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

Not Restricted

S ECI 2020 01535

NERITA SOMERS & ORS
(according to attached schedule) — Plaintiffs

v

BOX HILL INSTITUTE & ANOR
(according to attached schedule) — Defendants

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 November 2022
DATE OF JUDGMENT:	29 November 2022
CASE MAY BE CITED AS:	Somers & Ors v Box Hill Institute
MEDIUM NEUTRAL CITATION:	[2022] VSC 730

REPRESENTATIVE PROCEEDINGS – Part 4A Group proceeding – Application for approval of settlement – Whether proposed settlement is fair and reasonable – Relevant considerations – Approval for payment of legal costs from settlement sum – Whether loading permitted by r 63.48 should be applied and at what rate – Approval of costs of settlement administration – Appointment of Scheme Administrator – *Supreme Court Act 1986* (Vic) pt 4A, s 33V; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 63.48.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	J T Rush KC with M W Guo	Gordon Legal
For the First Defendant	B Quinn KC and M Hooper	Lander & Rogers
For the Second Defendant	R Zambelli	Maddocks

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HIS HONOUR:

The application

1 The plaintiffs in this group proceeding applied for approval of settlements of the proceeding pursuant to s 33V of the *Supreme Court Act 1986* (Vic). There are two settlements to be considered.

(a) The settlement between the plaintiffs and Box Hill Institute (**BHI**) under which BHI will pay $33 million in satisfaction of the claims of the plaintiffs and group members, inclusive of both the legal costs incurred by the plaintiffs and group members in the conduct of the proceeding and scheme administration costs;

(b) The settlement between the plaintiffs and Gobel Aviation (**Soar**) under which the plaintiffs' proceeding as against Soar will be discontinued, with the plaintiffs to pay $15,000 to Soar in full satisfaction of a previous costs order in Soar's favour.

The settlements

2 A settlement deed (**Deed**) was executed between the parties and is dated 8 September 2022. BHI's payment of $33 million comprises the **Resolution Sum**. Subject to court approval, certain amounts are to be deducted from the Resolution Sum to constitute the **Compensation Sum** to be distributed to group members. The deductions sought were:

(a) The plaintiffs' legal costs up to the date of settlement approval in the sum of $5,455,000;

(b) The costs of administration and distribution of the Resolution Sum to the plaintiffs and group members in the sum of $4,825,000;

(c) The costs of any costs referee appointed by the court;

(d) An amount not exceeding $70,000 in total to compensate the plaintiffs for their time and out of pocket expenses;

(e) $15,000 to the liquidator of Soar for part of its legal costs;

(f) The Compensation Sum is to be distributed to the plaintiffs and group members in accordance with the Settlement **Scheme** described in an annexure to the Deed.

3 A significant feature of the Deed is the releases to be given by group members that operate in the following circumstances.

4 As students in the CPL Diploma course, group members were entitled to Commonwealth government assistance with tuition fees. There were two schemes, the VET-FEE HELP (**VFH**) scheme and the VET Student Loans (**VSL**) program. Group members had the opportunity to seek a recredit of their HELP balance and under both the VFH scheme and the VSL program, recrediting a student's HELP balance results in the remittal of their associated debt. Under the terms of the relevant statute, the Department of Education, Skills and Employment (**DESE**) may then have recourse against BHI in respect of that debt.

5 Clause 5 of the Deed provides that the plaintiffs on their own behalf and as representatives on behalf of all group members in the proceeding release BHI from all claims made by or on behalf of group members in the proceeding or arising from, in connection with, in respect of or related to the subject matter of the proceeding as well as the administration of the scheme and the costs of and incidental to the proceeding. The releases extend to all recredit applications made to the DESE. The Deed also required group members to withdraw any claim lodged with the DESE for a recredit of any Commonwealth student loan or to not make any such claim and it provides that group members indemnify BHI in respect of any such claims.

6 The releases apply to any person who remains a group member in the proceeding regardless of whether they have lodged a notice of claim with the scheme administrator. BHI is able to rely on the Deed as evidence that group members have waived their rights to make any application in respect of the CPL diploma under the relevant Commonwealth legislation. Plainly, BHI's objective is to avoid exposure to recourse against it by DESE.

7 Later in these reasons I will consider what deductions from the Resolution Sum are to be approved in order to calculate the Compensation Sum to be distributed under the scheme. However, at this point it is convenient to outline how that Scheme will operate.

8 The scheme involves a process of assessing the claims of group members, which are subjected to certain discounts, and then calculating the distribution. There is a 'clawback clause' and a 'scale-back clause'. If the total value of assessed claims is less than the Compensation Sum, the difference is to be returned to BHI. Conversely, if the total value of assessed claims exceeds the Compensation Sum, the claims are to be scaled back on a *pari passu* basis.

9 The scheme is to be administered by a scheme administrator. The Deed provided that Gordon Legal be appointed as scheme administrator. I indicated at a directions hearing that it is my practice to identify an individual to accept responsibility for settlement administration and reporting to the court. Mr Andrew Grech, a partner, who has acted as the principal solicitor for the plaintiffs in the proceeding, has nominated for court approval for that office. Brendan John Richards and James Henry Stewart, who are the joint and several liquidators of Soar, offered to undertake the role of scheme administrator in their capacity as partners of KPMG. I will return to this issue later in these reasons.

10 The scheme requires the scheme administrator to first be satisfied that the applicant group member is an eligible claimant as defined. The Deed then sets out, in some detail, the steps in the assessment of individual claims of group members. In summary, the steps are:

(a) Group members must lodge a notice of claim and the scheme administrator then determines if the group member is an eligible claimant.

(b) An eligible claimant then has 90 days to complete a questionnaire providing relevant information and supporting documents.

(c) The eligible claimant will be interviewed by a representative of the scheme administrator to supplement and assess the information provided. On the basis of this interview a statement of evidence will be drafted.

(d) The scheme administrator will assess the eligible claimant's claim . The scheme administrator will apply a discount of between 10% and 40% to each claim by reference to several factors, agreed between the parties, including the status of the claimant (whether they were, in their course, withdrawn, passed or admitted) and whether the eligible claimant has documented their loss and damage and other particular matters set out in the Scheme that the claim must address.

(e) The scheme administrator will then issue a notice of decision specifying the claimant's entitlement to a settlement payment. The notice will also include a summary of the claim and an explanation of the settlement process.

(f) A claimant can request that the scheme administrator reconsider the assessment and may submit additional relevant information, documents or statements in support of that reconsideration.

(g) If the claimant is not satisfied with the outcome of the reconsideration of the claim, the claimant may apply to the scheme administrator for a referral of the claim to a Review Panel. The Panel will consist of independent barristers, members of the Victorian Bar, and the determination of the Review Panel is final and binding.

(h) Once all claims are assessed, the scheme administrator will calculate the total value of all eligible claims and shall file a confidential report with the court confirming that the assessment process is complete, the total amount of the settlement payments, the assessed settlement payments to each claimant, and all other matters pertaining to the discharge of the scheme and for the dismissal of the proceeding.

(i) The scheme administrator will then make all payments due to each claimant from the Compensation Sum.

(j) Within fourteen days of the final payment to eligible claimants being made, the scheme administrator shall also provide a final report to the court and BHI, accounting for the distribution of the Compensation Sum and for orders to be made dismissing the proceeding.

