FEDERAL COURT OF AUSTRALIA

Gill v Ethicon Sàrl (No 12) [2023] FCA 902

File numbers:	NSD 1590 of 2012 NSD 310 of 2021
Judgment of:	**LEE J**
Date of judgment:	3 August 2023
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – incorporated solicitors controlled by a public company and who claim to be entitled to $82 million in costs and disbursements for running a class action now seek an additional alleged “just” deduction of $32 million from the settlement proceeds which would otherwise be paid to women who suffered serious and chronic complications caused by pelvic mesh implantation and who obtained a “borderline” settlement – where solicitors originally agreed to pay costs and disbursements and did so out of retained earnings until shortly prior to trial and then decided to enter into a “disbursement funding facility” potentially exposing group members to interest charges initially calculated at rates between 22.4% and 31.8% per annum – where evidence does not reveal sufficient exploration of alternatives and no earlier contingency plan if the case proceeded to trial – where evidence reveals inadequate disclosure to applicants and no disclosure to group members – where representation made that the interest sum now claimed could be recovered against the respondents but solicitors now say such an argument is “hopeless” and no attempt was made to make an application to the trial judge for an order for recovery of the sum – evidence reveals retained earnings reduced by over $45 million in dividends since 2016 financial year – absence of sufficient proof that exposure of group members to interest charges was reasonable in all the circumstances – proposed order not just for numerous reasons – application dismissed with costs

Legislation:	*Competition and Consumer Act 2010* (Cth) Pt VIB *Corporations Act 2001* (Cth) Pt 2D.1, s 254T(2) *Federal Court of Australia Act 1976* (Cth) Pts IVA, VB, ss 33V(1), 33V(2), 33Z, 33ZA, 33ZB, 33ZJ(3) *Trade Practices Act 1974* (Cth) Pt VIB *Legal Profession Uniform Law* (NSW) ss 6, 181, 182 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 4.1.1 *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* (NSW) (repealed)

Cases cited:

Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3) [2020] FCA 1885; (2020) 385 ALR 625

Dyczynski v Gibson [2020] FCAFC 120; (2020) 280 FCR 583

Ethicon Sàrl v Gill [2021] FCAFC 29; (2021) 288 FCR 338

Flower & Hart v White Industries (Qld) Pty Ltd [2001] FCA 370; (2001) 109 FCR 280

Furnell v SEPL Pty Ltd [2022] FCA 1603

Gill v Barnsley Canister & Others (County Court at Barnsley, Corkill DCJ, 15 November 2021, unreported)

Gill v Ethicon Sàrl (No 2) [2019] FCA 177; (2019) 134 ACSR 649

Gill v Ethicon Sàrl (No 5) [2019] FCA 1905

Gill v Ethicon Sàrl (No 6) [2020] FCA 279

Gill v Ethicon Sàrl (No 7) [2020] FCA 700

Gill v Ethicon Sàrl (No 10) [2023] FCA 228

Gill v Ethicon Sàrl (No 11) [2023] FCA 229

IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq) [2009] FCAFC 9; (2009) 253 ALR 240

Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Ltd [2019] FCAFC 107; (2019) 369 ALR 583

Law Society of New South Wales v Harvey [1976] 2 NSWLR 154

Pilmer v Duke Group Ltd (in liq) [2001] HCA 31; (2001) 207 CLR 165

Secretary of State for the Department of Energy and Climate Change v Jones [2014] EWCA Civ 363; [2014] 3 All ER 956

The National Bolivian Navigation Company and Others v William Millar Wilson and Others (1880) 5 App Cas 176

Walker v Wimborne (1976) 137 CLR 1

Westpac Banking Corporation v Lenthall [2019] FCAFC 34; (2019) 265 FCR 21

Williamson v Sydney Olympic Park Authority [2022] NSWSC 1618

	Class Actions Practice Note (GPN-CA) Grech A, and Morrison K, "Slater & Gordon: the Listing Experience" (2009) 22 *Georgetown Journal of Legal Ethics* 535 Hersch A, "Disbursement funding: the benefits for SME law firms" (2017) 139 *Precedent (Australian Lawyers Alliance)* 46 Mark S, "The Corporatisation of Law Firms – Conflicts of Interests for Publicly Listed Law Firms" (Australian Lawyers Alliance National Conference 2007, 13 October 2007) "Recovering interest on disbursement loans: the need for evidence" (Civil Litigation Brief, 22 February 2022)
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	205
Date of hearing:	13 June, 24 July 2023
Counsel for the intervener:	Mr A Leopold SC with Mr B Hancock
Solicitor for the intervener:	Shine Lawyers
Contradictor:	Mr M Darke SC with Ms R Francois
Solicitor for the contradictor:	William Roberts Lawyers

ORDERS

NSD 1590 of 2012

BETWEEN:	**KATHRYN GILL** First Applicant **DIANE DAWSON** Second Applicant **ANN SANDERS** Third Applicant
AND:	**ETHICON SÀRL** First Respondent **ETHICON, INC.** Second Respondent **JOHNSON & JOHNSON MEDICAL PTY LIMITED (ACN 000 160 403)** Third Respondent

NSD 310 of 2021

BETWEEN:	**LISA TALBOT** Applicant
AND:	**ETHICON SÀRL** First Respondent **ETHICON, INC.** Second Respondent **JOHNSON & JOHNSON MEDICAL PTY LIMITED (ACN 000 160 403)** Third Respondent

ORDER MADE BY: **LEE J**

DATE OF ORDER: 3 AUGUST 2023

THE COURT ORDERS THAT:

1. The application by the solicitors for the applicants for an order pursuant to s 33V(2) of the *Federal Court of Australia Act 1976* (Cth) for a deduction from the approved settlement fund of an amount in excess of $32 million, calculated by reference to the interest incurred on disbursement funding facilities be dismissed.
2. For the avoidance of doubt, Order 1 does not prevent a further application by the solicitors for the applicants for a different s 33V(2) order relating to the same subject matter.
3. The solicitors for the applicants pay the costs of the contradictor as agreed or, failing agreement, following a lump sum assessment, with such an assessment to be conducted if the failure to reach agreement as to costs within 14 days is notified to the Associate to Justice Lee.

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

REASONS FOR JUDGMENT

LEE J:

A INTRODUCTION

1. This is an application for a payment out of an approved settlement fund to an incorporated solicitors' practice (**Shine**). Shine is a wholly owned subsidiary of Shine Justice Ltd, an entity which listed on the Australian Securities Exchange (**ASX**) in 2013 (**Shine Justice**).

2. The application arises in unusual circumstances and gives rise to important issues. What is at stake is a proposed payment of well over $32 million going to solicitors out of a settlement sum, which would otherwise go to group members, in circumstances where the sum was not recovered against the respondents (even though the representative applicants were fully successful at trial and on appeal and obtained favourable costs orders).

3. The deduction is proposed even though: (1) the solicitors have either already recovered (or claim to be entitled to recover) around $82 million for costs and disbursements for the conduct of these matters; and (2) I described approval of the settlement in *Gill v Ethicon Sàrl (No 10)* [2023] FCA 228 (at [170]) as "borderline", as the $300 million paid pursuant to the settlement was "at the low end of the range of fair and reasonable settlement outcomes".

4. The legal foundation of the claim is at least superficially straightforward. In *Gill v Ethicon Sàrl (No 10)* and *Gill v Ethicon Sàrl (No 11)* [2023] FCA 229, I approved the settlement of two open class actions (*Gill v Ethicon Sàrl* (NSD 1590 of 2012) (**Gill Proceeding**) and *Talbot v Ethicon Sàrl* (NSD 310 of 2021) (**Talbot Proceeding**)) pursuant to s 33V(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).

5. Put in precise terms, the present question for determination is whether it is "just" that a sum referable to interest accrued on two "disbursement funding facilities" entered into by Shine now be paid to Shine. As at 31 May 2023, that amount was $32,235,418. Interest continues to accrue at a rate of 11.6% per annum. Shine estimates that the

amount of interest which accrued from 1 June 2023 until 20 June 2023 was $99,261. That amounts to approximately $4,963.05 per day. I will refer to this accruing interest amount in the balance of these reasons as the **relevant amount**.

6. As may already be anticipated, the other costs and disbursements sought to be recovered by Shine are not the subject of this judgment. I have made orders appointing a referee to conduct an inquiry and prepare a report for the Court as to the reasonableness of the applicants' legal costs incurred in relation to the proceedings (but excluding the applicants' costs which have been paid by the respondents to date).

7. There is no issue as to power to make the payment if I was satisfied it was just to make it. Section 33V(2) of the FCA Act relevantly provides that if there is an approved settlement, the Court "may make such orders as are just with respect to the distribution of any money paid under a settlement".

8. The exercise of the discretion to make any distribution order under s 33V(2) is conditioned upon: *first,* there being a settlement (present here); *secondly,* the settlement being one by which a fund of money has been or is to be created or which provides for payment out of a fund of money paid into court (present here); *thirdly,* the proposed order effects a distribution to a person or persons of all or part of the fund (which would be the case if the proposed order is made); and *fourthly*, the proposed order for distribution being one that is considered by the Court, on the material before it, to be just (the issue of contention on this application). Insofar as *power* to make a s 33V(2) order is concerned (as opposed to any discretionary considerations), the fact that the proposed payment is made to a solicitor or a solicitor corporation is neither here nor there.

9. However, it is important at the outset to stress an important point in relation to the proposed recipient of such an order: the payment sought by Shine is not what has become described as a "common fund order" (**CFO**) or, more particularly, a payment of the kind contemplated in *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Ltd* [2019] FCAFC 107; (2019) 369 ALR 583, being an order which incorporates the payment of an amount, in addition to legal

costs, out of any approved settlement pursuant to s 33V(2) of the FCA Act (or under ss 33Z, 33ZA or 33ZJ(3), or otherwise upon judgment) whereby a "just" distribution is made to the solicitors who have borne the risks of funding the litigation and securing the creation of the settlement fund (or judgment sum) for the benefit of group members. At the risk of creating further jargon in this area, this form of CFO has commonly been labelled a "solicitors' common fund order": see *Klemweb* (at 587–588 [16]–[23] per Middleton and Beach JJ; at 612–613 [139]–[141] per Lee J). Such a proposed order was never apparently contemplated; nor was such an order sought by Shine. It was certainly never notified as a possibility to group members. One assumes this is because Shine was never prepared to adopt the role of a litigation funder *per se*, which has been thought by some to create potential issues about recovery under s 33V(2) because of a perceived inconsistency with some prohibitions on contingency fee arrangements. Although I consider these misgivings are misplaced, it is unnecessary to pursue this topic further for present purposes. Moreover, adopting such a funding or joint funding role would, of course, have likely required Shine to provide a costs indemnity to the applicants and also assume an obligation to pay security for costs in exchange for funding the litigation, as is the case in funded class actions where the usual adverse cost regime applies.

10. In any event, for reasons I will explain below, I do not consider the proposed order sought would be just. Having reached that conclusion, the application must be dismissed.

11. Despite my concerns about aspects of what occurred expressed below, I wish to emphasise that nothing about this decision should be seen as an implied criticism of any individual solicitors. To the contrary, I have no doubt the individual solicitors for the applicants were committed to the case. In the end, they succeeded in securing a signal victory, upheld on appeal, against a very determined opponent. This was no small achievement, and irrespective of the contribution of others, the curial outcome no doubt had much to do with the hard work, professionalism and dedication of the individual solicitors involved in the day-to-day conduct of the litigation, most notably, Ms Janice Saddler and Ms Rebecca Jancauskas. Nor should it be perceived as any

criticism of Mr Craig Allsopp, a well-regarded and experienced class actions solicitor who came into the matter recently.

12. It is necessary to commence by turning to make a number of findings as to the relevant background.

B THE EVIDENCE AND FINDINGS

13. Although initially I thought it may be possible to determine this application promptly on limited evidence at the time of the settlement approval application, it became apparent the application raised novel and substantive issues and its resolution was deferred in order to allow Shine to put on any and all material it proposed to rely upon. A direction to this effect was communicated by my Associate to Shine on 7 June 2023.

14. In the end, the following affidavits were read: five affidavits of Mr Ravin Raj, the Chief Financial Officer of Shine Justice, affirmed on 11 November 2022 (**November Affidavit**); 19 December 2022 (**December Affidavit**); 4 April 2023 (**April Affidavit**); 9 June 2023; and 21 July 2023 (**July Affidavit**); three affidavits sworn by Ms Saddler on 11 November 2022 (**First Saddler Affidavit**); 15 November 2022 (**Second Saddler Affidavit**); and 28 November 2022 (**Third Saddler Affidavit**); and an affidavit sworn by Mr Craig Allsopp on 22 July 2023 (**Allsopp Affidavit**). Without objection, the following materials were also admitted into evidence:

(1) the "Prospectus for an offer of 45,000,000 shares in Shine Corporate Ltd ACN 162 817 905 at $1.00 per share", dated 28 March 2013 (**Prospectus**). Shine Corporate Ltd (**Shine Corporate**) later became Shine Justice;

(2) the Shine Justice "Code of Conduct", adopted by the board on 26 May 2016 and last reviewed on 26 May 2023 (**Code of Conduct**);

(3) the Constitution of Shine Justice dated 19 October 2022 (**Constitution**); and

(4) Shine Justice's Annual Reports from 2016 to 2022.

