FEDERAL COURT OF AUSTRALIA

Uren v RMBL Investments Ltd & Anor (No 2) [2020] FCA 647

File number:	VID 1093 of 2018
Judge:	**MURPHY J**
Date of judgment:	13 May 2020
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – application for approval of settlement pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – whether proposed settlement is fair and reasonable – whether it is just under s 33V to make an Expense Sharing Order in relation to litigation funding charges – whether proposed litigation funding commission is fair and reasonable – whether applicant's legal costs are fair and reasonable – application for a reimbursement payment to the applicant – settlement approved
Legislation:	*Corporations Act 2001* (Cth) *Federal Court of Australia Act 1976* (Cth) s 33V *Civil Procedure Act 2005* (NSW) *Limitation of Actions Act* 1958 (Vic)
Cases cited:	*Andrews v Australia and New Zealand Banking Group Ltd* [2019] FCA 2216 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 374 ALR 627 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 *Cherry v Boultbee* [1838] 41 ER 171 *Fisher (as trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66 *In the matter of Anne Lewis Pty Ltd* [2016] NSWSC 1860 *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; (2016) 335 ALR 439 *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC

	107; (2019) 369 ALR 583 *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374 Lenthall v Westpac Banking Corporation (No 2) [2020] FCA 423 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98; (2017) 252 FCR 1 *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194; (2016) 343 ALR 662 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* [1994] HCA 54; (1994) 181 CLR 404 *Pearson v State of Queensland (No 2)* [2020] FCA 619 *Perera v GetSwift Limited* [2018] FCAFC 202; (2018) 263 FCR 92 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842; (2018) 132 ACSR 258 *Santa Trade Concerns Pty Limited v Robinson (No 2)* [2018] FCA 1491 *State of New South Wales v Kable* [2013] HCA 26; (2013) 252 CLR 118 *Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44; (2016) 259 CLR 212 *Wong v Silkfield* [1999] HCA 48; (1999) 199 CLR 255
Date of hearing:	6 May 2020
Registry:	Victoria
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Category:	Catchwords
Number of paragraphs:	97
Counsel for the Applicant:	Mr B Quinn QC and Mr J Richardson
Solicitor for the Applicant:	Maurice Blackburn Lawyers
Counsel for the First Respondent:	Mr N O'Bryan SC and Ms S Jacobson

Solicitor for the First Respondent:	Hope & Co Lawyers
Counsel for the Second Respondent:	The Second Respondent did not appear
Counsel for the intervener:	Mr L Armstrong QC and Mx N Chow

ORDERS

VID 1093 of 2018

BETWEEN:	**NOEL MURRAY UREN** Applicant
AND:	**RMBL INVESTMENTS LTD** First Respondent
	BRUCE NORMAN UREN Second Respondent
JUDGE:	**MURPHY J**
DATE OF ORDER:	**13 MAY 2020**

THE COURT ORDERS THAT:

1. Pursuant to r 9.12 of the *Federal Court Rules 2011* (Cth) and s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**) Litigation Lending Services Ltd (**LLS**) have leave to intervene in this proceeding including to adduce evidence and make submission in respect of the applicant's interlocutory application filed 23 December 2019.

2. Pursuant to ss 37AF and 37AG of the FCA, on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until further order, the material contained in:

   (a) the Confidential Affidavit of Steven Mark Foale dated 27 April 2020; and

   (b) the Schedule of Confidential Material annexed to these orders and marked "**Annexure A**",

   not be published or disclosed without the prior leave of the Court to any person or entity other than the applicant, the applicant's legal advisers, the Judge with the carriage of the matter from time to time and officers of the Court to whom it is necessary to disclose the material.

3. Pursuant to s 33V of the FCA the settlement of this proceeding be approved on the terms set out in:

(a) the Deed of Settlement and Release dated 15 November 2019 (being annexure 'SMF-25' to the Affidavit of Steven Mark Foale affirmed 20 December 2019) (**Deed**); and

(b) the Settlement Distribution Scheme (**SDS**) annexed to these orders and marked "**Annexure B**".

4. Pursuant to ss 33V and 33ZF(1) of the FCA the Court authorises the applicant, *nunc pro tunc*, to enter into and give effect to the Deed for and on behalf of all class members.

5. All remaining claims of the applicant and the class members in this proceeding be dismissed, with no orders as to costs.

6. All costs orders made in this proceeding to date, whether made in favour of the applicant, the first respondent or otherwise, be vacated.

7. Pursuant to ss 33V of the FCA Maurice Blackburn be appointed Administrator of the SDS, to act in accordance with the SDS and be given the powers and immunities contained in the SDS.

8. Pursuant to s 33V(2) of the FCA and/or the Court's equitable jurisdiction, for the purpose of the SDS the Court approves the following payments from the Resolution Sum (as defined in the Funding Terms annexed to the orders of 2 May 2019):

(a) the amount of $1,431,733.73 as the 'LLS Payment' to be paid to LLS, comprising:

(i) $681,733.73 as reimbursement for Project Costs paid by LLS , being the reasonable costs and disbursements of conducting the proceeding paid by LLS; and

(ii) $750,000 as consideration for the funding of the proceeding (being 25% of the gross settlement).

(b) the amount of $268,266.27 as the 'MB Unpaid Costs Payment' (which includes the 'Administration Costs') to be paid to the applicant's solicitors, comprising the reasonable unpaid costs and disbursements of conducting the proceeding and administering the SDS; and

(c) the amount of $5,000 as the 'Applicant's Reimbursement Payment' to be paid to the applicant.

9. Pursuant to ss 33V and 33ZF(1) of the FCA Ms Monica Belosevic and Manor Estate Pty Ltd be deemed to be 'Participating Class Members' for all purposes under the SDS.

10. Each of:

    (a) the applicant (dated 8 May 2019);

    (b) Maurice Blackburn (dated 6 May 2019); and

    (c) LLS (dated 6 May 2019),

    be released from the undertakings which they gave to each other and to the Court to comply with their obligations under the Funding Terms annexed to, and the terms of order 1 of, the orders made on 2 May 2019.

11. Maurice Blackburn as Administrator under the SDS have liberty to apply in relation to any matter arising under the SDS.

12. Pursuant to s 33ZB of the FCA, the persons affected and bound by these orders are the applicant, the first respondent and the class members (other than those class members who have opted out of the proceeding in accordance with s 33J of the FCA).

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

Annexure A

#	DOCUMENT	CONFIDENTIAL INFORMATION
Evidence of LLS		
1.	Affidavit of Kim May dated 28 April 2020	Paragraph [20] to [22] – whole Paragraph [25](a) – whole Paragraph [25](b) - whole Paragraph [35] – whole Paragraph [40] - whole Paragraph [43] – first three sentences Paragraph [44] – first sentence Paragraph [45] – whole, except for the last sentence. Paragraph [50] - whole Paragraph [74] – last two sentences
2.	Exhibit KM1-18 to the affidavit of Kim May dated 28 April 2020	Whole
3.	Exhibit KM1-24 to the affidavit of Kim May dated 28 April 2020	Whole

Annexure B

UREN v RMBL INVESTMENTS LTD & ANOR
(VID 1093 OF 2018)

SETTLEMENT DISTRIBUTION SCHEME

BACKGROUND

A. This Scheme establishes a procedure for distributing the Settlement Sum paid by RMBL pursuant to a settlement of the Proceeding approved by the Court.

B. This Scheme does not become operative until the Court has made the Approval Orders.

C. Having regard to the relatively modest amount of the Residual Settlement Sum expected to be available for distribution under this Scheme, and consistent with s 37M of the FCAA, this Scheme provides for a simplified distribution to Participating Class Members in proportion to the total amount of Collection Charges paid by each Participating Class Member, irrespective of:

   a. the initial Collection Charge rate specified in each Class Member Loan Agreement, or in related pre-contractual documentation, and whether that Collection Charge rate was ever increased prior to the discharge of the Participating Class Member's loan;

   b. whether the particular Participating Class Member's loan agreement was in the form of the 2008 Loan Agreement, or was in the form which was in use by RMBL prior to the 2008 Loan Agreement; or

   c. the time at which the Collection Charges were paid by each Participating Class Member.

D. For the reasons set out in C. above, this Scheme does not seek to factor in to the distributions to be made to Participating Class Members under this Scheme any allowance for the following matters, on the basis that any more elaborate scheme which did factor in such matters would also come with increased complexity and concomitant Administration Costs, which in the particular circumstances of this case is not warranted:

   a. the relative merits and risks of success or failure of the Applicant's respective 'actual costs construction' and 'agreed rate construction' arguments, as presented at the trial of the Proceeding;

   b. the possibility that Participating Class Members whose loan agreement was in the form of the 2008 Loan Agreement might have achieved, if the Proceeding were to proceed to judgment, a more favourable or less favourable outcome than other Participating Class Members; or

c. the possibility that claims in relation to Collection Charges that were paid more than six years prior to the commencement of the Proceeding, or alternatively more than fifteen years prior to the commencement of the Proceeding, may (notwithstanding the Applicant's arguments to the contrary at the trial of the Proceeding) have been found to be statute-barred if the Proceeding were to proceed to judgment.