The evidence

11 The plaintiffs relied on three affidavits of Andrew Grech, the plaintiffs' solicitor, and affidavits by each of the plaintiffs. It was proper to order that certain parts of Mr Grech's affidavits be filed with redactions to protect confidential information and privileged communications. The confidential parts of these affidavits included a description of the course of negotiations to compromise the proceeding, including instructions received from the plaintiffs, a report from Mr Michael Dudman, a costs consultant, opining as to the reasonable costs of the plaintiffs in the proceeding, a statement of assumptions relevant to assessing the prospective costs to be incurred in the settlement administration and a confidential joint opinion prepared by the plaintiff's counsel. I will come to this issue later in these reasons.

12 As the plaintiffs claimed confidentiality over the report of Mr Michael Dudman, for this and other reasons, I appointed an independent costs expert as a special referee pursuant to r 50.01 of the *Supreme Court (General Civil Procedure) Rules* 2015 (Vic), with instructions to address a number of questions submitted for her consideration. No materials were withheld from the special referee. On the hearing of the application I was satisfied that the interests of justice required that the report of the special referee be adopted and I so ordered, resulting in the report of Catherine Mary Dealehr dated 15 November 2022, together with all annexures, forming part of the evidence on the application.

13 As I had determined to appoint a special referee, notwithstanding that some key material remained undisclosed to group members until my final ruling, I did not consider it necessary to appoint a contradictor. I am satisfied that the unrestricted

access of the special referee to the material over which confidentiality was sought properly protected the interests of group members. Given the complexities and technicalities of assessment of legal costs, the interests of group members are best protected by the work of the special referee.

14 The first defendant read no affidavits while the second defendant relied on the affidavit of Brendan John Richards. All parties filed written submissions.

The applicable principles

15 Section 33V of the Act provides:

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

16 In ***Botsman*** *v Bolitho,*[1] the Court of Appeal observed that the two sub-sections of 33V confer two distinct, but related, powers: first, to approve the settlement and, second, to approve the distribution of payments under it.

17 The principles that guide the exercise of the court's power to approve a proposed settlement are well established.[2] The court must consider whether the proposed settlement is fair and reasonable as between the parties having regard to the claims of the group members bound by the settlement; whether it is in the interests of group members as a whole and not just in the interests of the plaintiffs and the defendants and whether the assessment and distribution of the settlement sum to individual group members *inter se* is fair and reasonable.

18 As Goldberg J observed in *Williams,*[3] approval of a compromise of litigation requires

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1 (2018) 57 VR 68, 111 [200]

2 ***Williams*** *v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, 465–6 [19]; ***Darwalla*** *Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2007) 236 ALR 322, 332–6 [30]–[40]; ***Blairgowrie*** *Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) [No 3]* (2017) 343 ALR 476, 499–500 [81]–[85]; *Botsman*, 110 [195] ff (n 1).

3 *Williams*, 465 [19] (n 2).

an assessment of whether the plaintiff is likely to succeed in the action, the measure of damages that a successful judgment would yield, the prospects of recovery, and the expenditure in costs, time and effort that would be required to bring the proceedings to a conclusion.

19 Whether a proposed settlement is fair and reasonable depends not only on whether the settlement sum is fair and reasonable, but also, among other things, on whether the distribution of the settlement sum among group members is fair and reasonable. I must be independently satisfied of the fairness and reasonableness of the proposed settlement. It will not be sufficient to simply assess whether the opinions expressed by the plaintiffs' legal advisers appear, on their face, to be reasonable. The absence of substantive objections to the settlement does not relieve the court of its obligations, but the court's assessment can do no more than confirm whether or not the proposed settlement is within the range of fair and reasonable outcomes as the relative prospects of success can only be broadly gauged.

20 The statutory task calls for matters of judgment based on imperfect knowledge and is influenced by appetite for risk. It is that state of imperfect knowledge and the existence of risks that will have likely induced the settlement and those matters should be accorded a degree of prominence in any assessment of the reasonableness of the settlement.[4]

21 The plaintiffs' submissions addressed a number of relevant factors on the question whether the proposed settlement is fair and reasonable as between the parties, having regard to the interests of group members as a whole.[5] These factors were:

(a) the complexity and likely duration of litigation;

(b) the reaction of the class to the settlement;

(c) the stage of the proceeding;

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4 *Botsman*, 112 [206] (n 1).

5 *Williams,* 465-6 [19] (n 2).

(d) the risks of establishing liability;

(e) the risks of establishing loss or damage;

(f) the risks of maintaining a group proceeding;

(g) the ability of the defendant to withstand a greater judgment;

(h) the range of reasonableness of the settlement in light of the best recovery;

(i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and

(j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

22 The Court of Appeal in *Botsman* also observed that:

> An important issue of principle also arises as to the extent to which a settlement may make provision for, or seek to control (including by way of condition precedent), the distribution of money paid under the settlement. That matter requires consideration of the nature of the power exercised by the court and the particular terms of a settlement which is sought to be approved. The issue will arise in respect of payments made to a funder, payments made in respect of legal costs and disbursements, and payments made to particular group members, most commonly the lead plaintiff, on account of his or her particular effort in the conduct of the litigation.[6]

23 I pause to note that the Court of Appeal referred with approval,[7] when addressing the question of control of the settlement process, to observations of Murphy J in ***Caason*** *Investments Pty Limited v Cao (No 2)*.[8] In that case, the settlement contained a condition precedent, being the making of a common fund order by the court, and it further provided that if that condition precedent was not satisfied the settlement deed 'shall cease to have any effect and shall be treated for all purposes as never having been made and never having had any effect'. Although each of the parties waived the condition precedent, Murphy J explained why he considered such a clause to be

6 *Botsman*, 112 [209] (n 1) (citation omitted).
7 Ibid 106 [174].
8 [2018] FCA 527, [28]-[38].

inappropriate. In particular, his Honour observed:

> Second, if the Court decides that the settlement terms are otherwise fair and reasonable but a common fund order should not be made, the Common Fund Condition Precedent would permit the applicants to walk away from the settlement and go to trial. It is not in the interests of class members that a fair settlement be abandoned so that they face the risks of a trial, in order to give the Funder a chance to receive a higher funding commission. In the present case I consider the settlement amount to be fair and reasonable and there is no benefit for class members in their walking away from the settlement. Instead there is a risk they will suffer detriment.[9]

24 I agree, with respect, with these observations, which are presently pertinent because the Deed contains a clause capable of operating in a similar way. The Deed presumes court approval of the appointment of Gordon Legal as the scheme administrator. When Mr Richards and Mr Stewart advanced the proposal that they be appointed as the scheme administrator and at a significantly lower cost, they drew strong opposition from the plaintiffs and from Gordon Legal, which raised the prospect of conflict between the interests of the representative plaintiffs and group members. However, at the conclusion of submissions, no suggestion remained that the Deed might be terminated should Gordon Legal (or Mr Grech) not be appointed as administrator. I will return to this question.

25 In respect of costs, the court's role is to satisfy itself that the plaintiffs' legal costs, to be deducted from the Settlement Sum, are reasonable and proportionate in all the circumstances.[10] The ability of group members to assess the reasonableness of costs is constrained because the information available to them will often be limited and may be subject to claims of confidentiality. That is what occurred here.

26 It remains the task of the court, not the costs expert, to determine whether the fees and disbursements claimed are reasonable. I am satisfied that I have sufficient information to enable me to undertake that assessment,[11] which I will come to later.

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9 Ibid [36].

10 *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, [91]; *Blairgowrie*, [180]-[181] (n. 2); *Botsman*, 116-7 [223] (n 1).

11 *Botsman*, 116-7 [224]-[225] (n 1).