15. On the basis of this material, I make the following findings.

B.1 Shine and Shine Justice Ltd

16. Shine is the largest legal entity within the Shine Justice group of companies.

17. Although there was no reference to it in the evidence filed by Shine on this application, Shine Justice has paid dividends to its shareholders during the currency of this proceeding. Shine Justice's Annual Reports record the total amount paid in dividends each financial year. The dividend payments (rounded to the nearest thousand) and dividend payout ratio (calculated based on the dividends actually paid during the year and profit for the year) for 2016–2022 were as follows:

Year	Dividend Payments	Dividend Payout Ratio
2022	$9,963,000	32%
2021	$8,230,000	32.2%
2020	$6,928,000	32.3%
2019	$6,061,000	43.4%
2018	$5,195,000	27.2%
2017	$5,638,000	28%
2016	$3,011,000	20.3%

18. The total distributed in dividends since the 2016 financial year amounts to some $45.026 million.

19. This means, one assumes, that at the time these dividends were paid, the directors of Shine Justice considered, in accordance with s 254T(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) that: (1) the company's assets exceed its liabilities immediately before the dividend was declared and the excess was sufficient for the payment of the dividend; (2) the payment of the dividend was fair and reasonable to the company's shareholders as a whole; and (3) the payment of the dividend did not materially prejudice the company's ability to pay its creditors.

20. The precise timing and amounts of certain dividend payments are recorded in the sections that follow.

B.2 The Retainers and the Litigation Generally

21. For those unfamiliar with this litigation, the Gill Proceeding was commenced in October 2012.

22. The initial representative applicant, Mrs Julie Davis, entered into a Conditional Costs Agreement dated 21 August 2012, which was superseded by a Conditional Costs Agreement dated 10 September 2014. Mrs Kathryn Gill entered into a Conditional Costs Agreement dated 11 December 2015. Conditional Costs Agreements were entered into by Mrs Dawson and Mrs Sanders in March 2016 and an undated Conditional Costs Agreement relating to Mrs Talbot is in evidence which, I infer, was entered into in much more recent times. Shine did not suggest that for present purposes there was any material difference between these agreements and, where, appropriate, I will describe them collectively as the **Costs Agreements**.

23. The Costs Agreements provide for "no win, no fee" retainers. Costs and disbursements are charged at hourly and fixed rates. Clauses 4–6 (and, in Mrs Talbot's case, cll 13–15) relevantly provide:

> 4. We will only charge you professional fees and disbursements upon the successful outcome of the matter or if this agreement is terminated in accordance with clauses 35 to 38 below.
>
> 5. If you lose, you will not be liable to pay our professional fees or any disbursements or expenses incurred on your behalf.
>
> 6. If your claim is successful and an order for payment of your costs is obtained against the Respondents, we agree to limit your costs and disbursements payable to the amount recovered from the Respondents for your share of the party/party costs.

24. The Costs Agreements include further statements to the following effect in respect of the recovery of costs and disbursements:

(1) cl 29 (cl 37 in Mrs Talbot's case): "An order by a court for the payment of costs in your favour will not necessarily cover the whole of your legal costs. However, we agree that the total costs and disbursements payable by you will be limited to the amount we recover from the Respondents for your share of party / party costs"; and

(2) cl 32, note (c) (cl 40, note (c) in Mrs Talbot's case): "The estimated ranges of costs are prepared bearing in mind that only a certain percentage of your total legal costs are recoverable or may be payable. In most matters, even if you win and obtain an order that the other party pays your costs, you will still be out of pocket with respect to legal costs charged by us on the solicitor/client basis. However we agree to limit your costs and disbursements payable to the amount we recover from the Respondents for your share of the party/party costs."

25. Apart from there being no costs indemnity provided to the client (as is common in funded litigation), three other matters are worthy of note, which Shine does not dispute. *First*, none of the clients have a contractual liability to pay interest under their Costs Agreements or pay any amount by which the relevant sum is calculated. *Secondly*, the fees were charged by reference to rates fixed by the Costs Agreements and, with the exception of Mrs Talbot, did not include or contemplate any "uplift" component (Shine told the Court, however, that it has "foregone this entitlement and does not seek to recover any uplift on its professional costs" in relation to Mrs Talbot). *Thirdly*, termination of the Costs Agreements by Shine is provided for in limited circumstances including with respect to Mrs Gill, for "just cause".

26. Acting pursuant to these retainers, the litigation was progressed by Shine. It had a long history but resulted in judgment by Katzmann J in favour of Mrs Gill, Mrs Dawson and Mrs Sanders (*Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905), following a trial which ran for 104 days from July 2017 to February 2018. Mrs Davis, although a client, had become a group member and Mrs Talbot's litigation was not part of the claims decided at the initial trial.

27. A vast sum was incurred by the applicants in costs and disbursements over the course of the initial trial. While I do not doubt the commitment of those involved and the fact it was necessary to expend very significant sums to pursue litigation on this scale, I cannot pass from this aspect of the chronology without noting the comments of the primary judge, Katzmann J, about the applicants' conduct of the matter (at [37]):

> It is questionable, for example, whether it was necessary for the applicants to plead so

> many causes of action. The applicants' pleadings were convoluted and, owing to cumbersome cross-referencing, often difficult to follow ... Insufficient judgment was exercised about the number of experts that should be retained in each discipline, the way in which the evidence should be elicited, and the documents that should be tendered …

28. I have the benefit of some familiarity with the proceeding as a member of the Full Court who heard the appeal and from case managing this and related proceedings in recent times. I have also had occasion, at times, to query the efficiency of the conduct of the litigation and the way costs have been incurred: see, for example, *Gill v Ethicon Sàrl (No 2)* [2019] FCA 177; (2019) 134 ACSR 649 (at 657–658 [34]). I am also conscious of delays and costs incurred on the settlement approval application (which took far longer than necessary because of having to pry some relevant information out of the applicants over several hearings, including basic details as to how much the claims were actually worth including interest and how aspects of the claim the subject of the proposed settlement were calculated): see, for example *Gill v Ethicon Sàrl (No 10)* (at [92]). Further, as I will explain shortly, the result of an assessment of the applicants' costs by a Registrar involved relatively modest recovery given the nature of the costs order. I mention all this not to be unduly critical or to diminish the quality and difficulty of the work, but to record deep scepticism as to whether it was truly necessary to spend anything like $82 million to conduct this admittedly hard fought litigation to this point.

29. In any event, following the delivery of judgment by Katzmann J, the applicants sought an order that the respondents pay 90% of their costs as agreed or taxed on an indemnity basis and their disbursements as agreed or taxed: *Gill v Ethicon Sàrl (No 7)* [2020] FCA 700. Justice Katzmann explained her Honour was not persuaded to make such an order because (at [41]–[43]):

> 41. … The applicants adduced no evidence to support the 90% figure and, as the respondents submitted, did not advance any basis for it. It seems to me that the lion's share of the applicants' costs would have been incurred in any event. I accept the applicants' argument that it is no answer to their claim (that the respondents acted unreasonably in putting the pleaded complications in issue) that the applicants should have proven their case using fewer experts. I also accept the applicants' point that no one expert in any one

> discipline could have been expected to address all the issues within his or her expertise. As the respondents acknowledged, the proceeding was complex, involving, as they put it in their submissions, a large number of documents and the resolution of complex scientific and legal issues.
>
> 42. But this is a distraction, too. In substance the application is based solely on the respondents' decision to put in issue two questions: the nature and significance of the pleaded complications and the potential for the Ethicon devices to cause those complications. Only in those respects did the applicants contend that the respondents' conduct was unreasonable. While these questions were relevant and critically important to all the causes of action, the concessions did not dispose of the numerous other issues the respondents raised, not even on the question of the sufficiency of the warnings. If I were to make the order the applicants seek, I would be punishing the respondents, not compensating the applicants.
>
> 43. While I accept that a proportion of the applicants' costs should be paid on an indemnity basis, I am unable to determine that proportion should be. It is not a satisfactory answer, it seems to me, to dismiss the application on that basis for that would amount to a windfall for the respondents. In the circumstances, if the applicants can establish by evidence what costs were incurred by reason of the respondents' unreasonable conduct, I will give them leave to do so, if they seek it ... I will therefore reserve the question of what proportion of the applicants' costs should be paid on an indemnity basis.

30. Her Honour made orders including that the amount of costs be fixed in a lump sum and that, failing agreement, a Registrar determine the amount of the lump sum.

31. The parties were unable to agree and the matter fell to be determined by Registrar O'Connor, who ordered the respondents pay $39,610,542.77 to Shine on account of costs and disbursements, as well as an amount for further professional fees expended in the course of obtaining the costs determination, bringing the total amount to $39,786,867. I will come to the Registrar's determination in more detail below in B.5, so that it may be understood in the context of Shine's financial position at the time.

32. As noted above, the respondents unsuccessfully appealed to the Full Court (*Ethicon Sàrl v Gill* [2021] FCAFC 29; (2021) 288 FCR 338) and were also unsuccessful in an

application for special leave to appeal to the High Court: *Ethicon Sàrl v Gill* [2021] HCATrans 187.

33. In addition to the $39,786,867 recovered in relation to the costs of the first instance proceeding, the total amount recovered from the respondents under costs awards in the Full Court appeal was $1,703,032.96, comprising $949,066.33 for professional fees and $754,666.63 for disbursements: First Saddler Affidavit (at [81]).

34. This means the total figure recovered under costs orders in the Gill Proceeding to date is $41,489,899.96.

35. For completeness, I note here that Shine's fees in respect of the work done for the unsuccessful special leave application that are sought to be recovered as part of the settlement approval application amount to $129,179.87: First Saddler Affidavit (at [89]).

36. Finally, the Talbot Proceeding was commenced in April 2021 to bring the same claims brought in the Gill Proceeding against Ethicon for the benefit of women who suffered a complication on or after 4 July 2017 (being the day after the cut-off date for class closure in the Gill Proceeding).

B.3 The Decision to Obtain Disbursement Funding

37. As at 31 December 2016, the total amount of the work in progress for the Gill Proceeding was $15.2 million and the aggregate disbursements paid or payable amounted to $4.8 million: November Affidavit (at [14]). At this time, Shine typically conducted personal injury matters and class actions on a speculative "no win, no fee" basis, paying for disbursements out of its own cash reserves rather than engaging litigation funders or other financial backing: November Affidavit (at [11]–[12]).

38. Mr Raj's view was that the Gill Proceeding "represented a significant impost on the balance sheet, and financial reserves of the business of Shine Lawyers": November Affidavit (at [15]).

39. In early 2017, the team responsible for the Gill Proceeding informed Mr Raj that the trial was listed to commence in July 2017 and was estimated to take approximately six

months: December Affidavit (at [6]). Mr Raj was told “significant further disbursements, estimated to be in the order of $10 million, were going to be incurred” as the matter proceeded to trial: November Affidavit (at [16]); December Affidavit (at [7]).

40. Mr Raj formed the view that unless Shine Justice could access significant sums of cash from an external source, it did not have sufficient cash reserves to fund such large outgoings in addition to its ordinary business expenses: December Affidavit (at [8]).

41. He came to this conclusion on the basis of his opinion that Shine Justice’s “short-term liquidity” was insufficient (December Affidavit (at [3]–[5])), that is, the amount of cash held by Shine Justice, less current trade payables, short term borrowings and current lease liabilities, was too small to fund operations beyond essential expenses. Shine Justice’s short-term liquidity at the end of the financial years 2016–2020 was as follows:

Date	**Short-term liquidity**
30 June 2016	($3,325,000)
30 June 2017	($5,782,000)
30 June 2018	$4,794,000
30 June 2019	$1,129,000
30 June 2020	$7,703,000

42. As can be seen, Shine Justice had negative “short-term liquidity” as at 30 June 2016 and 30 June 2017.

43. Shine had a number of debt facilities with the Commonwealth Bank of Australia (**CBA**) at the time, however, most are said to have been “fully or mostly drawn throughout that period”: December Affidavit (at [11]). The evidence before the Court in support of this proposition is scarce and unsatisfactory. Three debt schedules are in evidence and, for what it is worth, they demonstrate these facilities were fully or mostly drawn at particular points in time (as at 30 June 2017; 31 December 2017; and 30 June 2018). An obvious and important gap in the evidence is the drawn balance of

these facilities in 2016. Additionally, no cash flow projections prepared around this time are in evidence.