E. This Scheme contemplates the following major steps:

a. Maurice Blackburn (or such other person as ordered by the Court) will be appointed as Administrator of this Scheme.

b. Interest earned on the Settlement Distribution Fund may be applied, to the extent necessary, for payment of Administration Costs.

c. Prior to any distribution to Participating Class Members, the Administrator will pay the LLS Payment, the MB Unpaid Costs Payment, the Applicant's Reimbursement Payment and any Administration Costs (as approved by the Court) from the Settlement Distribution Fund, leaving a Residual Settlement Sum.

d. The Administrator will distribute the Residual Settlement Sum to the Participating Class Members in proportion to the total amount of Collection Charges paid by each Participating Class Member.

e. Any remaining undistributed component of the Residual Settlement Sum will be dealt with as directed by the Court.

OPERATIVE PROVISIONS:

1. Definitions and Interpretation

1.1. In this Scheme, the following terms have the meanings defined below (in many instances those meanings are the same as in the Settlement Deed, but are reproduced in full below for ease of reference; clause references are references to the clauses of this Scheme unless otherwise specified):

2008 Loan Agreement means the form of loan agreement that was in use by RMBL from in or around 2008 onwards (being Exhibit A2 at the trial of the Proceeding).

Administration Costs means the reasonable actual or estimated costs and disbursements of the Administrator calculated at the rates set out in Schedule A and approved by the Court in connection with the administration of this Scheme.

Administrator means Maurice Blackburn (or such other person as ordered by the Court) acting as the Court appointed administrator of this Scheme.

Administrator Delegates means the persons or entities delegated by the Administrator to perform the functions necessary or convenient for the efficient implementation of this Scheme.

Appeal Period means the later of:

(a) the period provided for in the FCAA, the *Federal Court Rules 2011* (Cth) and the *High Court Rules 2014* (Cth) (as applicable) following the Court's determination of an application made in accordance with the Settlement Deed within which:

(i) an appeal or application for leave to appeal to the Full Court of the Federal Court may be brought from a decision at first instance; and

(ii) in the event that such an appeal or application for leave to appeal is brought, any application for leave to appeal to the High Court may be brought from any decision of the Full Court of the Federal Court,

(unless the Court has fixed a later date by which an appeal or an application for leave to appeal may be brought, in which case, that later date); and

(b) the ultimate determination of the matters the subject of any appeal or application for leave to appeal commenced within the period in (a)(i) or (a)(ii) above.

Applicant means Noel Murray Uren, the applicant in the Proceeding.

Applicant's Reimbursement Payment means an amount by way of compensation for time and expenditure reasonably incurred by the Applicant in the interests of prosecuting the Proceeding on his own behalf and on behalf of the Class Members as a whole, in such amount as is determined by the Court.

Approval Orders has the meaning given to it in sub-cl 5(a) of the Settlement Deed.

Business Day means a day on which banks are open for business in Melbourne excluding a Saturday, Sunday or public holiday in that city.

Class Closing and Registration Orders means the orders referred to in sub-cl 3(a) of the Settlement Deed.

Class Member means those persons defined as such in the Originating Application dated 4 September 2018 filed in the Proceeding, other than those persons who opted out of the Proceeding pursuant to s 33J of the FCAA prior to 4.00 pm on 26 July 2019.

Class Member Loan Agreements means the loan agreements entered into between each Class Member and RMBL from time to time.

Collection Charges means the 'collection charges' imposed by RMBL on the Applicant pursuant to cl 6.3 of the Loan Agreement and on the Class Members pursuant to the equivalent clause in the Class Member Loan Agreements.

Common Fund Order means orders 1 and 2 of the orders made by the Court in the Proceeding on 2 May 2019, which provided for LLS to fund the Proceeding on the terms set out in the Funding Terms annexed to those orders.

Court means the Federal Court of Australia.

Database means the database referred to in cl 3 below.

EFT means electronic funds transfer.

FCAA means the *Federal Court of Australia Act 1976* (Cth).

Final Distribution Amount means, in relation to each Participating Class Member, an amount calculated in accordance with cll 6.2 and 6.4 below.

Interest means interest earned on the monies held in the Settlement Distribution Account.

Late Registrant means a Class Member who or which has submitted a purported registration in the manner contemplated by the Class Closing and Registration Orders, save that the purported registration was received by Maurice Blackburn after the Registration Deadline.

LLS means Litigation Lending Services Ltd (ACN 129 188 825).

LLS Payment means the total amount payable to LLS out of the Settlement Sum pursuant to the Common Fund Order and/or any other orders of the Court.

Loan Agreement means the Loan Agreement between the Applicant, Bruce Norman Uren and RMBL dated 29 May 2001 (as varied from time to time).

Maurice Blackburn means Maurice Blackburn Pty Ltd (ACN 105 657 949).

MB Unpaid Costs Payment means the reasonable legal costs and disbursements of Maurice Blackburn not otherwise paid by LLS pursuant to the Common Fund Order or otherwise, in such amount as is approved by the Court.

Participating Class Member means, subject to cl 4.1, a Class Member who or which provides their contact and other necessary details to Maurice Blackburn prior to the Registration Deadline.

Proceeding means the representative proceeding commenced by the Applicant against, *inter alia*, RMBL in the Court on 4 September 2018 under Part IVA of the FCAA (VID 1093 of 2018).

Registration Deadline means 4.00 pm (AEST) on 7 April 2020.

Residual Settlement Sum means the amount of the Settlement Distribution Fund remaining after payment of the LLS Payment, the MB Unpaid Costs Payment, the Applicant's Reimbursement Payment and the Administration Costs (and any other permitted deductions, including any applicable fees and taxes).

RMBL means RMBL Investments Ltd (ACN 004 493 789), the first respondent in the Proceeding.

Scheme means the terms of this settlement distribution scheme as approved by the Court, including any Schedules.

Settlement Deed means the Deed of Settlement and Release dated 15 November 2019 between the Applicant, RMBL, LLS and Maurice Blackburn.

Settlement Distribution Account means the interest bearing account opened in accordance with cl 2(a) of the Settlement Deed.

Settlement Distribution Fund means the monies from time to time held in the Settlement Distribution Account.

Settlement Sum means the amount of $3,000,000 paid by RMBL under the Settlement Deed.

1.2. In this Scheme:

(a) headings are for convenience only and do not affect interpretation; and

(b) the following rules apply unless the context requires otherwise:

(i) the singular includes the plural, and the converse also applies;

(ii) a gender includes all genders;

(iii) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;

(iv) a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;

(v) a reference to dollars or $ is to Australian currency; and

(vi) a reference to any thing done by any person includes a reference to the thing as done by a director, officer, servant, agent, personal representative or legal representative if permitted to be so done by law or by any provision of the Settlement Deed or this Scheme.

2. Scheme Administrator

2.1. The Settlement Distribution Fund shall be administered and applied by Maurice Blackburn (or such other person as ordered by the Court) as Administrator.

2.2. The Administrator will, subject to and in accordance with this Scheme:

(a) hold the Settlement Distribution Fund on trust until the Settlement Distribution Fund is distributed; and

(b) distribute the Settlement Distribution Fund (including any Interest accrued) as expeditiously as possible.

2.3. The Administrator, in discharging any function or exercising any power or discretion conferred by this Scheme, shall do so as lawyers required by the Court to administer this Scheme fairly and reasonably according to its terms, as a duty owed to the Court in priority to any obligation to any individual Class Member.

2.4. Upon the coming into effect of this Scheme, Maurice Blackburn will cease to act as the solicitors for the Applicant and/or the Class Members in relation to matters connected with the Proceeding and/or this Scheme.

2.5. Notwithstanding anything elsewhere contained in this Scheme, the Administrator may at any time and in its sole discretion correct any error, slip or omission occurring in the course of its administration of this Scheme.

2.6. The Administrator and the Administrator Delegates, in discharging any function or exercising any power or discretion conferred by this Scheme, shall not be liable for any loss to Class Members arising by reason of any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the Administrator or the Administrator Delegates who are sought to be made liable.

2.7. Where a Participating Class Member is a Participating Class Member by virtue of a registration submitted on their behalf by a trustee, investment manager, responsible entity or agent, the Administrator may rely on any information, instruction or declarations provided by that trustee, investment manager, responsible entity or agent as if it had been provided by the Participating Class Member itself.

