upon which the Court or the referee could determine the fair, reasonable and proportionate costs for unrecorded time in the amount claimed.

262 While the amount claimed is not justified and Mr Burstyner's approach including his 65% reduction is flawed it is nonetheless necessary to consider the specific criticisms of the referee's reasoning to decide whether adoption of her reports concerning this topic is appropriate, applying *Wenco*.

263 The first alleged error is the referee's comparison of the memorandum dated 12 September 2019 identifying costs of $420,540 and the pre-filing costs of $811,964 identified in the 15 June 2020 LFA. In my view, the referee's reliance on these documents was reasonable. Even accepting that the amount referred to in the September 2019 memorandum was incorrect and had not been updated since December 2016, there is no evidence that this was explained to the referee. Before the hearing, it was not clear to the Court what the issue concerning the September 2019 memorandum was, and what the explanation for the error was. There is no evidence that information communicated to the Court during the hearing was provided to the referee in the way in which it was explained in Court. The referee was reasonably entitled to draw the conclusion that she did based on the documents provided or other contemporaneous documentary evidence recording time for work performed. I am

not satisfied that the first alleged error demonstrates a patent misapprehension of the evidence or a manifest unreasonableness in fact finding.

264 The second alleged error is the referee's failure to consider the Summary and supporting documents, unlike Ms Ward who did the 'typical work of a costs expert' which was submitted to be to 'look at the tasks qualitatively and estimate quantitively the time associated with those tasks'. This misconceives the role of the referee. The referee was appointed to report on 'the amount of legal costs that the Court should approve as fair, reasonable and proportionately incurred'. It is not the role of the referee to sift through summaries of tasks, themselves prepared years after the event, to calculate an estimate of the reasonably incurred costs without the benefit of actual time entries and supporting narrations. I am not satisfied that, by noting the Summary and tallying the total number of hours referred to by Mr Burstyner in the Summary, the referee has demonstrated a patent misapprehension of the evidence or a manifest unreasonableness in fact finding.

265 If it were relevant to do so, and it is not in the case of the adoption of the report of the referee where the task is more limited as explained in *Wenco*, I am also not satisfied that the approach adopted by Ms Ward to the issue of pre-filing work should be favoured over the approach of the referee. The plaintiffs described Ms Ward's approach as estimating the time associated with the tasks described by Mr Burstyner. It is hard to evaluate the strength or otherwise of Ms Ward's opinions which, as the plaintiffs concede, are really only estimates. By way of example:

(a) Ms Ward allows 10 hours for work described by Mr Burstyner as 'communicating at length with Mr Armstrong KC and Ms Keily of counsel'. Ms Ward allowed '5 hours per counsel for a duration of 9-month period based on resultant action'. However, Mr Burstyner's Summary describes the work as part of the initial investigations conducted between May and August 2016; 4 months.

(b) In respect of work described by Mr Burstyner as 'engaging/conferring with dairy farmers by phone, email, and in-person, to understand the matter and the industry, including working on case studies, obtaining data and documents from dairy farmers', Ms Ward allowed '50 hours as reasonable based on number of group members'. Similarly, in respect of work described as 'building relationships and trust with industry leaders and organisations', Ms Ward allowed '10 hours as reasonable based on number of group members'. The descriptions of the work by Mr Burstyner do not relate to group members. It is therefore unclear why the hours allowed in respect of this work is influenced by the number of group members.

(c) Ms Ward allowed 66 hours in respect of the preparation of a memorandum to the litigation funder of over 6,600 words, together with 11 attachments. Ms Ward describes the allowance as '6 mins per 100 words = 66 hours (when finalised)'. However, based on an allowance of 6 minutes per 100 words, a 6,600 page memorandum would take 6.6 hours, not 66 hours. Further, the overall test is whether the costs are fair and reasonable and proportionate. Costs of $33,000 for the preparation of a memorandum to obtain funding are, in my view, excessively high.

266 Leaving the contents of Ms Ward's report to one side, it is to be noted that it is not $692,950 as assessed by Ms Ward that is claimed for this item. No explanation was provided during the course of the hearing about why, given her assessment was $692,950, it should be reduced to $494,135 or why her assessment supported such an allowance.

267 The third alleged error is the referee's allowance of 250 hours, apparently based on work recorded by Ms Moylan for the period until 18 October 2017 totalling 246.2 hours. Although this only relates to part of the period for which Mr Burstyner said he did work, he provided no other reliable evidence which would allow calculation of the time spent in the remaining period that would provide a proper basis for an estimate of fair and reasonable costs. In the absence of time entries or

other reliable evidence as to Mr Burstyner's hours, I am not satisfied that the referee's allowance of 250 hours demonstrates a patent misapprehension of the evidence or a manifest unreasonableness in fact finding, whether based on Ms Moylan's time recording or otherwise.

268 The referee's assessment of a reasonable allowance in respect of unrecorded time in the period May 2016 to May 2019 is 250 hours. The competing assessment is Mr Burstyner, whose assessment is so speculative that it simply cannot be acted upon to provide an estimate of the costs that are fair, reasonable and proportionate. The same has to be said for Ms Ward's assessment, which is even higher than that of Mr Burstyner. The report of the referee in relation to this contested item is adopted.

Costs of the debt recovery proceeding

269 The lead plaintiffs were defendants in the debt recovery proceeding, which was brought against them by Fonterra commenced in the County Court in 2019. That proceeding was transferred to this Court in August 2020. Adley Burstyner was initially engaged to represent the lead plaintiffs in the debt recovery proceeding in around May 2019. A costs agreement in respect of the debt recovery proceeding was signed on 9 August 2019.

