FEDERAL COURT OF AUSTRALIA

Lenthall v Westpac Life Insurance Services Limited [2018] FCA 1422

File number:	NSD 1812 of 2017
Judge:	**LEE J**
Date of judgment:	18 September 2018
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – representative proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) – open class – application for common fund order – applicable principles – whether appropriate to make common fund order – desirability for amount to be paid to a funder increases as the risk undertaken by the funder increases and that any percentage commission payable to a funder be struck by reference to net resolution sum
Legislation:	*Federal Court of Australia Act 1976* (Cth) Pt IVA, s 33C FCR 9.12(2)
Cases cited:	*Australian Executor Trustee Ltd v Provident Capital Ltd* [2018] FCA 439 *Blairgowrie Trading Ltd v Allco Finance Group (recs & mgrs apptd) (in liq)* [2015] FCA 811; (2015) 325 ALR 539 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 *Hodges v Sandhurst Trustees Limited* [2018] FCA 1346 *Impiombato v BHP Billiton Limited* [2018] FCA 1272 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; (2016) 245 FCR 191 *Pearson v State of Queensland* [2017] FCA 1096 *Perera v GetSwift Limited* [2018] FCA 732; (2018) 127 ACSR 1 *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 Legg, M, "A Critical Assessment of the Shareholder Class Action Settlements - The Allco Class Action" (2018) 46 *Australian Business Law Review* 46

Date of hearing:	25, 26 June 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	65
Counsel for the Applicants:	Mr A S Martin with Mr T L Bagley
Solicitor for the Applicants:	Shine Lawyers
Counsel for the Respondents:	Mr A Leopold SC with Mr S Free
Solicitor for the Respondents:	Allens
Counsel for the Intervener:	Mr N Hutley SC with Ms S Tame
Solicitor for the Intervener:	Robert & Partners Lawyers

ORDERS

NSD 1812 of 2017

BETWEEN:	**GREGORY JOHN LENTHALL** First Applicant
	SHARMILA LENTHALL Second Applicant
	SHANE THOMAS LYE Third Applicant
	KYLIE LEE LYE Fourth Applicant
AND:	**WESTPAC BANKING CORPORATION ABN 33 007 457 141** First Respondent
	WESTPAC LIFE INSURANCE SERVICES LIMITED ABN 31 003 149 157 Second Respondent
JUDGE:	**LEE J**
DATE OF ORDER:	**18 SEPTEMBER 2018**

THE COURT ORDERS THAT:

1. Subject to order 2, the parties provide to the Associate to Justice Lee an agreed minute of order or, failing agreement, each party's proposed minute of order, reflecting these reasons by 4pm on 25 September 2018.
2. In the event that the funder, JustKapital Litigation Pty Limited, is not prepared to provide undertakings to fund this proceeding on the basis of the common fund order that the Court has indicated that it is prepared to make, then the applicants are to inform the Associate to Justice Lee of this eventuality by 4pm on 21 September 2018, and the proceeding will thereafter be listed for a case management hearing.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LEE J:

A INTRODUCTION

1 In *Perera v GetSwift Limited* [2018] FCA 732; (2018) 127 ACSR 1 at 8-14 [10]-[30], I traced the development of funded class actions, from the time that a class action regime (such as later enacted in Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**Act**)) was originally conceived by the Australian Law Reform Commission (**ALRC**), through to the rise of common fund orders and the advent of competing class actions. What can be gleaned from this historical survey is that commercial class actions have experienced something of a full circle and recent developments have seen a return to the original intention of the ALRC, that is, the commencement of open class proceedings determining common issues arising in relation to the claims of all persons who have an action against a respondent arising out of the same, similar, or related circumstances.

2 The commercial demands of funders and the drafting of s 33C of the Act (which allowed a proceeding to be commenced on behalf of only "some" persons affected by an alleged wrong) led, for some time, to closed classes being the preferred model of funded class actions. The reason was simple: to commence as an open class would mean that there was no incentive for group members to sign funding agreements delivering commercial benefits to the funder. Although the so-called "free rider" problem was in part alleviated by the development of what are commonly referred to as "funding equalisation orders", issues remained with closed classes, including duplicative closed classes and devising mechanisms to provide certitude to a respondent in settling a proceeding commenced on behalf of only some group members.

3 One of the developments to which I made reference in *GetSwift* and which gave rise to the return of the open class mechanism, was the decision of the Full Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; (2016) 245 FCR 191. As I said in *GetSwift* at 12-13 [25]:

> (r)ather than the economics of a class action being dictated by the size of sign-up, a common fund order allows an open class representative proceeding to be commenced without the necessity to build a book of group members who have bargained away part of the proceeds of their claim. Instead of addressing the 'free-rider' problem by making 'funding equalisation orders' (to redistribute the additional amounts received 'in hand' by unfunded class members *pro rata* across the class as a whole), the Court indicated its willingness to fashion a solution whereby the funder, who had borne the risks of the litigation, is recompensed from the common fund of proceeds obtained by the group

as a whole.

4 This is not to say that the willingness of the Court to make common fund orders in respect of open class proceedings has solved all problems. I used the analogy of a "whack-a-mole" game, where resolving one issue leads to another emerging. The lowering of one barrier to bringing a class action (in removing the necessity to sign up group members to ensure commerciality), has contributed to the rise of duplicative open class proceedings. This is the subject of significant contemporary controversy, but this issue can be put to one side in the present case.

5 The applicants in this case seek a common fund order. Before coming to the order that is now sought, it is appropriate that I say something about the nature of the proceeding and the procedural history of this application.

B THE PROCEEDINGS & THE RELEVANT PROCEDURAL HISTORY

6 There is no need to go into significant detail as to the relevant allegations. The class action was commenced in October 2017 by Mr Gregory Lenthall, Mrs Sharmila Lenthall, Mr Shane Lye and Mrs Kylie Lye against Westpac Banking Corporation and Westpac Life Insurance Services Limited (**Westpac Life**). Throughout these reasons, for convenience, I will refer to the respondents collectively as **Westpac**, unless specified otherwise.

7 The action seeks to vindicate the individual claims of Mr and Mrs Lenthall and also Mr and Mrs Lye. These applicants also represent persons (**group members**) who, on or after 12 October 2011, were (a) given advice by Westpac Banking Corporation, through its financial advisers in Westpac Financial Planning (including BT Advice, St George Financial Planning, Bank of Melbourne Financial Planning or Bank SA Financial Planning), on insurance and the premiums payable; and (b) obtained, from Westpac Life, policies of insurance by reason of that advice. Amongst other things, it is alleged that in providing advice, the relevant financial advisors breached their fiduciary duties to group members along with the statutory best interests and no conflict obligations. Put simply, the applicants say that those obligations, among other things, required Westpac Banking Corporation and the Westpac Financial Planning financial advisors to advise group members about policies of insurance offered by third party insurers where those policies were equivalent or better and were available at a lower premium price. All allegations of breach are denied and the proceeding is being defended.

