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

Not Restricted

S ECI 2024 04990

PAPINDER SINGH — Plaintiff

v

HARVEY NORMAN HOLDINGS LTD
(ACN 003 237 545) — First Defendant

YOOGALU PTY LTD
(ACN 002 269 132) — Second Defendant

S ECI 2025 01528

CONSTANTINOS DAGLAS — Plaintiff

v

HARVEY NORMAN HOLDINGS LTD
(ACN 003 237 545) — First Defendant

YOOGALU PTY LTD
(ACN 002 269 132) — Second Defendant

JUDGE:	Harris J
WHERE HELD:	Melbourne
DATE OF HEARING:	13 May 2025
DATE OF JUDGMENT:	27 May 2025
CASE MAY BE CITED AS:	Singh v Harvey Norman Holdings Ltd; Daglas v Harvey Norman Holdings Ltd
MEDIUM NEUTRAL CITATION:	[2025] VSC 290

PRACTICE AND PROCEDURE – Group proceedings – Multiplicity of proceedings – Consolidation – Application to consolidate two proceedings – Agreement between plaintiffs to have two firms of solicitors acting - *Supreme Court (General Civil Procedure Rules) 2015* (Vic) r 9.12(1).

GROUP PROCEEDINGS – Consolidation – Agreement between plaintiffs to have two firms of solicitors acting – whether independent costs referee should be appointed to monitor costs to identify unnecessary or duplicated work and costs.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff in S ECI 2024 04990	Mr D Fahey	Maurice Blackburn
For the Plaintiff in S ECI 2025 01528	Mr J Page	Echo Law
For the Defendants	Mr P Crutchfield KC with Mr B McLachlan	Arnold Bloch Leibler

TABLE OF CONTENTS

Introduction and background **1**

The consolidation application **2**

Consolidation **3**

Legal Principles 3

Consolidation – the evidence and the parties' submissions 5

The proceedings should be consolidated and the procedural orders made 7

The parties' submissions on an independent costs referee **9**

An independent costs monitor should be appointed **13**

HER HONOUR:

Introduction and background

1 These reasons concern two open class group proceedings against the same defendants, **Harvey Norman** Holdings Ltd and its wholly owned subsidiary **Yoogalu** Pty Ltd. The proceedings relate to the sale and issue of extended warranty products known as 'Product Care' in connection with the acquisition of certain goods (including electrical goods, appliances, white goods and computer products).[1] The pleadings in the two proceedings demonstrate that the issues significantly overlap but are not identical.

2 On 17 September 2024, Mr Constantinos Daglas commenced proceedings against Harvey Norman and Yoogalu in the Federal Court of Australia (VID943 of 2024) (**Daglas Proceeding**). On 19 September 2024, Mr Papinder Singh commenced his proceeding in this Court (S ECI 2024 04990) (**Singh Proceeding**).

3 On 12 March 2025, Justice Bennett of the Federal Court made orders transferring the Daglas Proceeding to this Court, pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

4 Prior to the cross-vesting orders, the Daglas Proceeding and the Singh Proceeding were jointly case managed by judges of the Federal Court and this Court. On 11 October 2024, at a case management conference of the Daglas Proceeding at which the plaintiff in the Singh Proceeding appeared by counsel, Justice O'Bryan of the Federal Court made orders that the plaintiff in the Singh Proceeding and the applicant in the Daglas Proceeding confer, by their solicitors, with a view to avoid a multiplicity of proceedings raising the same or similar issues.[2] On 18 October 2024, Justice Delany made substantially equivalent orders in the Singh Proceeding.[3]

5 Conferral between the parties did not in the first instance resolve the further conduct of the proceedings. In accordance with the *Protocol for Communication and Cooperation*

---

1 Affidavit of Vavaa Mawuli (**Mawuli Affidavit**) affirmed on 10 April 2025, [15].

2 Mawuli Affidavit, [22]; Exhibit VM-1, 17-19 (Orders of Justice O'Bryan of the Federal Court of Australia in the Daglas Proceeding made on 11 October 2024).