270 When transferring the debt recovery proceeding to this Court, Burchell JR observed:

> There appears to be significant overlap between the legal and factual issues raised in this proceeding and those contained in S ECI 2020 02588 Iddles v Fonterra & Ors, a group proceeding alleging variously that the defendant (which is the three entities that form the Fonterra Group, one being the plaintiff in the county court proceeding), in pursuing the step down of the price it paid its suppliers for milk in May 2016, acted in breach of its contracts with suppliers, and/or in breach of ss 18 or 21 of the ACL. The county court proceeding issued by Fonterra is a debt recovery action in which Fonterra seeks monies owed to it under a loan agreement. The defendants claim that the loan agreement fails due to a lack of consideration, or duress, or alternatively, that Fonterra is in any event liable to them for breach of contract, or breaches of the ACL arising from Fonterra's conduct in pursuing the price stepdown. To avoid the risk of inconsistent findings, there appears to be a sound basis for the two proceedings to be managed together.

271 The referee disallowed the professional fees of the debt recovery proceeding in the amount of $73,238.00. The referee also disallowed counsel's fees related to the debt recovery proceeding.

272 In her first report, the referee observed that the pre-issue work claimed by Adley Burstyner:

> 62 … also included substantial fees relation to the Lead Plaintiff's County Court proceedings. Unlike costs agreements I have considered in other class actions, there is no specific and clear indication in the CA as part of the scope of work for such pre-issue investigation work, including obtaining funding. Instead, the reference to the scope of work covering the pre-issue work is located in the budget schedule to the LFA which appears to address issues pertinent to LLS (such as the involvement of another funder) and the County Court proceedings.
>
> 63 In my opinion the description of the pre-issue legal costs is poorly and confusingly worded. Furthermore, the ambit of the work incorporated in the pre-issue work set out in the budget included work that related to the Lead Plaintiffs' County Court costs which are covered by the County Court CA and clearly are not costs of this proceeding.

273 Later, the referee identified costs associated with the debt recovery proceeding as non-claimable hours, observing that:

> This task coded time recordings which related to the County Court Proceeding and was subject to a separate costs agreement with the lead plaintiffs. In any event, the terms of settlement at paragraph 5.2 providing that each party bear their own costs in this proceeding. This task was fully discounted and claimed at $0.00.

274 Ms Ward was not asked to express an opinion on whether the debt recovery proceeding costs ought to be excluded because of a lack of entitlement. She was asked to assess reasonably recoverable costs incurred in relation to the debt recovery proceeding assuming Adley Burstyner is entitled to such costs.

275 Ms Ward opined that, where there is sufficient supporting documentation such as itemised time records, the debt recovery proceeding fees should be assessed at the amount identified as relating to the debt recovery proceeding by the referee. Further, that counsels' fees related to the debt recovery proceeding are not unreasonable and are reasonably likely to be fully recoverable on assessment. Ms Ward assessed the

amount of counsels' fees related to the debt recovery proceeding as $9,982.50 (excluding GST).

276 The plaintiffs submitted that the referee's approach was flawed. They submitted that she made two errors. First, that she erred in construing the CA and the LFA separately and that, properly construed, those agreements provide for the costs covered by those agreements to include work done in relation to the debt recovery proceeding. Second, that she erred in construing the Settlement Agreement as excluding the costs of the debt recovery proceeding from the settlement sum.

277 As to the second matter, the Settlement Agreement relevantly provides that:

> **1.1 Definitions**
>
> In this Agreement, unless the context requires otherwise:
>
> …
>
> "**FASL Proceeding**" means Supreme Court of Victoria proceeding number S ECI 2020 03513 (*Fonterra Australia Pty Ltd v Geoffrey Kenneth Iddles and Lynden Elizabeth Iddles*), being County Court of Victoria proceeding number CI-19-02195 commenced by Fonterra Australia Pty Ltd against the Plaintiffs and subsequently transferred to the Court, and includes the Plaintiffs' counterclaim in that proceeding.
>
> …
>
> 5.2 The Parties agree that, save for any entitlement of the Plaintiffs (subject to Court approval) to be repaid their costs of the Proceeding (or part of those costs) from the Settlement Sum as part of the SDS, they will each bear their own costs (if any) of and incidental to the Proceeding, the FASL Proceeding and the Plaintiffs' counterclaim in the FASL Proceeding, and they will not enforce any costs orders made in any of those proceedings.
>
> 5.3 The Parties agree that, and must consent to and do all other things reasonably necessary for the Court to make orders in the Proceeding and the FASL Proceeding that:
>
> …
>
> (c) each of the Proceeding, the FASL Proceeding and the Plaintiffs' counterclaim in the FASL Proceeding be otherwise dismissed with no order as to costs.

278 I accept the plaintiffs' submission that clauses 5.2 and 5.3(c) of the Settlement Agreement are concerned with the costs position as between the parties. Those

clauses do not affect the recoverability of the costs as between the lead plaintiffs and their solicitor as a deduction from the settlement sum.

279 As to the first matter, I am not persuaded that the referee erred in disallowing costs of the debt recovery proceeding. That is the case having regard to the referee's consideration of these matters in her third report to which I will shortly refer.

280 As the referee correctly observed in her first report, the work in question was covered by a separate costs agreement for the debt recovery proceeding. Unless overtaken by the CA and the LFA, that agreement stands.