Confidentiality

27 It is desirable to say something further about the issue of confidentiality. Initially, I directed that the plaintiffs had leave to file on a confidential basis, and not serve, evidence, or redactions of evidence, on which they proposed to rely at the settlement approval hearing and which they sought to keep confidential. Whether any evidence is to remain confidential remained a matter for determination by this ruling. My directions were intended to cover information that is usually kept confidential such as the joint memorandum of counsel on the plaintiff's prospects in the proceeding and the suitability of the settlement reached. The claim for confidentiality has greater force before the settlement *per se* is approved, because of the prospect that the proceeding might continue to trial if the settlement is not approved.

28 In *Botsman*, the Court of Appeal considered whether there was error in a claim allowed by the primary judge for confidentiality in respect of the Deed, the costs report, affidavits filed on behalf of the defendant, a confidential affidavit filed by the special purpose receiver, the submissions of counsel for the special purpose receiver, and the opinions of counsel for the plaintiff. An objecting group member contended that there was no justification for such a broad sweep of confidentiality, which was inconsistent with principle, and which denied her a basis to challenge the approval. The parties' submissions drew on principles of transparency, the need for informed decisions, the terms of the court's practice note, the terms of the deed and the notion of 'inherent confidentiality'. The Court of Appeal observed:

> In assessing the competing submissions, there are two interlocking principles that must be applied. The first is the open court principle. That principle requires that court proceedings occur in open court and that evidence placed before a court is open to public scrutiny, save in exceptional circumstances. The principle is also reflected in the obligation imposed on courts to provide reasons for judgment in which conclusions are expressed openly and clearly. The second principle is that courts must act with procedural fairness, and that this generally demands that persons who are affected have access to the material on which the court is to act and be given an opportunity to respond by way of evidence and submissions.
>
> Those principles are not absolute. They may need to give way to the need for confidentiality in order to avoid prejudice to the administration of justice. As Crennan J observed in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*, 'the availability and accessibility of all relevant evidence in judicial proceedings is not absolute.' However, any departures from the paradigm

> must be justified and must extend only so far as is strictly necessary for the furtherance of the administration of justice. It may involve the provision of material to legal advisers on an undertaking as to confidentiality. To the extent that any orders may prohibit or restrict the disclosure of information derived from a proceeding, the *Open Courts Act 2013* will also be engaged.
>
> It is important to emphasise that there are no special rules that apply to group proceedings. Confidentiality orders must be justified by reference to the same principles as are applied in any other proceeding in the Court.[12]

29 Applying these principles in the present case, I note firstly that I gave no direction that any of the material over which confidentiality was claimed not be made available to any group member seeking access to it. There was no complaint before the court that any group member was prejudiced by a lack of access to confidential material and no objection has been taken by any group member to the proposed settlement.

30 The residual basis upon which confidentiality might be maintained over the redacted parts of Mr Grech's affidavit – dealing with the course of negotiations prior to the entry into the Deed and the confidential opinions of counsel and solicitors as to the prospects of the plaintiff in the proceeding – remain, namely, that such matters are protected by the client legal privilege or settlement negotiation privilege under pt 3.10 of the *Evidence Act 2008* (Vic). I am satisfied that that material should remain confidential to prevent prejudice to the proper administration of justice, save that I will expressly exclude any disclosure to a group member or their advisors.[13] Group members have a common interest with the plaintiffs in such materials.

31 I am not persuaded that there is a proper basis to maintain confidentiality in respect of the cost reports of Mr Michael Dudman. Mr Dudman was engaged as an expert costs consultant by the plaintiff. His report was relied on by the plaintiffs. It was also made available to and analysed by the special referee. The use of Mr Dudman's report in this way constitutes a waiver of any claim to confidentiality in the instructions pursuant to which it was prepared, meaning that exhibit 'AG-3' to Mr Grech's affidavit affirmed 13 September 2022 and annexures 'AG-1', 'AG-2' and 'AG-3' to Mr Grech's affidavit affirmed 10 November 2022 will not be the subject of any

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12 Ibid 120 [244]-[246] (citations omitted).

13 The protection of privileged material is an accepted basis to make a confidentiality order: *Clime Capital Limited v UGL Pty Limited (No 2)* [2020] FCA 257, [23] and the cases there cited.

confidentiality orders. A number of these documents are, in any event, annexures to the special referee's report. I add that, as will become clear, reference to the detail and reasoning of the costs experts is necessary to provide comprehensible reasons. The public interest in my doing so outweighed the interest of the plaintiff and Gordon Legal in maintaining confidentiality in that information.

32 I acknowledge that in *Botsman*, the Court of Appeal noted that it was not appropriate to leave the making of confidentiality orders until after the approval applications had been determined.[14] For the reasons given, I consider that the conditional confidentiality afforded by my directions given on 16 September 2022 has not interfered with the discharge of the court's protective role in ensuring that settlements are fully and appropriately tested. Those directions have not in any way frustrated that process as occurred in *Botsman*.

Assessment of the settlement

33 On being notified that a settlement had been reached and approval of it was being sought, I gave directions for the distribution of a number of documents (the Notice Documents) in an approved form. These documents were:

(a) The Notice of Proposed Settlement;

(b) Notice of Claim;

(c) Opt-out Application Notice;

(d) Notice of Objection;

(e) Notice of Reinstatement of Group Member.

34 Accordingly, any group member who had earlier opted out of the proceeding could apply for reinstatement and any person who wished to now opt out could apply to extend the time to do so. A small number of applications were received and although they are capable of being dealt with by the scheme administrator under the terms of

14 *Botsman,* 136 [273] (n 1).

the Deed, it will be convenient that I make orders declaring one group member to have opted out of the proceeding, reinstating three group members and deeming the notice of claim of six group members that were received out of time to be accepted.

35 Those directions also provided for any group member who wished to object to the proposed settlement to give notice of that objection, but no such notices have been received. I also directed that any group member who intended to make a claim in the scheme complete a notice of claim and deliver it to the plaintiffs' solicitors by 21 October 2022.

36 Mr Grech has deposed that these directions were complied with. No group member has objected to the settlement.

37 By the deadline, 541 notices of claim were received by Gordon Legal, which includes those group members whose claims have been regularised by the proposed orders I referred to earlier. I was informed that no significant variation in this number is now expected.

38 I earlier identified the structure of the settlement and its principal terms, which is the commencing point for this assessment. I am satisfied that as between group members *inter se* the settlement scheme provides for claims of group members to be assessed in a fair and reasonable manner. The settlement scheme recognises that each group member will have unique characteristics relevant to their claim and the process takes account of that variability when making a proper assessment of the value of each claim. Allowances and adjustments are made through the discretionary discounting that is subject to both reconsideration and then independent review.

39 This process of detailed individual assessments based on proper information is appropriate to ensure that the assessments are fair and reasonable as between group members. Further, the scheme provides for ample communication between the scheme administrator and group members that ought to provide the latter with comfort that their individual circumstances will be, or have been, taken into account. Significantly, the opportunity to request a reconsideration of the scheme

administrator's assessment and then to further request that a review be conducted by the Review Panel will, I am satisfied, provide a proper level of assurance to each group member that their claim will be assessed in a fair and reasonable manner.

40 I accept the plaintiffs' submissions that the releases that the group members will provide to BHI are fair and reasonable. Group members who give those releases have agreed not to pursue applications with the DESE for recrediting of their student loan liabilities. They will have their student loan liabilities assessed and receive cash payments for those liabilities under the scheme. For that reason, there is no need for any group member to pursue a recrediting application.

41 Group members who fail to register their claims, and who have not opted out, will give releases in respect of their student loan liabilities without receiving any share of the settlement sum. Having regard to the confidential disclosures about the progress of negotiations with BHI and the plaintiffs' submission that non-registering group members are unlikely to have meaningful liabilities on their student loans or have otherwise satisfactorily dealt with their personal situation, I am satisfied that the releases that group members will provide under the Deed are fair and reasonable.