3 Mawuli Affidavit, [23]; Exhibit VM-1, 20-21 (Orders of Justice Delany made on 18 October 2024).

between the Supreme Court of Victoria and the Federal Court of Australia in Class Action Proceedings, a joint hearing of this Court and the Federal Court of Australia was listed on 14 February 2025 to determine whether, and in what manner, the Singh Proceeding and/or the Daglas Proceeding will be permitted to proceed.[4] That joint hearing was to be heard by Justice Bennett of the Federal Court and by me sitting together.

6 Prior to the joint hearing, solicitors for the plaintiff in the Singh Proceeding advised the Court that the plaintiff in the Singh Proceeding and the applicant in the Daglas Proceeding had reached an in-principle agreement for consolidation of the two proceedings,[5] and that an application would be made in the Federal Court to transfer the Daglas Proceeding to this Court.[6]

7 The transfer application was made by the applicant in the Daglas Proceeding on 21 February 2025 in the Federal Court.[7] Justice Bennett of the Federal Court made orders transferring the Daglas Proceeding to this Court on 12 March 2025.[8]

The consolidation application

8 The plaintiff in the Singh Proceeding[9] and the plaintiff in the Daglas Proceeding[10] seek orders consolidating the proceedings into a single proceeding. The orders are sought pursuant to r 9.12 of the *Supreme Court (General Civil Procedure)* ***Rules*** *2015* (Vic) and/or s 33ZF of the ***Supreme Court Act*** *1986* (Vic).

9 The plaintiffs also seek procedural orders for the conduct of the consolidated proceeding, including orders:

(a) that the costs already incurred in the separate proceedings are to be costs in the consolidated proceeding;

---

4 Orders of Justice Delany made on 19 December 2024; Email from the chambers of Justice Harris to the parties in the Singh Proceeding on 6 February 2025.
5 Email from Maurice Blackburn to the chambers of Justice Harris on 10 February 2025.
6 Email from Maurice Blackburn to the chambers of Justice Harris on 13 February 2025.
7 Interlocutory Application filed by Echo Law on behalf of the plaintiff in the Daglas Proceeding dated 21 February 2025.
8 Email from Echo Law to the chambers of Justice Harris on 14 March 2025.
9 By summons filed on 28 March 2025 and amended on 10 April 2025.
10 By summons filed on 28 March 2025.

(b) that pursuant to s 33ZF of the *Supreme Court Act*, **Maurice Blackburn** Pty Ltd be the solicitor on record for the plaintiffs in the consolidated proceeding and **Echo Law** Pty Ltd is to act as an agent for Maurice Blackburn, with the proceeding be conducted in accordance with the Agency Retainer Agreement and the Cooperative Litigation Protocol in the form exhibited to the affidavit of Vavaa Mawuli affirmed on 10 April 2025 (**Mawuli Affidavit**);[11] and

(c) for consolidated pleadings to be filed and for an exchange of critical documents between the parties pursuant to s 26 of the ***Civil Procedure Act** 2010* (Vic).

10 The defendants do not oppose the consolidation of the Singh Proceeding and Daglas Proceeding. After some pre-hearing communications and modifications to the orders, they also do not oppose the procedural orders proposed. The defendants also do not oppose the confidentiality orders but note that to the extent that they are making an application for a suppression order, the application should be made in accordance with the requirements of the ***Open Courts Act** 2013* (Vic).

11 However, the defendants submit that an order should be made, in the context of the procedural orders, that an independent costs referee be appointed to review and report on costs for the purpose of identifying any duplicated work and costs. The defendants submit that this is appropriate given the proposal that both Maurice Blackburn and Echo Law will represent the plaintiffs in the proceeding.

12 The plaintiffs submit that appointment of an independent cost referee is unnecessary and oppose that order.

Consolidation

Legal Principles

13 Rule 9.12(1) of the Rules provides for the consolidation of proceedings where common questions of fact or law arise in a proceeding, as follows:

> Where two or more proceedings are pending in the Court and –

[11] Mawuli Affidavit [35]-[37].

(a) some common question of law or fact arises in both or all of them;

(b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) for any other reason it is desirable to make an order under this Rule –

the Court may order the proceedings to be consolidated, or to be tried at the same time or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them.