8 A first case management hearing was held in November 2017. At that time, a tentative hearing date for the initial trial was set in March 2019. More relevantly for present purposes, a common fund order was foreshadowed.

9 In January 2018, an order was made that the applicants provide to Westpac a draft common fund order notice together with draft orders with respect to the proposed manner and timing of the application for a common fund order. Further orders were made for Westpac to respond to the draft notice and for conferral. Then, in March 2018, orders were made for the applicants to file and serve the common fund application and detailed orders were made in relation to the service of what was described as the "Common Fund Notice". A Common Fund Notice was eventually sent out to group members in the following terms:

NOTICE TO GROUP MEMBERS

FEDERAL COURT OF AUSTRALIA

WESTPAC LIFE INSURANCE CLASS ACTION

NSD 1812 / 2017

1. Why is this notice important?

A class action has been commenced in the Federal Court of Australia by Mr Gregory Lenthall, Mrs Sharmila Lenthall, Mr Shane Lye and Mrs Kylie Lye against Westpac Banking Corporation **(Westpac)** and Westpac Life Insurance Services Limited **(Westpac Life)**.

The action relates to the conduct of Westpac in offering life (and related) insurance products to its customers through financial planners employed by the Westpac Group, with those policies to be provided by Westpac Life, which is a wholly-owned subsidiary of Westpac. Westpac and Westpac Life are defending the action.

The Federal Court has ordered that this notice be published.

You have been identified as a potential Group Member. You should read this notice carefully. If there is anything in it that you do not understand, you should seek legal advice.

2. What is a class action?

A class action is an action that is brought by one or a small number of people (**Applicant** or **Applicants** – in this case Mr and Mrs Lenthall and Mr and Mrs Lye on behalf of a class of people (**Group Members** – this may include you) against another person (**Respondents** – in this case Westpac and Westpac Life) in circumstances in which the Applicants and the Group Members have similar claims.

Group Members in a class action **are not** individually responsible for the legal costs associated with bringing the class action. In a class action, only the Applicants are responsible for the costs.

3. Are you a Group Member?

You are a Group Member in the Westpac Life Insurance Class Action if, on or after 12 October 2011 you:

(a) Were given advice by Westpac, through its financial advisers in Westpac Financial Planning (including BT Advice, St George Financial Planning, Bank

of Melbourne Financial Planning or Bank SA Financial Planning), on insurance and the premiums payable on that insurance; and

(b) Obtained from Westpac Life policies of insurance by reason of that advice.

If you are unsure whether or not you are a Group Member, you should contact the Applicants' lawyers, Shine Lawyers, via email on wpac@shine.com.au or seek your own legal advice without delay.

4. How is the class action being funded?

The Applicants in the action have entered into Funding Agreements with JustKapital Litigation Pty Ltd (**JKL**) which provide for JKL to pay the Applicants' legal costs of the action, to indemnify the Applicants in respect of any adverse costs orders which may be made against the Applicants in the action, and to provide any security for adverse costs in the action.

Under the terms of the Funding Agreements (which do not bind you) there is to be paid out of any settlement or judgment sum in favour of the Group Members, prior to any distribution to them, the following:

(a) The cost of the action paid by JKL in funding the action;

(b) An amount equal to 30% of the settlement or judgment amount as a commission to JKL; and

(c) The costs of the action incurred by Shine Lawyers which have not been paid by JKL.

No Group Member other than the Applicants have entered into a Funding Agreement with JKL to date.

5. Court Approved Funding Terms

The Applicants have applied to the Court for orders seeking to make you bound by similar arrangements as if you had signed the Funding Agreement. If approved, this will lead to Court-approved 'Funding Terms', such that in the event of a successful outcome in the action (either by way of settlement or judgment), the settlement or judgment sum recovered for all Group Members will be used, before any distribution to Group Members, to:

(a) Reimburse JKL for the costs paid by JKL in funding the action which the Court considers fair and reasonable in all the circumstances;

(b) Pay JKL a commission which will be fixed at a later time by the Court but which will be no more than 30% (35% on appeal) of the settlement or judgment sum and which the Court considers fair and reasonable in all the circumstances; and

(c) Pay Shine Lawyers the costs incurred by them in the action which have not been paid by JKL but which the Court considers fair and reasonable in all the circumstances.

No Group Member will be liable to pay any amount of money to JKL unless and until there is a successful outcome in the action, and then (subject to any other order the Court may make) the above amounts payable to JKL and Shine Lawyers will be deducted from the settlement or judgment sum before the balance is distributed to Group Members.

The Applicants' application for the Court to approve "Funding Terms" has been listed for hearing before the Federal Court in Sydney **on 29 and 30 May 2018 at 10:15am**.

6. What do you need to do?

(a) If you wish to object to the Court approving the "Funding Terms"

If you wish to oppose the Court approving the "Funding Terms" (**see Section 5 above**) then you:

- should, on or before **4pm on Friday 18 May 2018** notify the Court of the Group Member's desire to be heard by filing the "Notice of Intention to Object" in the form attached and marked "A" attached to this notice;
- should, on or before **4pm on Monday 24 May 2018** file with the Court any evidence and any written submissions on which the Group Member proposes to rely; and
- are encouraged to attend the hearing at **10.15am on Tuesday 29 and 30 May 2018**.

The names and addresses of all the Group Members who have returned a completed Notice of Intention to Object form may be provided to both the Applicants' and Respondents' lawyers and may be provided to the Court.

(b) If you do not object to the Court approving the "Funding Terms"

You do not need to do anything.

Any Group Member who does not wish to remain as a Group Member in the action will at some point be given appropriate notice enabling them to opt out of the action.

7. Where can you obtain copies of relevant documents?

Copies of relevant documents, including the current pleadings may be obtained by:

(a) Downloading them from https://www.shine.com.au/service/class-actions/westpac-class-action; or

(b) Inspecting them between 9am and 5pm at one of the offices of Shine Lawyers by prior appointment to be made by emailing wpac@shine.com.au.

Please consider the above matters carefully. If there is anything of which you are unsure, you should contact Shine Lawyers via email to wpac@shine.com.au or seek your own legal advice.