281 The plaintiffs submitted that, given the significant overlap between the debt recovery proceeding and the class action, the costs of the debt recovery proceeding were subsumed into the class action.

282 The plaintiffs submitted that, to the extent that costs of the debt recovery proceeding pre-dated the CA and the LFA, they were subsumed into item 0 of Schedule 1 (budget) to the LFA, which relevantly refers to 'costs to 25 May 2020 of defending County Court Action'. They submitted that costs of the debt recovery proceeding on and from the date of the CA and the LFA are captured in the definition of 'Common Benefit Work' in the LFA. The definition of 'Common Benefit Work' in the LFA is:

> **Common Benefit Work** means Legal Work other than Individual Legal Work, including Legal Work for the common benefit of LLS Claimants or a sub-class of LLS Claimants, for any representative or sample claimant's claim (including County Court Proceeding No. Cl - 19-02195), and work for the benefit of class members generally, whether in the Class Action or other processes, which falls within the scope of the Budget.

283 As set out earlier in these reasons, I had found that the CA is void. On that basis, the original costs agreement in respect of the debt recovery proceeding remains in place to the extent that it would otherwise have been displaced by the CA. The costs of the debt recovery proceeding are not recoverable under a void agreement.

284 In any event, the quantification of the costs of the debt recovery proceeding is not adequately dealt with in the CA and the LFA, and the plaintiffs have not demonstrated

that the referee erred in not allowing the deduction of the costs of the debt recovery proceeding from the settlement sum.

285 The referee addressed these matters in her third report.

> 42 Lead Plaintiffs owe additional obligations to the group members they represent. They must ensure that the claim/s they run serves the interests of the group members and not pursue a course of action that is for their own sole benefit. Entering into a costs agreement which resulted in the Lead Plaintiffs costs liability for their own separate litigation being incorporated into the ongoing class action funding benefitted AB (by securing its legal fees) and perhaps the Lead Plaintiffs (if they were to be liable for those fees). However, it did not benefit the group members given liability for those fees lay elsewhere and not as part of the class action. This is more concerning given this was done without informing the group members for reasons set out below.
>
> …
>
> 49 In relation to paragraph 39, the County Court costs are said to be included in the CCA by virtue of the words used in funding budget item 0 found in the Schedule 1 attached to the LFA. I set out the words used at item 0 at paragraph 60 of my first report and stand by my view stated at paragraph 63 of my first report that the description is "*poorly and confusingly worded*". There are no details as to the value of the County Court portion of costs at that time, or to what amount LLS had agreed to pay for those County Court costs as part of the breakdown of the pre-issue costs.
>
> 50 In relation to paragraph 40, I now acknowledge that the LFA contains a definition of "Common Benefit Work" that includes County Court Proceeding No. CI 19-02195 as part of any representative's claim which "*falls within the scope of the budget*". The budget only specified County Court costs in the pre-issue work and the ongoing work associated with the County Court proceeding which was not stayed until September 2020. In any event and importantly from a disclosure point of view, the group members do not have access to the details of the scope of the budget for reasons set out below due to the details in the table in the budget being masked on the AB's website page.
>
> 51 For all the reasons stated, I maintain my opinion that liability for AB's costs as against the Lead Plaintiffs in the County Court proceedings should not be added to the costs payable under the CCA payable by the group members out of the settlement sum which relates to not only the Lead Plaintiffs claims but others. In previous class actions I have seen satellite proceedings form part of the costs payable out of the settlement sum but in those circumstances the inclusion of those costs as class action costs have been clearly identified and known to all group members.

286 It is clear from the foregoing extract that the referee did not disallow the costs of the debt recovery proceeding because she has construed the CA and the LFA separately, or because she overlooked the budget and the definition of Common Benefit Work. These matters are addressed in her third report. The plaintiffs have not addressed the reasoning in the referee's third report. Nor have they made any submissions as to why it ought not be adopted.

287 I am not satisfied that the referee's approach concerning this issue was flawed as submitted by the plaintiffs. I am not satisfied that her reports reveal some error of principle, absence or excess of jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding. The definition of Common Benefit Work in the LFA directs attention to the budget. Stage 0 of the budget includes a reference to the 'costs to 25 May 2020 of defending the County Court Action', but no separate budgetary amount representing the costs of the debt recovery proceeding is identified, whether up to that date or otherwise. I adopt the referee's reports as to the issue of the costs of the debt recovery proceeding. The costs of the debt recovery proceeding are not to be deducted from the settlement sum.

Harwood Andrews employee costs

288 As earlier mentioned, Adley Burstyner charged out employees 'seconded' from Harwood Andrews at rates higher than those charged by Harwood Andrews to Adley Burstyner.

289 The referee opined that the higher hourly rates charged by Adley Burstyner for the Harwood Andrews personnel were reasonable, but she nevertheless reduced those rates to the lower rates charged by Harwood Andrews to Adley Burstyner.

290 The plaintiffs submitted that the referee reduced the rates because she considered that:

(a) the secondment was an informal arrangement without a costs agreement or contract;

(b) the CA did not make it clear that Mr Fullerton was 'seconded' from Harwood Andrews but instead suggested he was a senior associate with Adley Burstyner;

(c) Adley Burstyner did not comply with s 174(1)(a) of the Uniform Law when disclosing its basis for charging to include legal services provided by Mr Fullerton in a way that implied he was part of Adley Burstyner and charging at its hourly rates rather than Harwood Andrews' hourly rates;

(d) the disclosure requirements under s 175(2) of the Uniform Law in relation to the engagement of a second law practice were not complied with; and

(e) there was a potential breach of the indemnity principle.