14 In the context of group proceedings, the broad power of the Court in s 33ZF of the *Supreme Court Act* to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding' is also relevant. As with all powers of the Court bearing on case management, the Court must also seek to give effect to the overarching purpose under the *Civil Procedure Act*, which is to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.[12]

15 The principles governing consolidation of proceedings in this Court are well settled. The decision to order consolidation is in the discretion of the Court, and the matters to be taken into account, as particularly relevant in the context of a group proceeding, include:

(a) whether the proceedings are of a broadly similar nature;

(b) time savings or other efficiencies that might be achieved;

(c) the stage each proceeding has reached;

(d) the number and nature of the issues that are not common to the proceedings; and

(e) the effect on the prospects of non-judicial resolution of the dispute through negotiation or mediation.[13]

16 A further central consideration in the context of these open class representative

12 *Civil Procedure Act 2010* (Vic) ss 7-8.

13 ***Lidgett*** *v Downer EDI Ltd; Kajula Pty Ltd v Downer EDI Ltd; Jowene Pty Ltd v Downer EDI Ltd; Teoh v Downer EDI Ltd* [2023] VSC 574, [17] (Delany J); *Traditional Values Management Ltd (in liq) v Taylor* [2012] VSC 299 [10] (Ferguson J); *Dawson v Insurance Australia Limited* [2025] VSC 92, [3(a)] (Nichols J).

proceedings is the need to protect the interests of group members.[14]

Consolidation – the evidence and the parties' submissions

17 The parties submit that the following factors are in favour of consolidation of the proceedings:

(a) both proceedings involve a considerable number of common questions of law and fact, including allegations relating to 'Product Care', its creation and its features and limitations,[15] and allegations of non-disclosure[16] and of misleading or deceptive representations;[17]

(b) the classes of group members are almost identical, being purchasers of Product Care who thereby suffered loss and damage in the six year period prior to 17 September 2024 (in the Daglas Proceeding) and in the six year period prior 19 September 2024 (in the Singh Proceeding), being a period of only two days' difference; and

(c) consolidation will permit the claims of group members to be advanced in a single proceeding. The two firms now representing the plaintiffs have agreed to arrangements between them whereby Maurice Blackburn will be the solicitor on record, and Echo Law will be appointed as agent pursuant to an Agency Retainer Agreement. Both firms will conduct the proceeding pursuant to a Cooperative Litigation Protocol. This will enable the Court and the defendants to proceed as though there is a single legal team acting for both plaintiffs, with one solicitor on the record. It is of benefit to the defendants to respond to one proceeding rather than multiple proceedings.[18]

18 The plaintiffs submit that the Court can be confident that the plaintiffs' legal

---

14 ***Wigmans*** *v AMP Ltd* (2021) 270 CLR 623, 667-8 [109], 670 [116]-[117] (Gageler, Gordon and Edelman JJ**)**; *Fuller,* 83 [12] (Nichols J).

15 See Statement of Claim filed on 17 September 2024 in the Daglas Proceeding (**Daglas Statement of Claim**) [11]-[12], [16]-[18]; Statement of Claim filed on 19 September 2024 in the Singh Proceeding (**Singh Statement of Claim**) [12], [30]-[63], [106]-[122].

16 See Daglas Statement of Claim [37], [39], [40(g)]; Singh Statement of Claim [70], [75] and [129].

17 See Daglas Statement of Claim [36], [42]; Singh Statement of Claim [136], [140]-[148].

18 **Plaintiff's Submissions on Consolidation** dated 10 April 2025, [22].

representatives will cooperate effectively in the conduct of the proceeding because the practitioners at both Maurice Blackburn and Echo Law have considerable experience in the conduct of representative and consolidated proceedings. They have proposed the Cooperative Litigation Protocol with which they will, pursuant to the proposed orders, be obliged to comply. The plaintiffs also note that they have already cooperated effectively to make a choice as to the Court in which the proceedings should be determined and agreed on consolidation, without the necessity of a contested hearing on those matters. They have cooperated to bring this application for consolidation and procedural orders. That past cooperation is, they say, a good indicator that future cooperation can be expected.[19]