10 There was no reasoned objection raised by any group member which engaged with the terms of the proposed order (although some objections were received which related to the substantive allegations in the proceeding). In any event, the matter came before the Court on 30 May 2018 and the orders sought on that date were consistent with those notified to group members, including a payment to the funder (**JKL**) of a commission which was to be subsequently fixed by the Court, but which would be no more than 30% of the gross settlement or judgment sum (or 35% in the event of an appeal).

11 After I received evidence and heard submissions from the parties on 30 May 2018, the following exchange occurred with Senior Counsel for the applicants (at T43-T45):

> HIS HONOUR: … Mr Martin, I do have a degree of hesitancy, I must say, in approaching this on the basis that a headline figure is appropriate or a cap is appropriate because … the cap seems to me to lead a spurious air of authority to the figure, in the sense that I think it is communicating a default position … (M)y personal view is that if we get into this business of common fund orders, it's a complex issue which has advantages and disadvantages. The big advantage it has is that it gets back to what Part [IVA] was all about, open classes, mass claims, people getting access to justice. But it has the downside of being a very unusual judicial task. And so unless you wish to persuade me further, I think my preliminary view is I would be disinclined to make an order for a percentage common fund. But I would be open to making an order which would have the components of a multiple of costs with a lesser headline figure.
>
> … if such a common fund order is sought, that it would be appropriate for that to also have the additional discipline of someone being able to control the issue of costs through the process. Now, I guess you can seek to – of course, seek to dissuade me from that course. Or, alternatively, I think, notwithstanding what Mr Leopold [SC, being senior counsel for Westpac] said, I would be disposed to adjourn the application, particularly given that GetSwift has changed the goalposts a little bit since you commenced this application, as to whether or not you wish to have the matter adjourned for a period in order to allow you to obtain instructions as to whether or not you wish to put a proposal up, and any further evidence along those lines or you wish me to proceed to determine the application. I'm open… to either course.
>
> MR MARTIN: … I hear what your Honour says. I'm not going to try to dissuade your Honour from the tentative views that your Honour has expressed. And I can certainly see the justification for it … our position will be that we would want time to put some proposal – some figure to your Honour.

12 The reference to the position of Mr Leopold SC was that senior counsel for Westpac had submitted that the application before the Court should be dismissed with costs. For reasons evident from the above extract, I allowed the interlocutory application to be amended and made orders to facilitate the hearing of an amended common fund application on 26 June 2018. Pursuant to FCR 9.12(2), I granted JKL leave to intervene and be heard in relation to the amended application.

13 The common fund order now sought proposed a funding rate of the lesser of three times the total spend on legal costs and disbursements and adverse costs orders, or 25% of the gross recovery in any resolution.

C THE EVIDENCE & RELEVANT FINDINGS

14 Ms Jan Saddler and Ms Vicky Antzoulatos, solicitors for the applicants from Shine Lawyers, gave evidence. The evidence given by the solicitors establishes that:

(a) JKL was selected as the appropriate litigation funder after negotiation of the funding commission (although only one other funder had been approached other than JKL, and these other discussions never reached a stage of negotiating terms or percentages);

(b) despite the lack of detailed discussion with any other funder, there are no other funders who have shown any interest in funding a similar class action;

(c) Shine has not approached alternative funders for the purposes of putting forward a more favourable common fund proposal (the reason being that Ms Antzoulatos considered to do so would expose the applicants to liability for breach of the JKL funding agreement);

(d) total legal costs disclosed in the retainer agreement are between $6.5 million to $9 million;

(e) JKL has already spent $1.2 million on legal costs; and

(f) there are many group members (perhaps in excess of 80,000 although it is difficult to be precise).

15 Ms Saddler also gave evidence that the group members each have, on average, a claim in the order of $2,000 to $15,000. This range is plainly "rubbery" and I think it is fair to say, on the present state of the evidence, the actual quantum of the amount in issue is very difficult to estimate with any degree of precision.

16 Additionally, further evidence was filed, apparently in response to the possibility I raised (on 29 May 2018) that if the Court made a common fund order other than as proposed by the applicants, it would then be a matter for JKL to decide if it wants to continue to fund the proceeding and, if it does not, the matter would be stayed to allow the applicants the opportunity to find another funder. In response to this, Ms Antzoulatos deposed that if the Court set its own funding terms, then JKL may elect not to fund the proceeding and Shine may terminate their retainers with the applicants. In these circumstances, if a new litigation funder was not found by the applicants, there was a potential for a permanent stay of the proceeding. There is no real reason to doubt this evidence, although I consider it to be of marginal relevance. If I am not satisfied it is appropriate to make the proposed common fund order, then the appropriate exercise of discretion would be to refuse the amended application or suggest the basis upon which I would be prepared to approve such an order. In the circumstances of this case, I intend to place little weight on this evidence because the Court's task is to form a view on whether

the proposal currently put forward is one which is in the interests of group members, without the distraction of any minatory suggestion that the funding would be, or may be, withdrawn if the Court declines to make the precise order JKL seeks.

17 There was no evidence filed on behalf of the applicants or by JKL which sought to justify, by way of any detailed economic analysis, the reasonableness of the return that would be received by JKL in the event that the common fund order was made and the applicants were successful. Rather, the approach of the applicants was to point to "market" rates for litigation funding, as revealed in a number of cases where settlement approvals have been made, or where the Court has made common fund orders.

18 This sort of empirical data, although useful, has obvious limitations. Any interested observer of the market for litigation funding in Australia, would be aware that the market is in a state of flux and is dynamic. This dynamism has two facets. The *first* is the increasing number of funders coming into the litigation funding market. The *second*, which no doubt is related to the first, is the apparent downward pressure on funding rates.

19 As noted below, some of these aspects of the changing litigation funding market were addressed in the evidence and they were also the subject of extended discussion during the course of submissions. The evolving nature of the market means that the rates historically charged for litigation funding must be approached with some degree of caution, to the extent that they are relied upon as reflecting contemporary market conditions. The further caveat is that funding rates are influenced by risk. Like an insurance policy, the amount to be charged for the provision of services (including adverse costs protection) is, or at least rationally should be, affected by risk of the payment of adverse costs. Again, although there is some use that can be made of funding fees charged in other class actions, there is a risk of decontextualisation. The amount to be charged in an individual case is not only a function of macro market forces and prevailing funding rates, but also the subjective assessment of risk of a bespoke funding proposal.