44. There were, however, two exceptions to the fully or mostly drawn facilities: the "Better Business Loan General Corporate Purposes" facility (**BBL**) and the "Group Limit Facility" (**Overdraft**): December Affidavit (at [11]). The debt schedules show as follows for those facilities:

Date	**Facility**	**Facility Limit**	**Drawn Balance**
30 June 2017	BBL	$16,000,000	$0
31 December 2017	BBL	$16,000,000	$16,000,000
30 June 2018	BBL	$16,000,000	$0
30 June 2017	Overdraft	$10,000,000	$0
31 December 2017	Overdraft	$10,000,000	$0
30 June 2018	Overdraft	$10,000,000	$0

45. The evidence is far from pellucid, but despite the apparent availability of funds in these facilities, Mr Raj determined that neither should be used to fund disbursements. The BBL facility was not deemed by him to be a realistic source as it was the company's main "come and go" facility (that is, a facility Shine was able to draw and repay in the ordinary course of business and use for day-to-day cash flow management): December Affidavit (at [12]). Regrettably, the debt schedules only show the amounts in the account at three points in time and so reveal nothing as to the use of the BBL facility for "come and go" funds. The Overdraft was also deemed unsuitable by him as it was a facility retained to be used to make capital investments or meet existing liabilities in circumstances where it had insufficient other sources of funds: December Affidavit (at [13]). Although I accept Mr Raj did not *want* to use it, why the facility *could not* be used to fund some disbursements is insufficiently explained.

46. What is also tellingly and worryingly absent in the evidence is any involvement of individual solicitors in considering alternative solutions and in the decision-making and, in particular, of any input being sought by management from the solicitors as to

Shine's professional obligations and duties to group members in circumstances where commercial decisions could have highly significant consequences for the class.

47. On the evidence adduced before me, it all seems to have been left to the money man, Mr Raj, with his understandable laser-like financial officer's focus on the financial interests of Shine Justice. The evidence reveals it was Mr Raj who was evaluating all the options and making all the decisions and he perceived a need to change the approach adopted up until that time of paying disbursements out of retained earnings and pursue external financing options.

48. What is also unexplained is why the decision to pursue external financing options was made notwithstanding Shine Justice paid a final dividend of 2.5 cents per share to shareholders in October 2016 (a total distribution of $4.329 million), and an interim dividend payment of 0.6 cents per share on 10 April 2017 (a total distribution of $1.039 million). Shine Justice did so notwithstanding its "dividend policy" was as follows (as stated in the 2017 Annual Report at 85):

> the Board expects to pay dividends of approximately 40% of NPAT excluding net movement in WIP and accounting for disbursements. **Net movement in WIP and disbursements could have a significant effect on the Group's ability to pay dividends. No guarantee is given about the payment of dividends**, the level of franking or imputation of such dividends or the size of the pay-out ratios. These matters will depend on a number of factors, including the future earnings of the Group, its financial, tax and franking credit position, and the Board's view of the appropriate dividend policy at the time.

(Emphasis added).

49. I again accept Mr Raj, by his own lights, could see no way to fund ongoing disbursements other than external financing. But that is not really the point. It is evident there were broader commercial demands and considerations at play for Shine Justice (despite the absence of discussion of these demands and priorities in the evidence adduced by Shine) and these commercial considerations motivated Mr Raj to act as he did in 2017 and beyond.

50. But the focus must start earlier. This case commenced as far back as 2012. Shine had entered into a paction with its clients to pay disbursements. The evidence as to planning for the management of cash reserves to meet increasing demands for disbursements for this case prior to the immediate lead up to the trial is sketchy, indeed it is non-existent. Until the issue was escalated to Mr Raj at the end of 2016, the intention was apparently to continue to pay out of cash reserves. The commercial decision of Shine not to seek some form of financial backing for the case early on might be understandable, but it is decidedly odd there was not a contingency plan in place as the case went on. Given what we now know as to the conduct of the defence at trial, any hope, if it was held, that the respondents would settle this case prior to trial, could perhaps be described as Panglossian. But given the nature of the defence filed, there was always a real likelihood this case would run – and there was more than ample time to put a plan in place to fund disbursements at a reasonable cost if the demands on cash reserves were too severe.

51. In the absence of evidence to the contrary, I conclude it is more likely than not that the commercial consideration of maximising returns to shareholders led to various decisions that it was better for Shine Justice to prefer the payment of dividends over keeping additional cash reserves as a "buffer" to pay disbursements. Whether any detailed or specific consideration was given to this case in declaring any dividend is speculative and unaddressed in evidence, but given the gargantuan nature of the litigation and the fact it was being defended stoutly, it must have been obvious for years prior to the commencement of the trial that there was a real risk that the case was likely to continue to occasion significant and increasing demands for disbursements. In any event, one thing we know for sure is that Shine went ahead paying dividends, notwithstanding the terms of its dividend policy.

52. Despite its superficiality, what the evidence does reveal is that in early 2017, Mr Raj considered the following two options.

53. The *first* was debt financing with the CBA. This option was rejected by Mr Raj as it would result in a borrowing to 12-month EBITDA (earnings before interest, taxes,

depreciation and amortisation) ratio pushing against (but not exceeding) covenants with CBA requiring Shine to keep its EBITDA ratio below 2.25: December Affidavit (at [15]–[16]). Mr Raj explains that he (December Affidavit (at [16])):

> reviewed Shine Justices' financial records and determined that if the amount of disbursements paid as part of this proceeding had been funded by borrowing financial debt, the borrowing to EBITDA ratio would have been 2.23 as at 30 June 2018 and 2.2 as at 30 June 2019. It was my view that it would have been unsound financial management to permit the ratios to climb so close to the covenant limits.

54. Of course, this evidence again has obvious gaps. It says nothing as to how much could have been borrowed to run up to an EBITDA ratio of just under 2.25. Further, there is no suggestion in the evidence that Shine contacted CBA to explain its position and entreated it to reconsider the relevant covenants, or that it contacted any other potential lender to obtain loan finance on the best possible terms. Mr Raj's evidence was not that he tried and failed to obtain funding from commercial banks but rather that Shine Justice's banker, the CBA, told him it "did not have a disbursement funding product as part of its funding portfolio": December Affidavit (at [17]).

55. The *second* was disbursement funding (which was evidently Mr Raj's focus). It is necessary to pause to explain exactly what this sort of financial product unusually entails.

56. Disbursement funding involves the provision of finance for third-party costs without cash flow implications. It typically enables personal injury firms (usually small personal injury firms) to defer payment of third-party costs until a case has run its course: Anthony Hersch, "Disbursement funding: the benefits for SME law firms" (2017) 139 *Precedent (Australian Lawyers Alliance)* 46. This, in turn, allows working capital to be released and injected into the business to increase turnover. Indeed, Shine Corporate's 2017 Annual Report noted (at 31) that "the use of disbursement funding [was] expected to continue to improve operating cash flow in future years as client disbursements have a diminishing impact on the Group's operating cash flows".

57. Like many financial products, the concept has different forms, but disbursement funding loans are commonly unsecured and do not require any repayment until a claim

is successful. It hence presents a "risk-free" and "cost-free" solution to a litigant but at a significant cost by way of a high (often very high) interest rate. As a practical matter this is often not a great disincentive to a borrower, because there is generally no need to service these sometimes usurious interest charges because they are typically deducted from damages.

58. Disbursement funding is an established financial product in the United Kingdom, and the current position seems to be that the Court may order "interest on costs from or until a certain date, including a date before judgment": see *Secretary of State for the Department of Energy and Climate Change v Jones* [2014] EWCA Civ 363; [2014] 3 All ER 956 (at [17]–[19] per Lady Justice Sharp, with whom Lord Justice Patten and Lady Justice Gloster agreed); cf ss 43, 51A and 52 of the FCA Act and *Flower & Hart v White Industries (Qld) Pty Ltd* [2001] FCA 370; (2001) 109 FCR 280.

59. A good example of how the recovery of such charges works in England and Wales is provided by *Gill v Barnsley Canister & Others* (County Court at Barnsley, Corkill DCJ, 15 November 2021, unreported). I pause to note the remarkable coincidence the claimant shares the name of the first applicant in the Gill Proceeding.

60. There, Mrs Gill sought to recover an amount of interest charged on a disbursement funding facility (charged at a rate of 15.3% per annum). She submitted that given her status as a private litigant of modest means, it was reasonable and proportionate to have funded the litigation by this method.

61. But Mrs Gill adduced no evidence as to her reasons for entering into a disbursement funding agreement on these terms. District Judge Corkill spotlighted that the court was "being asked to make an assumption as regards the claimant's need and reasonableness" without a copy of the agreement or any details of comparable rates (at [14]). There was no question as to power but it would be "wrong" to make assumptions without adequate evidence (at [18]), particularly in circumstances where the interest rate payable was unusually high. The court was entitled to be provided with evidence to establish there was "no way of funding the litigation or funding the disbursements without such a loan, that the loan he took out was the only available loan to him and that, as a consequence, the interest rate charged was the only rate of interest he could take out in the loan market" (at [20]).

62. Hence, the position is that recovery is allowed provided that the disbursement was incurred reasonably and the evidence reveals the absence of a less costly alternative. A good summary of the approach in the United Kingdom is contained in the article, "Recovering interest on disbursement loans: the need for evidence" (Civil Litigation Brief, 22 February 2022).

63. Returning to the narrative in this case, what the evidence reveals is that in late 2016, disbursement funding was in place for a number of other cases, with an entity called Wingate: November Affidavit (at [17]). Mr Raj determined Shine should consider putting in place a disbursement funding facility for the Gill Proceeding and, given Wingate was in the course of withdrawing from the market, determined to consider other options which would provide funding in the order of about $14 million (about the amount of disbursement costs expended and projected to be expended): November Affidavit (at [19]).

64. As noted above, Mr Raj enquired as to whether CBA "would consider advancing funds to Shine to enable it to pay the disbursements, but … was advised that CBA did not have a disbursement funding product as part of its funding portfolio": December Affidavit (at [17]). The facilities provided to Shine by CBA were secured by a charge over all of the assets and undertakings of Shine Justice such that it is asserted Shine Justice did not have the ability to give further additional security to any other potential debt funder for the purposes of securing *additional* financing for the disbursements: December Affidavit (at [17]). Again, it is passing strange that the December Affidavit makes no mention of the details of any enquiry with CBA as to whether there was some prospect whereby it would consider advancing further funds to Shine by means other than a "disbursement funding product". No business records have been produced in this regard.

65. In the end, Shine selected Assess Medical Group (**AMG**) as its disbursement funder, because, in Mr Raj's view, it was the only disbursement funder in the market with the scale and terms to facilitate the funding sought: November Affidavit (at [20]).

66. In May 2017, Shine Corporate entered into a "Deferred Settlement Agreement" with AMG (**AMG DSA**). The AMG DSA was an agreement between AMG and Shine Corporate, pursuant to which Shine Corporate bore responsibility for repayment of amounts drawn, as well as interest. Its obligation to do so was not dependent on success in the proceedings (November Affidavit (at [27])).

67. The facility provided for AMG to advance $14 million to Shine Corporate on account of the Gill Proceeding, both by way of reimbursement of disbursements already paid by Shine Corporate and for further disbursements: November Affidavit (at [26]). The limit of the facility was $24 million with a two-year term. Differing interest rates would be charged the longer the period utilised, within the range of no less than the remarkable rates of 22.4% and 31.8% per annum. Mr Raj explained that at the time of entry into the facility, it was contemplated that the matter may well resolve by way of settlement within 12 months, in which case the rate of 22.4% would apply: November Affidavit (at [22]–[24]).

68. Pausing here, by way of context and comparator, the cash rate was 1.5% as at 2 May 2017; the lending rate for large businesses was around 3%; and the average amount being paid by way of interest on credit card facilities in May 2017 was 19.77%.

69. Upon implementation of the AMG disbursement funding facility, Shine received reimbursement of the disbursements it had funded to that point, totalling approximately $7.56 million: November Affidavit (at [23]). Put bluntly, it used funds, borrowed at this high rate, to pay itself with the hope the interest cost of doing so would be paid by others.

70. It was in this context that, in September 2017, the directors of Shine Justice paid its shareholders a final dividend of two cents per share.

B.4 The WFM Deferred Payment Agreement

71. In about May 2018, Mr Raj began investigating a new disbursement funding facility, as AMG began seeking progressive repayment of its facility and because the facility agreement contemplated an increase in the interest rate to about 27%: November Affidavit (at [30]).

72. An interim dividend of one cent per share was paid to shareholders on 20 March 2018.

73. Having considered a number of facilities, Mr Raj determined to proceed with the facility offered by Western Funds Management Pty Ltd (**WFM**) (a subsidiary of Moelis Australia Ltd): November Affidavit (at [32]). In his view, WFM offered the most beneficial disbursement facility, on the basis it: offered a relatively lengthy term; had the financial capacity to support the necessary disbursements; and provided a so-called "competitive" interest rate of 20% per annum. Assuming the funding would continue until 31 May 2020, the interest saving for Shine under the new agreement with WFM, as compared with the interest payable pursuant to the existing facility with AMG, amounted to over $3.73 million: November Affidavit (at [32](c)).

74. In June 2018, Shine entered into a Deferred Payment Agreement with WFM (**WFM DPA**). The WFM DPA was an agreement under which Shine bore the obligation to make repayments of principal and interest, regardless of the outcome in the proceedings. Following entry into the WFM DPA, Shine gave notice of termination to AMG and the AMG DSA consequently terminated. At this time, AMG was content to receive payment based on the 22.4% rate, notwithstanding it was entitled to a higher figure: November Affidavit (at [24]).