19 The plaintiffs in the Singh and Daglas Proceedings propose that the consolidated proceeding be jointly funded by Maurice Blackburn and CF FLA Investments 4 Pty Ltd, the litigation funder in the Singh Proceeding.[20] The litigation funder involved in the Daglas Proceeding will not be involved in the consolidated proceeding.[21]

20 The defendants in their submissions accept that assuming that appropriate costs and other safeguards are put in place, consolidation of the two proceedings is an appropriate way forward. The defendants identified three aspects of the proposed orders as not appropriately addressing potential adverse impacts on the defendants:[22]

(a) the absence of an order requiring that the plaintiffs be bound by the proposed Cooperative Litigation Protocol. This was resolved when the plaintiffs agreed to such an order in advance of the hearing;

(b) the absence of an order for the provision for appointment of a costs referee; and

(c) the absence of an order that the cost of work arising from the consolidation and the agency relationship between Maurice Blackburn and Echo Law is not

---

19 Plaintiff's Submissions on Consolidation [14], citing the decision of the Court of Appeal in *Kajula Pty Ltd v Downer EDI Ltd* (2024) 76 VR 75, 106, [109], [113] (Macaulay, Lyons and Orr JJA).

20 Mawuli Affidavit, [39]; Exhibit VM-1, 86-94.

21 Mawuli Affidavit, [40].

22 **Defendants' Submissions re Consolidation Application** dated 29 April 2025, [6]-[8].

recoverable from the defendants.

21 The orders sought by the plaintiffs that certain parts of the Mawuli Affidavit in support of the consolidation application remain confidential were not formally opposed by the defendants. However the defendants noted that to the extent that the orders constituted suppression orders in substance, they should comply with the requirements of the *Open Courts Act*. The defendants accepted the plaintiffs' submission that having regard to the nature of the orders sought, the *Open Courts Act* would apply in this case only if my reasons for decision are subject to a confidentiality constraint, noting the authority of *Mumford v EML Payments Limited*.[23]

The proceedings should be consolidated and the procedural orders made

22 It is appropriate, having regard to the objective of facilitating the just, efficient, timely and cost effective resolution of the real issues in dispute,[24] and the features of the two proceedings, that the proceedings be consolidated.

23 The proceedings are at the same early stage, with defences yet to be filed. There are numerous ways in which the proceedings involve common factual issues and legal questions which makes the proceedings suitable for consolidation pursuant to rule 9.12(1) of the Rules. Although there are currently certain distinct causes of action pleaded,[25] there is also a substantial overlap in the causes of action. The proposed orders provide for the filing of a consolidated writ and statement of claim which will enable the defendants to plead to one case. Most interlocutory steps are yet to be undertaken and it will be convenient to address the necessary steps, including a proposed application for a group costs order, in the one consolidated proceeding.

24 The arrangement between the plaintiffs for legal representation, involving Maurice Blackburn being the solicitors on the record and Echo Law acting as agent pursuant

---

23 [2022] VSC 750, [18] (Delany J) citing the approach of Elliot J in *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 26)* [2021] VSC 242; Defendants' Submissions re Consolidation Application, [24].

24 *Civil Procedure Act 2010* (Vic), ss 7, 8.

25 Such as the pleading in the Singh Proceeding under the *Corporations Act 2001* (Cth) based on the allegation of the defendants trading without an Australian Financial Services Licence, see Singh Statement of Claim [80]-[87], and the Daglas Proceeding claims for unconscionable conduct pleaded at paragraphs [63]-[72] of the Daglas Statement of Claim.

to an Agency Retainer Agreement, appears to be an appropriate arrangement in circumstances where the two firms have agreed to be bound by a Cooperative Litigation Protocol. It is also relevant that even without the application of the Cooperative Litigation Protocol, the firms have been able to negotiate and subsequently cooperate sufficiently to resolve the dispute as to carriage of the matter and agree on the Court in which the two proceedings should be conducted.

25 The plaintiffs' proposed procedural orders (save for the omission of an independent costs referee, which I address below) are agreed and are appropriate, including the disclosure of critical documents pursuant to s 26 of the *Civil Procedure Act* within 28 days of consolidation, and orders relating to pleadings including an extended time for the defence. The parties proposed that the costs incurred in the Daglas Proceeding in the Federal Court are to be costs in the consolidated proceeding. This is also appropriate, taking into account the terms of s 12 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic), which provides:

> Where a proceeding is transferred or removed to a court, that court may make an order as to costs that relate to the conduct of the proceeding before the transfer or removal if those costs have not already been dealt with by another court.