2.8. The Administrator is required to comply with the taxation obligations of any trust created for the benefit of Participating Class Members in the course of administering this Scheme and may seek expert advice to facilitate this. Any tax that the Administrator may be required to pay in respect of an individual Participating Class Member may be deducted from that Participating Class Member's Final Distribution Amount. Any taxation obligations payable by any trust(s) created by the establishment of the Settlement Distribution Fund will be deducted from the Settlement Distribution Fund.

3. Class Member Database

3.1. The Administrator will create and maintain a database of Class Members who have registered, or who have purported to register, to participate in the Proceeding, which shall include:

(a) all persons who registered to participate in the Proceeding prior to the Registration Deadline; and

(b) any Late Registrants.

3.2. In relation to each category of person referred to in cl 3.1 above, the Database shall include:

(a) all information, including last known contact details, provided by those persons at the time of their registration, or purported registration, or subsequently provided by them to the Administrator; and

(b) whether that person was charged Collection Charges by RMBL at any time (to the extent that is known by the Administrator on the basis of information provided to it by RMBL and/or the Class Member).

3.3. For the purpose of determining

(a) whether any particular persons who have registered to participate in the Proceeding are in fact Class Members; and

(b) the amount of Collection Charges paid by each Participating Class Member,

the Administrator shall be permitted to rely upon any information provided to Maurice Blackburn by RMBL in accordance with cl 4(b) of the Settlement Deed and/or in any further correspondence.

4. Late Registrants and Non Registrants

4.1. If the Court makes an order permitting a Late Registrant to participate in the distribution of the Settlement Distribution Fund, the Late Registrant shall be deemed to be a Participating Class Member for all purposes under this Scheme.

4.2. Any Class Member who is not a Participating Class Member (including any Late Registrant in respect of whom the Court does not make an order of the kind referred to in cl 4.1 above) will remain a Class Member for all purposes but:

(a) shall not be entitled to receive a distribution from the Settlement Distribution Fund; and

(b) shall not be entitled to receive any notices under this Scheme.

5. Application of Interest

5.1. Interest may be applied, in the first instance, to payment of Administration Costs.

5.2. Any additional Administration Costs shall be paid to the Administrator out of the Settlement Distribution Fund before any final distribution of the Settlement Distribution Fund.

5.3. Any Interest which is not otherwise required for the payment of Administration Costs will form part of the Settlement Distribution Fund and be available for distribution to Participating Class Members.

6. Distribution

6.1. Prior to any distribution from the Settlement Distribution Fund to the Participating Class Members, the following payments shall be made from the Settlement Distribution Fund:

(a) an amount to LLS for the LLS Payment;

(b) an amount to Maurice Blackburn for the MB Unpaid Costs Payment;

(c) an amount to the Applicant for the Applicant's Reimbursement Payment; and

(d) an amount to the Administrator for Administration Costs.

6.2. Subject to cl 6.4 below, the amount remaining in the Settlement Distribution Fund after payment of the amounts referred to in cl 6.1 above (and after deducting any other permitted deductions, including any applicable fees and taxes) (being the Residual Settlement Sum) shall be divided between the Participating Class Members in the proportion that the total amount of Collection Charges paid by each Participating Class Member bears to the total amount of Collection Charges paid by all of the Participating Class Members, irrespective of:

(a) the initial Collection Charge rate specified in each Class Member Loan Agreement, or in related pre-contractual documentation, and whether that Collection Charge rate was ever increased prior to the discharge of the Participating Class Member's loan;

(b) whether the particular Participating Class Member's Loan Agreement was in the form of the 2008 Loan Agreement, or was in the form which was in use by RMBL prior to the 2008 Loan Agreement; or

(c) the time at which the Collection Charges were paid by each Participating Class Member,

(but subject to any minor rounding adjustment the Administrator may make to ensure that all Final Distribution Amounts are rounded to whole cents in such a way as to

ensure that the aggregate of all Final Distribution Amounts does not exceed the Residual Settlement Sum).

6.3. As soon as practicable (and, in any event, within ten (10) Business Days) after the Court has made the Approval Orders, the Administrator shall write to each of the Participating Class Members:

(a) notifying them of their estimated Final Distribution Amount (calculated in accordance with cl 6.2 above), and the basis on which their estimated Final Distribution Amount has been calculated in accordance with this Scheme;

(b) requesting them to provide to the Administrator bank account details to facilitate payment of their Final Distribution Amount via EFT; and

(c) notifying them of the terms and effect of cll 6.4 and 6.5 below.

6.4. Any Participating Class Member who does not, prior to the expiry of the Appeal Period relating to the Approval Orders, provide to the Administrator bank account details to facilitate payment of their Final Distribution Amount via EFT, or otherwise satisfy the Administrator in accordance with cl 6.5(a) below, shall thereafter cease to be a Participating Class Member for the purposes of this Scheme, and:

(a) the Final Distribution Amount that would otherwise have been paid to that Participating Class Member shall be forfeited; and

(b) the Administrator shall recalculate the Final Distribution Amount payable to the remaining Participating Class Members accordingly.

6.5. The payments of Final Distribution Amounts to Participating Class Members are to be made by EFT, except where:

(a) a Participating Class Member demonstrates, to the Administrator's satisfaction, that distribution by EFT is impracticable for the Participating Class Member; or

(b) the Administrator, in its absolute discretion, considers that another method would be more conducive to effecting a timely distribution to any Participating Class Member or group of Participating Class Members.

6.6. As soon as practicable (and, in any event, within fifteen (15) Business Days) after the expiry of the Appeal Period relating to the Approval Orders, the Administrator shall pay to LLS, Maurice Blackburn and the Applicant the payments referred to in cl 6.1 above, and shall pay to each Participating Class Member their Final Distribution Amount by way of:

(a) EFT (for those Participating Class Members who provided to the Administrator bank account details in accordance with cl 6.3 above); or

(b) any other method in accordance with cl 6.5 above.

6.7. For the avoidance of doubt, the Administrator is not obliged to (but may, in its absolute discretion) make further inquiries, prior to calculation and distribution of the Final Distribution Amount, of those Participating Class Members who have not responded to the communication from the Administrator referred to in cl 6.3 above.

6.8. For the avoidance of doubt, the Administrator is not obliged to (but may, in its absolute discretion) make further inquiries, after distribution of the Residual Settlement Sum, of:

(a) those Participating Class Members (if any) whose EFT payment under cl 6.6(a) above was unable to be processed due to incorrect account information provided by the Participating Class Member; and/or

(b) those Participating Class Members (if any) who received payment of their Final Distribution Amount by cheque but have not presented that cheque for payment.

7. Immunity from Claims

7.1. The completion of distributions made pursuant to cl 6 above, including distributions made by:

(a) EFT that are unable to be processed due to incorrect account information provided by the Participating Class Member; and/or

(b) cheques that remain unpresented after forty (40) Business Days of posting,

shall, subject to any contrary order of the Court, satisfy any and all rights, claims or entitlements of all Class Members in or arising out of the Proceeding.

7.2. The Administrator will have no liability to a Participating Class Member who does not receive payment of their Final Distribution Amount, provided that the Administrator:

(a) in relation to an EFT payment, attempted to effect the payment in accordance with the account details provided by the Participating Class Member; or

(b) in relation to a cheque payment, posted the cheque to the last known address of the Participating Class Member as last advised by them to the Administrator.

7.3. Without limiting cl 7.2 above, the Administrator will have no liability to a Participating Class Member who does not receive payment of their Final Distribution Amount due to the provision of incorrect information by the Participating Class Member.

8. Supervision by the Court

8.1. Forty (40) Business Days after the last of the payments referred to in cl 6.6 above is paid, the Administrator must file with the Court a confidential report which sets out:

(a) an account of all receipts into, and all payments out of, the Settlement Distribution Account as at the date of the report;

(b) the number and total amount (if any) of all EFT payments that, as at the date of the report, were unable to be processed due to incorrect account information provided by the Participating Class Members; and

(c) the number and total amount (if any) of all cheques to Participating Class Members that remain unpresented as at the date of the report.

8.2. The Administrator may, no earlier than twenty (20) Business Days after filing the report referred to in cl 8.1 above, and subject to any contrary order of the Court:

(a) cancel all cheques to Participating Class Members that remain unpresented as at that date; and

(b) distribute the remaining balance in the Settlement Distribution Account (if any) in accordance with any orders of the Court.

8.3. The Administrator may refer any issues arising in relation to this Scheme or the administration of this Scheme to the Court for determination.

8.4. On the application of the Administrator, or of its own motion, the Court may vary or amend the terms of this Scheme.

8.5. Any costs incurred by the Administrator in any such reference to the Court, or in any application made by the Administrator, shall be deemed to be Administration Costs, unless the Court otherwise orders.