75. In the financial year ending 30 June 2018, Shine Justice paid out $5.195 million in dividends to shareholders.

76. Since 31 August 2018, Shine has drawn down on the WFM DPA as follows:

Month ending	Principal Drawdowns
31/08/2018	$13,340,612
31/10/2018	$866,958

30/11/2018	$4,423,899
31/12/2018	$1,979,716
31/01/2019	$2,140,935
28/02/2019	$1,610,984
31/03/2019	$502,583
30/06/2021	$997,338

77. Shine has also made three repayments totalling $38,310,273.24, the *first* in September 2018, in the amount of $35,316, the *second* in November 2021, in the amount of $15,673,958; and the *third* in April 2023, in the amount of $22,600,999.24: April Affidavit (at [10]).

78. Upon making the second repayment, Shine renegotiated the interest rate with WFM. As Shine had repaid approximately half of the principal amount, WFM agreed to reduce the interest rate to 14%: November Affidavit (at [45]).

79. The *third* payment was made following orders of the Court allowing an interim distribution of $22,600,999.24 to be paid to Shine (comprising 50% of Shine's professional costs ($15,656,736.30) and 100% of Shine's disbursements ($6,944,262.94)). Upon making the order, the Court noted that:

> If the Court determines that the amount that ought to be paid to Shine out of the settlement sum under s 33V(2) of the FCA Act on account of costs, disbursements and interest under the Deferred Payment Agreement with Western Funds Management Pty Ltd is less than the amount of the interim distribution in Order 1:
>
> (a) Shine undertakes to the Court to repay to the settlement fund the amount of any difference within 30 days of the Court making an order under s 33V(2); and
>
> (b) Shine Justice Limited undertakes to the Court to repay any amount that Shine has not repaid in accordance with the above undertaking within a further 14 days.

80. The current rate of interest is apparently 11.6% per annum.

B.5 Costs Determination

81. As explained above in B.2, Registrar O'Connor determined the costs to be paid by the respondents to the applicants in late 2020.

82. In so doing, Registrar O'Connor usefully summarised the parties' positions as follows (at [10]):

Cost	**Incurred**	**Amount claimed by applicants**	**Amount respondents say ought be awarded**
Professional fees	$35,764,941.45	$23,247,211.95 That is: $6,080,040.05 (Indemnity basis: 20% of $35,764,941.45 x 85%) + $17,167,171.90 (Party/party basis: 80% of $35,764,941.45 x 60%)	$17,882,470.73 (50% of $35,764,941.45)
Loading		$5,150,151.57 (30% of $17,167,171.90)	No loading
Counsels' fees	$10,359,708.37	$7,769,781.28 (75% of $10,359,708.37)	$6,215,825.02 (60% of $10,359,708.37)
Experts' fees	$5,273,779.80	$5,273,779.80 (100% of $5,273,779.80)	$2,760,792.98 (approx 52% of $5,273,779.80)
Disbursements – general	$5,806,097.51	$5,502,891.57	$4,971,117.84

Internal disbursements	$801,614.98	$195,000 (less than 25%)	
Subtotal	$58,006,142.11	$47,138,816.17	$31,830,206.57
Interest on disbursements	$14,029,714.13	$14,029,714.13	No interest
Subtotal	$72,035,856.24	$61,168,530.30	$31,830,206.57
Professional fees: Affidavit and Costs Summary	$164,699.48	$123,524.61 (75% of $164,699.48)	No submissions on this point
Kerrie Rosati: preparation of costs summary	$52,800	$52,800	No submissions on this point
Total incurred/ claimed:	$72,253,355.72	$61,344,854.91	$31,830,206.57

83. In the end, Registrar O'Connor ordered that the respondents pay the applicants' costs in the amount of $39,610,542.77 on account of professional fees of $22,873,941, disbursements of $16,721,664.02 and internal disbursements of $14,937.75: First Saddler Affidavit (at [27]). Accounting for further professional fees as to preparation for the costs determination, Registrar O'Connor ordered the respondents pay the applicants a total of $39,786,867.

84. For completeness, the figure was broken down as follows:

Cost	**Awarded**

Professional fees	$20,485,170 That is: $4,560,030 (Indemnity basis: 15% of $35,764,941.45 x 85%) + $15,925,140 (Party/party basis: 85% x $35,764,941.45 - $7,650,000 above scale = $22,750,200 – 30% discount)
Loading	$2,388,771 (15% of $15,925,140)
Subtotal	$22,873,941 (or around 64% of professional fees)
Counsels' fees	$6,999,748.61 ($10,359,708.37 - $2,124,710 = $8,234,998.37 x 85%)
Experts' fees	$4,219,023.84 (80% of $5,273,779.80)
Disbursements (general)	$5,502,891.57
Internal disbursements	$14,937.75
Interest on disbursements	None
Subtotal	$39,610,542.77 (or around 68% of professional fees, costs and disbursements incurred)
Professional fees: Affidavit and Costs Summary	$123,524.61
Kerrie Rosati: preparation of costs summary	$52,800
Total awarded:	$39,786,867 (rounded to nearest dollar)

85. Of especial present importance is that Registrar O'Connor rejected the applicants' claim to include interest on the disbursement funding facilities in the party/party costs payable by the respondents (at [77]–[81]), for the following reasons. *First,* $14 million of interest in respect of $20 million of disbursements over a three year period seemed "unreasonable" "at first blush" (at [78]). *Secondly,* Registrar O'Connor could not accept the applicants' submission that the amount of interest is properly characterised as a "disbursement", noting as follows (at [79]):

> It is essentially payment of interest on a loan. Parties to litigation may fund litigation in any number of ways – for example, from income, from savings, from sale of assets or from loans. However, if a party takes out a loan to fund litigation (either the payments of fees or disbursements), I do not consider that it is permissible under sections 43 and 51A of the *Federal Court of Australia Act 1976* (Cth), the *Rules*, including item 18 of the *Rules* or at common law to recover those interest repayments on costs or disbursements as disbursements from the costs respondent. Furthermore, to do so, would not be fair and reasonable, as it would effectively penalise the cost respondents for the cost applicants' funding arrangements for the litigation, particularly if those arrangements are unreasonable or uncommercial.

86. *Thirdly,* the applicants provided no case law in support of the proposition they are entitled to recover interest on the disbursement funding facility (at [80]). Indeed, at least some authority relevant to the point was first brought to the attention of Shine by the Court on the final day of the settlement approval hearing (16 February 2023): T5.4–8; T5.24–27; T6.27–30. Mention was subsequently made by Shine to the authorities alluded to (in particular, *Secretary of State v Jones*) in Shine's submissions filed on 30 May 2023.

87. I will return below to aspects of the intention, understanding and approach of Shine to recovering the interest on the disbursement funding facilities as a disbursement under any costs order (matters notably unaddressed in the evidence and the subject of somewhat contradictory submissions). But relevantly it is sufficient to note the applicants did not take any step to challenge Registrar O'Connor's determination.

88. Payment of the ordered sum was made to Shine shortly after 25 November 2020: November Affidavit (at [40]). Mr Raj deposed that upon receipt of the funds, he

determined to deposit the money paid by the respondents into “the Shine Trust Account” because of a concern that if the funds received were repaid against the disbursement facility with WFM, and subsequently those funds were required to be repaid to the respondents in the event of a successful appeal, Shine may not have been able to withdraw against the WFM DPA: November Affidavit (at [41]). Mr Raj discussed Shine’s position with WFM, which confirmed that the disbursement funding facility was not a “come and go” facility and if the funds were repaid, WFM may not agree to a redraw on the facility: November Affidavit (at [42]). As it happens, the appeal was resolved expeditiously but could have taken well in excess of a year.

89. Why this amount was paid into trust rather than into a controlled money account earning interest was not explained (and I suspect is wholly inexplicable).

90. Following the High Court’s refusal of the respondents’ special leave application on 5 November 2021, the funds which had been held in trust in respect of the WFM disbursements were paid to WFM in the amount of $15,673,957.57 on 10 November 2021: November Affidavit (at [44]).

B.6 Disclosure and Awareness of Applicants and Group Members

91. Shine asserted the representative applicants in the Gill Proceeding were made aware of Shine’s entry into the AMG DSA and WFM DPA (although accepted the situation with respect to Mrs Talbot was somewhat different).

92. As to the applicants in the Gill Proceeding, on 16 May 2017, Mrs Gill, Mrs Sanders and Mrs Dawson were provided with what was described as an updated costs disclosure. It is well to set out precisely what was said in that document:

> **2. Disbursement Funding**
>
> As you are also aware, Shine has been talking with disbursement funders to make arrangements to assist with the funding of disbursements, including Counsels’ and experts’ fees. To date Shine has paid almost $7,500,000 in these expenses on behalf of the Class Action.
>
> In view of the significant commitment Shine has made to date and will make during the course of the upcoming trial, we have reached an agreement with a disbursement

funder, Assess Medical Group Limited ('Assess'), to provide a funding facility to Shine to cover the costs of these disbursements. Assess have agreed to reimburse Sine for the disbursements incurred to date and to provide Shine with up to an additional $7,500,000 on account of the disbursements to be incurred.

Assess will provide these funds to Shine on 12 May 2017 and will charge interest on those funds at rates between 22.4% and 31.8% per annum depending on the term of the facility.

The terms upon which Assess are providing this facility are consistent with the terms that other disbursement funders provide for similar facilities.

By comparison, if an agreement had been entered into with a traditional litigation funder (for eg, IMF Bentham Australia) rather than a Conditional Costs agreement between you and Shine, then the litigation funder would look to recover between 30 and 40% of the total settlement sum (or judgement [sic] sum) as their fee or commission for providing such funding. We are happy to explain this further if you require any clarification in relation to this matter.

On this basis, Shine considers that these interest charges will be considered by the Court to be fairly and reasonably incurred when approving any settlement in this proceeding.

Shine proposes to charge for these interest costs under its Conditional Costs Agreement and in turn, to seek recovery of this interest from the Respondent as part of the costs that they will be ordered to pay.

(Emphasis added).

93. The interest on disbursements at the "common issues stage", including GST, was estimated to be in the range of $2.688 million – $3.816 million.

94. At the conclusion of the updated costs disclosure, the following is stated:

It is important to note the following:

1. We confirm that Shine will continue to carry the professional costs and disbursements incurred for acting for you and the other Lead Applicants and the Group Members in this proceeding on the same conditional or "no-win no-fee" basis as set out in our Conditional Costs Agreement and Disclosure Notice. The funding arrangement with Assess does not affect this agreement.

2. Shine continues to be responsible for the payment of disbursements incurred in

> this matter as it has done to date and is committed to doing that. In accordance with the terms of your costs agreement, Shine will be reimbursed both the disbursements incurred and the interest payable to Assess, in the event the action is successful as defined in the costs agreement.
>
> 3. You are not a party to any agreement with Assess.

95. The applicants were provided with a further updated costs disclosure on 18 January 2018, and another on 16 May 2019. The latter recorded the following as to Shine's disbursement funding arrangements:

> … We have since entered into an agreement with Western Funds Management to cover the costs of both future disbursements and the pre-existing disbursements and service fees owing to Assess, such that there is no ongoing relationship with Assess. The interest rate charged by Western Funds Management is currently 20.0% per annum.
>
> We confirm that Shine will continue to carry the professional costs and disbursements incurred in acting for you and the other Lead Applicants and Group members in this proceeding ….
>
> Shine continues to be responsible for the payment of disbursements incurred in this matter as it has done to date and is committed to doing that. In accordance with the terms of your Costs Agreement, Shine will be reimbursed both the disbursements incurred and the interest payable to Western Funds Management, in the event the action is successful as defined in the Costs Agreement.

96. That document also stated that the estimate of interest on the disbursement funding facility to the conclusion of the common issues stage was $9 million – $10 million: Second Saddler Affidavit (at [66]).

97. It is said Mrs Gill obtained "independent" legal advice in relation to the disbursement funding facility in May 2019, at Shine's expense but no evidence whatsoever was provided by Mrs Gill as to the content of that advice or who provided it: Second Saddler Affidavit (at [65]). It is certainly unclear whether Mrs Gill was given advice as to her responsibilities toward group members and whether those duties were consistent with adopting a course which conferred a financial benefit on her solicitors (by a reimbursement) and would expose group members to a cost she would not be

exposed to herself. I would have been assisted by seeing a copy of this advice. Further, to Ms Saddler's knowledge, neither Mrs Dawson nor Mrs Sanders requested or obtained any independent legal advice: Second Saddler Affidavit (at [65]).

98. Another update was provided to Mrs Gill on 30 August 2022, informing Mrs Gill that the revised estimate of the interest charge to settlement approval or the development of an individual assessment process would be between $25 million and $34 million. That estimate was based on the monthly interest rate accruing of approximately $400,000 per month at that time, and the settlement being approved, or a process by which individual claims would be assessed being determined in the next 12 to 18 months: Second Saddler Affidavit (at [67]).

99. Mrs Talbot entered into a conditional costs agreement with Shine in April 2021. Neither the agreement nor the accompanying costs disclosure statement explain the disbursement funding arrangement or provide for interest to be charged on disbursements.

100. To the extent they occurred, these client disclosures were, to say the least, highly problematical. As is evident from the document (excerpts of which are extracted at [92] and [94]), it was a disclosure of the facts that Shine had reached an agreement with a disbursement funder, Assess, the agreement's core terms and its suggested consistency with other such facilities. The following comparison was then invoked:

> By comparison, if an agreement had been entered into with a traditional litigation funder (for eg, IMF Bentham Australia) rather than a Conditional Costs agreement between you and Shine, then the litigation funder would look to recover between 30 and 40% of the total settlement sum (or judgement [sic] sum) as their fee or commission for providing such funding.