26 In the orders pursuant to which Justice Bennett of the Federal Court transferred the Daglas Proceeding to this Court, her Honour reserved the costs of the applicant's transfer application of 21 February 2025.[26] There are plainly costs for Mr Daglas and for the defendants from those proceedings which remain unresolved and it is appropriate and efficient that an order be made that they be costs in the consolidated proceeding.[27]

27 I will also make the confidentiality orders sought by the plaintiffs, with respect to the privileged and confidential information contained in the Affidavit of Vavaa Mawuli of Maurice Blackburn relating to the plaintiff's estimated legal costs, and financial

---

26 Orders of Justice Bennett of the Federal Court of Australia in the Daglas Proceeding made on 12 March 2025.

27 See *Lidgett* [26] (Delany J).

modelling. This is information of a limited scope, that is appropriately confidential from the defendants;[28] and which may be referred to further in the context of the foreshadowed group costs orders on a confidential basis. The information the subject of the proposed confidentiality orders has not been specifically relied on by the plaintiffs, and I have not found it necessary to rely on the confidential information for the purposes of the determination on consolidation and the independent costs referee below.

28 I will therefore make the orders proposed by the plaintiffs for consolidation of the proceedings, and for the procedural matters relating to disclosure of critical documents, filing of pleadings, and confidentiality of the identified portions of the affidavit material.

29 The remaining issue is whether an independent costs referee should be appointed.

The parties' submissions on an independent costs monitor

30 The defendants submit that it is appropriate in the case of a proceeding where more than one set of solicitors is acting to appoint an independent costs referee or 'monitor' to provide an independent method of monitoring costs on a regular basis in order to identify duplicative or otherwise excessive costs.[29] The defendants submit that the appointment of an independent costs referee is a regular feature of orders which have the effect of approving arrangements in which more than one firm acts for plaintiffs in group proceedings. They note specifically the following proceedings in both the Supreme Court and the Federal Court:

(a) ***Stallard v Treasury Wine Estates Ltd***; *Napier v Treasury Wine Estates Ltd*;[30]

(b) ***Fuller*** *v Allianz Australia Insurance Ltd; Wilkinson v Allianz Australia Insurance Ltd*;[31]

28 **Plaintiff's Outline of Submissions in Reply on Consolidation** dated 9 May 2025, [18]-[20].
29 Defendants' Submissions Re Consolidation Application, [10].
30 [2020] VSC 679 (Nichols J).
31 (2021) 65 VR 78 (Nichols J).

(c) ***Thomas v The A2 Milk Company*** *Ltd; Xiao v The A2 Milk Company Ltd;*[32]

(d) *Bain* ***v International Capital Markets*** *Pty Ltd (No 2).*[33]

31 The defendants seek orders of the kind made by Justice O'Bryan in the *International Capital Markets* case, which provide for six monthly inquiries and reporting on costs, as follows:

> 11. Pursuant to ss 33ZF and 54A of the [Federal Court] Act, an independent costs referee (Costs Referee) be appointed for the purpose of:
>
> (a) conducting inquiries every six months (commencing from the date of the making of these orders) as to the question of whether there is unnecessary or excessive work (including any duplication of work) being performed by the Lawyers in the Consolidated Proceeding, having regard to:
>
> (i) the skills and experience of the Lawyers;
>
> (ii) the objective of ensuring that the total legal costs are reasonable and proportionate; and
>
> (iii) the objective of minimising, to the greatest extent possible, the legal costs incurred through overlapping or duplicated work;
>
> (b) providing confidential written reports (of no more than 8 pages) to the Court (Costs Report) and to the Lawyers every six months (commencing after the date of the making of these orders) stating the Costs Referee's opinion on the question set out in paragraph 11(a) above.
>
> 12. Within 14 days of the date of these orders, the Applicants are to identify a suitable candidate to carry out the role of Costs Referee, provide the candidate's curriculum vitae to the Court and seek orders from the Court for that candidate's appointment.
>
> 13. The Lawyers must provide such information, access to personnel and access to documents as the Costs Referee requires.
>
> 14. The reasonable fees of the Costs Referee shall be borne equally by the Applicants in the Consolidated Proceeding and shall not be recoverable against the Respondents in the Consolidated Proceeding.[34]