9. Notice

9.1. Any notice to be given pursuant to this Scheme shall be deemed given and received for all purposes associated with this Scheme if it is:

(a) addressed to the person to whom it is to be given; and

(b) either:

(i) sent by email to that person's email address (being, in respect of a Class Member, the email address as last advised by them to the Administrator) and no delivery failure notification is received in respect of that email by the sender; or

(ii) delivered, or sent by pre-paid post, to that person's postal address (being, in respect of a Class Member, the postal address as last advised by them to the Administrator).

9.2. A notice that complies with this cl 9 will be deemed to have been given and received:

(a) if it was sent by email, at the time it was sent;

(b) if it was sent by post to an addressee in Australia, five (5) Business Days after being posted; or

(c) if it was sent by post to an addressee overseas, ten (10) Business Days after being posted.

9.3. The Administrator's address and email address shall be as set out below unless and until the Administrator notifies the sender otherwise:

RMBL Class Action
Maurice Blackburn Pty Ltd
Level 21, 380 La Trobe Street
Melbourne Vic 3000
Email: RMBLClassAction@mauriceblackburn.com.au

10. Time

10.1. The time for any person to do any act or thing under this Scheme may be extended by the Administrator in its absolute discretion.

10.2. The time for any person to do any act or thing under this Scheme may be extended by order of the Court.

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Schedule A

Fee Earner	Hourly Rate $ (ex GST)
Principal / Special Counsel > 15 years' experience	$790.00
Principal / Special Counsel < 15 years' experience	$720.00
Senior Associate	$610.00
Associate	$540.00
Lawyer	$440.00
Trainee Lawyer	$350.00
Paralegal / Law Clerk	$250.00
Litigation Technology Consultant / Data Administrator	$240.00
Customer Service Officer	$180.00

REASONS FOR JUDGMENT

MURPHY J:

1 The applicant, Mr Noel Uren, seeks orders for Court approval of the proposed settlement of this class action under s 33V of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**).

2 The first respondent, RMBL Investments Ltd (**RMBL**) is the responsible entity of the RMBL Mortgage Income Investments Scheme, a registered managed investment scheme under Chapter 5C of the *Corporations Act 2001* (Cth). In that capacity it has for many years carried on business as a contributory mortgage investment manager which, in broad terms, involved collecting funds from investors and then lending those funds to borrowers. The applicant and his brother Mr Bruce Uren, the second respondent, were partners in a partnership to conduct a cattle farm in Gippsland, Victoria. In May 2001 they entered into a loan agreement with RMBL for an initial amount of $760,000 (the **loan agreement**), which by virtue of several variations was extended over time and only discharged in 2016.

3 The applicant commenced the proceeding on 4 September 2018 on his own behalf and on behalf of all other persons who had entered into loan agreements with RMBL which had clauses similar to cl 6.3 of the applicant's loan agreement, which clause required the applicant to pay what is described in the proceeding as 'collection charges'. Essentially, the proceeding alleged that on a proper construction of cl 6.3 of the loan agreement, RMBL was not entitled to be paid the 'collection charges' which the applicant and class members had been required to pay throughout the course of their loan agreements.

4 I heard the applicant's claim in contract and RMBL's defences thereto, excluding all issues of quantification, in early August 2019. At the conclusion of the hearing I referred the proceeding to mediation and after some weeks of negotiations the parties reached an in-principle settlement. The parties entered into a Deed of Settlement dated 15 November 2019 pursuant to which RMBL agreed to pay the sum of $3 million inclusive of interest and costs, in full settlement of all of the claims of the applicant and class members. The settlement monies are proposed to be distributed, after various deductions, to class members in accordance with a settlement distribution scheme (**SDS**).

5 I heard the settlement approval application on 6 May 2020 and informed the parties that the settlement would be approved. I now make the relevant orders and publish reasons for doing so.

6 Having regard to the materials before the Court, and my understanding of the case from the initial hearing, the proposed settlement is plainly fair and reasonable in the interests of class members to be bound to it. The SDS is fair and reasonable, as are the proposed deductions from the settlement fund. The only issues of any controversy are:

(a) whether it is "just" to make an order under s 33V(2) of the FCA to require all class members who recover compensation under the settlement to pay to the litigation funder of the proceeding, from the common fund of their recoveries, a pro rata share of the litigation funding charges incurred to achieve the settlement. For the reasons I explain, I was satisfied that it is; and

(b) whether it is appropriate to order that the SDS provide that any borrowers who are included in the list of participating class members, but in respect of whom RMBL has an offsetting claim for monies owed by them to RMBL in an amount which exceeds the collection charges paid by those borrowers, should be excluded from receiving a distribution under the settlement. For the reasons I explain, I was not persuaded such an order would be "just" pursuant to s 33V(2).

THE CLASS

7 The proceeding was commenced as an 'open' class action. Following the parties reaching the in-principle settlement, the applicant applied for orders to notify class members of the proposed settlement, and of a requirement for class members to register if they wished to share in the settlement (**Notice of Proposed Settlement**).

8 On 5 March 2020 the Court made orders, amongst others, providing that:

(a) any class members that wished to participate in the distribution of compensation under the proposed settlement must register as a "participating class member" by 7 April 2020 (the **class member registration order**);

(b) a copy of the Notice of Proposed Settlement be sent by RMBL to class members by email or post by 10 March 2020; and

(c) pursuant to s 33ZF of the FCA, class members who neither opted out nor registered would be bound by any approved settlement of the proceeding but precluded from sharing in the compensation under the settlement (the **class closure order**).

9 The Notice of Proposed Settlement informed class members of the class member registration order and the class closure order in clear terms, and I considered that the notification regime

was effective as the notices were sent directly to the email or postal address of class members. I am satisfied on the materials that the notice was sent in accordance with the orders.

10 101 class members sought to register to participate in the distribution of the settlement, but only 86 persons or entities ultimately did so. Two class members, Manor Estate Pty Ltd and Mrs Monica Belosevic, sought to register shortly after the 7 April 2020 deadline. The evidence shows they had good reasons for their failure to register within time, and it is appropriate to order that they be deemed to be participating class members for the purpose of the SDS.

THE MATERIALS IN SUPPORT OF THE APPLICATION

11 The application is supported by four affidavits of Steven Mark Foale, one affirmed on 20 December 2019, two affirmed on 27 April 2020 and one affirmed on 5 May 2020.

12 The litigation funder of the proceeding, Litigation Lending Services Ltd (the **Funder**), sought and was granted leave to intervene in the settlement approval application, to adduce evidence and make submissions. The Funder relied on the affidavit of Ms Kim May dated 28 April 2020.

OVERVIEW OF THE PROCEEDING

13 The class action centrally concerned the proper construction of cl 6.3 of the loan agreement between RMBL and the partnership of the applicant and the second respondent. Clause 6.3 provided as follows:

> FEES, COSTS AND EXPENSES
>
> 6.1 …
>
> 6.2 …
>
> 6.3 The Borrower shall pay to the Lender or the Lender's Solicitors on demand all costs, charges and expenses incurred in connection with the collection of interest on all moneys and amounts payable pursuant to this Agreement as follows:-
>
> 6. 3.1 for interest calculated at the Acceptable Rate:
>
> An amount of five and one half per centum (5.5%) of all interest entitled to be collected; and
>
> 6.3.2 for interest calculated at the higher rate:
>
> An amount of five and one half per centum (5.5%) of all interest entitled to be collected;
>
> PROVIDED THAT the percentages specified in paragraphs 6.3.1 and 6.3.2 may in the absolute discretion of the Lender be increased or decreased from time to time.

14 Between 9 March 2006 on 16 September 2010, RMBL exercised its discretion under cl 6.3 to increase the rate of the collection charges on four occasions, the aggregate increase over time being from 5.5% to 25% plus GST. The collection charge rates applied in relation to the interest on the loan rather than the outstanding amount of the loan. For example, the interest for one year on a loan of $760,000 with an interest rate of 8% per annum would be $60,800, and a 5.5% collection charge would therefore amount to $3,344.

15 The principal issue in the proceeding was whether, on a proper construction of cl 6.3 and an analogous clause which was used by RMBL in loan agreements from around early 2008, the loan agreement imposed upon the borrowers an obligation to pay to RMBL only the costs, charges and expenses *actually* incurred in connection with the collection of interest, or whether RMBL was entitled to collection charges as specified by RMBL in its discretion, regardless of its out-of-pocket costs relating to the collection of interest.

16 The competing constructions of cl 6.3 were as follows:

(a) the applicant's primary contention was that on the proper construction of the clause, RMBL was only entitled to its actual out-of-pocket costs associated with collecting interest (the **actual costs construction**);

(b) RMBL's primary contention was that on the proper construction, it was entitled to charge collection charges at its 'absolute discretion' regardless of its actual out-of-pocket expenses in relation to the collection of interest (the **unfettered construction**); and

(c) the applicant submitted in the alternative, that the percentage rate that applied for collection charges at the commencement of each loan agreement was an agreed rate with no further changes permitted, on the basis that the discretion to increase or decrease the collection charge rate was void for uncertainty (the **agreed rate construction**).