20 The significant changes in the funding market were illustrated by evidence filed on behalf of Westpac. A solicitor for Westpac, Mr Guy Stuckey-Clarke, swore an affidavit which, among other things, noted that in the five competing AMP class actions (now being dealt with by the Supreme Court of New South Wales: see *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143), the Maurice Blackburn class action secured funding from International Litigation Funding Partners Pte Ltd at a funding commission rate of 12.5% of what I infer is the gross

resolution sum. The Quinn Emanuel class action secured funding from Burford Capital at a funding commission rate of 10% of what I again infer is the gross resolution sum (further, Quinn Emanuel has agreed to undertake this work on a speculative basis). The Slater & Gordon class action secured funding from Therium at a funding rate of 10% of *net* recoveries with Slater & Gordon working on a speculative basis). The other two AMP class actions (by Shine Lawyers, run by Ms Antzoulatos, and IMF) have apparently undertaken to charge a funding commission rate no higher than that approved by the Court.

21 Additionally, evidence was also adduced that in none of the AMP class actions (or indeed in competing proposals dealt with in *GetSwift*) was there a provision for an extra 5% commission for each appeal, as there is in the present proposal (see the proposed Funding Terms, cl 6(c)).

22 From this evidence and the history of settlement approvals over the last decade, it is possible to argue that abnormally high returns have likely been enjoyed by funders in securities class actions in recent times. What is plain is that the "business model" has proven to be a profitable one; particularly given that no liability to pay adverse costs has ever been triggered in a common form securities class action, and that no such cases have proceeded to a final determination. Such a conclusion would be consistent with the observations of Professor Michael Legg in "A Critical Assessment of the Shareholder Class Action Settlements - The Allco Class Action" (2018) 46 *Australian Business Law Review* 54. Professor Legg notes (at 64) that the state of the current litigation funding market is unclear and "the continued entry of new funders may suggest that above normal returns are being earned" and that, consequently, "the current approach to determining a litigation funder's fee [by reference to past headline rates] may create concern": see also *GetSwift* at 63 [242] and *Australian Executor Trustee Ltd v Provident Capital Ltd* [2018] FCA 439 at [25]-[26] (Rares J).

23 What is particularly notable about recent developments (but hardly surprising) is that when there is real competition for funding, the rates charged have reduced considerably from those which prevailed in similar cases at a more embryonic stage of the development of the market for funding securities class actions.

24 Drawing these threads together, it seems to me that I should proceed to determine this application on the basis that the competition in the funding market for securities class actions is now far more intense than previous times and that the funding rates previously enjoyed by funders no longer reflect the contemporary market. For other types of commercial class actions, the picture is not quite so clear. For reasons that I will come to, however, these conclusions do

not assume decisive importance in determining whether or not the present application should be granted.

D THE PRINCIPLED APPROACH TO COMMON FUND ORDERS

25 The decision of the Full Court in *Money Max* and the decisions of Murphy J in *Pearson v State of Queensland* [2017] FCA 1096 and *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, recognised that the power to grant a common fund order was grounded in s 33ZF (*Money Max* at 224 [165]; *Pearson* at [18]; *Caason* at [34]) and that "the Court has power to make a common fund order in an appropriate case": *Pearson* at [21]. See also *Hodges v Sandhurst Trustees Limited* [2018] FCA 1346 at [7] (Lee J) and *Impiombato v BHP Billiton Limited* [2018] FCA 1272 at [24]-[25] (Moshinsky J).

26 Consistently with the terms of s 33ZF, an applicant must establish the orders are "appropriate or necessary to ensure that justice is done in the extant proceedings, rather than by reference to broad policy considerations" (*Money Max* at 207 [66]). In *Money Max*, the fixing of the rate of the common fund order was deferred until settlement, but the Court went on and considered various factors in the process of determining whether the order (absent a fixed rate) was necessary in those proceedings including: (a) the court's power to refuse to approve the funding commission (at 211-212 [92]); and (b) whether class members would be worse off under the proposed common fund orders compared to a funding equalisation order (at 213 [97]).

27 The applicants in the present case submitted, correctly in my view, that in *Money Max* the Court made seven findings of present relevance which, in the circumstances of that case, were relied upon in support of making the order. *First*, that the funder had sufficient resources to meet its obligations (at 222 [153]); *secondly*, that any funder rate set would be reasonable (at 209 [79]); *thirdly*, that no conflict issue arose (at 222 [155]); *fourthly*, that the pre-existing relationship between the funder and the solicitors had no bearing on the solicitors' view that it was appropriate that that particular funder fund the proceedings (at 222 [157]); *fifthly*, that the common fund was proposed by the applicant's solicitors and not the funder (at 222 [158]); *sixthly*, that the legal costs of the applicant in complex class actions are very considerable; and *seventhly*, that litigation funders are generally only prepared to fund closed class representative proceedings.

28 A similar approach was adopted in *Pearson* at [20], where the following presently relevant factors were taken into account when determining whether the common fund order was appropriate in the interests of justice in that matter: *first*, group members were to be informed

of the order and to be given the opportunity to opt out (at [26]); *secondly*, the funding agreement in that case included protections for class members (at [27]); *thirdly*, the common fund order eliminated conflicts of interests between the categories of class member in that case (at [28]); *fourthly*, the common fund order would reduce the legal costs of the case and place less of a burden on class members (at [29]); and *fifthly*, the funding rate was favourable (at [24]).

29 Unlike in *Caason* and *Hodges v Sandhurst Trustees Limited*, in *Money Max*, *Pearson* and *Impiombato*, common fund orders were made at a relatively early stage of the proceedings (although unlike in *Money Max*; in *Pearson* and *Impiombato*, a rate was set). A similar approach to *Pearson* was taken in *GetSwift* where the following was noted at 64 [244]-[246]:

> Despite some earlier hesitancy in the Court making common fund orders at the commencement of a proceeding (rather than at the settlement stage), there is nothing which prevents an order being made sooner rather than later. Indeed in [*McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947] at [22], Beach J noted that whether such an order should be granted and its terms needed, in the circumstances of that case, to be dealt with at "*an early point*". It was for this reason, among others, that it was necessary to resolve the appropriate constitution of the competing class actions before dealing with common fund questions. Moreover, if the possibility of a 'windfall' can be removed, the basis for the hesitancy in setting fund rates at the commencement of a proceeding disappears.
>
> To my mind, provided the potential 'windfall' problem is minimised, there are significant advantages of making a common fund order and putting in place a funding regime sooner rather than later. *First*, it has the advantage of there being some certainty (subject to later variation) prior to the time being fixed for opt out. At the time of opt out, group members can make an informed decision, including as to whether they consider that the proposed funding regime is appropriate in all the circumstances. *Secondly*, it is already inherent in setting funding rates for different actions that there needs to be an assessment of risk by the funder. In this case the differing common fund proposals presumably reflect that assessment of risk. An assessment as to whether it is likely that the funder will have to pay adverse costs orders (an eventuality, it will be recalled, that has not, as yet, occurred) which would include a subjective assessment of the prospects of success of the case and the likelihood of settlement, should be an *ex ante* rather than an *ex post* analysis. The risk of hindsight bias is real when one is dealing with a common fund application at the conclusion of a case.
>
> It is notable that Murphy J in *Pearson* made orders early on during the course of proceedings in circumstances where group members would be informed of the requirement to pay the commission *before* they decided whether to opt out and which would allow members to opt out if they were unhappy with the order. Making the order at this time also avoided wasted costs associated with book building which would ultimately have been deducted from the possible recoveries, and the waste of time and effort that would have been needed to explain the details of funding arrangements against a backdrop of uncertainty as to what the Court would eventually do.