42 Turning next to the assessment of the settlement as between the parties, I accept that the diversity of loss scenarios amongst group members presents some level of complexity in terms of how wide common findings might have extended if the proceeding had gone to trial. There were other considerations likely to have been pressed by the defendants at a trial that created risk for the plaintiffs and these factors contribute to the conclusion that a settlement with some discount was appropriate.

43 Further, the certainty of settlement avoided a four week trial that would not necessarily have resolved all issues relevant to the determination of individual loss claims. The proceeding settled shortly prior to the commencement of the trial when the plaintiffs had filed all their evidence. Soar, being in liquidation, was neither contesting the claims nor filing evidence. Further, BHI had not filed its lay evidence and in all of the circumstances, the plaintiffs' counsel considered that the plaintiffs

were entitled to have some confidence of a favourable outcome in the trial. That confidence appears to have carried forward into a satisfactory settlement.

44 I accept counsels' opinion that the plaintiffs were entitled to negotiate on the basis that they have strong prospects of success in the proceeding while necessarily accepting a discount for the ordinary vicissitudes of litigation. I am satisfied that the plaintiffs by entering into the Deed did not accept any further material liability discount.

45 The discounts incorporated into the scheme to quantify the vicissitudes and risks of litigation, which were agreed between the plaintiffs and BHI, start with a base discount of 10%. The uniform application of that discount appropriately recognises general litigation risk which, having regard to the joint confidential memorandum of counsel, is a modest allowance. The discount is capped at 40%, save for two particular circumstances identified in cl 4.6 that concern claims for non-compensable loss and failure to provide evidence for any category of loss, where the scheme administrator may wholly discount the claim i.e. by 100%.

46 Any further discount of an individual claim, applied in the range between 10% and 40%, represents the scheme administrator's assessment of that claim by reference to factors identified in cl 4.4 of the scheme. These factors lead to a detailed assessment of the individual circumstances of group members and have been set by the negotiations between the parties. It is unnecessary to set these provisions out in full in these reasons. I am satisfied that they are proper and appropriate and will lead to fair and reasonable outcomes.

47 BHI is a body corporate established under the *Education and Training Reform Act 2006* (Vic). As an entity funded by the state, BHI might have capacity to withstand a greater judgment. I am not persuaded that this is a relevant factor. The period for lodgement of claims having closed, the plaintiffs submitted that it is tolerably clear that the proposed Compensation Sum will be adequate to pay out the assessed claims in full and will result in group members recovering their losses without greater discount than has been built into the settlement scheme. The scale-back clause is likely to have

no application, with the scheme possibly returning some funds to BHI under the claw-back provision.

48 There was no real prospect that the plaintiffs could extract any meaningful contribution from Soar, given what was revealed by the liquidator's Report as to Affairs.

49 For these reasons, I am persuaded that the separate settlements with BHI and Soar fall within the range of fair and reasonable outcomes and will be approved.

Approval of deductions from the Resolution Sum

50 I now turn to the deductions from the settlement sum that have been claimed. These claims fall into five categories.

(a) The legal costs and disbursements of the plaintiffs to the point of settlement approval;

(b) The costs and disbursements to be incurred in the administration of the scheme;

(c) Reimbursement payments to the lead plaintiffs;

(d) The costs of the special referee;

(e) The payment to be made to the liquidator of Soar.

Soar

51 The payment to be made to the liquidator of Soar is approved as fair and reasonable. That liability was incurred in the process of dealing with the liquidator to identify the terms of insurance policies that might indemnify Soar in respect of the plaintiffs' claims. The interlocutory application for access to these policies included an order that the plaintiffs pay the liquidator's costs and in the settlement those costs were agreed in the sum of $15,000. This sum was less than half of the liquidator's claim. I am satisfied that the settlement with Soar is on appropriate reasonable terms and should be paid out from the Resolution Sum.

Costs of special referee

52 The special referee submitted an invoice in the total sum of $49,277.25. The invoice provided a detailed description of the work performed and no party took any issue with it. I am satisfied that this sum should be forthwith paid by the scheme administrator from the Resolution Sum.

Reimbursement Payments

53 Each of the plaintiffs seeks approval of a reimbursement payment up to a collective limit of $70,000 for their time and inconvenience spent in prosecuting the proceeding on behalf of the whole class. While it is not usual to compensate a litigant for the inconvenience of litigation , the courts have accepted on numerous occasions that such deduction may be appropriate.[15] It is appropriate to recognise, in a modest way, that the burdens assumed by a representative plaintiff can involve the discharge of a not insignificant responsibility in acting as a representative party to achieve a corresponding benefit for the group as a whole.

54 The force of these authorities was noted by Nichols J in *Lenehan v Powercor Australia Ltd*.[16] Her Honour noted that a conservative approach should be taken to the quantification of compensation of this kind, and a distinction should be drawn between time devoted by the plaintiff to work activities that benefit the group as a whole, as opposed to work that benefits the plaintiff's personal claim. A claim of this kind must be based on adequate evidence.[17]

55 Each of the plaintiffs has filed an affidavit providing an estimate of the time that they spent reviewing and responding to communication from Gordon Legal, conferring with Gordon Legal and counsel, providing instructions, conferring with other group members and identifying and collating documents. On review of these affidavits, it was not always easy to distinguish between work that has genuinely been performed on behalf of group members and work that related to the preparation of individual

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15 *Darwalla*, 347 [76] (n 2); *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [29]; *Matthews v Ausnet Electricity Services Pty Ltd* [2014] VSC 663, [423]-[426]; *Caason Investments Pty Ltd v International Litigation Partners No 3 Ltd* [2018] FCAFC 176, [5].

16 (2020) VSC 82.

17 Ibid [93].

claims. It is also not clear why there are four representative plaintiffs.

56 The first named plaintiff, Ms Somers, has stated that the proceedings have taken a personal toll on her causing frustration and stress. She has been subjected to trolling; substantial online ridicule and at times direct verbal abuse by group members over an extended period of time. While I sympathise with Ms Somers that she has been required to endure such reprehensible behaviour, no basis has been identified for requiring that she be compensated for her anxiety and distress by group members rather than the perpetrators of such behaviour. Although I do not take that factor into account, I accept that Ms Somers carried the greatest burden of advocating for group members in terms of the time that she has devoted to assisting in the preparation of the proceeding. A fair and reasonable assessment of a reimbursement payment for each of the plaintiffs is as follows:

(a) Ms Somers, $20,000;

(b) Mr Hassanein, $15,000;

(c) Mr Ouldanov, $15,000;

(d) Mr Lamont, $15,000.

I will direct that the scheme administrator pay these sums to the plaintiffs from the Resolution Sum.

Plaintiffs' legal costs of the proceeding

The plaintiffs' claim

57 Initially, the plaintiffs claimed legal costs in the proceeding up to approval of the settlement of $5,455,000, based on Mr Dudman's estimate.

58 Mr Dudman, a costs consultant, was instructed by Gordon Legal to provide an opinion as to a fair and reasonable lump sum amount the court should award in respect of solicitor and own-client costs in the proceeding up to the point of settlement approval. Mr Dudman has previously been engaged by Gordon Legal to provide costs

advice. He identified that his opinion was based on a letter of instructions dated 29 August 2022. Mr Dudman estimated that the professional fees proportion of a fair and reasonable lump sum amount is $4,494,336.26. This estimate was based upon calculating, by reference to hourly rates, professional fees for the work done in the proceeding. He reduced this amount by 14.8% for 'unreasonable/excessive time spent'. He then allowed a further reduction of 6.6% for non-recoverable items and for allocations to appropriate fee earners. Next, he made a deduction of 5% for deficiencies in record keeping arriving at a sub-total of $2,614,886.55.