291 As to the first of these matters, although the referee observed that Adley Burstyner and Harwood Andrews 'informally reached the agreement without entering into a costs agreement or contract', it does not appear to me that this was a basis for the referee's disallowance of the higher fees charged for Harwood Andrews personnel.

292 As to the second, third and fourth of these matters, the referee did not identify non-compliance with the Uniform Law as a basis for disallowing the higher charge out rates. Rather, she opined that the consequence of non-compliance is that Adley Burstyner can only recover fair and reasonable costs, which would not include Adley Burstyner's uplift (dealt with elsewhere in these reasons). However, to the extent that alleged non-compliance with ss 174 and 175 forms part of the referee's reasons for disallowing the higher charge out rates, I have found earlier that s 174 was not contravened and s 175 did not apply. These provisions therefore do not provide a basis for disallowing the higher charge out rates.

293 The real issue is whether there was some error of principle on the part of the referee when she concluded that the higher amounts ought not be allowed because:

(a) 'it is not fair, reasonable or proportionate for AB to charge out employees of HA at rates other than those upon which they were charged'; and/or

(b) 'there may be a possible breach of the indemnity principle'.

294 The referee considered that there may be a possible breach of the indemnity principle because the hourly rates charged by Adley Burstyner are higher than the rates charged by Harwood Andrews. She concluded that the rates can be no more than the rates agreed to between Adley Burstyner and Harwood Andrews and, accordingly, the amount claimed must be reduced to those lesser amounts, irrespective of what was stated in the CA or what might otherwise be considered reasonable.

295 The indemnity principle was described in *Wentworth v Rogers*:[69]

> [I]t is beyond dispute that the purpose of an adverse costs order is to compensate or partly indemnify one party to litigation (usually the successful party) for the legal costs incurred in the course of the proceedings. The [indemnity] principle does not require that the costs have been paid, but it does require that there be a legal liability to pay costs.

296 Similarly, in *Mainieri v Cirillo*,[70] the Victorian Court of Appeal observed that:[71]

> In broad terms, the indemnity principle is that, as between party and party, the party ordered to pay the other party's costs is obliged to pay only those costs which the other party is legally obliged to pay to his or her solicitor.

297 I accept the plaintiffs' submission that the indemnity principle only applies in the context of party/party costs. It does not apply in the present context. I am not, however, persuaded that the plaintiffs have established that the referee erred in disallowing the higher charge out rates for the Harwood Andrews personnel. That is because the overriding consideration is whether the costs contended for are fair, reasonable and proportionate as provided for in the Uniform Law and in s 24 of the CPA.

298 The plaintiffs submitted that law firms are entitled to charge rates which incorporate their various costs, including salaries, rent and biscuits in the canteen, and to make a profit. They submitted that the rates charged by Harwood Andrews to Adley Burstyner are akin to salaries. Mr Burstyner arranged and paid for infrastructure and

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69 [2006] NSWCA 145; (2006) 66 NSWLR 474, 504 [126] (Basten JA, Hislop JA agreeing at [215]).
70 [2014] VSCA 227; (2014) 47 VR 127.
71 Ibid 144 [43] (Nettle AP, Hansen and Santamaria JJA).

overheads in respect of Harwood Andrews personnel including Adley Burstyner email addresses, accounts and login credentials for Adley Burstyner's Office 365 account and user accounts in Adley Burstyner's practice management software. Mr Burstyner said that he accounted for the fees charged in respect of Harwood Andrews personnel in the 'Gross Fee Income' (being the figure used as the basis for Adley Burstyner's insurance premium) provided to the Legal Practitioners' Liability Committee. However, it is not clear whether the Harwood Andrews personnel were covered by Adley Burstyner's or Harwood Andrews' professional indemnity insurance during this period. It is also unclear which firm is displayed as the law practice on their practising certificates.

299 The plaintiffs relied on the decision in *Byrne v Marles* ('*Byrne*')[72] in support of the proposition that secondment is recognised as having the effect of transferring, albeit temporarily, a person's employment from one employer to another. In that case, Kaye J observed that:[73]

> [A]ccording to her affidavit, at all times she has been remunerated by the Commissioner for her services, and she has taken direction from and been answerable to the Commissioner. Each of those factors are important indications of the existence of a relationship of employment between Ms Cohen and the Commissioner. On the other hand, the fact that Ms Cohen was on secondment from the Department of Justice to the Commissioner does not disturb that conclusion. The Macquarie Dictionary meaning of the verb "second", in this context, is to "transfer … temporarily to another post, organisation or responsibility". That definition accords with the normal every day use of the word in this context. In other words, during the period of her secondment, the employment of Ms Cohen was transferred, albeit temporarily, to the Commissioner. For that period she was not in the employment of the Department of Justice, but of the Commissioner.

300 Although the decision of Kaye J was overturned on appeal, this aspect of it was upheld.[74]

301 However, it is not, in my view, a forgone conclusion that because there was a secondment arrangement in place, Harwood Andrews personnel became employees

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72 [2007] VSC 63.

73 Ibid [34].

74 *Byrne v Marles* [2008] VSCA 78; (2008) 19 VR 612, [33] (Nettle JA, Dodds-Streeton JA agreeing at [94], Coghlan AJA agreeing at [95]).

of Adley Burstyner. Secondment arrangements can take all sorts of different shapes and forms. It is necessary to look to the actual arrangement in place to determine whether the employment of certain individuals was transferred to Adley Burstyner.