101. I will return to this wholly inapt comparator below.

102. As to group members, the opt out notices paint, at best, a vague picture. In section 6 of the first opt out notice dated 17 March 2017, the following is set out:

> **6. Will you be liable for legal costs if you remain a class member?**
>
> You will **not become liable for any legal costs** simply by remaining as a class

member for the determination of common issues. However:

(a) if the preparation or finalisation of your personal claim requires work to be done in relation to issues that are specific to your claim, you can engage the Applicants' lawyers or other lawyers to do that work for you. A copy of the terms on which the Applicants' lawyers are acting in the class action may be obtained from them by contacting them on the details set out below; and

(b) if any compensation becomes payable to you as a result of any order, judgment or settlement in the class action, the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the Applicants in running the class action but which are not able to be recovered from Ethicon Sarl, Ethicon Inc. or JJM Australia; and

(c) class actions are often settled out of court. If this occurs in the class action, you may be able to claim from the settlement amount without retaining a lawyer.

103. It is said this opt out notice was accurate as it was sufficient to put group members on notice that an order was sought for payment of the relevant amount. That contention must be rejected. Apart from the lack of any specificity, this was *not* a cost incurred by the applicants in running the class action because Shine accept the applicants were not liable for this aspect of the costs.

104. The fact is that notwithstanding it was apparent to Shine that it needed some form of disbursement funding facility in connexion with the proceedings in late 2016 (November Affidavit (at [11])), this possibility was not mentioned in the first opt out notice, or in the further four opt out notices which do not mention that facility, its later replacement, or the interest payable under either of them.

B.7 Findings as to Shine's View of Recoverability

105. The next focus is ascertaining how Shine approached the recoverability of the relevant sum as part of any costs order that could be or was made in the proceedings.

106. It is here one sees contradictions and an apparent evolution in the approach of Shine. As noted above (at [92]), Shine expressly represented in its disclosure that it proposed to seek recovery of the interest as part of any costs order obtained. One assumes that

was a view genuinely held at the time. This belief is consistent with the relevant sum being sought as part of the recovery sought before the Registrar (who, as explained above at [85]–[86], rejected the claim because it was an unreasonable sum; because it was not properly characterised as a "disbursement"; and, importantly, because Shine provided no assistance by way of authority to support a contention that they could recover interest on the disbursement funding facility on any legal basis).

107. The evidence is again lacking, but I suspect it is more likely than not those responsible within Shine continued to believe the relevant sum was recoverable from the respondents prior to the Registrar's determination. Given their later actions, I am unsure as to the actual basis upon which they formed that belief in the absence of any evidence of close consideration of the issue.

108. Interrupting my findings, it is convenient to note, that the recoverability argument was novel, but had real merit (that is, as a matter of *legal* argument). In short, if an applicant in a large class action being conducted on a speculative basis can prove the only practical way a defended proceeding could have come to a successful conclusion on common issues was for the applicant, acting reasonably and prudently, to incur a litigation expense such as a disbursement facility interest charge, there is no reason in law or logic why that sum ought not to be recoverable from a respondent whose unsuccessful defence of the class action caused the necessary cost to be incurred. This is little different to the position that has commended itself to judges in personal injury litigation in the United Kingdom, albeit under different costs rules. It is unnecessary to form a view as to the legal position for the purposes of this application but, in my view, the Court has ample statutory power under Pt IVA to make such an order if it was thought it in the interests of justice to do so. Doing the best I can with a counterfactual, as I will explain, the difficulty for Shine on any such application was less about power or legal argument, and much more about proving that in this case it had acted reasonably and prudently in entering into the bargains it struck.

109. It suffices to note that despite what previously had been expressly said to the clients and the extent of the sum being sought, no attempt was made, prior to the matter going

to the Registrar, to develop an argument and explain to Katzmann J what had occurred, that the claim was a proper one as the litigation could not have been conducted without the charge being incurred, and asking her Honour to exercise her broad discretion as to costs or to make a bespoke order under a provision within Pt IVA or otherwise to allow recovery of this sum. There is no guarantee such a course would have been successful, particularly on the facts I now have before me, but what is important is it was legally open to argue but not attempted. Why Shine did not have the bottle to try to seek recovery in a determined way, exploring every power, is difficult to understand. It is too speculative to conclude Shine did not try because those acting recognised it did not adequately explore less expensive alternatives.

110. Moreover, following the Registrar's determination, no review was sought to allow development of the argument, on a proper legal and factual basis, in front of the judge. When and why was that view formed? The only explanation before me is because Shine considered a *de novo* review of all costs and disbursements allowed would be a dangerous endeavour because the extent of recoverability could conceivably come down following the conduct of a review. But the evidence is silent as to why Shine formed such a view. Assuming they had confidence in the overall amount claimed, presumably they thought the amounts claimed could be justified. Tellingly, the evidence does not even attempt to explain why they thought the downside risk outweighed any upside – particularly when it must be recalled this was the only chance to recover the relevant sum against the unsuccessful respondents, rather than Shine banking upon getting the amount back upon any eventual settlement out of the pockets of group members.

111. It also meant that from this moment on, Shine must or should have understood this facilitated the applicants necessarily being treated differently from those persons the applicants represented, being the group members. There could no longer be an equitable sharing of the impost. Having abandoned efforts to obtain a recovery against the respondents, it meant the applicants would receive their ordered judgment sums unencumbered by any proportional payment for the relevant sum, but those they

represented remained exposed. In blunt terms, the group members, rather than those who were acting as their representatives, were now going to be left holding the bag.

112. Further, the decision not the pursue the matter on review is more difficult to understand (on the evidence before me) because the overall extent of successful recoverability before the Registrar was, on any view, a proportionally modest one, given the amount claimed under, and the terms of, the cost order. Further, although it probably does not matter, even at this belated stage, there is no evidence a novel application to a judge was contemplated seeking to invoke a Pt IVA power, outside the formal review process (although given what had occurred this would likely have faced insuperable difficulties given the applicants had run the point, albeit superficially, in front of the Registrar).

113. Doing the best I can on the incomplete evidence, it is evident that at some time, something changed. Shine came to the view that its position on recoverability pursuant to the costs order against the respondents was different to what it had earlier told its clients. On this application, at the hearing on 13 June 2023, senior counsel for Shine was adamant about Shine's current position. He explained (at T21.9–14) that Shine's view was that the amount:

> was sought to be recovered from the [R]egistrar and, on the authorities – not just in England, but in Australia – a review from the decision of the registrar would have been, in effect, hopeless. That's our submission; it just wasn't – it wasn't recoverable. It's not costs or disbursements. It's a – it's interest and interest is not recoverable. Interest on costs is not recoverable either in Australia or the UK.

114. It seems more likely than not that the position now adopted that "any review wouldn't have had any realistic prospects of success" is one, I infer, must have been reached at around the time a decision was made not to seek it.

115. In the light of all this, I had the following exchange with senior counsel (at T35.34–36.11):

> MR LEOPOLD: … The registrar was correct.
>
> HIS HONOUR: The registrar was correct.

> MR LEOPOLD: … we could have gone backwards.
>
> HIS HONOUR: So aren't we left with a bit of a moral hazard here, which I've never come across before, and that is, if you're right and it can never be recoverable against a respondent, there's a positive financial incentive on the solicitor to settle, rather than run the case to a conclusion, because you would never be able to recover that fund from the respondent? If you proceeded to judgment, you would never recover it because you say it's not recoverable as costs and disbursements - - -
>
> MR LEOPOLD: Yes, well, I understand the - - -
>
> HIS HONOUR: - - - whereas you can wet your beak and get it from group members if you settle; isn't that a moral hazard?
>
> MR LEOPOLD: Well, it may well be described as a moral hazard, but the question is whether (a) the authorities we cited do stand for the proposition we say – well, the authorities we will cite do stand for the proposition we say, and if they don't, whether it was really a path forward whereby that could successfully have been argued before a single judge, that notwithstanding the authorities, the decision was reviewable.

116. This topic was also the subject of an later exchange (at T52.41–55.14), when senior counsel made the point that because of the way the legal costs were agreed to be charged, then unless an order was now made allowing a deduction of the settlement proceeds then because:

> MR LEOPOLD: …they did it this way and took on a risk which, if it has come home to roost and they recover nothing, will leave them in a position where, over running this case successfully for the applicants and group members for 10 years and producing a settlement which your Honour says was reasonable, of $300 million, they will end up, in net terms, and we can demonstrate it, with almost nothing.
>
> HIS HONOUR: But if that's the case, then how were they going to make money if they pushed it through to a judgment? They wouldn't be able to recover this, save a judgment, and why doesn't that create a real problem, because if the only way they could make money is forcing a settlement, that's a real problem, isn't it?
>
> MR LEOPOLD: Well, I think they probably believed that it would be recoverable as part of the costs or whatever, and such an application was made to Registrar

O'Connor, and she said that that was not recoverable.

HIS HONOUR: Yes, but it puts the solicitor in a very awkward situation in negotiating a settlement, in circumstances which, at that stage, they had Registrar O'Connor's determination, where look, we've got a – we can either make money by settling this case and getting a payment out of the settlement proceeds, or we will not make money if we run it through to a judgment. [That] certainly wasn't told to me on the settlement approval application. Was that told to the clients and the group members, that the only way we can make money is settling the case and getting an order under section 33V(2), because we won't make money if we run it?

MR LEOPOLD: Well, I don't think that was their understanding.

HIS HONOUR: But isn't that the logic of your submission?

MR LEOPOLD: No, because I think they believed that if they were successful – if they were successful, it would be recoverable; if they weren't successful, it would be recoverable from the – as deduction from the settlement fund.

HIS HONOUR: But how could they – how could they be of that view when Registrar O'Connor had already said that it wasn't recoverable and you said that an argument to the contrary would be hopeless?

MR LEOPOLD: I am saying that now. That was not the view taken at the time. I'm saying that on a review of the authorities, that it would not be – it would not have succeeded if they challenged it.

HIS HONOUR: All right. Just pardon me just a moment.

MR LEOPOLD: I mean, on the judgment, if you – I should have said, in answer to your Honour, that they could have got, out of the judgment, the sum, we say, pursuant to any of 33ZF, ZJ, ZA or Z.

HIS HONOUR: Well, if they could have, I don't understand why they say they couldn't have got it – they couldn't have got it as part of the costs order that they got against the respondents – there's just an inconsistency in what you say.

MR LEOPOLD: Because it – because the deal was taken it wasn't - - -

HIS HONOUR: Whatever way I look at it, there's an inconsistency.

***

HIS HONOUR: …there does seem to be an inconsistency at the heart of the

> argument, Mr Leopold. This amount was either recoverable from the respondents or not recoverable from the respondents. You seem to be saying that …it wasn't recoverable against the respondents and was never able to be recoverable against the respondents, because it's not within the definition of cost. It's only recoverable against the group members. Now, that seems to me to create a real moral hazard, because it's a real incentive for a … publicly- listed company to settle litigation, rather than running it through to a conclusion, because the only way [it] can make a profit and secure a return to [its] shareholders is by settling, rather than running the litigation. Because that seems to be the logic of what you're saying.
>
> MR LEOPOLD: But, no, because if you run – if you run the litigation, you get an order under 33Z, ZF, ZJ, ZA. If you don't run the litigation, you - - -
>
> HIS HONOUR: All I'm saying if that's the case – if that's the case, they could have got it on behalf of the applicants in the costs order.
>
> MR LEOPOLD: But they thought they did have it in the – there's no evidence about this, but one would think that the costs order – costs may have covered it. The registrar ruled otherwise. The view was taken we shouldn't take it any further. It turns out that that view was probably well-founded, although your Honour has pointed to some possible contrary authority. But once one is looking at a review from a registrar, the position is quite different to what would be the position if you ran the case and won and sought a costs order. They're two differently separate situations, governed by different regimes.

117. For present purposes, the point to be made from the above is that it is evident Shine had to consider the prospect of entry into a disbursement funding arrangement, particularly of this nature, prudently and reasonably. If it was proceeding on the basis the relevant sum would be recoverable pursuant to a favourable costs order, then it needed to form a view as to recoverability on reasonable grounds and if, as I find, there was some legal basis to advance an argument, ensure there was a record, demonstrable by way of evidence, that there was no better option. It needed to explain the situation transparently and fairly to its clients, group members and the Court, in particular, its intention to seek payment of the relevant sum from either the respondent (in case of judgment) or any amounts payable to group members (if the case settled). Armed with this record, if there was a costs order, it then needed to pursue the

application to recover the relevant sum properly and provide the necessary assistance to the Court, by reference to any existing authority and also by way of analogy, as to why the relevant sum should be recoverable.