59 To that sub-total he applied a loading of 25% for skill, care and responsibility pursuant r 63.48 of the Rules and item 17 of the Supreme Court Scale of Costs.[18] He asserted, without supporting reasoning, that the proceeding—

> involved a relatively moderate level of difficulty and a relatively high level of complexity, calling on a high level of legal and management skills to manage a reasonably large number of group members, each requiring varying degrees of assistance. The matter involved a somewhat high volume of evidence, involving a somewhat wide range of loss and damage suffered.

60 As Gordon Legal had complied with its statutory obligations for costs disclosure and its costs agreements were in conformance with statutory requirements, Mr Dudman concluded that it was entitled to an additional uplift of 25% pursuant to costs agreements on the successful conclusion of the proceedings. Mr Dudman opined that he considered its application to the balance of professional fees to be reasonable. Finally, he added 10% for GST.

61 Mr Dudman made several adjustments to disbursements including:

(a) reducing the rates of senior counsel to those permitted under the scale;

(b) reducing the fees paid to senior counsel for work performed in settling the statement of claim by 25%;

(c) disallowing fees paid to Blackstone Legal Consulting for work performed

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18 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) App A.

advising on costs disclosure;

(d) reducing fees incurred for time spent by lay witnesses to the clerical rate permitted under scale; and

(e) disallowing catering costs.

62 Mr Dudman stated that he had no opportunity to consider any proper assessment of the experts' disbursements but that other disbursements appeared to him to have been incurred 'relatively sparingly'. Counsel's fees, which he opined formed a particularly small proportion of total costs, appeared appropriate save for the adjustments referred to as counsel had carried out their work efficiently and with minimal or no duplication. The reason for reducing senior counsel's fees for settling the statement of claim did not appear. In the result, the claim of $714,322.75 was reduced to what Mr Dudman assessed to be the reasonable sum of $676,993.77.

The special referee

63 Ms Dealehr, the special referee, took issue with Mr Dudman's methodology, although on analysis of Gordon Legal's compliance with the statutory requirements for costs disclosure and costs agreements, she also concluded that costs assessed in accordance with the conditional costs agreements can be accepted as fair and reasonable.

64 Broadly, I accept Ms Dealehr's comments on Mr Dudman's assessment. The plaintiffs revised their claim in the light of Ms Dealehr's assessment and only a limited number of specific issues remained for my consideration.

65 Ms Dealehr coded Gordon Legal's time recording systems into different categories of work, enabling the legal fees incurred to be presented to the court in a manner that provides a better understanding of the nature of the work undertaken by the lawyers and provides necessary information to explain the time and task undertaken, by whom it was undertaken, and for what purpose. As other courts have recently done, I accept this methodology as providing a reasonable basis for assessing the quantum of costs and disbursements being claimed in large-scale litigation.

66 Ms Dealehr identified the methodology that she adopted to determine whether the claim for professional fees was reasonable by reference to the following eight steps:

(a) Verify the accuracy of the time recording entries;

(b) Apply the relevant scale rates;

(c) Classify time spent by phase-task-activity to provide information on the nature of the work undertaken;

(d) Identify and excise non recoverable work by reference to costs not claimable;

(e) Apply any discounts after considering the nature of the work claimed or the way that work was done;

(f) Apply any discretionary loading under r 63.48;

(g) Apply a 25% uplift (div 4 of pt 3.2 of the *Legal Profession Uniform Law*);

(h) Add GST to the total professional scale fees including the success fee.

67 The analysis of the law practice's time recording system revealed significant shortcomings. Ms Dealehr opined, and I accept, that the report relied on by the plaintiffs was based on a methodology that lacked sufficient rigor. For example, it relied on Gordon Legal's unadjusted professional fees calculation on hourly rates without a proper examination of the veracity of the claims. Inadequate time recording by casual paralegals was clearly evident. Errors were also evident in the spreadsheet formulas that precluded proper assessment of some amounts claimed. I will refer below to Ms Dealehr's classification of the phases and tasks that break down the nature of the legal work undertaken. That assessment assisted in identifying the proper analysis of the time recording system. Ms Dealehr reduced unadjusted professional fees for unreasonable/excessive time spent by applying a discount factor of 14.8% to the unadjusted professional fees calculated on hourly rates. This deduction was not in dispute.

68 Next, it was necessary to reduce the claimed unadjusted professional fees to the scale, identifying reductions for non-recoverable items and applying the work at appropriate rates to appropriate fee earners. Mr Dudman allowed a deduction of 6%, Ms Dealehr assessed the deduction at 18.1%, and the plaintiffs submitted that the deduction should be no more than 12.4%. I will concentrate on those aspects of Ms Dealehr's report that were addressed by the plaintiffs.

Charge-out rate for paralegals

69 For paralegals, Mr Dudman applied the hourly rate of $315-$329[19] for the relevant period for all paralegals, pursuant to the Supreme Court Scale, item 1(b)[20] which is for attendances by non-legal practitioners that require legal skill. The alternate hourly rate under item 1(c)[21] for attendances by non-legal practitioners, not requiring legal skill, is $239-$250. These rates may be compared with the Federal Court scale hourly rate of $240 for law graduate or articled clerk and $110 for clerk or paralegal. Ms Dealehr's analysis showed that little time was spent on the matter by law graduates. She considered it unreasonable to classify paralegals who are law students at the higher rate, for non-legal practitioners requiring legal skill, suggesting that the proper classification is the rate for clerks. Ms Dealehr noted that after the application of a r 63.48 loading, Mr Dudman assessed an hourly rate for paralegals at $393.75-$411.25 (before uplift fee and GST).

70 The plaintiffs contested this rate adjustment, submitting that the work of paralegals required supervision and control, which warranted a higher hourly rate. I do not agree. Supervision and control is not achieved through a higher charge-out rate for the supervised worker. The supervision and control over paralegals forms part of the professional hours contributed by legal practitioners and I accept that the exercise of that responsibility is, in this proceeding, a factor in favour of some loading, an issue discussed below. The difference between the cost to a law practice of employing paralegals to do undemanding work and the charge-out rate represents profit to the

19 The range presumably reflecting the increases in the scale over time.
20 In the report this is referred to as item 1(ii) of the scale.
21 In the report this is referred to as item 1(iii) of the scale.

law firm. It may be inferred that there is a significant profit margin in charging out a law student at $400 per hour, although there was no evidence of the cost of employing law students. Misclassifying these workers by reference to the scale increases the profit of the law practice at the expense of group members. It is a practice that is neither reasonable nor justifiable. As Ms Dealehr noted, there was no evidence that Gordon Legal conferred with the representative plaintiffs to explain the various methods of charging under the scale and obtained that plaintiffs' consent to charging by reference to item 1(b) rather than 1(c). Further, I was not referred to any evidence that demonstrated that paralegals perform tasks that required legal skill. It is not possible to draw that inference from the fact that the paralegals were law students.

71 I prefer the analysis undertaken by Ms Dealehr and I am satisfied that the reasonable costs for paralegals should be allowed at the lower hourly rate that she suggested, which results in a reduction of the professional fees claimed.

Other deductions

72 Ms Dealehr found guidance as to the discounts that might apply in the assessment of costs on a gross sum basis in *Seven Network Ltd v News Limited*.[22] Her methodology of coding professional attendance into tasks and activities assisted in identifying where discounts were warranted. This included matters such as use of the same generalised narrative descriptions for multiple days in a row, work not being conducted by the appropriate person of seniority, careful assessment of 'planning, preparation and drafting' and multiple activities, internal communications, multiple lawyers attending hearings, excessive hours in a day, single time unit recording and global discounts.