302 In *Byrne*, the critical factors to finding that the secondment amounted to an employment relationship were the fact that the secondee was remunerated by the Commissioner and took direction from and was answerable to the Commissioner.

303 As to the second of the features identified by Kaye J, Mr Burstyner's evidence is that he supervised all work performed on behalf of Harwood Andrews' personnel. Although it is unclear whether the personnel took direction from and were answerable to Mr Burstyner, I accept that the fact that they worked under his supervision is a matter which supports a conclusion that they were 'employed' by Adley Burstyner.

304 However, unlike the facts in *Byrne*, based on Mr Burstyner's evidence, Harwood Andrews billed Adley Burstyner for the staff. Just as Adley Burstyner was liable to pay Harwood Andrews for fees charged for Harwood Andrews' personnel, it appears that it was Harwood Andrews and not Adley Burstyner, who paid seconded personnel. It also appears likely that the other costs of employment, such as holiday pay, workers compensation and superannuation, were met by Harwood Andrews.

305 In addition, the fact that the personnel were seconded on an 'as needs' basis indicates that they were not 'employed' by Adley Burstyner.

306 In light of these matters discussed, I consider that it is more likely than not that the Harwood Andrews personnel remained employees of Harwood Andrews. The arrangement was more akin to a labour hire arrangement than a secondment. Although categorised as professional fees, the costs associated with Harwood Andrews' staff, engaged on an 'as needs' basis, are, in my view, more appropriately categorised as disbursements.

307 I have not been directed to any authority to the effect that a law practice may charge an uplift on disbursements. Section 182 of the Uniform Law which deals with uplifts

explicitly excludes disbursements from the calculation of an uplift. I am not satisfied that there is any basis for Adley Burstyner to recover either a profit or an uplift on Harwood Andrews' personnel.

308 I am not satisfied that the higher charge out rates, beyond the 'pass through' of the Harwood Andrews personnel costs incurred, are fair, reasonable and proportionate. The amounts paid to Harwood Andrew are disallowed as a deduction from the settlement sum. Those amounts are to be dealt with as proposed by the referee. There is no reason not to adopt her report concerning this contested item.

25% discount for multiple activities

309 The referee applied a 25% discount to 'multiple activities', described in her first report as 'time entries where multiple activities were present in a single entry'.

310 In applying a 25% reduction, the referee explained:

> These entries were difficult to translate into a single activity code. I have concluded that a reduction should occur relying on the **Seven Network Case** in which Justice Sackville identified the difficulties experienced in translating the lawyer's time recording into a form acceptable for taxation purposes. This also accords with my experience at taxations where the Costs Court or Taxing Officer typically would reduce the claims where there are multiple activities. I have therefore applied a **25**% discount to these entries.

311 The same discount was applied by the referee to 'multiple activities' by counsel.

312 Ms Ward considered that a multiple activities discount was appropriate, but was of the opinion that 25% is 'unreasonably high', akin to the size of a discount that would be applied when assessing costs on a party/party basis. Ms Ward concluded that, if any reduction is to be applied, it should not be greater than 5%.

313 The plaintiffs submitted that the Court should not adopt the referee's report in this regard and should instead apply a lower discount (if any) of up to 5%.

314 The recognition by Ms Ward that a reduction on account of multiple activities is appropriate is significant. This is not a case where the Court is called upon to choose between two experts, one of whom says the appropriate reduction is 25% and the

other of whom says the reduction should be between zero and 5%. The question is a different one: Should the referee's report be adopted in this respect?

315 In circumstances where both experts agree that a reduction is appropriate and that all that is in issue is the appropriateness of the percentage to be adjusted it cannot be said that the referee's report reveals 'some error of principle, absence or excess of jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding'. I adopt the referee's report in this regard.

Costs of settlement administration

316 The plaintiffs seek an order approving all costs incurred in the settlement administration to date (professional fees of $61,888.00 and disbursements of $41,747.00), and for the prospective approval of an estimate of the future administration costs (professional fees of $41,228.00 and disbursements of $42,426.00), reserving liberty to apply to seek approval if the estimate is too low. It is submitted that if the estimate is too high, the difference will go to group members or a nominated charity.

317 When the referee provided her second report, she allowed professional fees of $62,647.34 and disbursements of $18,249.00 relating to scheme administration, a total of $80,896.34. That allowance was based on instructions provided by Adley Burstyner in relation to its estimated professional fees and disbursements for administering the settlement scheme. The referee largely allowed the estimated professional fees, except that she disallowed time allocated to liaising with the referee, reduced Mr Fullerton's rate to $385 (inclusive of GST) for the reasons set out earlier, and disallowed the buffer of 10%. In relation to the estimated disbursements, the referee disallowed the engagement of junior counsel, disallowed costs relating to engagement with the referee and disallowed the 10% buffer.

318 Because of the passage of time since the second report, certain of the estimated costs of scheme administration have been replaced with actual costs. The evidence filed shortly prior to the June 2023 hearing shows that Adley Burstyner's professional fees

and disbursements have, or will shortly, exceed the estimates provided to the referee for the completion of scheme administration.