118. In summary, the facts as revealed in the evidence do not establish to my satisfaction that Shine took the necessary steps to: (1) plan for the increasing disbursements that would likely occur prior to trial in anything like a timely fashion; (2) explore all available options for accessing other sources of funds or securing financing at a better rate in the interests of group members; (3) maximise the chances of recovery of the relevant amount against the respondents; (4) provide sufficient and accurate disclosure to group members of an intention to seek to recover funds otherwise payable to group members at any stage of the process; and (5) recognise that any conflict arose between the interests of their clients and group members in relation to entering into the arrangement which led to the relevant sum accruing and then recovery being pursued only against the group members, particularly in the context of later engaging in settlement discussions (a matter to which I will return below).

C SHINE'S SUBMISSIONS

119. As it happened, Shine put on four sets of submissions in support of its application. The final set received was, at my direction, focussed upon a number of issues perceived by me to be significant but which had not, up to that point, been addressed by Shine. Accordingly, I will set out Shine's broad submissions here, before turning to those particular issues below in Section E.

120. The outline of Shine's position is as follows.

121. *First*, an important feature of the interest charge incurred by Shine is that, by borrowing under the relevant loan facilities, it incurred a very significant personal risk. Without Shine having taken on the burden of that risk, it is very doubtful whether the proceedings would have been able to be run to their conclusion. It should not be expected that a solicitor bear the immediate costs of those disbursements, in addition to uncharged solicitors' fees, until resolution of the matter, and for no return.

122. Shine submits that viewed in combination, four contextual matters demonstrate the significance of the risk undertaken. *First*, the costs of the proceedings have not been met by a litigation funder. *Secondly*, these proceedings were conducted by Shine on a conditional basis. *Thirdly*, Shine does not seek to recover any uplift on its professional fees. If Shine did charge a 25% uplift, as permitted by ss 181 and 182 of the *Legal Profession Uniform Law* (NSW) (**Uniform Law**), it would have been entitled to an uplift of approximately $13,750,000. *Fourthly,* given the size and complexity of the matter, it was inevitable that the solicitors' costs would be significant. The appropriateness of permitting Shine to recover its outlays under the disbursement funding agreements must be assessed in the light of this substantial risk.

123. *Secondly,* it was at least originally submitted that the original costs agreement contemplated Shine being reimbursed an amount for interest on disbursements. This submission was made despite Shine accepting that the applicants are not legally bound to pay interest on disbursements.

124. *Thirdly,* the Court should be satisfied the terms of the funding agreements were reasonable, having been negotiated by an experienced financial officer with the intention of obtaining the most suitable terms. Shine had a very real interest in ensuring the terms were as beneficial as possible, given the risk Shine would be liable to pay the full amount owing.

125. *Fourthly,* it is crucial to take into account the effect of a decision not to allow recovery of the interest component. If Shine is required to bear the impost of the relevant amount, it will amount to a discount of approximately 60% on its professional fees. That would leave Shine without a fair commercial return for the enormous work it has undertaken to obtain a very significant benefit for group members. Shine contends that if Shine is not entitled to the amount of interest, the Annual Reports demonstrate it will have prosecuted the proceedings for the benefit of group members at a loss. The deduction for interest under the disbursement funding facilities is larger (and in every case except 2022, substantially so) than Shine's net profit after tax in each financial year; and it is almost as large as the combined net profit after tax for the 2016 and

2017 financial years combined and for the 2018 and 2019 financial years combined. For completeness, the Annual Reports relevantly reflect as follows:

Financial Year	**Gross revenue**	**Gross revenue less employee and "Other" expenses**	**Net profit after tax**
2016	$151,501,400	$25,929,278 (approximately 17% of gross revenue)	$14,822,360 (9.8% of gross revenue)
2017	$165,027,000	$34,863,000 (approximately 21% of gross revenue)	$20,155,000 (12% of gross revenue)
2018	$179,371,000	$37,953,000 (approximately 21% of gross revenue)	$19,113,000 (11% of gross revenue)
2019	$177,903,000	$34,863,000 (approximately 20% of gross revenue)	$14,032,000 (7.8%of gross revenue
2020	$180,799,000	$49,323,000 (approximately 27% of gross revenue)	$19,113,000 (11% of gross revenue)
2021	$191,880,000	$54,646,000 (approximately 28% of gross revenue)	$21,553,000 (11% of gross revenue)
2022	$213,186,000	$61,482,000 (approximately 29% of gross revenue)	$31,483,000 (15% of gross revenue

126. *Fifthly*, Shine rejects any suggestion that a payment to Shine on account of interest would not be fair and reasonable where the applicants did not seek a review of the decision of Registrar O'Connor. Two points are advanced. *First,* it is said that there was a real risk that, on review, the Court may have reached conclusions less favourable to the applicants than those reached by Registrar O'Connor. It is

unreasonable for the Court to expect "*Shine* to have opened *itself* up to this threat" (emphasis added). *Secondly,* as noted above, Shine asserts any review would have been hopeless.

127. Shine also invokes three arguments which may be said to go to issues of principle.

128. The *first* is there is an analogy to be drawn between the role assumed by Shine and the role of a litigation funder. It is said that Shine seeks reimbursement for the interest incurred "in what is in effect a separate capacity, that is, in effect, in its capacity as a funder of the disbursements".

129. *Secondly,* the accrued interest is on all fours with after the event (**ATE**) insurance premiums. The interest charge is, like an ATE premium, a cost of borrowing funds from a third-party lender in order to enable counsel and experts to be paid. Shine identifies that while it appears deductions for such premiums will not be permitted *in addition* to a commission payable to a funder (see *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885; (2020) 385 ALR 625 (at 634 [31]–[32] per Lee J); *Williamson v Sydney Olympic Park Authority* [2022] NSWSC 1618 (at [76] per Black J)), the interest amount should be recoverable by Shine because it is the "price" of payment for disbursements, and Shine is not being compensated for the cost of carrying disbursements in any other way.

130. *Thirdly,* a deduction from the settlement sum on account of the interest charged would be consistent with longstanding equitable principle and practice: see *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; (2019) 265 FCR 21 (at 49 [103]–[104] per Allsop CJ, Middleton and Robertson JJ); *Klemweb* (at 610 [128]–[129] per Lee J). It is said that where Shine has, by its efforts, brought into court a fund in the administration of which it and other parties are interested, Shine's costs and expenses in preservation and realisation of the fund will be a first claim upon that fund: *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* [2009] FCAFC 9; (2009) 253 ALR 240 (at 254–255 [63] per North, Emmett and Rares JJ).

131. Shine contends that the Court should have regard to two counterfactuals which may have obtained if Shine had not incurred the interest on the disbursement funding

facility. The *first* is that Shine would not have continued to conduct the proceedings. The *second* is that litigation funding would have been obtained to enable the proceedings to run. In such circumstances, there would be no doubt that any funder would be entitled to be paid a commission. The amount sought to be recovered by Shine on account of disbursement funding interest (materially less than 10% of the settlement sum) is substantially less than would be expected to be approved by way of commission for a funder.

132. It will already be evident I reject a number of these submissions by reason of the findings I have made as to what occurred (to the extent it is revealed on the incomplete evidence). But before ensuring I deal with each of them, it is useful to address a topic discussed at some length in submissions relevant to the consideration of the position of Shine.

D AN OBSERVATION CONCERNING CONFLICTING INTERESTS

133. There was significant discussion during the course of the hearing as to potential conflicts between the commercial imperatives of Shine and Shine Justice and the position of its clients and group members. In some respects the tensions exhibited in this case were unusual. Much was made by the contradictor of the failure of Shine to adduce any evidence that anyone within Shine had regard to the interests of group members in making the commercial decision to pursue the disbursement funding facilities. I am satisfied that if there had been some close consideration of the interests of group members at the time Mr Raj made his decision, some evidence would have been adduced of it. Its absence fortifies me in my belief that the decision was made by a non-lawyer without any real examination of how that would impact upon group members.

134. In response, over and again, Shine stressed it would be wrong to find it had “any duty to fund” the litigation and was entitled to arrange its affairs as to the funding of this litigation as it wished, consistently with the law and its broader commercial priorities.

135. This brings into focus the question of where Shine’s obligations lay in the circumstances in which it found itself. It also demonstrates the tensions that can exist

between the professional, contractual and fiduciary duties owed to clients and duties owed to group members on the one hand; and the duties owed by directors, officers and employees to a solicitor corporation on the other. This requires some explanation.

136. Rule 4.1.1 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (**Solicitors' Conduct Rules**) provides that a solicitor must "act in the best interests of a client in any matter in which the solicitor represents the client". The fiduciary duty of a solicitor to his client may be expressed in a similar vein: a solicitor, as a fiduciary for the client, must prefer the client's interests over the solicitor's personal interests: *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165 (at 199 [78] per McHugh, Gummow, Hayne and Callinan JJ).

137. Where a solicitor is acting for a representative applicant, the content of the duty involves advising and assisting the applicant to discharge the obligation to represent the claims of group members in accordance with Pt IVA and Pt VB of the FCA Act. The Court is entitled to expect that the applicant's solicitors will not act contrary to the interests of group members as a whole in advancing and dealing with the common aspects of their claims. But, at the same time, the directors of a company owe a fiduciary duty to the company to act in its best interests (*Walker v Wimborne* (1976) 137 CLR 1 (at 6–7 per Mason J)), which may but need not align with the best interests of creditors and shareholders. There is also, of course, the suite of statutory duties owed by company directors in Pt 2D.1 of the Corporations Act.

138. Historically any tension arising from these various duties, in this form, did not exist, but the commencement of the *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* (NSW) (repealed) in July 2001 was a turning point. The present iteration of the relevant legislation, the Uniform Law, provides in s 6 that an incorporated legal practice is a "qualified entity" which may engage in legal practice. This shift precipitated an increase in innovative structures such as incorporated legal practices and corporate relationships between listed entities and wholly owned incorporated legal practices, such as the relationship between Shine Justice and Shine: see, generally Legal Services Commissioner Steve Mark, "The Corporatisation of Law

Firms – Conflicts of Interests for Publicly Listed Law Firms" (Australian Lawyers Alliance National Conference 2007, 13 October 2007); Andrew Grech and Kirsten Morrison, "Slater & Gordon: the Listing Experience" (2009) 22 *Georgetown Journal of Legal Ethics* 535 (at 537).

139. In recognition of its duties, Shine Justice has adopted corporate governance policies to reinforce the primary of professional and ethical obligations of legal practitioners in the company. Notably, cl 6 of Shine Justice's Code of Conduct provides as follows:

> As legal professionals, we (and our employees) have a paramount duty to the Court, and then to our clients. Those duties prevail over our duty to shareholders. There may be instances where we and our lawyers, in exercising our duties to the court or to the client (or both), act other than in the best interests of shareholders. An example is in settlement negotiations where our duty to our clients would be favoured over any short-term cash flow or funding needs we may have. The Board respects the paramount duty owed by Shine and its lawyers to the courts and their duty to act in the best interests of clients, but believes that doing so will also be in the long term best interests of Shine and its shareholders.

140. The Code of Conduct is silent as to duties owed to group members or representative persons in class actions or in other forms of representative proceedings. This might be thought to be less than ideal in circumstances where it is apparent a large and important part of Shine's practice is class action litigation involving the claims of thousands of group members across many facets of commercial and everyday life. Whether or not a group member has retained the solicitor acting for the representative applicant, the solicitor has a duty not to act inconsistently with the interests of group members: *Dyczynski v Gibson* [2020] FCAFC 120; (2020) 280 FCR 583 (at 672–673 [378]–[380] per Lee J). This duty complements the representative role assumed by a lead applicant and guards against any asymmetry between a representative applicant, who has the benefit of legal representation, and group members, whose "claim[s]", as that term is used in s 33C, are in the hands of the representative applicant unless they opt out of the proceeding under s 33J of the FCA Act. I assume Shine agrees that the duties it has to group members must inform its actions in a similar, albeit different way to the duties owed to its clients. The omission of these duties from the Code of

Conduct would not have assisted those within the company keeping these duties at the forefront in considering the issue of funding disbursements, particularly if decisions were being made without the active involvement of individual solicitors (who would be better aware of the content of their professional duties than financial executives).

141. It was not expressly submitted by the contradictor that Shine was in breach of any duty it had to group members. It would be inappropriate for me to explore this issue except to the extent necessary for the purposes of considering the circumstances relevant to the disposition of this application. I will proceed on the basis that I do not find that Shine acted inconsistently with its obligations *qua* group members. But, at the very least, what this case exposes is the imperative on those in incorporated legal practices, *a fortiori* solicitors working for the benefit of listed entities, to keep at the forefront of their mind the paramount duty to the Court, and other professional duties. There is always a live risk that "human frailty will prove unequal" to the task: *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154 (at 172 per Street CJ). This need for vigilance is acute when decisions are or can be made by non-lawyer officers of a corporation, which can affect the interests of clients and group members and hence the proper discharge of professional duties.

142. I make these comments, which are strictly unnecessary to decide the application, because I was troubled by the exchanges with senior counsel for Shine (extracted above at [113] and [115]–[116]). It seems there is an unwillingness on the part of Shine to accept that any special or unusual conflict arose in the circumstances in which Shine found itself.