17 In addition to submitting that the unfettered construction should be preferred, RMBL raised the following defences which were also the subject of the initial trial:

(a) estoppel;

(b) acquiescence and/or laches;

(c) change of position;

(d) limitations pursuant to s 5(1)(a) of the *Limitation of Actions Act 1958* (Vic) (**Limitations Act**); and

(e) RMBL's claim for set off based on *quantum meruit/quantum valebat (*the **set off claim***).*

18 Questions of quantum, either for the applicant's claim or RMBL's set off claim, were not part of the initial trial.

THE PRINCIPLES RELEVANT TO SETTLEMENT APPROVAL

19 The applicable principles in relation to settlement approval under s 33V are well established. They were summarised in: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 (***Blairgowrie No 3***) at [81] to [85] (Beach J); *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; (2016) 335 ALR 439 (***Kelly***) at [62] to [77]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 (***Caason***) at [12] to [13]; and *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 (***Camilleri***) at [5], [32], [43] to [44], and [53] to [54] (Moshinsky J). Fundamentally, the applicant must establish that the proposed settlement is fair and reasonable in the interests of class members to be bound to it, including as between class members.

THE KEY TERMS OF THE PROPOSED SETTLEMENT

20 The key terms of the proposed settlement provide that RMBL will pay $3 million (**settlement sum**) in full and final settlement of the claims of the applicant and class members, inclusive of costs and interest and without admission of liability, in return for binding releases from the applicant and class members.

THE SALIENT CONSIDERATIONS FOR SETTLEMENT APPROVAL

The releases under the proposed settlement

21 Pursuant to the settlement deed the applicant agreed, on his own behalf and on behalf of the class members, to release and discharge RMBL, its employees and agents (both current and former) and any related bodies corporate from all 'Claims' that exist or may exist and whether known (actually or constructively) or unknown to any of the parties or class members, any of their employees, agents or former employees and agents, and includes 'Claims' which may be discovered after the execution of the Deed.

22 The ambit of the releases is reduced by the definition of 'Claim', which is as follows:

> **Claim** means any claim, demand, or cause of action of any nature whatsoever in

relation to, concerning, arising out of, connected with or related to:

(a) the claims made by the Applicant in the Proceeding;

(b) the matters relating to charges which are as at the date of this deed or were at any time the subject of the Proceeding or any part of the Proceeding or which are raised in the Proceeding, whether arising at common law, in equity, under statute or otherwise;

(c) Collection Charges which are or were at any time paid by and/or levied to the Class Members, whether arising at common law, in equity, under statute or otherwise.

23 While the releases are broad they do not in practical terms extend beyond the subject matter of the proceeding such as to affect releases of class members' claims beyond the common claims related to the subject matter of the proceeding, and thus do not extend into claims for which the applicant has no representative authority under the FCA: see *Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44; (2016) 259 CLR 212 at [53]-[54]; and *Santa Trade Concerns Pty Limited v Robinson (No 2)* [2018] FCA 1491 at [18]-[23].

The preclusion of unregistered class members

24 The releases, together with the class member registration order and class closure order, mean that upon settlement approval class members that neither opted out nor registered are bound by the releases that form part of the settlement, and therefore lose their right to sue, but are precluded from sharing in the compensation under the settlement.

25 At the time of the class closure orders *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98; (2017) 252 FCR 1 (at [70]-[80]) was authority that the Court had power to make a class closure order under s 33ZF of the FCA. Recently, in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66 (***Haselhurst***), the Court of Appeal of the Supreme Court of New South Wales held that a pre-trial class closure order made in that case was beyond the power of s 183 of the *Civil Procedure Act 2005* (NSW), which is equivalent to s 33ZF of the FCA. The class closure orders in the present case were not however challenged in the settlement approval application and as orders of a superior court they are valid until and unless set aside: *State of New South Wales v Kable* [2013] HCA 26; (2013) 252 CLR 118 (***Kable***) at [32]. I proceed on the basis that class closure order remains valid.

26 I consider the preclusion of unregistered class members was appropriate at the time the orders were made. It is strictly unnecessary to decide this question in circumstances where there has

been no challenge to the class closure order and it remains valid. Were it necessary to decide, in my view it would be appropriate to make orders as part of the settlement approval application under ss 33V and 33ZB to bind class members who neither opted out nor registered into the settlement of the proceeding, but to preclude them from recovering compensation through the settlement. As Moshinsky J noted in *Fisher (as trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 (***Vocus***) at [61], the decision in *Haselhurst* can be distinguished on the basis that it concerned a pre-trial class closure order, and different considerations apply at the settlement approval stage. His Honour further noted that in *Haselhurst* the Court of Appeal referred with apparent approval to *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194; (2016) 343 ALR 662 (***Newstart***) in which Beach J approved a settlement in circumstances where unregistered group members did not receive a distribution but were nevertheless bound by the settlement: *Haselhurst* at [97] per Payne JA (although distinguishing *Newstart* as a case in which class closure orders were made by consent) and at [7] per Bell P.

27 The preclusion of class members who neither opted out nor registered is likely to be a key term of the settlement for RMBL as that feature allows it to achieve greater finality in relation to the claims in the proceeding. Having regard to the notification regime in relation to the Notice of Proposed Settlement, I am satisfied that class members were given appropriate notice that should they neither register nor opt out before the deadline, they would be bound by the proposed settlement (and thereby lose their rights to claim damages) but precluded from sharing in the compensation under the settlement. They were also informed of their right to object to any aspect of the settlement and none objected to this aspect. As I have noted, my orders allow for the only two late registrants to be deemed to be participating class members.

Counsels' Opinion

28 The Court has had the benefit of the confidential opinion by Mr B Quinn QC and Mr J Richardson of counsel (**Counsels' Opinion**), each of whom was involved in the preparation of the case and the initial trial. Counsel provided the joint opinion as officers of the Court rather than as advocates for the applicant and it deals candidly with the salient considerations set out in Class Actions Practice Note (GPN-CA) (the **Practice Note**).

29 The opinion is confidential and it would be inappropriate to go to its substance. It must suffice to note that having regard to those considerations, counsel jointly recommended that the Court approve the settlement. I have given significant weight to Counsels' Opinion in approving the

settlement as being fair and reasonable. The matters contained in the opinion confirm certain of the preliminary views that I formed while hearing the initial trial. I now turn to the salient considerations under the Practice Note.

The stage of the proceeding at which settlement was reached

30 The settlement was reached after the hearing of the initial trial, and thus at a point when the parties and their lawyers were in a good position to make an informed assessment of their prospects in the case, and the further costs likely to be incurred. This points strongly in favour of settlement approval.

The complexity and likely duration of the litigation

31 The case was confined to a relatively narrow point of contractual construction. At the time the in-principle settlement was reached the initial trial had been heard, other than issues of quantification. Upon a decision on liability being handed down, the issues of quantification were unlikely to have been complex or controversial.

32 There was nevertheless a real prospect that the case would drag out for some time because of the possibility that the result in the initial trial would turn on its own facts including the circumstances in which the applicant and his brother took out the loan agreement. In that event, the initial trial would not resolve all points in a manner readily applicable to all class members. The partnership between the two brothers broke down in acrimonious circumstances ending in litigation in the Supreme Court of Victoria. Bruce Uren was joined as a second respondent to ensure that he, as a fellow partner, was bound by the result in the case. Although he was primarily responsible for negotiating the loan agreement and the extensions to it, he did not give evidence, and RMBL's account of the relevant circumstances was therefore largely uncontested.

33 It is relevant too that some of RMBL's defences, particularly estoppel, acquiescence, and/or laches, were likely to be class member specific and would depend upon each class member's circumstances and dealings with RMBL.

34 Thus there was a real risk that a successful outcome on the applicant's claim would not translate to all, or perhaps even any, other class members. Prior to the initial hearing the applicant sought to address such a difficulty by placing the cases of some sample class members before the Court, but did not ultimately pursue that course.

The risks of establishing liability and quantum

35 Having regard to Counsels' Opinion, together with the preliminary views that I formed during the initial trial, I am satisfied that the applicant faced a risk that it would not succeed in establishing the actual cost construction of cl 6.3 and that some of RMBL's defences would succeed. There was also a risk that the Court would prefer the unfettered construction which RMBL advanced, and if that occurred the applicant's claim would fail entirely.

36 In the event that the Court preferred the agreed rate construction, while the applicant's claim would not fail entirely, the quantum of the claim would be substantially reduced.