32 The plaintiffs submit that the making of such orders is unnecessary. The plaintiffs acknowledge that orders appointing independent costs monitors have been made in

---

32 [2022] VSC 319 (Button J).
33 [2024] FCA 847 (O'Bryan J).
34 Defendants' Submissions Re Consolidation Application, [13].

other cases with similar circumstances, but submit that whether such an order is required depends on the individual circumstances of the case. It is contended that because the source of the power to order an independent costs monitor is s 33ZF of the *Supreme Court Act*, which provides the Court with the power to make any order it thinks 'appropriate or necessary to ensure that justice is done in the proceeding', a monitor should only be required if it is regarded as necessary or appropriate to *ensure* that justice is done in a proceeding.[35]

33 The plaintiffs contend that it is not necessary or appropriate to appoint a costs referee to ensure justice is done for the following reasons.

34 *First*, it is said that the costs referee's work will have no impact on the plaintiffs or group members following the making of a group costs order under s 33ZDA, as is sought in this proceeding, because once made, the plaintiff and group members' exposure to legal costs is capped subject to the Court's power to revise the rate under s 33ZDA(3). For that reason the only benefit of the appointment would be to the defendants if the claims progress to final judgment and the plaintiffs are successful.[36] It was submitted that, as recognised by the High Court in ***Wigmans*** *v AMP Ltd*[37] the commencement of more than one proceeding against a defendant is not an abuse of process, so that there is no right to face only one set of legal costs in defending common allegations.[38]

35 *Secondly,* the plaintiffs submit that there is no evidence that the appointment of a costs referee will achieve material costs savings.[39] The plaintiffs rely on evidence of Ms Vavaa Mawuli of Maurice Blackburn relating to a review of fifteen cases run jointly by Maurice Blackburn. Of those cases, an independent costs referee was appointed in ten of them. Having reviewed a number of the reports of those costs referees, Ms Mawuli formed the view that 'the costs of engaging a cost referee to periodically monitor costs are generally significant and the extent of unnecessary or excessive

35 Plaintiff's Outline of Submissions in Reply on Consolidation, [6]-[8].
36 Plaintiff's Outline of Submissions in Reply on Consolidation, 9 May 2025, [9]-[11].
37 (2021) 270 CLR 623.
38 Transcript 13/05/25 T26.05-20.
39 Plaintiff's Outline of Submissions in Reply on Consolidation, [12].

duplication arising by reason of having two firms acting in a consolidated case is minimal and in some cases non-existent.'[40] Ms Mawuli gives the example of two cases in which periodic reviews were undertaken over a six and five year period respectively, where 'no unnecessary or excessive duplication of costs' has been identified, and the cost of engaging the costs referee was $157,000 and $44,000 respectively. She gives a third example of a case in which periodic reviews were undertaken over a three year period, the cost of engaging the cost referee was $78,000 and 'minimal duplication of costs has been identified'.[41]

36 *Thirdly*, much of the role of costs monitor will be performed by the litigation funder under the terms of the Revised Costs Sharing Agreement, which provide that the Funder may request a Cost Assessor appointed under the Agreement to provide a report as to the reasonableness of the costs incurred in litigating the proceedings.[42]

37 *Finally*, it is said that the costs limiting order provided for in the proposed orders reduces the utility of a costs monitoring order. The costs limiting order is in the following terms:

> The costs of any work performed in the Consolidated Proceeding on and after the date of these orders that relate to work that has been performed solely by reason of there being two firms involved in the Consolidated Proceeding, and where such work would not have needed to be performed if there was only one firm involved in the Consolidated Proceeding, are not to be recoverable against the Defendants in the Consolidated Proceeding subject to any further order of the Court.[43]

38 The defendants in responding submissions observed that members of the High Court in *Wigmans*, while accepting that a defendant may be subject to more than one legal proceeding relating to the same broad subject matter, also held:

> [A] multiplicity of proceedings is not to be encouraged and that competing representative proceedings… may in principle be inimical to the administration of justice. [44]

---

40 Affidavit of Vavaa Mawuli affirmed 9 May 2025, [14]-[16].
41 Affidavit of Vavaa Mawuli affirmed 9 May 2025, [16].
42 Plaintiff's Outline of Submissions in Reply on Consolidation, [13]; see Transcript 13/05/25 T30.09-21, referring to Mawuli Affidavit.
43 Plaintiff's proposed orders dated 9 May 2025, proposed order 4.
44 *Wigmans*, 666 [106].