143. Shine took on the case. Its retainer obliged it to incur and pay costs and disbursements in the proper conduct of the case. Shine repeatedly stressed that it was placed with a choice of either entering into the disbursement funding facility on the terms struck, or ceasing to act. This suggested binary choice is not established on the evidence. Even leaving aside the possibility of other and more favourable funding methods, Shine's retainer *required* it to act in the matter subject to termination for some "just" cause. Given the pendency of the initial trial at the time when Shine changed tack and ceased

funding disbursements out of retained earnings, it is not evident to me that Shine did not have a duty to continue to act in the proceedings in 2017. It is unnecessary to form any concluded view, but as the contradictor submits, the proposition that a law firm in a representative proceeding could, at any stage, simply cease acting was doubted by Charlesworth J in *Furnell v SEPL Pty Ltd* [2022] FCA 1603 (at [20]). Particularly given its protective and supervisory role in Pt IVA proceedings and its implied power to control proceedings and practitioners before the Court, the implicit suggestion of Shine that the Court would simply allow a firm operating on a "no win, no fee" retainer to walk away for commercial reasons, just before the initial trial, is one I find difficult to accept. Moreover, there are plenty of plaintiff law firms and funders hungry for work. I am far from convinced that if Shine said to group members and the Court, in a timely way, that it would no longer act unless it exposed group members to the terms of the disbursement funding facility it negotiated, another proposal for conducting the litigation could not have been struck.

144. We only know for sure what happened. And this gives rise to significant concerns.

145. Shine paid itself an amount representing past disbursements and exposed group members to usurious interest charges. Prior to doing so, Shine told group members nothing and they told its clients that the proposed impost constituted interest costs under the Costs Agreements and they would either: (1) seek recovery of this interest "*from the Respondent* as part of the costs that they will be ordered to pay" (emphasis added); *or* (2) seek the "interest charges" as fair a reasonable amount incurred "when approving any settlement in this proceeding".

146. As explained above, Shine now says the first course is misconceived but, at the same time, suggest this does not create a worrying incentive for a business enterprise to pursue the only other mode of recovery it contemplated.

147. Various other avenues of seeking orders relying on Pt IVA to obtain a payment out of a judgment sum were belatedly raised without elaboration in submissions, but these modes seemed to contemplate a payment out of *judgment sums*, not from *the respondent*. Of course, to the extent an order for payments of proportional sums would

have been available against the respondents upon determination of individual claims, this would not be recovery against *the respondents* without seeking to invoke a similar power and principles to require payment of the whole of the relevant sum under the costs order abandoned as being “hopeless”.

148. This incentive is even more troubling when, for reasons I explained at great length in *Gill (No 10)*, I think the settlement achieved was a borderline one. I hasten to add that I have nothing but confidence in the professionalism of the individual solicitors involved and the highly experienced and able counsel they briefed. I unquestionably accept they recognised the settlement procured was the only one they could get and, after considering the pros and cons, they conscientiously believed the settlement should be approved. But it is asking much of even a fine professional to make such vexing judgments while working in a large business endeavour ultimately owned by shareholders who are naturally interested in returns and the maximisation of revenue and profit.

149. Shine goes so far as to submit the incentive to settle in this case “is no greater than in any case in which the solicitors for the applicant(s), running the case pursuant to a conditional costs agreement, apprehend that there is a significant risk of losing”. At best this contention is superficial. At worst, it reveals starkly a misapprehension of the extent and difficulties of conflicts that can, and in my experience often do, arise in the potential settlement of complex class actions.

150. I recognise that commercial considerations loom very large in any traditional plaintiff law firm model (or any firm of solicitors, big or small). Few do such jobs for love alone although, one hopes, for most practitioners, money is not the only consideration. Speaking generally, in the halcyon days of the common law, “spec” work paid well because of volume. Legal reforms, increased competition and lower volumes meant risk increased but, with the introduction of “uplifts”, there was at least some accommodation for risk. There are plenty of cases where plaintiff lawyers will be faced with dilemmas if they think their case is going south, but their interests are at least generally aligned with those of their clients. The far more acute problem here is

not only the extent of the relevant amount but the fact that one mode of recovery was thought hopeless and the only other practical mode of recovery was to: (1) settle; (2) seek a payment diminishing the amount payable to group members; and (3) treat the applicants and group members inequitably.

151. It must be stressed that the evidence now reveals this was the context in which settlement discussions took place. One would be naïve to think that significant commercial incentives did not exist for Shine to settle the litigation. These commercial incentives relating to past costs and expenses were exacerbated by the fact that the settlement was predicted to secure a short term and material revenue stream. It will be recalled (see *Gill (No 10)* (at [12])) that when settlement (subject to documentation and Court approval) was struck on 9 September 2022, Shine made an ASX announcement pursuant to ASX Listing Rule 3.1 (which provides that once an entity is or becomes aware of information that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell the ASX that information). That announcement provided that because of the settlement "[s]ubject to the timing of the Court's approval, cash is expected to be positively impacted in FY23".

152. Again, I stress none of this should be construed as a finding that Shine breached its duties, even less that it did so knowingly. I repeat, I have no reason to think the individual lawyers acted other than entirely properly and conscientiously. Rather, it is to emphasise my concern at the apparent unwillingness of Shine to accept on this application that when decisions were made at various stages of the conduct of this litigation, there arose real and unusually acute conflicts of interest that needed to be managed and were different in type and scale than those that usually arise for practitioners acting in a "spec" matter.

E CONSIDERATION

153. As would be evident from my findings, I do not consider the result of this application to be anything like a close call. As I have explained, I am not satisfied that Shine acted prudently and reasonably in relevant respects. There are a number of more specific

reasons why I do not think a payment of the kind sought would be just. As I will explain, some are determinative in themselves.

E.1 Risk of Under-Compensation

154. Perhaps most importantly, if the interest amount is recoverable by Shine, there is a risk group members will be under-compensated. This risk has two aspects, the *first* being that group members will bear this cost where the applicants will not; and *secondly,* the amount recoverable by group members will no longer be in the range of what is fair and reasonable.

155. Shine submits any risk of under-compensation needs to be considered in the light of my observations in *Gill (No 10)* (at [140]) that:

> I am comforted by the fact that I can guard against **unjust deductions.** Precisely how far along on the spectrum of reasonableness the settlement ultimately sits will **depend on the distribution of funds to scheme administrators and the applicants' lawyers**. That is, the lower the amount paid to Shine and paid to the scheme administrators, the higher the settlement will sit within the range.
>
> (Emphasis added).

156. Emphasis is placed on the notion of an "unjust" deduction. It is said there is nothing "unjust" about the amount of interest sought to be recovered, because on any view the amount payable to group members will fall within the range of reasonable outcomes identified in *Gill (No 10)* (at [140]), that is, the range of $184.187 million (lower limit) to $233.53 million (upper limit). Indeed, counsel for Shine calculated approximately $215.529 million would be left in group members' pockets if the following variables are in play:

(1) the total settlement sum is $306.834 million, including interest accrued and credited to the account in which the settlement sum is being held;

(2) Shine recovers 90% of its unrecovered costs and disbursements (a matter presently before a costs referee), being approximately $36.655 million;

(3) Shine recovers $28.65 million in interest (reduced from the gross amount of $32.25 million in line with the "point" estimate of Dr Sarah Whitehouse, a biostatician (see *Gill (No 10)* (at [92]));

(4) the costs of administering the settlement scheme is approximately $26 million; and

(5) group members pay an estimate of $26.113 million to third-parties (for example, Medicare and private health insurers) (see *Gill (No 10)* (at [48], [50])).

157. In developing this submission, counsel for Shine handed up the following table:

Unadjusted/original amount	**Adjusted amount**	**Difference**
Settlement sum		
$300 million	$306.834 million	$6.834 million
Recovery amounts		
-$26.113 million	$0	$26.113 million
Scheme administration costs		
-$45 million	-$26 million	$19 million
Unrecovered costs and disbursements		
-$38.131 million	-$36.655 million	$1.476 million
Interest on disbursement funding		
-$32.25 million	$28.65 million	$3.6 million
Amount for group members after deductions		
$158.506 million	**$215.529 million**	**$57.023 million**

With respect, this document makes little sense. To suggest that my evaluative assessment as to the deduction should be affected by the fact that the $300 million settlement sum is being held in an interest-bearing account with interest accruing at 4.2% borders on the risible. Shine must recognise that the current inflation rate means the value of this money diminishes when invested at such a rate and that, in any event, prior to distribution of this sum, group members are out of pocket. Many are likely to be required to service debts upon which interest is accruing, at a rate far higher than 4.2%, such as home loans, unsecured personal loans and credit card debt. Despite submissions being put by Mr Leopold SC on behalf of Shine with his characteristic skill and force, this was a reflection of a tendency on the part of Shine to advance less than compelling arguments.

158. Similarly, it was said that I should have a degree of comfort as the "adjusted" amount accounts for recovery amounts of $26 million (being amounts group members are required to pay to discharge debts to third parties). Plainly, I took this matter and others into account on the settlement approval application and still formed the view that the settlement was at the lower end of the scale. I am not assisted in determining this application by Shine suggesting the settlement was somehow better than I characterised it upon settlement approval.

159. I consider a further deduction in excess of $32 million will make a marginal settlement less than reasonable. Borderline means borderline. The settlement got a grudging and hesitant pass, not a credit. Shine made repeated reference to the applicants' evidence on the settlement approval application, in particular, the "point estimates" prepared by Dr Whitehouse, which formed the basis for the applicants' estimation of the range of group member claims. Shine's approach was to point to various factors that were said to make the settlement sum look more favourable than those estimates reflected.

160. This approach missed the mark. The reality is that, as I explained in *Gill (No 10)* (at [77]–[104]), the estimates before me on the settlement approval application did not provide for anything near best recovery. They were, *inter alia*: (1) based upon extrapolation from a reduced subset of group members; and (2) assessed in accordance with Pt VIB of the *Trade Practices Act 1974* (Cth) (**Trade Practices Act**) and Pt VIB of the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**), meaning that only product liability and misleading and deceptive conduct claims were captured (and not negligence claims), and non-economic loss claims were restricted to the "most extreme case" threshold in the Trade Practices Act and Competition and Consumer Act, rather than the applicable state and territory legislation (which is, in some cases, uncapped). Indeed, as I explained in *Gill (No 10)* (at [104]), "[t]he contradictor pointed to the fact that an applicant in the Gill Proceeding was entitled to twice as much under state legislation for her claim as she was under the Trade

Practices Act". Additionally, the estimates did not account for interest, or for the fact that group member claims will be diminished by having to foot the bill for the costs of the proceedings rather than pursuing their claims and the possibility of obtaining a favourable costs order.

161. At the end of the day, Shine's submissions ran headlong into the reality that each of the applicants in this case recovered very substantial damages ($1,276,113 to Mrs Gill, $555,555 to Mrs Dawson and $757,372 to Mrs Sanders) plus an order for costs: *Gill v Ethicon Sàrl (No 6)* [2020] FCA 279. The group members will only obtain a fraction of these amounts notwithstanding that at the initial trial, s 33ZB orders were made in their favour. The settlement, cannot be characterised as a good one from the perspective of group members, whatever belated attempts are made to put lipstick on a pig (or, perhaps more fairly, on a passably attractive sow). Accordingly, I am not satisfied that the net sum left for group members will be sufficient if the deduction sought is made. This is fatal to characterising the deduction now sought as "just".

E.2 Insufficiency of Notice to Group Members and Mrs Talbot

162. It is self-evidently unsatisfactory that Shine expects group members to carry the interest costs, given they were not notified of its accrual during the opt out process or at any other time. It is also highly problematical that one client, Mrs Talbot, was not informed, notwithstanding she is not expected to carry the burden.

163. Moreover, as is evident from the document extracted at [92], a disclosure was made as to Shine reaching an agreement with a disbursement funder, Assess, the agreement's core terms and its suggested consistency with other such facilities. A comparison was then invoked when it was said:

> By comparison, if an agreement had been entered into with a traditional litigation funder (for eg, IMF Bentham Australia) rather than a Conditional Costs agreement between you and Shine, then the litigation funder would look to recover between 30 and 40% of the total settlement sum (or judgement [sic] sum) as their fee or commission for providing such funding.

164. It was apparently expressly "[o]n this basis" that Shine considered the relevant sum to be fairly and reasonably incurred.

165. As noted above, this was an inappropriate analogy.

166. Funders perform a different role than the role performed by Shine. A funder of a class action is invariably required to provide a costs indemnity for adverse costs to a lead applicant. Moreover, in exchange for becoming liable for adverse costs, a funder either enters into a series of bilateral promises to obtain a funding fee or seeks an order of the Court to obtain a CFO representing a return for the risk it incurred in running the litigation through to a successful conclusion. This is an entirely different situation from the position Shine, acting as a solicitor on a speculative basis.

167. Moreover, Shine has not explained why group members should be burdened with the deduction when the applicants are not. It was open to Shine to seek to negotiate as a term of the Costs Agreements that the interest on Shine's disbursement funding facility would be payable from any judgment or settlement, however, it did not do so. No evidence explaining that decision has been advanced by Shine.