73 By the application of these various factors, discounts from the claimed professional fees were identified. Ms Dealehr allowed for these discounts by a reduction of 18.1% and I am satisfied that this discount is required.

Loading for skill, care and responsibility

74 The principal contest in submissions was the allowance of a loading for skill, care and responsibility under r 63.48 and scale item 17. Mr Dudman allowed a loading of 25%,

22 [2007] FCA 2059.

Ms Dealehr allowed a loading of 12.5%. In submissions, the plaintiffs contended I ought to split the difference and allow 18.25%.

75 It must first be noted that this allowance, which seems to be automatically applied at a very generous percentage in almost every class action, is in the discretion of the Costs Court. With limited guidance from the Costs Court, costs consultants tend to opine about their experience of Costs Court practice, usually without detailed reasoning, when nominating a percentage, rather than undertaking an analysis of the matters identified in r 63.48(2).

76 Secondly, the Rules refer to the circumstances of 'the legal practitioner' acting for the party to be charged. It is not a loading to be applied to work properly described as mundane or mechanical that does not require special expertise or particular thought.[23] No basis to apply the loading would exist in cases properly described as unexceptional or 'run of the mill'.[24] As Professor Dal Pont notes,[25] the provision for an allowance for 'general care and conduct' is 'principally intended to ensure that a scale of costs which is based overwhelmingly on specified fees or rates for items of work done does not result in solicitors who represent clients in complex or novel matters being under-rewarded in comparison with those who are involved in more routine matters'. Evaluation of the factors identified in sub-r (2) ought to identify whether the practitioner is being under-rewarded by the scale, a pre-requisite to exercising the discretion to award the loading.

77 Thirdly, Practice Note SC GEN 11 at 12.6 provides that in respect of scale item 17 – care, skill and attention – a percentage of the amount allowed in the bill of costs is commonly within the range 0-15%. Mr Dudman applied loading of 25% without providing any analysis or information describing how, in his expert opinion, the Costs Court would exercise its discretion, if called upon to do so, on the basis of the

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23 *Brennand and Naughton v Hartung and Best Practice Education Group Ltd* [2014] ACT SC 326, [176].

24 *Auspine Ltd v Australian News Print Mills Ltd* (1999) 93 FCR 1, 13. I do not consider the observation of the Court in *Lashansky v Bruvecchis Pty Ltd* [2006] FCA 793, [35] to be a proper analysis of the matters to which the court must have regard under the Rule.

25 *Law of Costs* (LexisNexis, 4th ed, 2018) [1581], citing *Brookfield v Davey Products Pty Ltd* (FCA, Branson J, 19 December 1997, unreported).

considerations identified in r 63.48(2) and allow such a high loading. He simply expressed the conclusion that the proceeding 'involved a relatively moderate level of difficulty and a relatively high level of complexity'.

78 Expressing an opinion that the reasonable loading in this proceeding is well outside the range identified in the practice note, requires close reasoning, by reference to all relevant criteria set out in the rule. Mr Dudman's reasoning reveals a failure to apply the required criteria and a want of familiarity with Costs Court practice. By failing to comply with s 79 of the *Evidence Act 2008* (Vic) in this way, Mr Dudman's opinion on this issue is inadmissible by operation of s 76.

79 Ms Dealehr referred to several other class actions where a significant loading was allowed and relied on her experience in taxing costs before the Victorian Costs Court on solicitor own-client matters, as well as in class actions where costs have been calculated on the Victorian scale and loadings have been applied. She concluded that the appropriate loading to be applied was 12.5%.

80 While this loading falls within the identified range, I do not accept this assessment. I was not persuaded by Ms Dealehr's reasoning that an appropriate loading would lie at the upper end of the identified scale.

81 Beyond the practice note, it is unclear what the practice of the Costs Court is, on which the costs consultants rely. In ***Williams*** *v Ausnet Electricity Services Pty Ltd,*[26] when considering the plaintiff's claim for costs in a settlement approval of a bushfire group proceeding claim, Emerton J referred the question of the appropriate r 63.48 loading to an Associate Judge in the Costs Court. The outcome of this assessment is noted in ***Williams*** *& Ors v Ausnet & Ors* ***(Ruling no 4)***.[27] The circumstances in *Williams* are not directly comparable with the present case, yet Wood AsJ identified a percentage loading of 5% as appropriate in that case. I am not aware of any other reported decision on this particular issue and none was cited to me.

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26 [2017] VSC 474.
27 [2017] VSC 619.

82 In *Williams (Ruling No 4),* J Forrest, J made a number of observations about the court's role under s 33V of the Act in respect of the plaintiff's claim for the legal costs of the proceeding. His Honour noted the inherent tension where there has been an 'all in settlement', between such a claim and ensuring that a fair and reasonable sum is available for distribution to group members under the scheme. Secondly, it is clear from both ss 24 and 33ZF of the Act that the court retains a broad discretion to assess the claims made against the settlement sum, notwithstanding that they might be specifically grounded on discretions under the costs rules permitting loadings and uplifts to be claimed. His Honour added:

> The same goes for the relevance of the costs agreement entered into between the representative plaintiff and the lawyers. If the court perceives that its terms are unreasonable and provide a windfall for the lawyers or is contrary to the interest of group members then it can be ignored. The court's role is to protect the interests of group members.[28]

83 I agree with J Forrest J's further observations.

> The costs allowed in other bushfire cases, or for that matter other class actions, are necessarily case–specific as each turns on its own facts. It is now apparent to this Court that when managing class actions real scrutiny is required of the costs claimed by lawyers, as I noted in *Downie*. I do not suggest that there is any systemic or endemic overcharging but rather that where there is a large settlement sum and a large group membership, it is imperative that the fund be preserved as far as is practicable to provide for the group members for whose benefit the proceeding is brought – allowing for a reasonable recovery of costs by the lawyers. The uplift, of course, separately rewards the lawyers for taking the risk in 'punting' the litigation for the benefit of the group members.[29]

84 On this fact-specific analysis, the court is required by r 63.48(2) to have regard to the following matters:

> In exercising the discretion under paragraph (1), the Costs Court shall have regard to—
>
> (a) the complexity of the matter;
>
> (b) the difficulty or novelty of the questions involved in the matter;
>
> (c) the skill, specialised knowledge and responsibility involved and the time and labour expended by the legal practitioner;

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28 Ibid [40].

29 Ibid [49(e)].

(d) the number and importance of the documents prepared and perused, regardless of length;

(e) the amount or value of money or property involved;

(f) research and consideration of questions of law and fact;

(g) the general care and conduct of the legal practitioner, having regard to the instructions and all relevant circumstances;

(h) the time within which the work was required to be done;

(i) allowances otherwise made in accordance with the scale in Appendix A;

(j) any other relevant matter.

85 The first issue is to what scale items or part of the fees claimed ought a loading properly be applied. If a practice of applying the loading to the whole of the fees charged is identifiable as the practice of the Costs Court, I do not consider that approach to accord with the Rules. It is necessary to identify in what respects the legal practitioner is being under rewarded by the scale in complex or novel matters.