37 This consideration points in favour of settlement approval.

Reasonableness in light of best recovery and in light of the attendant risks of the litigation

38 The evidence shows that at the commencement of the proceeding the applicant believed that there were some thousands of class members who, between them, had paid an aggregate of several million dollars per year in collection charges over many years, which charges it was alleged borrowers were not obliged to pay.

39 However, an uncommonly high percentage of the class decided to opt out of the proceeding, and many potential corporations who had been borrowers from RMBL, and thus potentially class members, were deregistered prior to commencement of the proceeding and had not since been reinstated. By the conclusion of the initial trial there were only approximately 362 class members. Then, following the class member registration process, only approximately 86 class members registered to become participating class members so as to share in the distribution of the settlement.

40 By reference to RMBL's records for the period from 14 June 2001 until 31 March 2020, Mr Foale calculated that the participating class members paid collection charges totalling $2,316,074.96, excluding interest, the great bulk of which were paid in the last 10 years. Thus, excluding interest, the quantum of the claim at its highest was $2.31 million *plus* party-party costs.

41 Mr Foale also calculated that after the deduction of legal costs and litigation funding commission (and some other smaller deductions), participating class members will receive approximately $1.295 million in damages, being 55.9% of the gross collection charges they paid. Litigation funding and legal costs were necessarily expended to achieve the settlement and thus an assessment of the proposed settlement against best recovery should add back: (a)

the litigation funding commission of $750,000; and (b) $348,898, being 40% of the total legal costs of $872,246 (representing the solicitor-client costs margin over party-party costs to be paid by the respondent). Approached this way, the proposed settlement represents approximately $2.39 million plus party-party costs, which is slightly more than a 100% recovery, excluding interest.

42 The materials also show that, on a rough calculation, if interest is included, the aggregate value of participating class members' claims is approximately $3.45 million. On that basis, the best possible recovery was $3.54 million plus party-party costs. Taking the same approach as above, a settlement of $2.39 million plus party-party costs thus represents 67.5% of the best recovery.

43 I am satisfied the settlement is reasonable when assessed against the best possible recovery, but in my view it is not particularly useful to assess the proposed settlement on that basis. Doing so involves the unrealistic assumption that the applicant will succeed in full on both liability and quantum, and it is more useful to assess the reasonableness of the proposed settlement in light of the attendant risks of litigation. Having regard to the risks the proceeding faced on liability and quantum, the proposed settlement falls comfortably at the high end of the range of possible settlements of the case, and is plainly fair and reasonable.

The reaction of the class to the settlement

44 Only two class members lodged objections to the proposed settlement.

45 One objection was signed and dated but included no contact details and did not contain any reasons for the objection. The presumed author of the objection did not respond to communications from the applicant's solicitors, Maurice Blackburn, seeking to clarify whether he in fact intended to object and if so whether he would provide reasons for the objection. The other objection was lodged by mistake. That class member did not provide reasons for the objection and, as it eventuated, intended to register to share in the settlement rather than to object. That class member subsequently registered.

THE PROPOSED DEDUCTIONS UNDER THE SDS

46 The SDS provides for the deduction of four amounts from the settlement sum prior to the distribution of compensation to class members. The proposed deductions are for:

(a) reimbursement of the Funder for the costs it expended and payment of a litigation funding commission;

(b) the unpaid component of the applicant's solicitor's fees;

(c) a reimbursement payment to the applicant; and

(d) settlement administration costs payable to the Administrator of the SDS, for the costs incurred in administering the settlement.

I will deal with each of these in turn.

The proposed deduction for litigation funding commission

47 The applicant seeks an order under s 33V of the FCA or under the Court's equitable jurisdiction that the Funder be paid $750,000, representing 25% of the gross settlement, from the common fund of class members' recoveries through the settlement. The Funder also seeks such an order.

48 I am satisfied that in the circumstances of the present case it is "just" pursuant to s 33V(2) to order that 25% of the gross settlement be distributed to the Funder, so as to fairly and equitably distribute the burden of litigation funding expenses amongst all persons who have benefited from the action, and so as to avoid the unjust enrichment of the class members. For consistency described such an order I will adopt the description "Expense Sharing Order" used by Lee J in *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423 (***Lenthall***) at [3].

49 My analysis as to whether is appropriate to make such an order necessarily starts with the judgment of the majority in *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 374 ALR 627 (***Brewster***). (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, with Gageler and Edelman JJ in dissent). The majority held that s 33ZF does not empower the Court to make a common fund order (at [3] per Kiefel CJ, Bell and Keane JJ; at [125] per Nettle J; and at [135] per Gordon J). Each of the judges who formed the majority referred to s 33ZF as a supplemental or "gap-filling" power. That is, a power available where it is conducive to the exercise of some express power, or to fill a gap when the express powers are wanting in some way, but not to empower orders that it appears the legislature stopped short of authorising.

50 But neither the ratio of *Brewster*, nor the considered dicta of the majority, stand for the proposition that the Court has no power to make a common fund order upon court approval of a settlement under s 33V(2) of the FCA: see *Lenthall* at [12] (Lee J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 at [31] (Beach J); *Vocus* at [72] (Moshinsky J).

51 It should be kept in mind that:

(a) section 33V(2) is not a "gap filling" power. It is a broad discretionary power granted to the Court specifically in relation to the distribution of any money paid under a settlement or paid into Court. It contains no express limit on the identity of the recipient of money so distributed, and any implied limit arises only from and is bounded by the purpose for which the s 33V(2) power was conferred: see *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374 (***Kuterba***) at [6] (Beach J);

(b) the words of s 33V(2) are not qualified in any way that can be regarded as analogous to the words of limitation in s 33ZF – that the order is "appropriate or necessary *to ensure that justice is done in the proceeding*" (emphasis added) – which the plurality in *Brewster* emphasised (including at [19], [21], [46] and [50]). The only precondition to the exercise of power under s 33V(2) is that the Court considers the relevant order to be "just" with respect to the distribution of money paid under a settlement or paid into Court;

(c) the power under s 33V(2) is only available to be exercised following approval of a settlement under s 33V(1). By that stage of a proceeding any litigation funding has already been provided and the relevant class action has been run to its conclusion. Thus an Expense Sharing Order under s 33V(2) has little or nothing to do with assuring a potential funder of the litigation of a sufficient level of return upon its investment, which was one of the main concerns of the plurality in *Brewster* (at [3]); and

(d) relatedly, the power under s 33V(2) can only be exercised at a point when the expenses associated with bringing the proceeding to a successful conclusion for the applicant and class members have actually been incurred, rather than merely being estimated and prospective. As the plurality in Brewster recognised (at [68]):

> The provisions of Pt IVA of the FCA and Pt 10 of the CPA expressly provide for the making of orders distributing any proceeds of a representative proceeding. As will be seen, the occasion for the making of such an order is the conclusion of the proceeding. At that stage, if the group members happen to be indebted to a litigation funder for its support of their claims, the value of the litigation funder's support to the group members will be capable of assessment and due recognition. That stage is the appropriate occasion for orders for meeting and sharing the cost burden of the litigation because the value of the litigation and the extent of the burden will have been rendered certain.

The plurality thus contrasted the powers available to make a common fund order at an early stage of a proceeding with those available at the conclusion of a proceeding.

Section 33V is one of the specific provisions "apt to accommodate" the task of "the fixing of the rate of the funder's remuneration" at the conclusion of a proceeding: *Brewster* at [59].

52 In the absence of express words of limitation, s 33V must be construed according to the language that is used, free of any presumptions imported across from other provisions like s 33ZF. The majority in *Brewster* corrected what they found to be an overly expansive construction of s 33ZF, but the decision did not displace the established principle that the words of s 33V(2) should not be read down by making implications or imposing limitations which are not found in their express words, construed according to their natural meaning and in their proper context: *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* [1994] HCA 54; (1994) 181 CLR 404 at 421; *Wong v Silkfield* [1999] HCA 48; (1999) 199 CLR 255 at [11].

53 The proper scope of the decision in *Brewster* was recognised in the Practice Note, which was updated following that decision. Paragraph [15.4] of the Practice Note provides:

> Particularly in an open class action, the parties, class members, litigation funders and lawyers may expect that unless a judge indicates to the contrary the Court will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, amongst all persons who have benefited from the action. The notices provided to class members should bring this to their attention as early in the proceeding as practicable.

The Practice Note contemplates orders to the effect of a common fund order, howsoever such an order may be titled, at the conclusion of a proceeding.

54 I consider the considerations relevant to the assessment of what is "just" under s 33V(2), or what is fair and equitable in the exercise of the Court's equitable jurisdiction, are not confined to the circumstances that might be regarded as "appropriate or necessary to ensure justice is done in the proceeding", and there is scope for consideration of any wider circumstances of "justness" with respect to the distribution of monies paid under the settlement.