E AN EVALUATION OF WESTPAC'S SUBMISSIONS AS TO WHY THE ORDER OUGHT NOT BE MADE

30 It is appropriate to record the formal submission made on behalf of Westpac that the Court cannot make an order creating new legal rights for the benefit of an entity that is not a party to the proceedings and to do so would involve an excess of power. This necessarily amounts to a submission that the Full Court's decision in *Money Max* was wrongly decided.

31 Further, Westpac submitted, if s 33ZF was engaged then the express limitation on the scope of the power conferred by s 33ZF means that the Court must decline to grant the order unless it affirmatively forms the view that there would be some injustice *in this particular proceeding* that could not be avoided unless the Funding Terms were approved: see *Blairgowrie Trading Ltd v Allco Finance Group (recs & mgrs apptd) (in liq)* [2015] FCA 811; (2015) 325 ALR 539 at 559 [105]. More particularly, it was asserted that if the applicants cannot point to any particular injustice which would result from refusal, then it follows that the proposed order is neither appropriate nor necessary to ensure justice in this proceeding.

32 Reference was made to the view expressed by Gordon J in *Modtech Engineering Pty Limited v GPT Management Holdings Ltd* [2013] FCA 626 at [60] (determined prior to *Money Max*), that it was difficult to conceive of circumstances in which a common fund order would be appropriate. Although Westpac accepted that the Full Court in *Money Max* formed the view that a common fund order was appropriate, this was because: (a) the Full Court in *Money Max* was satisfied that justice in the particular proceeding was delivered through a form of order that treated all class members equally and in turn provided a more secure foundation for the funding of the proceeding (see 224-225 [167]); and (b) the Full Court emphasised that it had formed this view because the common fund order was coupled with a so-called floor condition to the effect that the making of the common fund order should not leave group members any worse off than if the order were not made (see 195 [9]). The absence of such a floor condition was said to be the "key point of difference" between *Money Max* and the present case.

33 Initially, Westpac submitted that the only reason for the application was to improve the bargain from the perspective of JKL, being a bargain it struck when it chose to enter into funding agreements with just the applicants.

34 Perhaps in recognition that this submission placed undue emphasis on the lack of "book building" by a funder, an endeavour conducive of wasted costs that the Court has sought to discourage since the advent of common fund orders (see *McKay Super Solutions Pty Ltd*

(Trustee) v Bellamy's Australia Ltd [2017] FCA 947 at [97], *GetSwift* at 62 [239], 64 [246], 64-65 [248], 77 [317]), more emphasis was put in supplementary submissions (and orally) on the assertion that the size of the commission that is potentially available to JKL through the order cannot be justified or, at least, that the applicants have not put material before the Court that would allow it to form such a view.

35 More specifically, emphasis was placed on four matters:

(a) *First*, the evidentiary matters in respect of which I have made findings at [14] above being: (i) that only one funder had been approached other than JKL, and these other discussions were preliminary; and (ii) Shine has not approached alternative funders because it was thought doing so would expose the applicants to liability for breach of the JKL funding agreement;

(b) *Secondly*, the lack of evidence as to the competitiveness of funding terms in circumstances where such evidence as there is, suggests the proposed terms are uncompetitive;

(c) *Thirdly*, there is doubt surrounding JKL's ability and willingness to fund this proceeding on an ongoing basis; and

(d) *Fourthly*, the proposal for a referee only deals with prospective costs and not the $1.2 million already incurred.

36 It is convenient to deal with each of these arguments in turn.

Lack of Approaches to Other Funders

37 As would already be evident, in the case of an orthodox securities class action, the more competition between the funders, the more likely it is that group members will obtain a more favourable funding arrangement. It is important, however, not to assume that the approach of funders to what I have described as the "common form" of securities class action will reflect the approach of funders to all forms of class actions, or even all forms of commercial class actions.

38 It is both undesirable and unnecessary that I spend any time analysing the prospects of success of the applicants and group members in this proceeding. It suffices to say that it is common ground that this is a case which raises issues of some complexity from both a legal and factual point of view. At present, a reference is being undertaken where the referee is enquiring into, among other things, the pricing of alternative insurance products. The impression that this

proceeding is not a straightforward one, is fortified by recalling the issues that arose in determining how the referee should conduct his inquiry and the scope of the matters to which the referee will have regard in preparation of his report. Given that the complexity of the proceeding is not in contest, it is unnecessary to set out in these reasons the proposed common issues identified in the originating application pursuant to s 33H of the Act, but even a superficial review of these common issues points to the complexity of the matter.

39 This conclusion is important because anyone familiar with litigation funders will know that the simpler the case and the more established the case theory, the more attractive the proposal is to a promoter of the proposed litigation. Although detailed discussions only took place with regard to JKL, from the moment that this proceeding was commenced, it was, of course, open for another funder to come forward with its own proposal to conduct the litigation on different terms. Whatever may be the position with other class actions before the Court, no one is beating down the Registry doors in order to commence a duplicative proceeding in relation to this matter. Although Shine has not approached alternative funders to seek alternative common fund proposals, there has been no fetter on other promoters from presenting an alternative proposal (using the vehicle of the individual claim of one of the very large number of group members).

40 Accordingly, subject to the commission being struck on a *gross* sum rather than a *net* sum (in circumstances where the proposal also includes an "uplift" on professional fees, a matter to which I will return), I do not consider that in the event that Shine had entered into detailed commercial discussions with more than one funder, that a different and more favourable proposal from the perspective of group members would likely have resulted.