39 The defendants submit that the fact of having two law firms appointed for the plaintiffs in the consolidated proceeding inevitably creates the potential for increased costs given the need for the partners in each firm to ensure that they discharge their duties with respect to the management of the litigation.[45] As to the evidence relied on by the plaintiffs to indicate that independent cost referees may result in increased costs rather than identifying material savings, it is submitted that the fact that the referees did not in two cases identify excessive costs may simply indicate that the fact of having an independent costs referee appointed has been effective to ensure unnecessary costs are not incurred.[46]

An independent costs monitor should be appointed

40 It is appropriate that an independent costs monitor should be appointed in this case. The reasonable but unusual situation of two firms being appointed to represent plaintiffs in a single proceeding does create the potential for duplication of costs, which is recognised by the plaintiffs' agreement to a costs limiting order. That costs limiting order is intended to ensure that costs arising because of the dual representation arrangement are not recoverable against the defendants. It is an appropriate measure to ensure that justice is done in the proceeding, having regard to the terms of s 33ZF of the *Supreme Court Act* which empowers the making of the order, and the legitimate interest of the defendant in not being exposed to duplicative costs. It is also an appropriate measure to appoint an independent person to monitor costs periodically to ensure that this costs limiting order is effective.

41 In *Fuller*, Justice Nichols described the purpose of the costs referee which she ordered should be appointed in that proceeding:

> … the role of the referee is to identify and report on duplicated work and resulting costs. … The referee is to be assigned that task so that Duplicated Work can be identified more or less contemporaneously, and the reports are to serve as a forensic tool that may be used in any costs assessment required at the end of the litigation. In that context (in the event that the defendants' liability to pay the plaintiffs' costs was in issue at the end of the litigation) the question whether the reports ought be adopted in whole or in part, would arise

45 Transcript 13/05/25 T35.16-24.
46 Transcript 13/05/25 T37.14-28.

for consideration.[47]

42 Similarly, in *Stallard v Treasury Wine Estates Ltd* Justice Nichols noted the benefit of the ongoing nature of the role of the independent costs consultant, in a passage cited by Justice Delany in *Lidgett*:[48]

> The purpose of the performance of assessments by an independent consultant during the course of the litigation, is to detect and record the existence of any duplicated work as it occurs, rather than deferring that exercise until the end of the proceeding when it may be more difficult to detect. Although created during the life of the proceeding, reports of the opinion of the costs referee would constitute a resource to which the Court might have regard when considering costs at the conclusion of the litigation.[49]

43 I also note the observation of Justice Button in *Thomas v The A2 Milk Company* when appointing a costs monitor that the making of periodic reports by the monitor 'ensures that such additional work as inevitably will arise where there are two firms on the record is both minimised and identified'.[50]

44 Independent costs referees or monitors have regularly been appointed in representative proceedings where two or more firms are acting.[51]

45 I have considered the evidence relied on by the plaintiffs for the submission that there is no evidence that independent costs referees have been effective to achieve costs savings. I consider that the evidence from other proceedings, limited as it understandably was by confidentiality considerations,[52] was inconclusive. It did not purport to involve a review of all independent costs referee reports in the relevant cases. More importantly, the evidence that costs referees had identified no, or only 'minimal' duplication of costs in three cases, does not support a conclusion that the cost of the referees had been incurred without any material benefit. As submitted by the defendants, the fact of the referee having been appointed may have contributed to