319 In his sixth affidavit, Mr Burstyner explained the reason for the increase in professional fees:

> 16 This increase in the estimate since 27 February 2023 is largely due to Adley Burstyner having to communicate with approximately 270 famers via telephone and email between 27 April and 26 May 2023 to obtain the following information in order to be able to process payments in accordance with the Settlement Agreement:
>
> (a) Complete and accurate supplier numbers from farmers which were previously provided in an incomplete format (preventing crucial steps in determining percentage stakeholdings in farm income, necessary to allocate payouts in respect of farms);
>
> (b) Correct bank account details, which in some cases, were previously provided incorrectly; and
>
> (c) Ascertaining the portion of milk production that was subject to the price decrease (as opposed to the portion of milk supply that was subject to a fixed price and therefore unaffected by the price decrease).
>
> 17 I had not anticipated this additional work, as I had assumed that complete information would be provided by group members upfront without Adley Burstyner having to go back to them with multiple information requests.

320 In his seventh affidavit, Mr Burstyner explained the reason for the increase in disbursements relating to work in progress undertaken by the accounting firm Vincents during the period 2 November 2022 to date:

> i. work involved in performing the calculations protocol set out in clauses 3 and 4 of the SDS (pages 1028 and 1029 of the supplementary application book). In order to perform the calculations under the protocol in the SDS, it was necessary to manipulate the data in the two databases provided by the Defendants and convert that data (which had been provided on a volume basis) to a revenue basis. This required Vincents to build a separate claimant database with the relevant information to be able to perform the calculations pursuant to the protocol set out in the SDS, which was required in order to complete the claim calculation notices in the amount of $28,858.50 (including GST). This compared favourably with a quote I had obtained from another accounting firm;
>
> ii. Assisting Adley Burstyner to obtain complete and accurate information from fanners in order to be able to process payments in accordance with

the SDS and engaging with Group Members in relation to queries they had, in the amount of $3,697.65 (including GST); and

iii. Preparation of the claim calculation notices and sending the notices to 569 Group Members, in the amount of $7,045.5 (including GST). This compared favourably with a quote I had obtained from a litigation support provider.

321 The test in relation to adoption in *Wenco* speaks to an error of principle, absence or excess of jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding as reasons for rejecting a referee's report. However, a further reason for not adopting a referee's report, or part thereof, in a situation such as the present, is where the subject matter of the report has been overtaken by subsequent events. Rule 50.03(2) of the Rules contemplates that in circumstances such as the present, one option is to refer the matter back to the referee to provide a further report or for further consideration.

322 Where new factual information is available, the allowable costs should be based on whether the actual, rather than estimated, amounts are fair, reasonable and proportionate.

323 However, rather than referring the question of the fair and reasonable costs of scheme administration now to the referee, when the scheme administration remains incomplete, the preferable course is to proceed as contemplated by cl 10.6 of the SDS:

> Upon the Administrator determining that he is in a position to complete the distribution of funds from the Settlement Distribution Fund:
>
> (a) obtain a final Supplementary Report from the Costs Referee; and
>
> (b) deliver to the Associate to her Honour Justice Nichols (or as the Court may direct) the final Supplementary Report together with such materials as the Administrator may deem appropriate in support of any application for the payment to the solicitors for the plaintiffs any costs or disbursement not yet paid.

324 Once the scheme administration is complete, there should be a single reference to the referee pursuant to r 50.03(2)(b)(ii) to assess the reasonableness of the administration costs claimed based on the work actually done. I will order that, if the referee is unwilling or unable to perform that task, the fair, reasonable and proportionate

administration costs of the scheme administration be determined by the Costs Court. I will include a direction that such a determination be on a gross sum basis or on such other basis as the Costs Court determines appropriate and otherwise having regard to these reasons concerning contested costs issues.

Costs: 1 December 2022 – 20 February 2023

325 In relation to the professional fees for the period 1 December 2022 to 20 February 2023, the referee applied the six-step process detailed at paragraph 158 of these reasons. The referee reduced the rates of Harwood Andrews personnel, disallowed administrative / not claimable costs, including the costs of engaging Ms Ward which the referee described as 'costs incurred by AB for its own benefit', and applied a 25% reduction to entries identified as 'multiple activities'. The referee calculated the reasonable fees as $90,864.06, plus an uplift of $22,716.01 if allowable.

326 The plaintiffs submitted that professional fees of $99,873 ought to be allowed. For the reasons set out earlier, I do not agree. There is no reason not to adopt the allowance of $90,864.06 as assessed by the referee.

327 Regarding disbursements for the period 1 December 2022 to 20 February 2023, the referee reduced disbursements for the period 1 December 2022 to 20 February 2023 by $198.00 to account for GST on an invoice which was inadvertently claimed twice. The referee calculated the reasonable disbursements for this period as $97,816.97. The plaintiffs do not take issue with the amount of disbursements allowed.

Costs: 21 February 2023 – 28 February 2023

328 Prior to the preparation of her second report, Adley Burstyner provided the referee with an estimate of its professional fees from 21 February 2023 to 28 February 2023 totalling $32,845.16. The estimate included a 15% reduction, which the referee did not consider to be necessary. The referee did, however, reduce the rates of Harwood Andrews personnel for the reasons set out earlier. The referee concluded that the reasonable estimated professional fees relating to this period were $34,818.85.

329 Regarding estimated disbursements for the period 21 February 2023 to 28 February 2023, the referee disallowed the costs of a second junior counsel attending the approval hearing, but allowed their fees in relation to assisting other counsel in preparation for the hearing. The referee also disallowed $21,725 of estimated general disbursements associated with a second hearing. The referee calculated the reasonable disbursements for this period as $171,435, including the referee's costs of $55,000.