41 Before leaving this topic two further points ought to be made. The *first* is that it is somewhat simplistic to think that all class actions evolve in the same way. Some might commence by a claimant approaching a solicitor who then perceives the prospect of a class action. Another way is for the solicitors to identify the prospect, search to obtain an appropriate lead applicant, and then approach a funder. A further way, which is not uncommon, is for the funder itself to identify the possibility. As a promoter of commercial litigation enterprises, this prospect might be valuable commercial information from the perspective of a funder. It is not unknown, in such circumstances, for funders to approach solicitors with the prospect, but only on terms that any discussions are subject to an express obligation of confidence.

42 By making reference to these three possibilities, I am not making comments about the genesis of this class action, but merely observing that it is unduly simplistic to say that common fund orders will only be appropriate in circumstances where a solicitor has exhausted offers from the funding market generally. Each case, and each proposal for a common fund order, must be judged on the merits.

43 The *second* point relates to the evidence that Shine did not approach other funders because they perceived it may breach the JKL funding agreement. The first thing to note is that when one has regard to the funding agreement, it could not constitute a breach of the funding agreement for the applicants to obtain evidence of competitive rates in the market for class actions of this kind. Moreover, the fact that the applicants may feel inhibited in seeking a more competitive rate from another funder is not something which should influence the Court in determining an appropriate common funding rate. If a particular applicant has entered into some sort of agreement which prevents exploration of the market in an attempt to obtain an optimum result for group members, then this might be a powerful consideration, depending upon an assessment of all the circumstances, for reaching the conclusion that the applicant may not be an appropriate representative party. It also might mean (again depending upon an analysis of all the circumstances) that the Court would need to be persuaded that the proposed common fund order should be made in the absence of there being some sort of tender process or other exploration of the commerciality of the proposed common fund order. Like in so many issues affecting the management of Part IVA proceedings and the protection of group members, it is highly undesirable to lay down fixed rules, as each proposal must be judged on its merits.

Lack of Competitiveness

44 As to the *second* argument, the proposed funding terms would involve JKL receiving the lesser of three times the Legal Costs or 25% of the gross "Resolution Sum", plus 5% extra for each appeal. It is said that these proposed terms are much less favourable to group members than those approved by this Court in *GetSwift*, where the funder was to receive the lesser of 2.2 to 2.8 times its costs or 20% of net recoveries.

45 Last month, in *Impiombato* at [32], Moshinsky J provided a recent "snapshot" in relation to common fund order rates when he observed:

> …a commission rate of less than 18% of gross recoveries compares favourably with funding commissions approved by the Court in other Pt IVA proceedings, in particular as it is inclusive of reimbursement for expenses paid by the funder. In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* (2017)

> 343 ALR 476, Beach J noted (at [125]) that a commission rate of 30% of net recoveries (equal to 22.1% of gross recoveries) compared favourably with the usual range of commission rates in Australian funded proceedings: see also *Earglow* at [166]-[177] (Murphy J). More recently, Murphy J in *Kuterba v Sirtex Medical Ltd* (VID1375/2017) approved a funding commission rate of "no more than 28%" of net recoveries, and Lee J in *Webb v GetSwift Limited* (NSD580/2018) approved a percentage-based commission of 20% of net recoveries (in the alternative to a commission based on a multiple of expenses). In *Kuterba* and *Webb*, the commission rate was separate from and in addition to reimbursement for expenses.

46 As Moshinsky J recognised, the "headline" rate is but one of a number of factors to be taken into account. I have already said enough to explain the limitations of comparative analysis. Dealing with the submission of Westpac more directly, this case is not another *GetSwift*, which was (and is) an orthodox securities class action. It is inappropriate to speculate about the risks of the funder of the *GetSwift* class action being visited with an adverse costs order, but it would be illogical to proceed on the basis that the assessment of risk in this case is essentially the same as in *GetSwift*. Apart from anything else, no securities class actions such as *GetSwift* has ever proceeded to a judgment where an adverse costs order has been made. This is not the case in other types of commercial class actions.

47 Subject to one matter, I do not consider there to be any real basis to conclude that the common fund proposal, at least as refined as discussed below, is not competitive. Indeed, when compared to previous common fund orders and the first proposal advanced by JKL, the current proposal has significant advantages. If a Court was faced with a settlement approval application where deductions of the type proposed for funding costs were a component of the settlement, such a deduction would not be regarded as being out of the ordinary.

48 This brings me to the issue that does cause me concern, that is, the proposal to strike the percentage rate (which is one of the two ways the commission is to be calculated) by reference to gross rather than net recoveries. As can be seen from the extract from *Impiombato* (see [45] above), percentage rates in other matters have been expressed on both a gross and net basis. This fact, together with the existence, in some cases, of additional proposed deductions, make "like for like" comparisons somewhat difficult. To the extent that consideration as to whether a common fund order should be made involves a comparative exercise, the process would be greatly assisted if the default position for any common fund order was to strike any percentage rate component by reference to net recovery. Moreover, doing so gives an added incentive to the funder to exercise some control over legal costs being incurred.

49 Additionally, in this proceeding, the relevant retainer agreement with Shine includes 25% "uplift" fee on what is described in the Shine Costs Agreement as the "Remaining Legal Costs". This apparently relates to the proportion of legal costs not paid by JKL, being 20% of the total costs incurred. Such an uplift necessarily involves a version of "risk sharing" between the funder and the solicitors. The existence of such "uplift" payments in class actions may be perfectly appropriate and understandable (and may foreshadow more sophisticated risk sharing arrangements between funders and solicitors in the event of legislative change allowing solicitors to charge contingency fees in the context of class actions), but it constitutes a payment ultimately borne by the group members. It would be an incomplete analysis to fail to have regard to the existence of such an "uplift" arrangement in the context of assessing the reasonableness of a proposed funding fee which has, as its justification, the assumption of risk by the funder.

50 Attached to these reasons as Annexure A is a table setting out a series of scenarios identifying amounts which would be deducted from a scale of possible resolution sums. It should be obvious that nothing about the consideration of these scenarios suggests that this is a matter that Westpac should or will necessarily settle; nor that any settlement will involve the payment of substantial compensation to group members. The scenarios have been chosen to reflect various hypotheses based on ranges of damages suggested by the applicants' solicitors. The document was prepared at my request at the conclusion of oral submissions. It identifies scenarios based on legal costs being incurred of $6.25 million (with actual fees paid by JKL amounting to $5 million).

51 As might be expected, the lower the resolution sum, the greater the disproportion between the amount that would be obtained by group members if the funding rate was struck by reference to net rather than gross recoveries. Given the existence of the uplift, it seems to me that a common fund order based on net recoveries would not only be useful in providing an additional incentive to restrain costs, but would also most appropriately reflect the fact that the funder is not accepting all the risks of an unfavourable outcome.