---

47 (2021) 65 VR 78, 94 [55].
48 [2023] VSC 574, [80(b)].
49 [2020] VSC 679, [72].
50 [2022] VSC 319, [25].
51 *Stallard* (Nichols J); *Fuller* (Nichols J); *Thomas v The A2 Milk Company* (Button J); *Bain v International Capital Markets Pty Ltd (No 2)* [2024] FCA 847 (O'Bryan J); *Stack v AMP Financial Planning Pty Ltd* [2020] FCA 1839, [28] (Beach J); *Southernwood v Brambles Ltd* [2019] FCA 1021, [60] (Murphy J); *Asirifi-Ofehere v Swann Insurance (Aust) Pty Ltd* [2019] FCA 1500, [15] (Gleeson J).
52 Affidavit of Vavaa Mawuli affirmed 9 May 2025, [16].

a rigorous approach to ensuring costs were not duplicated. The size of the charges of the referee was unable to be measured in any meaningful way given that there was (again, understandably) no information about the scale of the work they had performed, and also no information about the quantum of the claims involved in the relevant proceedings. It is not possible to conclude from the limited evidence that the appointment of a costs monitor would give rise to costs which are disproportionate to the benefit the appointment is intended to achieve.

46 While it would be possible to address questions of duplication of work in a costs taxation process if costs are awarded against the defendants, there is in my view a practical value in having an independent monitor inquiring into costs on an ongoing basis to identify any duplicated work as the proceedings progress. This may assist the plaintiff firms in managing the proceeding so as to limit the possibility of any duplication of work for which costs cannot be recovered.

47 I accept the plaintiffs' submissions that interests of the group members may be protected with respect to costs if a group costs order is made, given that the exposure of the group members costs would be capped, subject to revision by the Court pursuant to s 33ZDA(3). However, the foreshadowed application for a group costs order is yet to be made. The extent to which it achieves the objective of protection against duplicative costs (as posited by the plaintiffs) would also in part be dependent on the process of estimating or forecasting costs in such a way as to avoid duplication of any costs being factored into the ultimate costs. I consider that at this stage, and on the evidence available, there remains a benefit to group members in the appointment of a costs monitor.

48 The interests of the defendants are also a relevant consideration in determining whether to order the appointment of an independent costs monitor. In exercising the discretion as to whether to order consolidation, it is relevant to consider whether the terms on which consolidation is to occur would entail any prejudice to the

defendants.[53] The possibility of prejudice to the defendants arising from the appointment of two firms to represent the plaintiffs which may give rise to some duplication of legal work and costs, which in turn the defendants could be ordered to pay if the plaintiffs are successful, cannot be discounted.

49 The funder may exercise some monitoring role over costs expended by the two firms acting for the plaintiffs. However that does not seem to me to provide the same sort of independent protection against potential duplication of fees, or of work made necessary by reason of two firms acting, as would the appointment of an independent referee. A funder, although no doubt having an interest in avoiding any duplication of costs, does not have the same interest as the defendant in monitoring whether the plaintiffs are incurring any duplicated costs by reason of the joint representation. Further, it is not proposed that the reports made to the litigation funder would be made available to the Court or to the defendant to assist in any taxation of costs. To the extent that any duplication or unnecessary costs are identified by a monitor reporting to the funder, it cannot be assumed that this analysis would be available in a costs taxation process to assist the defendants and the Court to identify duplicated costs and avoid having to undertake an analysis anew.

50 Finally, the existence of the cost limiting order does not reduce the utility of the appointment of an independent costs monitor. The role of the costs monitor will be primarily to ensure that the costs limiting order, which protects the defendants against paying duplicative costs arising by reason of the appointment of two firms, in the event that the costs are recoverable from the defendants, can be given effect.

51 For these reasons, I will, in making the consolidation and procedural orders sought, also make orders appointing an independent costs monitor. I will provide the parties with an opportunity to consider the orders relating to that appointment before they are authenticated.

---

53 *Fuller*, 84 [18] (Nichols J) citing *Klemweb Nominees v BHP* (2019) 369 ALR 583, 615-17 [155]-[160] (Lee J, Middleton and Beach JJ agreeing at 590 [34]).

CERTIFICATE

I certify that this and the 16 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Harris of the Supreme Court of Victoria delivered on 27 May 2025.

DATED this twenty-seventh day of May 2025.