330 For the period 21 February 2023 to 28 February 2023, the plaintiffs claim professional fees of $26,288 and disbursements of $122,500. These amounts are lower than the amounts allowed by the referee. Although not explicitly addressed by counsel, I expect this discrepancy arises because the referee's allowances for the period 21 February 2023 to 28 February 2023 were based on estimates provided to her by Adley Burstyner. To the extent that the amounts actually incurred were less than the estimates, only the actual professional fees and disbursements incurred ought to be allowed.

331 It is convenient to remit the matter back to the referee pursuant to r 50.03(2)(b)(ii) to consider whether the actual amounts of professional fees and disbursements incurred for the period 21 February 2023 to 28 February 2023 are fair, reasonable and proportionate, noting that the referee previously disallowed certain amounts when assessing the reasonable costs for this period based on estimates. If the referee is unwilling or unable to undertake the reference then I will make orders for referral to the Costs Court in default of the availability of the reference to determine costs for this period.

Costs of the further hearing: 1 March 2023 – 23 June 2023

332 For the period 1 March 2023 to the second hearing, the plaintiffs claim professional fees of $100,852 and disbursements of $86,842. Mr Burstyner's evidence is that most of these increased amounts is attributable to considering and responding to the three reports prepared by the referee.

333 Adley Burstyner provided the referee with an estimate of costs for a second hearing, but the referee excluded the costs from her second report '[i]n the absence of cogent reasons why there would be a need for a second hearing'.

334 In her third report, prepared once it was known that a second hearing would be required, the referee observed that:

> I have now been provided with further information from AB regarding the further disbursements sought in emails from AB to my office on 26 April 2023 and 28 April 2023 which include fees for counsel and the costs expert but not AB's costs which are not being sought as part of the approval of legal costs.

335 The referee allowed nil professional fees and $36,987.50 for disbursements for the period up to and including the further hearing. The referee disallowed the costs of Ms Ward. She disallowed costs of counsel relating to advice to Adley Burstyner regarding the referee's reports and the engagement of Ms Ward to respond to those reports. The referee acknowledged that:

> If the Court were to accept the SW report or that it was reasonable for AB to have engaged a costs lawyer (even if her report is not accepted) then I acknowledge the hourly rate of Suzanne Ward as an experienced costs lawyer is reasonable.

336 The plaintiffs claim the amount of $100,852 for the period 1 March 2023 to the second hearing. However, it appears from the referee's third report either that no information was provided to her regarding professional fees for the period 1 March 2023 to the further hearing and/or that Adley Burstyner informed the referee that it was not seeking approval of its costs.

337 So far as Adley Burstyner's professional fees for the period 1 March 2023 to the further hearing relate to quantification of their costs for the purpose of the referee's reports, I consider that it is reasonable to make a further allowance. There is, however, insufficient information available to determine whether the professional fees sought are fair, reasonable and proportionate and whether they relate to that work or other work.

338 There is a further discrete issue that requires consideration. The plaintiffs submitted that the Court should not adopt the referee's reports to the extent of her disallowance of the costs of advising, obtaining evidence on and making submissions about costs claims with which the referee disagrees or which the Court ultimately disallows.

339 Relying on authorities concerned with the quantification of costs of other fiduciaries such as trustees and insolvency practitioners, the plaintiffs submit the amounts incurred by fiduciaries in the quantification of their costs (both professional fees and disbursements) are properly allowable out of the relevant fund.[75] Further, that the allowance does not depend on the substantive merits of the fiduciary's argument as to quantification. Rather, the costs of quantification are allowed regardless of whether the fiduciary succeeds in their arguments on costs, because the issue is one which concerns the administration of the fund.[76]

340 The authorities relied on by the plaintiffs include *Re Reiter Brothers Exploratory Drilling Pty Ltd* ('*Re Reiter Brothers*'),[77] where Zeeman J observed, in the context of an application by a former provisional liquidator for determination of his remuneration, that:

> A very large proportion of the remuneration claimed relates to the work done by the applicant to prepare his claim for remuneration. On my assessment, in excess of $11,000 is claimed for such work. Counsel for the Company submitted that no part of it, whether done before or after the termination of the applicant's appointment, ought to form part of the remuneration to be fixed by me but that it ought to be treated as being part of the costs of the application. I do not accept that submission. The dictum from Day v Mount (supra) to which I have referred would suggest the contrary to be the case. It is difficult to see how remuneration of such work would form part of the costs of the application in the normal sense. In my view work properly done by the applicant by way of preparing his claim for remuneration falls to be dealt with as part of his remuneration.

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75 Relying on *Reiter Brothers Exploratory Drilling Pty Ltd* (1994) 12 ACLC 430 (provisional liquidator); *Thackray v Gunns Plantations Ltd (No 2)* [2011] VSC 417, [3] (receivers); *Re PPI Corporation Pty Ltd* [2014] VSC 366, [46]–[47] (administrators); *Re Custometal Engineering Pty Ltd* [2018] VSC 726, [42] (liquidators).

76 Relying on *Sons of Gwalia Ltd v Margaretic* (2006) 232 ALR 119; [2006] FCAFC 9, [5]–[7]; *Shao v One Funds Management Limited* [2023] VSC 251, [52]–[58].

77 (1994) 12 ACLC 430.