52 The sort of returns to group members which would result if the basis of a funder's return was calculated by reference to a net resolution sum, seem to me to result in a fair and reasonable outcome for group members, while providing a "market" return to the funder commensurate to the risk undertaken.

53 I will return below to what I consider to be the advantages of remuneration for funders linked to incremental increases in risk. For present purposes it is sufficient to note that I am satisfied that there is an adequate evidentiary foundation for concluding that the proposal is fair to group members if the percentage rate component was calculated on a net basis.

JKL's Ability to Fund

54 Westpac points to a number of disclosures by JKL to the ASX referred to in the affidavit evidence of Mr Stuckey-Clarke. In summary, the Board of Directors of JKL entered into documentation to transfer its litigation portfolio to a new trust structure. PPB Advisory, a consultant engaged by the Board of JKL, concluded that the proposed transaction was neither fair nor reasonable and not in the best interests of JKL shareholders as a whole. The Board of JKL elected to terminate the proposal and, since then, has received other enquiries about purchasing the funding portfolio. In May 2018, JKL disclosed attempts to remove various directors of JKL. Repeating earlier comments made, in June 2018, JKL also disclosed to the ASX that it remained "committed to the exit of its litigation funding business in a timely and profitable manner".

55 In short, it is submitted that the Court should make orders based on the alleged inability of the applicants to approach any other funder in circumstances where JKL itself is apparently not committed to seeing the proceeding through to the end and that if the funder is likely to change, any common fund application should be deferred.

56 I do not consider that there is any real substance in this submission. JKL had indicated an intention to continue to fund this "legacy" case and will be required to give undertakings to comply with the funding terms. If security orders are made going forward, then JKL will be required to meet them. Provided adequate security is ordered, Westpac should be at no risk in relation to recovery of adverse costs and there is no real reason to think that JKL will not adequately fund the action.

Prior Costs & the Referee

57 Again, I do not consider that there is substance in this point. I will make appropriate orders to ensure that the referee approaches the assessment of past costs with the same level of scrutiny that the referee is to employ in considering future costs. No amount will be included as an integer in the costs multiple (being one mode of calculating commission), which has not been the subject of prior scrutiny by a referee and assessment by the Court.

F WHY A COMMON FUND ORDER SHOULD BE MADE

58 Having rejected Westpac's attacks on the proposed order, it is appropriate I summarise my reasons as to why I consider a common fund order should be made.

59 As I have already noted, the revised proposal substantially mirrored the form of the funding terms that I had indicated were appropriate in *GetSwift*. Although the multiples and percentage rates proposed were higher than those proposed in *GetSwift*, if the percentage rate was struck by reference to net recoveries, the proposal is within the range of reasonable funding commissions (and, to the extent relevant, lower than commissions approved in settlement approval hearings of roughly comparable cases). That is particularly so having regard to the fact that: (a) only one funder, JKL, has indicated a willingness to fund this class action, and has already expended significant resources; and (b) aspects of the present claim are novel and potentially riskier than a securities class action. Additionally, the applicants proposed a legal costs referee be appointed, which assists in ensuring that the applicants' legal costs are incurred reasonably.

60 In *GetSwift* I identified a number of reasons why I considered a common fund order linking a funding commission to a multiple of the expenses or a percentage (if such a percentage resulted in a lesser sum) had advantages over the terms of common fund orders made in other proceedings, which have been based simply on percentage sums of net or gross proceeds (at 72-73 [285]-[291]):

> *First*, a significant attraction is that by aligning the reward of the funder with a multiple of legal costs, it recognises the reality that the risk of a funder increases incrementally as legal costs increase. Moreover, the increase in the legal costs expended by the applicant is likely to reflect, at least in some rough proportion, the increasing exposure to any adverse costs order. In this sense there is a real and demonstrable proportionality between risk and reward which is not directly reflected in 'headline' funding percentages.
>
> *Secondly*… one of the criticisms made of common fund orders is the Court not receiving expert evidence in order to ascertain whether the returns proposed by funders are above average. There may be good reason to doubt the ability to obtain funding market evidence from persons who have a greater measure of specialised knowledge than the participants in the litigation, including the judges of the Court but, in the case of economic evidence, this would involve very large and difficult questions, including whether any economic analysis should be done by reference to the individual piece of litigation the subject of the order or by reference to the entirety of the funder's business activities or indeed against comparable business activities such as other forms of managed investment schemes. Leaving aside questions as to the principled exercise of judicial power, one need only reflect on the complexity of the economic evidence placed before public utility regulators in making discretionary assessments or the former Prices Justification Tribunal to understand how ill equipped the Court is to perform any role analogous to that performed by a price regulator.

> The answer to the question of what should be an appropriate or fair return is not one that lends itself to a single answer. It is an inquiry without bright lines and at the margins. Value judgments, which may vary idiosyncratically from judge to judge, may intrude. When this is appreciated, it seems to me that assessing the value of risk as the proceeding progresses in a way which can be readily appreciated and understood by the Court, that is, by reference to costs, is beneficial. Although the multiple to be applied to the base legal costs and the alternative percentage based commission figure of 20% are components the reasonableness of which still involves some of the challenges of setting a 'headline' figure, linking the multiple to a figure which increases in way that has a direct relationship to heightened risk seems to me to be an improvement.
>
> *Thirdly*, tethering the return to funders to the risk associated with the expenditure of legal costs seems to me to better reflect that litigation funders are promoting a particular type of commercial enterprise, which is the provision of legal support and hence the funders have become indirectly engaged in the provision of legal services to a client.
>
> *Fourthly*, a further advantage is that this mechanism serves to prevent windfalls. Reservations have been expressed on a number of occasions about the possibility of a funder obtaining disproportionate sums where the ultimate recovery from a proceeding was very large… It was for this reason that some hesitation has existed about specifying the amount recoverable under a common fund order until a settlement sum has been ascertained. Removing windfall possibilities allows common fund rates to be set at the outset of a proceeding, thus delivering the advantages of additional certainty and informed opt out to which I have already made reference.
>
> *Fifthly*, the alternative form of remuneration, that is, a 20% return on net proceeds in the event this sum is less than the relevant costs multiple, also guards against the prospect that the recovery could become disproportionate if legal costs are expended in a case where the return is minimal. This is a real problem which has been encountered in a number of recent class action settlements.