168. But even more fundamentally problematic is the failure to notify group members.

169. Clause 16.1 of *Class Actions Practice Note* (GPN-CA) (**Practice Note**) states in terms that:

> [w]here a proposed settlement contemplates that any part of the payments to be made to class members will be applied toward reimbursement of the unrecovered legal costs of the proceeding, or toward payment of litigation funding charges, the Court will usually require that the material filed in support of the application should demonstrate **that reasonable steps were taken to alert class members to the likelihood of such deductions as soon as practicable after that became apparent so that class members were, at the relevant time, able to take such steps as may have been practically available to them to negotiate as to legal costs or as to litigation funding charges as applicable, or to remove themselves from the class action**.
>
> (Emphasis added).

170. As noted above in B.6, no steps – reasonable or otherwise – were taken prior to opt out to alert group members to the possibility that Shine might seek an order for the payment of interest under its disbursement funding facility from any settlement sum.

171. The usual requirement stated in the Practice Note exists for good reason. It would ordinarily be unjust to deduct from group members' settlement entitlements amounts of which they had no notice at a time when they could have done something to avoid them.

172. Shine somewhat hesitantly submitted that the opt out notices effectively gave group members notice of its intention to seek to have the relevant amount deducted from any settlement sum because they stated that, if any compensation was payable to group members, the Court might order that "some of that compensation be used to help pay a share of the costs which are incurred by the [a]pplicants in running the class action but which are not able to be recovered from [the respondents]". Shine submits that it would be "artificial" to distinguish between costs incurred by the applicants and costs incurred by Shine.

173. It was right to be hesitant in putting this submission.

174. As the contradictor rightly submitted, the interest "paid at eye-wateringly high rates on Shine's disbursement funding facilities was not within what any ordinary group member would understand or expect to be a cost of running the class action, and that interest was most certainly not a cost incurred by the [a]pplicants or even one for which they might be made liable".

175. This failure to give any notice of such a potentially large deduction in express and clear terms to group members is again, in and of itself, fatal to characterising the order now sought as "just".

E.3 Insufficiency of Evidence as to Ability to Obtain Alternative Financing

176. My findings as to the extent of Shine's evidence in relation to its inability to obtain alternative financing are set out above. Leaving aside anything other than Mr Raj's

subjective views as to available financing options, I simply do not know how much *could* have been borrowed within the covenants given by Shine to the CBA.

177. As to retained earnings, while Shine's dividend policy recognised that movement of work in progress and disbursements could have an effect on its ability to pay dividends, Shine stresses this recognition does not give rise to, or assume, a duty on the part of Shine to fund disbursements.

178. So much may be true, but what Shine needed to do was act fairly, reasonably and prudently in paying disbursements (which it was required to do) including obtaining funds and putting in place plans to ensure group members were not exposed to unnecessary costs. I am not satisfied on the evidence it adduced that it did so. This is a further pointer to the proposed order being unjust.

E.4 The Rate of the Funding Obtained

179. Mr Raj says he sought to select facilities with interest rates which were "competitive in comparison to other [disbursement] funders in the market": November Affidavit (at [31]). This misses the point by assuming such a form of funding at such exorbitant rates was appropriate except, perhaps, as a very last resort after taking all reasonable steps to preserve a prospect of recovery against the respondents and proper notification. This was not the case, and is another pointer to unjustness.

E.5 Steps Not Taken to Maximise Return to Group Members

180. This has two components: *first*, the lack of effort in recovering a greater proportion of the costs charged against the respondents (which I have adequately explained above); and *secondly*, the failure to maximise the interest to augment the sums paid by the respondents.

181. At the hearing on 13 June, I asked Shine to provide further information as to: (1) the account the costs order of Katzmann J was paid into in November 2020; and (2) the details of the account the settlement sum was paid into on 28 November 2022.

182. As to the *former*, Shine has not provided an adequate answer as to why funds paid to Shine pursuant to the costs order were placed in a trust account bearing no interest,

and remained in that account for almost one year (that is, 28 November 2020 to 10 November 2021). While I accept Shine may not have been able to withdraw against the WFM DPA, this does not explain why Shine failed to maximise the interest paid on the amount to augment the amount paid under the costs order while they remained dormant pending the determination of the respondents' application for special leave.

183. Further, it is unclear why an amount of $15,673,957.57 was paid to WFM on 10 November 2021 "in respect of the WFM disbursements" (to engage Mr Raj's language), when Registrar O'Connor awarded an amount of $16,736,601.80 on account of disbursements (disbursements of $16,721,664.02 and internal photocopying disbursements of $14,937.75). As can be seen, there is a discrepancy of $1,062,644.23 which has not been explained.

184. As to the *latter*, the settlement sum was paid into a CBA business saver interest-bearing account with a variable interest rate (currently 4.2%): July Affidavit (at [3]). Up until 20 July 2023, interest of $6,182,597.01 had accrued and been credited to that account; and a further amount of $651,681.86 in interest had accrued but had not been credited to the account: July Affidavit (at [3]–[4]). The lack of diligence in taking all steps to maximise the return to group members may not be particularly significant in itself, but it is a discretionary factor pointing away from making the order (although it is not material in my rejection of the application).

E.6 Other Relevant Shine Conduct

185. Apart from what I have already canvassed, there are other aspects of Shine's conduct which militate against exercising the discretion in s 33V(2) to make the order sought in its favour at the significant expense of group members without some reduction or modification (although these issues would not, in themselves, be determinative).

186. For example, issues arise in connexion with Shine's delays in repaying its current disbursement funding facility. On around 25 November 2020, the respondents paid Shine $39,786,867 on account of the applicants' costs. At that time, the balance owing on Shine's disbursement funding facility was less than that amount, being $37,993,701 as at 30 November 2020. However, rather than electing to repay the facility, or even

some part of what was owing, Shine chose to repay *none* of it, in order to have a ready source of funds available if it had to make restitution in the event of a successful appeal. The result, as can be seen from the statement of account exhibited to the November Affidavit (at 116), is that around $8.6 million of additional interest accrued in the relatively short period between that time and 31 October 2021, at a rate 20% per annum. The same document demonstrates that since that time, of course, Shine has permitted many more millions of dollars in interest to accrue on that facility.

187. Additionally, Shine now seeks to obtain funds against Mrs Davis (being a former applicant) and Mrs Talbot otherwise than in accordance with the contractual arrangements they have with those clients. It will be recalled that Mrs Davis and Mrs Talbot are clients. They have entered into a bargain with Shine which does not provide for the payment of any interest on disbursements and yet, through the mechanism of this application, Shine intends to make them liable for their component part of the sum to be deducted. This is contrary to principle.

188. There was some suggestion that such an order would amount to a variation of the Costs Agreements. For a variety of reasons unnecessary to detail for the purposes of this judgment I do not consider that this would be the true legal consequence of making the order sought.

E.7 Other Shine Submissions

189. It is convenient here to deal with a miscellany of other Shine submissions, all of which I have considered, to the extent they have not already been addressed.

190. *First,* Shine submitted that from the outset of the matter, it was "contemplated that Shine would need to recover some amount to compensate it for the burden of carrying the disbursement costs". In pursuit of this submission, Shine referred to cl 9.6 of the Costs Agreement signed by Mrs Davis in 2012, which provided, "[y]ou agree to pay an additional Disbursement to Us, being an interest charge calculated at the rate of ten percent (10%) per annum on the amount paid by Us for Disbursement on Your behalf…" It was said that, generously:

> Shine has not sought, and does not seek, to recover amounts payable under that

provision. Indeed, it does not seek to recover any amount on account of interest on disbursements referable to a period before May 2017, when the first drawdown on a disbursement funding arrangement occurred.

191. The basis of this submission is unclear. The 2012 Costs Agreement was superseded by a further Costs Agreement in 2014, which contains no such provision. Moreover, the Costs Agreements signed by the other applicants do not contain provisions to this effect. As explained above, focus should be directed to the relevant retainers. No principled argument was advanced as to the existence of an express or implied term by which the applicants agreed Shine could pass on disbursement funding charges. This is an example of Shine's tendency to make vague assertions about what the applicants can be taken to have understood or agreed to.

192. *Secondly*, as explained at [125] above, Shine asked the Court to take account of the overall effect of dismissing the application on Shine's financial position, amounting to what it refers to as a "discount" on its professional fees.

193. This submission invites the Court to compensate for the ramifications of commercial choices made by Shine in running its business. It is also unsupported by the evidence: Shine has not adduced evidence as to the profit made from the proceedings, or what the profit would be without recovery of the interest amount from the settlement sum. Shine has sought to cure this lacuna in its evidence by extrapolating from its Annual Reports when what is required to advance a submission of this kind is specific evidence of Shine's operating margin for the proceeding.

194. If there was any doubt, a further difficulty with this argument is it proceeds upon the unstated premise that the fees charged by Shine in these proceedings were set without regard to its disbursement funding costs. I simply do not know how Shine set the charge out rates it applied to the work it did in these proceedings, let alone the extent to which those rates accounted for disbursement funding costs. Moreover, there were a number of options for Shine in conducting this litigation: it could have conducted the case on speculative basis and have sought an uplift; it could have sought a solicitors' CFO; and it could have entered into a variety of forms of more orthodox funding arrangements. The choices that Shine made reflected commercial decisions made by a

public company. If those commercial decisions have turned out, with the benefit of hindsight, to be suboptimal, this does not mean it is just that women, including a number who have suffered profound personal loss, should ameliorate the consequences of these commercial decisions.

195. It is worth noting that it is difficult to understand why Shine could not have made a handsome profit out of this litigation, which was demonstrated to have substantial merit. After all, it obtained a swingeing costs order in favour of its clients and won at all stages of the process. If that is not the case, such a result is the fault of commercial decisions for which it is responsible.

196. *Thirdly*, Shine's contention that equitable principle supports a deduction from the settlement sum on account of the interest charged cannot be sustained. As the discussion of *The National Bolivian Navigation Company and Others v William Millar Wilson* (1880) 5 App Cas 176 in *Westpac v Lenthall* (at 49 [103]–[104] per Allsop CJ, Middleton and Robertson JJ) demonstrates, the approach in representative proceedings in equity was to ensure costs and expenses were shared equitably between the representative plaintiff and those on whose behalf that person had sued. The order sought by Shine runs contrary to this rationale, placing the applicants in a better position than those they represented.

197. Finally, Shine drew an analogy between the interest amount and ATE insurance costs, but submitted that given Shine is not entitled to a commission for funding disbursements, it should be entitled to the relevant amount, being a cost of pursuing the litigation, akin to ATE insurance costs. The comparison between ATE insurance costs and the relevant amount is odd. If funders are rewarded for risk then, in my view, as a general proposition, they should not be able to recover the costs of minimising that risk by passing on the attendant cost to group members. But any controversy as to recovery of ATE premia is beside the point. The decision to enter into a disbursement funding arrangement with an exorbitant interest rate was one made by Shine in the course of conducting its business and it has not proven it was

reasonable or prudent. Group members, including vulnerable women, should not be burdened with the consequences of the commercial decisions made by Shine.

F CONCLUDING REMARKS

198. The determination of what is "just" is a broad, evaluative decision informed by all the relevant circumstances. I have explained why the relief sought by Shine cannot be characterised as just. I have, however, given consideration as to whether I should adopt a course other than simply dismissing the application. At the conclusion of oral argument, senior counsel for Shine noted it would be open for me to fix upon another (and lower) figure that I considered appropriate. The contradictor, in response, stressed there were insuperable difficulties in making a just order for deduction in any amount.

199. I propose to dismiss the application but will make it explicit that this dismissal does not operate as an insuperable fetter on bringing of a further application, on proper evidence, as to why a lower amount should be deducted (and in such a way as to redress the differential treatment as between the applicants and group members and to ensure Shine does not act inconsistently with any contractual obligations it presently owes to its clients).

200. The reference to proper evidence will require Shine to face squarely what seems to me to be the real issue that would arise on such an application. That is, given my findings Shine did not act prudently or reasonably in entering into the disbursement facilities in a manner which best protected the interests of group members, and did not maximise the prospect of recovery of the relevant amount against the respondents, how can it be just for me to allow *any* deduction?

201. In the settlement approval process, I spent several days listening to women who have suffered greatly. Marriages and lives have been irreparably damaged and some ruined. The pain and anguish of the women who made representations opposing the settlement was palpable and moving. The legislative scheme for recovery of personal injury damages in this country limits significantly the ability of these women to obtain sufficient compensation to help them get on with the rest of their lives. The evaluation

as to whether *any* further deduction from the settlement sum requires consideration of all the circumstances, including the modest recovery of these women.

202. I should also note that because the result is clear cut on this application, I have not found it necessary to reach any conclusion as to whether Shine acted contrary to any legal duty in going down the path it chose, but an alternative application may require consideration of this issue.

203. Although I have made findings, this is an interlocutory application and it is open to me to receive fresh evidence on any further application. If such an application is made, I would need to understand better than I do now precisely why Shine changed tack and expose group members to these extraordinary interest charges. I would also need to know why far earlier than the end of 2016 there was no contingency plan and why, by 2017, it was not possible to pay the amounts out of retained earnings or seek out a more cost-effective source of funds.

204. I am not encouraging any further application, but if it was made, I would be assisted by the presence of the contradictor and by discovery and cross-examination to ascertain precisely what went on, so that I can have a firmer foundation to form a judgment as to whether any deduction of a lesser sum could ever be just.

I certify that the preceding two hundred and five (205) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate:

Dated: 3 August 2023