55 It can be accepted, as Moshinsky J noted in *Vocus* at [72], that the observations of the majority in *Brewster* favoured the making of funding equalisation orders over common fund orders. But if s 33V(2) empowers the Court to make a common fund order where it is just to do so, as it does, the real question is one involving the proper exercise of discretion which will necessarily be case-specific.

56 I have taken into account the following salient considerations in relation to the Expense Sharing Order made.

57 *First*, the Funder funded the litigation and took on the costs and risks of the case in return for a percentage funding commission payable if the case was successful. The case could not have been undertaken without litigation funding, which funding has meant that class members will share in a settlement which I consider to be fair and reasonable having regard to the attendant risks of the case.

58 *Second*, and importantly, the Funder funded the litigation during a period when numerous single judges of this Court and intermediate courts of appeal had affirmed the availability of common fund orders made in the early stages of a class action. The evidence shows that the Funder agreed to fund the proceeding on the basis that it would be conducted on an 'open' class basis without undertaking any 'book building', in the expectation that a common fund order was likely to be made.

59 The applicant sought a common fund order and the Court made such an order on 2 May 2019. The Funding Terms approved under that order provide that the Funder is entitled to a funding commission of one of two nominated percentages, being:

(a) no more than 25% of the gross settlement, if settlement occurs on or before 31 August 2019; or

(b) no more than 30% of the gross settlement, if settlement occurs on or after 1 September 2019.

60 At the time the case was commenced it was reasonable for the Funder to treat a common fund order as being likely to be made at some stage in the litigation. Once the common fund order was made, the Funder had a legitimate expectation that upon a successful settlement it would receive a funding commission of no more than 25% or 30% of the settlement. It should also be kept in mind that neither party, nor any class member, applied to discharge the common fund order and as an order of a superior court it therefore remains valid: see *Kable* at [32]. The form of the order however means that it cannot operate without a further order of the Court (c.f.: *Pearson v State of Queensland (No 2)* [2020] FCA 619 at [268]).

61 Given that the Funder provided the finance that enabled the class action to be run to a successful conclusion on the basis of a common fund order, it would not in my view be "just" if the Funder

was subsequently not remunerated fairly for the costs and risk it took on according to the terms upon which it acted.

62 Further, the evidence shows that, if a common fund order was not made, the Funder would have insisted, as per the funding agreement, that the applicant seek an order that RMBL produce a list of relevant borrowers and it would then have conducted a book-building process. That was a condition subsequent in the funding agreement and the Funder was not obliged to continue to fund the proceeding unless that application for production was successful and in the Funder's opinion the case remained financially viable. It cannot be known how many class members would have signed litigation funding agreements had the book-building occurred, but the important point is that the Funder relied upon the common fund order in continuing to fund the proceeding.

63 *Third,* this Court has on numerous occasions exhorted plaintiff law firms and funders not to engage in the wasted expense of book-building, given the opt out nature of the Part IVA regime and the availability of common fund orders: *Perera v GetSwift Limited* [2018] FCAFC 202; (2018) 263 FCR 92 at [295] (Middleton, Murphy and Beach JJ); *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107; (2019) 369 ALR 583 at [69](2) (Lee J with whom Middleton and Beach JJ agreed). The applicant's solicitors and the Funder apparently observed those exhortations because class members were not asked to enter into funding agreements and only the applicant executed such an agreement.

64 That is significant because a funding equalisation order in the present case could only operate to share across the class the applicant's personal obligation to pay a funding commission to the Funder. That result would be unfair because the funder would recover only a *de minimis* amount and it would not fairly remunerate the Funder for the costs and risks it assumed in funding the successful conduct of the proceeding. It would also unjustly enrich class members who, in that hypothetical, would have had a 'free ride' (financed by the Funder) in achieving such recoveries.

65 *Fourth*, and relatedly, a funding equalisation order is not always the appropriate counterfactual or comparator to orders such as an Expense Sharing Order: see *Blairgowrie No 3* at [105]; *Caason* at [162] and [167]-[168]. The present case, where for perfectly understandable reasons book-building was not undertaken, is a paradigm example of that. The fact that no class members entered into a funding agreement means that there can be no meaningful comparison

between the amount that would be charged to class members under a putative funding equalisation order and the Expense Sharing Order that I consider to be appropriate.

66 In *Vocus*, Moshinsky J decided that a funding equalisation order was preferable to a common fund order but the facts in *Vocus* are readily distinguishable from those in the present case. The class in that case comprised both a significant 'book' of class members who had signed litigation funding agreements, together with a body of class members who had not. As I have said, in the present case only the applicant has signed a funding agreement. And I should add that the presence or absence of book-building is not determinative, as the exercise of the discretion under s 33V(2) is case specific and it will usually involve consideration of a variety of factors.

67 *Fifth*, the Notice of Proposed Settlement informed class members in clear terms that the Funder proposed to seek a common fund order under s 33V and/or in the Court's general equitable jurisdiction. Class members were informed that the applicant would seek Court approval for a payment of approximately $750,000 to the Funder representing 25% of the gross settlement, and that they had a right to object to any aspect of the proposed settlement. No class member objected to this aspect. It is relevant too that neither party nor any class member contended that a funding equalisation order was fairer or preferable to an order in the nature of the Expense Sharing Order.

68 *Sixth*, an Expense Sharing Order is a transparent mechanism for fairly apportioning funding charges across the class and straightforward for class members to understand. Such an order avoids disputes about whether, on its proper construction, the funding agreement permits the Funder to charge a funding commission on the "grossed up" amount redistributed to funded class members from unfunded class members' recoveries.

69 *Seventh*, in my view the funding commission the Funder seeks under the proposed Expense Sharing Order is fair and reasonable. It is not excessive or unreasonable when under the terms of the extant common fund order the Funder has a legitimate expectation that it is entitled to receive no more than 30% of a settlement achieved at that date. The Funder could have sought a funding rate of 30% of the gross settlement, but it instead sought the reduced rate of 25%.

70 The approval of funding rates should not become a "race to the bottom" and they should provide an appropriate reward for the risk undertaken by a litigation funder: *Kuterba* at [12]. The proposed funding rate of 25%, representing a funding commission of $750,000, is

reasonable and proportionate when the Funder paid a total of $681,733.73 in legal costs and disbursements up to the point of settlement and it bore the risk of 75% of the costs incurred in the proceeding and 100% of the disbursements. It also bore the risk of an adverse costs order in circumstances where it estimated adverse costs would be approximately $700,000.

71 Further, it is wrong to place too much emphasis on the headline rate. This is a small settlement, and the return for the funder is close to 1:1 with the costs actually incurred, a return which is well below the Funder's expected rate of return and of the litigation funding market generally. In the circumstances of the present case 25% is commercially realistic, properly reflects the costs and risks taken on by the Funder, and avoids hindsight bias. It is within the range found by Professor Morabito's empirical research; that the median funding rate for funded class actions settled between January 2013 and December 2018 was 25.5% of the gross settlement: Professor V Morabito, "An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments", Monash University (January 2019).

72 *Eighth*, a funding commission of $750,000 is also in my view proportionate. After deduction of the funding commission the amount available for distribution to class members would be $2.25 million, which is almost equivalent to all the collection charges paid by class members, excluding interest. Taking into account *all* Court-approved deductions, class members will receive an amount which is approximately 55.9% of the collection charges they paid and approximately 43.33% of the gross settlement. In my view, in the circumstances of the case that is reasonable and proportionate.

73 It is plainly undesirable that more than half of the settlement is taken up by legal costs, litigation funding charges and other expenses but the relevant comparator for the purposes of proportionality is the settlement or judgment amount the applicant's solicitors reasonably expect would be achieved by class members, not what they actually achieved: *Blairgowrie No 3* at [181]; *Caason* at [148]-[152]. The evidence shows that the applicant's solicitor and the funder had a reasonable basis for considering that the aggregate claim size would be much larger than its eventual aggregate quantum. The aggregate quantum was lower than expected because of an uncommonly high level of opt out (approximately 60% of class members opted out), a low rate of class members registering to become participating class members, and because of the number of corporate borrowers who had been deregistered and were therefore unable to participate in the case unless reinstated. This is not a case like *Petersen*

Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3) [2018] FCA 1842; (2018) 132 ACSR 258 where obvious inquiries that would have revealed an overestimated claim-size could have been, but were not made. I am satisfied that the solicitors for the applicant and the Funder took appropriate steps to ascertain the size of the viable claim group as early and as efficiently as possible.

The proposed deduction for legal costs

74 The Funder paid the applicant's solicitors 75% of their fees and 100% of the disbursements. The total legal fees and disbursements incurred up to and including 31 March 2020 comprised $872,246.72 (including $30,141.24 representing a 25% uplift on unpaid professional fees), of which $681,733.73 had been paid by the Funder. That left $190,512.99 unpaid at the time of settlement approval.