86 Ms Dealehr calculated the value of Gordon Legal's professional fees (in amount and time) by breaking the claim down by reference to the position and type of operator. This analysis revealed that 51% of the time charged by Gordon Legal was the time spent by law graduates (8%) or paralegals (43%) and the remaining time was the work of legal practitioners. Having regard to the text of the rule, this analysis demonstrates it is inappropriate to allow a discretionary loading on any more than half of the professional fees claimed. That is because the loading applies to the work of legal practitioners and the work of law graduates and paralegals does not satisfy the r 63.48 discretionary criteria. It was submitted that such work requires appropriate guidance and supervision in a complex matter, which I accept, but that responsibility is exercised by the legal practitioners and reflects in their own attendances on the matter.

87 Ms Dealehr undertook a breakdown of the professional fees claimed by Gordon Legal with reference to the phase of the proceeding and the tasks undertaken.

Phase	Percentage amount	Percentage hours
Pre-action work	.7%	.6%
Pleadings	1.8%	1.5%
Discovery	7.5%	8.1%
Case management	4.5%	3.6%
Interlocutory applications	.4%	.3%
Expert evidence	4.6%	4.7%
Lay witness evidence	5.2%	4.8%
Media/settlement negotiations	13.4%	11.8%
Trial preparation	32.2%	36.2%
Large scale litigation management	14.4%	14.3%
Settlement approval	5%	3.9%
Miscellaneous	10.4%	10.3%

88 This analysis is valuable when addressing a number of the considerations that need to be taken into account under r 63.48(2). On a global assessment, taking into account which work was performed by legal practitioners, and what of that work is appropriately characterised as complex or difficult with regard to the phase of the litigation in which it was performed, I conclude that approximately 35% of the professional hours recorded would reasonably constitute a base for the application of a loading under this rule. It does not follow that all of the work of the legal practitioners would be undercompensated by remuneration on the scale simply because the matter is complex and/or unique. Ms Dealehr identified the allowable professional fees to be in the sum of $2,572,834.56. I will allow a loading under r 63.48 on just over 35% of that amount, namely the (rounded out) sum of $1,000,000.

89 There will be extraordinary proceedings that warrant a loading beyond the range 0-15% identified in the practice note. The Robodebt Class Action,[30] nominated by Ms Dealehr and in which both she and Gordon Legal were involved, may be an example. In my experience, the large Black Saturday bushfire case, the Kilmore-East Kinglake class action, was another. Otherwise, in order to allow a discretionary loading at a rate towards the upper end of that scale, a strong preponderance of the relevant considerations must weigh in favour of that outcome.

90 While Ms Dealehr did not consider this proceeding to be one of the more difficult class actions she has been involved in, she did opine that it could be characterised as moderately complex with some unique factual issues. There were over 500 group members, with the first defendant's discovery consisting of approximately 5000 documents. The trial was anticipated to occupy 25 days involving 8 experts, 9 group members and 3 former staff of the first defendant.

91 I do not accept this assessment. It appears to be *de rigueur* to regard any class action as complex or unique, throwing in references to the number of group members, the number of witnesses and the length of the trial, and the number of documents discovered, as if the proper characterisation is revealed by statistics. What is required is careful evaluation of the factors identified in sub-r (2).

92 Turning to those considerations, I do not consider that items (a) and (b) compel a discretionary conclusion in favour of a high loading. I accept that those factors fall in favour of some loading but I was not persuaded that the proceeding raised matters of particular legal complexity. The confidential joint memorandum of counsel did not identify any particularly difficult legal issues that would lift this proceeding out of the ordinary run of cases. Nor do I consider that there was a special difficulty or novelty created by the statutory framework that I have noted for higher education funding and the highly regulated process of commercial pilot licensing. Although that statutory framework may be infrequently encountered, these factors do not, of themselves, necessarily imply that the proceeding was complex or unique. The

30 *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634.

framework and context for the proceeding was easily revealed by engaging appropriate experts, as occurred. Professional time dealing with expert evidence was less than 5% of the total costs incurred.

93 Regarding item (c), I accept that legal practitioners (which excludes law graduates and paralegals) have applied some skill, specialised knowledge and responsibility and that this is a factor in favour of a loading but it cannot be assumed that every hour of attendance to the matter can be so characterised.

94 In my view, simply referring to the number of documents discovered does not address the issue identified in sub-paragraph (d). Ms Dealehr's analysis shows that only 7-8 % of professional resources were allocated to discovery. There was no evidence of particular research and consideration of questions of law and fact being required.

95 It was not necessary for counsel to provide legal advice to Gordon Legal, as would ordinarily be expected if solicitors had been faced with complex, difficult or unique issues, and as usually occurs in genuinely complex litigation. A large proportion of the time claimed by Gordon Legal was for work undertaken by paralegals. Much of that work done by paralegals was supervised by qualified lawyers. Ms Dealehr's analysis shows that a significant percentage of time was taken in preparation for mediation.

96 That it was time consuming to prepare a representative sample of loss assessments for the purposes of mediation is also a factor that, while in favour of some loading, does not warrant a conclusion of complexity requiring a high loading. That is a common feature of group proceedings usually reflected in the professional time that is charged. I accept that costing by the scale may fall short in this respect.

97 Balancing all of these considerations, I will allow a r 63.48 loading at the rate of 5%, meaning the loading is allowed in the sum of $50,000.

98 This assessment has been made on the primary assessment by the costs experts of professional fees in the proceeding to 31 August 2022. As the Deed was executed on

12 September 2022, there will not be any identifiable basis for a r 63.48 loading after that time. The 25% contingency uplift continues to be applied until settlement approval, but not thereafter.

Conclusion on legal fees and disbursements to approval

99 I accept that some clerical errors in Ms Dealehr's report were identified in oral submissions, and I have adjusted accordingly in reaching my assessment of the proper sum to be allowed as a deduction from the Resolution Sum for the plaintiffs' legal costs and disbursements to the date of the settlement approval.

100 I allow the plaintiffs' claim for professional fees to settlement approval, before loadings, uplifts and GST in the sum of $2,754,947.96.[31] To this sum is added a loading under r 63.48 in respect of professional fees to 31 August 2022 of $50,000, bringing the assessment to $2,804,947.96. An uplift of 25% for the contingency and 10% for GST results in an assessment of $3,856,803.44. I assess the reasonable disbursements to be $767,031.69[32] resulting in a total assessment of professional fees and disbursements of $4,623,835.14, which I allow to the plaintiffs' solicitors as a payment from the Resolution Sum.

Appointment of scheme administrator

101 I earlier foreshadowed that KPMG partners, Messrs Richards and Stewart, sought appointment as scheme administrator. In support of this appointment they initially submitted that under their administration the cost of settlement administration was estimated to be $3,998,500 (all figures are GST inclusive). Initially, on the basis of estimates prepared by Mr Dudman, the plaintiffs had sought the sum of $4,826,226.90 for the cost of settlement administration although this claim was reduced to $4,422,052.80 when the hearing commenced. At the hearing, KPMG adjusted its

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31 Being the sum of $2,572,834.56 to 31 August 2022 and the sum of $182,113.40 to settlement approval (professional fees as at 31 August 2022 less non-claimable amounts and discounts were assessed at $130,370.90, plus hours claimed in time recording from 21 October 2022 to 10 November 2022 of $28,142.50 and from 11 November 2022 to 17 November 2022 of $23,600) as assessed by Ms Dealehr before application of loading, uplift and GST.

32 Disbursements that the costs referee allowed as fair and reasonable up to 7 October 2022 ($684,398.21) plus those allowed between 8 October and 17 November 2022 ($28,660.50; $27,843.75; $5,953.13; $7,441.40; $12,734.70).

assessment to a sum not exceeding $3,189,514.09. KPMG's revised estimate appeared to be based on the most recent information revealed by Mr Grech as to the number of claims that had been received in the context of the closure of the period for lodging claims and the improbability that there would be further significant claims made.