341 *Re Reiter Brothers* was cited by Davies J in *Thackray v Gunns Plantations Ltd (No 2)*[78] in approving allowances for receivers' legal costs of calculating their lien and their remuneration relating to the calculation of the value of their indemnity and lien. The reasoning in *Re Reiter Brothers* was endorsed by Gardiner AsJ in *Re P.P.I Corp Pty Ltd* ('*Re P.P.I*')[79] in the context of an application by a former administrator for determination of their remuneration. Both *Re Reiter Brothers* and *Re P.P.I* were subsequently cited by Matthews JR, as her Honour then was, in *Re Custometal Engineering Pty Ltd (in liquidation)*[80] in a case concerning remuneration of former administrators.

342 The cases relied on by the plaintiffs involved work of a different nature to the work associated with the further hearing.

343 Each of the decisions relied on by the plaintiffs must be seen in context. They all involved applications to the Court for the determination or approval of an insolvency practitioner's remuneration. The analogous step in the present situation was the collation of documents and preparation of material for the referee. The costs of contesting the referee are in a different category. The task that the referee was entrusted with upon being provided with documents and information by the solicitors is akin to the role of the Court in remuneration applications by insolvency practitioners. That is, to express an opinion for adoption or otherwise by the Court as to the reasonable costs and disbursements which ought be allowed based on the material provided. The contested costs concern the solicitors' costs of embarking on a contested hearing concerning the adoption of the referee's report following the referee's review of the material previously provided.

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78 [2011] VSC 417.
79 [2014] VSC 366, [46]–[47].
80 [2018] VSC 726, [42].

344 Separately, in support of rejection of this aspect of the referee's reports, the plaintiffs referred to decisions concerning trusts disputes. In *Sons of Gwalia Ltd v Margaretic* ('*Sons of Gwalia*'),[81] Finkelstein J observed that:[82]

> In a trust dispute the costs of all parties are treated as necessarily incurred for the benefit of the estate and are ordered to be paid out of the fund either on a solicitor and client or indemnity basis.

345 In *Shao v One Funds Management Ltd* ('*Shao*'),[83] Derham AsJ, citing Kekewich J in *Re Buckton, Buckton v Buckton*,[84] identified three classes of litigation regarding the construction of trust instruments equally applicable to proceedings for judicial advice generally, where it was determined appropriate, in two of the three classes of case, that the costs come out of the estate because they were incurred for the benefit of the estate.[85]

346 I do not consider the passages in *Sons of Gwalia* and in *Shao* relied on by the plaintiffs show error on the part of the referee or that her report should not be adopted in this respect. This case does not fall within the category of trust dispute identified by Finkelstein J, nor within the first two categories identified by Derham AsJ. The further hearing did not involve disputed questions between group members. It was concerned with what allowance should be made for Adley Burstyner's costs, and the true moving party in the further hearing was Adley Burstyner. The costs associated with the unsuccessful disputation of the referee's reports, urging that parts of the report not be adopted and seeking higher professional fees, are not costs necessarily incurred for the benefit of the group members. They are costs incurred for the benefit of Adley Burstyner.

347 For the foregoing reasons, I do not consider that Adley Burstyner's professional fees associated with engaging Ms Ward and disputing the conclusions of the referee ought to be allowed out of the settlement sum.

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81 [2006] FCAFC 92; (2006) 232 ALR 119.
82 Ibid 121 [7].
83 [2023] VSC 251.
84 [1907] 2 Ch 406.
85 *Shao v One Funds Management Ltd* [2023] VSC 251, [52].

348 Finally, concerning disbursements during this period, the plaintiffs contended that $86,842 should be allowed for the period 1 March 2023 to 23 June 2023, rather than the $36,987.50 allowed by the referee. For the reasons set out above, insofar as the claimed disbursements relate to advising, obtaining evidence on and making submissions about the costs claim, they are not properly allowed as a deduction from the settlement sum.

349 For the same reasons, the costs of Ms Ward's report should not be allowed.

350 It is appropriate that the question of what fair, reasonable and proportionate costs relating to the period 1 March 2023 to 23 June 2023 should be allowed as a deduction from the settlement sum should be referred back to the referee for consideration and report in accordance with these reasons. To minimise unnecessary costs, I expect this issue to be dealt with in the same report as concerns the further costs of the administration. Once again, if the referee is unwilling or unable to undertake that work I will refer the questions for determination by the Costs Court on the same basis as the scheme administration costs.

The Referee's Costs

351 It appears that some of the referee's costs have been paid out of the settlement sum. The amount of the referee's costs to date, according to the plaintiffs' cost table, are $55,000 and $17,500, totalling $72,500. Her costs that are either unpaid or relate to further work to be performed should also be paid out of the settlement sum. If there is any dispute about whether those costs are fair, reasonable and proportionate, any such dispute shall be referred to the Costs Court for determination.

Orders

352 I direct the solicitors for the lead plaintiffs to prepare a draft order that gives effect to these reasons to the extent the reasons are not reflected in orders previously made. A draft order should be provided to my chambers by no later than 4:00pm on 4 October 2023.

CERTIFICATE

I certify that this and the 104 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Delany of the Supreme Court of Victoria delivered on 20 September 2023.

DATED this twentieth day of September 2023.

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SCHEDULE

LYNDEN IDDLES	First Plaintiff
and	
GEOFFREY IDDLES	Second Plaintiff
and	
FONTERRA AUSTRALIA PTY LTD (ACN 006 483 665)	First Defendant
and	
FONTERRA MILK AUSTRALIA PTY LTD (ACN 114 326 448)	Second Defendant
and	
FONTERRA BRANDS (AUSTRALIA) PTY LTD (ACN 095 181 669)	Third Defendant