75 Mr Foale estimated, and I accept, that: (a) fees and disbursements for the application for settlement approval and work preparatory to the anticipated settlement administration would be in the region of $100,000 to $125,000 (incl. GST); and (b) settlement administration costs would be approximately $99,000 (incl. GST). Thus, Mr Foale estimated that the total legal costs including settlement administration would be in the region of $1.075 million to $1.1 million (incl. GST). That estimate did not include a large amount of fees and disbursements incurred by the applicant's solicitors during the investigation phase of the proceeding which were permanently written off when it appeared for various reasons that the case would not proceed.

76 The applicant's solicitors however volunteered to limit their costs claim to $950,000, representing a reduction of approximately $125,000 to $150,000, or approximately 11.6% to 13.6% of the estimated costs (on top of the fees and disbursements earlier written off). The terms of the SDS direct that the legal costs paid by the Funder be reimbursed to it, and subject to the overall limit of $950,000, the applicant's solicitor's unpaid costs including the costs of settlement administration be paid to it.

77 Having regard to: (a) the relatively small settlement amount; (b) my review of the costs agreements and the applicant's solicitors invoices; (c) the relatively modest fees charged; (d) the fees and disbursements incurred in investigating the claim which were written off; and (e) the applicant's solicitors agreement to limit the costs claimed by $125,000 to $150,000; I did not consider it necessary to appoint a referee in relation to the costs or to require an independent cost consultant's report.

78 I am satisfied that the applicant's legal costs are fair, reasonable and proportionate. Pursuant to s 33V(2) I approve the reimbursement of the legal costs paid by the Funder and payment of the unpaid costs to the applicant's solicitors. It is just, fair and equitable that those class members who stand to benefit from the settlement pay the same pro rata share of the legal costs that were incurred to achieve the settlement.

The proposed reimbursement payment to the applicant

79 The SDS provides for a reimbursement payment to the applicant in the sum of $5,000 for the time, expense and inconvenience of prosecuting the claim for the benefit of class members.

80 Mr Foale deposed that his conservative estimate of time that Mr Uren had spent on the case was at least 50 hours. Mr Uren prepared a 'Log of times, dates and expenses' which showed more than 40 hours of time spent, not including the time he spent in travel for various 330 km roundtrips between his home and Melbourne for the purposes of the case, plus $850 in expenses for attendance at the initial trial. The applicant sought that he be reimbursed $5,000 representing a rate of $100 per hour.

81 In my view a reimbursement payment of $5,000 is fair and reasonable.

The settlement administration costs

82 Mr Foale deposed that Maurice Blackburn has an internal team dedicated to settlement administration work, and Mr Foale attached a spreadsheet setting out its estimate of the costs likely to be incurred at each stage of the settlement administration process, in a total of $99,000 (incl. GST). Having regard to the spreadsheet, and the fact that the applicant's solicitors have agreed to limit the costs charged overall, I am satisfied that the settlement administration costs are fair and reasonable. Given the applicant's solicitor's offer to limit their costs, if settlement administration costs are higher than the estimate provided that will not be at the expense of the class members.

THE REASONABLENESS OF THE SDS

83 The proposed SDS is not complex. It provides for a distribution to each registered class member proportionate to the amount each paid by way of collection charges.

84 The loss assessment method proposed is simple and readily understandable by class members but, as the applicant accepted, other more accurate calculation methods could be used, including by:

(a) making the payment proportionate to the amount of collection charges paid plus the interest payable from the date of payment thereof; or

(b) weighting the payment to allow for the prospect that the Court may have preferred the agreed rate construction, which would have the effect that the value of many registered class members' claims would reduce significantly or potentially disappear altogether.

85 I am though satisfied that such alternative methods are likely to involve a significant level of increased cost without a sufficient correlative benefit. While making the payment proportionate to the amount of the collection charges paid plus interest would be more accurate, it adds an additional complication to the calculation process which involves further expense which is unlikely to make a sufficient difference to justify the cost. Further, weighting the payment as described above is practically unworkable as it would hinge largely upon being able to make accurate assessments of the likely outcome of the construction question and weighting each case accordingly, before applying any other factors such as amount paid and interest. Also, neither alternative approach takes account of the defences made by RMBL, at least some of which are likely to be case specific. It would be both unwieldy, expensive and disproportionate to the relatively small sums involved to apply such weighting.

86 Particularly when the proposed loss assessment method relates to a relatively small settlement sum there is a balance to be struck between fine-tuning the assessment method, and the cost of undertaking an exercise which produces a more accurate result: *Camilleri* at [43](d); *Andrews v Australia and New Zealand Banking Group Ltd* [2019] FCA 2216 at [45]-[46] Middleton J). In my view the method proposed under the SDS is fair and reasonable.

THE ISSUE REGARDING ALLEGED DEFAULTING BORROWERS

87 After the settlement deed was entered into, but before the SDS was finalised, RMBL informed the applicant's solicitors that there may be class members in respect of whom RMBL had offsetting claims, arising for example out of defaults in respect of those class members' loans.

88 RMBL submits that any borrowers who are included in the list of participating class members, but in respect of whom RMBL has an offsetting claim for monies owed by them to RMBL in an amount which exceeds the collection charges paid by the borrower, should be excluded from participating in the settlement. Alternatively, if there is any doubt or dispute about RMBL's offsetting claim, RMBL submits that the SDS should provide for the Administrator to require proof going to whether such class members owe amounts to RMBL that exceed the collection

charges paid by them. RMBL identified nine class members whose loans are in default, who it contends still owe amounts to it in respect of unpaid interest, costs or other defaults after the underlying mortgage security was sold by RMBL as mortgagee in possession.

89 RMBL argues that the monies owed to it would be the subject of equitable set offs if the defaulting borrowers pursued individual claims against it in respect of any alleged overpayments of collection charges, including in the course of the class action after the resolution of common issues, or if any of them pursued other claims against RMBL separately. It contends that as a matter of principle, those who seek to take or benefit from a fund ought first to make good anything they owe to the fund, relying on the rule in *Cherry v Boultbee* [1838] 41 ER 171; see also *In the matter of Anne Lewis Pty Ltd* [2016] NSWSC 1860 at [16]-[17] (Black J).

90 RMBL contends that if the defaulting borrowers are to remain as participating class members, by application of the rule in *Cherry v Boultbee*, it is appropriate for the Administrator to reduce the amount to be distributed to each of them by the amount they owe RMBL, but because they each owe more to RMBL than the collection charges paid by them it would be more practicable to simply exclude them from the settlement by removing them from the list of participating class members.

91 I do not accept RMBL's contentions.

92 *First*, RMBL's argument is based in a legal conclusion that it has an entitlement to be paid monies by the relevant class members, without there having been any judicial determination of that question. The class members may have defences to the claims asserted by RMBL, including defences under the Limitations Act given that the data provided by RMBL shows the dates of discharge of the loan facilities range from 2005 to 2013.

93 RMBL's suggestion that the task of determining whether class members owe monies to it be put in the hands of the Administrator is not a satisfactory answer. On the assumption that the Court in fact has power to do so, which is not self-evident, I consider that it would be inappropriate to make orders providing for the Administrator to determine whether certain class members owe monies to RMBL, when it would require the Administrator to decide legal disputes outside of the scope of the claims which were resolved by the settlement.

94 Further, if the SDS was amended to provide for the Administrator to make such decisions, the settlement administration will take longer and be more expensive, with that delay and cost

being borne by class members. RMBL did not offer to cover any increased costs of settlement administration, and I do not consider it appropriate to impose that cost and delay on the class members.

95 *Second*, there is nothing to prevent RMBL from proceeding against any of the allegedly defaulting borrowers. The settlement deed does not provide a release in favour of the class members. RMBL can readily estimate the approximate amount of money each allegedly defaulting borrower will receive under the SDS and when they will receive it. If RMBL wishes to recover the monies allegedly owed, it would be straightforward for it to bring proceedings against the allegedly defaulting borrowers, and to obtain default or summary judgment if the debts are as plain as it contends.

96 *Third*, any allegedly defaulting borrowers are entitled to be heard on an application which would have the effect of excluding them from recovering compensation under the settlement. The Notice of Proposed Settlement did not inform class members that they might be disentitled from claiming compensation under the proposed settlement if RMBL alleged that they owed monies under their loan agreements. Before an amendment to the SDS of the nature which RMBL seeks could properly be made, the class members would need to be informed, given an opportunity to obtain legal advice, and a further settlement approval hearing take place to enable them to be heard. In circumstances where RMBL's rights to seek recovery of the alleged debts are unaffected, such cost and delay would be contrary to s 37M of the FCA.

97 In the circumstances it is appropriate to decline to make the orders sought.

I certify that the preceding ninety-seven (97) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy.

Associate:

Dated: 13 May 2020