61 These comments apply with equal force to the amended proposal of the applicants in this proceeding.

62 Moreover I am satisfied: *first*, that JKL will likely meet its obligations; *secondly*, as noted above, that the funding rate (if calculated by reference to net recoveries) is reasonable in all the circumstances and it is not evident another funder would propose more favourable terms; *thirdly*, no conflict issues arise; *fourthly*, that the solicitors have acted responsibly in the selection of the funder notwithstanding the only detailed discussion as to terms was with JKL; *fifthly*, the common fund order now proposed is put forward by the applicants and their solicitors conscious to their duties to group members; *sixthly*, that the legal costs are likely to be very considerable and without litigation funding it is likely that the proceeding would not advance to resolution at a mediation or on the merits; and *seventhly*, that the making of the proposed order, and thus allowing an open class, is consistent with the policy objectives of Part IVA.

G CONCLUSION & ORDERS

63 In the circumstances, in accordance with s 33ZF of the Act, the making of a common fund order in the terms I have proposed is appropriate to ensure that justice is done in this proceeding. Without an appropriate common fund order being made, a particular injustice would result, being the likely inability, absent funding, of the group members to have their claims advanced in this class action.

64 In reaching this view I have not only had regard to the likely deductions from any resolution sum but further, as a matter of principle, it seems to me that a commission rate which is struck by reference to the lesser of a multiple of costs or net recoveries is a preferable form of a common fund order. This is not only because a percentage struck by reference to net recoveries allows for more ready comparison with earlier common fund orders, but it is more appropriate as reflecting the reality that what is fair, reasonable and in the interests of group members is an evaluation conducted by reference to what those group members actually receive in the hand following determination or settlement of their claims. Given the order being sought allows for a further proposed deduction being made from any resolution sum (the "uplift"), depending upon whether the outcome of the proceeding is successful, the focus on net recoveries is even more appropriate.

65 I am cognisant of the fact that the amended application sought a common fund order on the basis of a percentage amount struck by reference to gross recoveries. As the applicants have anticipated, as has now become common, the form of order will record the giving of an undertaking by JKL to perform the funding terms. Obviously enough, it is entirely a matter for JKL as to whether it is prepared to provide the undertaking required. In these circumstances, I will allow a period to ascertain whether agreement to be reached between the parties on orders reflecting my reasons and for undertakings to be given. To guard against the possibility that JKL is not prepared to give an undertaking in the terms proposed, I will also make an order that the solicitors for the applicants inform my Associate if an undertaking is not forthcoming.

I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated: 18 September 2018

Annexure A

CFO Funding Scenarios - Westpac Class Action - Revised For Net Percentage

Fees Incurred of $6.25M, Actual Fees paid $5M										
Resolution Sum (RS)	20,000,000	25,000,000	30,000,000	35,000,000	40,000,000	45,000,000	50,000,000	55,000,000	60,000,000	65,000,000
Fees	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000
Lawyers Uplift	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500
Net RS	13,437,500	18,437,500	23,437,500	28,437,500	33,437,500	38,437,500	43,437,500	48,437,500	53,437,500	58,437,500
Funder's Return										
25% of Gross Resolution Sum	5,000,000	6,250,000	7,500,000	8,750,000	10,000,000	11,250,000	12,500,000	13,750,000	15,000,000	16,250,000
25% of Net Resolution Sum	**3,359,375**	**4,609,375**	**5,859,375**	**7,109,375**	**8,359,375**	**9,609,375**	**10,859,375**	**12,109,375**	**13,359,375**	**14,609,375**
3.0X	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000
Group Members with different Funders Fee										
If 25% of Gross RS to funder - Amt to Members	8,437,500	12,187,500	15,937,500	19,687,500	23,437,500	27,187,500	30,937,500	34,687,500	38,437,500	42,187,500
If 25% of Gross RS to funder - % to Members	42%	49%	53%	56%	59%	60%	62%	63%	64%	65%
If 25% of Net RS to funder - Amt to Members	**10,078,125**	**13,828,125**	**17,578,125**	**21,328,125**	**25,078,125**	**28,828,125**	**32,578,125**	**36,328,125**	**40,078,125**	**43,828,125**
If 25% of Net RS to funder - % to Members	**50%**	**55%**	**59%**	**61%**	**63%**	**64%**	**65%**	**66%**	**67%**	**67%**
If 3.0X costs paid to Funder - Amt to Members	- 1,562,500	3,437,500	8,437,500	13,437,500	18,437,500	23,437,500	28,437,500	33,437,500	38,437,500	43,437,500
If 3.0X costs paid to Funder - % to Members	-8%	14%	28%	38%	46%	52%	57%	61%	64%	67%

CFO Funding Scenarios - Westpac Class Action - Revised For Net Percentage

Fees Incurred of $6.25M, Actual Fees paid $5M									
Resolution Sum (RS)	70,000,000	75,000,000	80,000,000	85,000,000	90,000,000	95,000,000	100,000,000	105,000,000	110,000,000
Fees	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000	- 5,000,000
Lawyers Uplift	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500	- 1,562,500
Net RS	63,437,500	68,437,500	73,437,500	78,437,500	83,437,500	88,437,500	93,437,500	98,437,500	103,437,500
Funder's Return									
25% of Gross Resolution Sum	17,500,000	18,750,000	20,000,000	21,250,000	22,500,000	23,750,000	25,000,000	26,250,000	27,500,000
25% of Net Resolution Sum	**15,859,375**	**17,109,375**	**18,359,375**	**19,609,375**	**20,859,375**	**22,109,375**	**23,359,375**	**24,609,375**	**25,859,375**
3.0X	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000	15,000,000
Group Members with different Funders Fee									
If 25% of Gross RS to funder - Amt to Members	45,937,500	49,687,500	53,437,500	57,187,500	60,937,500	64,687,500	68,437,500	72,187,500	75,937,500
If 25% of Gross RS to funder - % to Members	66%	66%	67%	67%	68%	68%	68%	69%	69%
If 25% of Net RS to funder - Amt to Members	**47,578,125**	**51,328,125**	**55,078,125**	**58,828,125**	**62,578,125**	**66,328,125**	**70,078,125**	**73,828,125**	**77,578,125**
If 25% of Net RS to funder - % to Members	**68%**	**68%**	**69%**	**69%**	**70%**	**70%**	**70%**	**70%**	**71%**
If 3.0X costs paid to Funder - Amt to Members	48,437,500	53,437,500	58,437,500	63,437,500	68,437,500	73,437,500	78,437,500	83,437,500	88,437,500
If 3.0X costs paid to Funder - % to Members	69%	71%	73%	75%	76%	77%	78%	79%	80%