102 The special referee stated that there were too many assumptions set out in Gordon Legal's estimates of the costs of administering the scheme to permit an estimate to be made with any confidence. That said, she stated that in her experience, the cost of administering a settlement scheme for 500 group members is typically substantially less than the amount being sought by Gordon Legal. Ms Dealehr noted that in her experience, courts that appoint the plaintiffs' lawyers as the scheme administrators do so on the basis of their reasonable and usual hourly rate rather than on the basis of the Supreme Court Scale. It is not uncommon for courts to appoint the costs referee to continue to assess the reasonableness of the ongoing administration costs and report to the court on the reasonableness of the legal fees being sought in the administration. Mr Dealehr noted that Gordon Legal was familiar with such an arrangement, it having been ordered in the Robodebt class action in which Ms Dealehr is the costs referee and Gordon Legal are the solicitors conducting the settlement administration.

103 At the hearing, Gordon Legal adjusted its claim in relation to settlement administration costs should it be appointed a scheme administrator. It agreed to be remunerated by the same mechanism as is being applied in the Robodebt class action. Gordon Legal went further, informing me that it would accept remuneration for settlement administration calculated on a time costing basis by reference to the hourly rates identified by the Supreme Court Scale[33] without, appropriately, claiming either a r 63.48 loading or a contingency uplift (neither of which would be appropriate in the context of settlement administration). Further they would accept a court-imposed cap on the total administration costs to be charged, should I be minded to impose one.

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33 Following the hearing, Mr Grech indicated that he had erroneously instructed counsel to submit that the scheme administration estimate before the court during the hearing applied Supreme Court scale rates, when in fact it used blended hourly rates (higher than the Supreme Court Scale rates).

104 The Australian Law Reform Commission in its 2018 report[34] recommended that the Federal Court in its practice note include a clause that the court may tender for settlement administration and include processes that the court may adopt when doing so. Usually the plaintiffs' law practice seeks the task and, absent some form of tendering process, it is not always clear that the solicitor's proposal is the most cost effective or best serves the interests of group members. I have no doubt that the court has the power to order settlement administration be determined after a tender process and the identification of a process through a practice note seems sensible.

105 In the present case, the major distinction between the two proposals before the court was cost. Although the plaintiffs submitted that the task required professional legal expertise which Gordon Legal possessed and KPMG did not, I found this argument unpersuasive. Firms of chartered accountants such as KPMG have extensive experience through insolvency and other work in acting as administrators of financial schemes involving distributions to creditors. The administration of such schemes in insolvency often raises legal issues that do not provide an impediment to administration by appropriately experienced chartered accountants. Further, in the present circumstance the only head of damage that the plaintiffs emphasised as requiring legal skills was the assessment of general damages for distress in respect of certain eligible claimants. Mostly, the assessment of damages is likely to be predominantly an accounting and verification exercise.

106 Once Gordon Legal adjusted its claim for the costs of administration of the scheme, there was little of substance to distinguish the competing proposals.

107 In *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)*.[35] The court appointed contradictor recommended that the court undertake a tender process to appoint a settlement administrator. Murphy J accepted that a tender process was appropriate in some circumstances but in that case considered the administration of

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34 Integrity, Fairness and Efficiency – An Enquiry into Class Action Proceedings and Third Party Litigation Funders (ALRC, 2018).

35 [2020] FCA 1053.

the settlement was best served by the applicant's legal representative.

108 Given that Gordon Legal is now prepared to administer the scheme on the basis I have described, costs savings for group members (and possibly the first defendant) is no longer a significant factor. In my view it is better to adopt the process of the continued engagement of the special referee to monitor the costs of settlement administration. I will order that the costs of settlement administration, which are to include the costs of the special referee, be capped at $3,250,000. Such costs are to be assessed on a time costing basis at rates permitted by the Supreme Court Scale and submitted regularly to the costs referee for independent review.

109 I will appoint Gordon Legal as the scheme administrator for three reasons:

(a) Gordon Legal has a greater familiarity with the issues and the position of the individual claimants by reason of being the plaintiffs' solicitor throughout the proceeding and, in particular, from having prepared a significant number of sample assessments of loss and damage for the purposes of mediation.

(b) Secondly, by the Deed the plaintiffs agreed with the first defendant that Gordon Legal would be the scheme administrator and the first defendant submitted that its agreement should be respected;

(c) Although KPMG have extensive experience in administering like schemes in the insolvency context, Mr Grech also has extensive experience in the context of group proceedings. In addition, for what it is worth, he has the support of the representative plaintiffs.

Conclusions

110 The settlement of the proceeding between the plaintiffs and the first defendant is approved on the terms set out in the Deed and the scheme. I authorise the plaintiffs *nunc pro tunc* for and on behalf of the group members (being those persons who meet the definition of 'Group Member' in the Amended Statement of Claim and who did not file an opt out notice) to enter into and give effect to the Settlement Documents and the transactions contemplated for and on behalf of group members.

111 As between the plaintiffs and the second defendant-

(a) the costs order dated 28 May 2021 be set aside and in its place I will order that the plaintiffs pay the second defendant's costs of the plaintiffs' summons dated 28 May 2021, fixed in the amount of $15,000; and

(b) the plaintiffs have leave to discontinue the proceedings as against the second defendant on the basis that there is no further liability under r 63.15 to pay any costs to the second defendant.

112 The report of the special (costs) referee, Catherine Mary Dealehr, dated 15 November 2022 is adopted.

113 I approve the following payments from the Resolution Sum as defined by the settlement documents to be made by the Scheme Administrator –

(a) $4,623,835.14 for the plaintiff's legal costs and disbursements.

(b) The following payments to the plaintiffs as reimbursement payments -

(i) Ms Somers, $20,000;

(ii) Mr Hassanein, $15,000;

(iii) Mr Ouldanov, $15,000;

(iv) Mr Lamont, $15,000.

(c) $49,277.25 for the costs of the special referee, Catherine Mary Dealehr.

(d) $15,000 to the liquidators of Soar.

(e) The costs of administration of the scheme as assessed by a costs referee and certified in accordance with the court's authenticated order subject to a cap of $3,250,000 (including the costs of monitoring and certification).

114 The sum remaining after the payments approved under the preceding paragraph shall

constitute the Compensation Sum for the purposes of the Deed.

115 I appoint Mr Andrew Alexander Grech of Gordon Legal, 22/181 William Street, Melbourne as the Scheme Administrator.

116 Subject to her consent, I appoint Catherine Mary Dealehr as costs referee. The costs of the costs referee are part of the costs of the administration and shall be paid by the Scheme Administrator on invoice out of the Resolution Sum

117 The Scheme Administrator shall file, and serve on the first defendant, reports as to the progress, or the completion, of the administration.

118 The following documents:

(a) The unredacted affidavit of Andrew Grech dated 13 September 2022;

(b) The unredacted affidavit of Andrew Grech dated 10 November 2022,

are confidential, not to be published or made available or disclosed to any person or entity except by order of a judge.

CERTIFICATE

I certify that this and the 35 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 29 November 2022.

DATED this 29th day of November 2022.

SUPREME COURT OF VICTORIA
Associate of a Judge of the Court

.....
Associate

SCHEDULE OF PARTIES

S ECI 2020 01535

BETWEEN:

NERITA SOMERS	First Plaintiff
ADEL HASSANEIN	Second Plaintiff
MATTHEW LAMONT	Third Plaintiff
FELIX OULDANOV	Fourth Plaintiff
-and-	
BOX HILL INSTITUTE	First Defendant
GOBEL AVIATION PTY LTD	Second Defendant