FEDERAL COURT OF AUSTRALIA

Kuterba v Sirtex Medical Limited (No 3) [2019] FCA 1374

File number:	VID 1375 of 2017
Judge:	**BEACH J**
Date of judgment:	23 August 2019
Date of publication of reasons:	26 August 2019
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – application for approval of settlement pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – whether proposed settlement fair and reasonable – funding commission percentage – claim of applicants for reimbursement payments – approval granted
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 23, 33V, 33ZF
Cases cited:	*Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 *Farey v National Australia Bank Ltd* [2016] FCA 340 *Lenthall v Westpac Life Insurance Services Ltd* (2018) 363 ALR 698
Date of hearing:	23 August 2019
Registry:	Victoria
Division:	General Division
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Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	34

Counsel for the Applicants:	Mr G Donnellan and Ms K Lindeman
Solicitor for the Applicants:	Maurice Blackburn
Counsel for the Respondent:	Mr PH Wallis
Solicitor for the Respondent:	Watson Mangioni Lawyers
Solicitor for the Objectors:	Mr D Barrow of Kingsnake Class Action Lawyers

ORDERS

VID 1375 of 2017

BETWEEN:	**PAWEL KUTERBA** First Applicant
	TODD HAYWARD Second Applicant
AND:	**SIRTEX MEDICAL LIMITED (ACN 78 166 122)** Respondent
JUDGE:	**BEACH J**
DATE OF ORDER:	**23 AUGUST 2019**

THE COURT ORDERS THAT:

1. Pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), the settlement of this proceeding be approved on the terms set out in:

   (a) the Deed of Settlement dated 25 June 2019 exhibited at pages 96 to 121 of the exhibit marked "Confidential Exhibit BJS-8" to the affidavit of Ben Slade affirmed 16 August 2019 (**Settlement Deed**); and

   (b) the Settlement Distribution Scheme exhibited at pages 54 to 76 of the exhibit marked "Exhibit BJS-9" to the affidavit of Ben Slade affirmed 21 August 2019 and the Loss Assessment Formula exhibited in the exhibit marked "Confidential Exhibit BJS-10" to the affidavit of Ben Slade affirmed 21 August 2019 (together, the **Scheme**).

2. Pursuant to s 33ZF of the Act, the Applicants be authorised, *nunc pro tunc*, to enter into and give effect to the Settlement Deed (and all transactions contemplated by it) for and on behalf of all group members (being those persons who meet the definition of group members in the Fifth Further Amended Statement of Claim and who did not file an opt out notice within time, that is to say, by 1 November 2018) (**Group Members**).

3. Pursuant to s 33ZB(a) of the Act, the persons affected and bound by the settlement are the Applicants, the Respondent, the Group Members, IMF Bentham Limited (**IMF**), Australian Funding Partners Limited (**AFPL**) and Maurice Blackburn Pty Ltd (**Maurice Blackburn**).

4. Pursuant to ss 22 or 23 of the Act, FCR 1.32 and/or the Court's implied jurisdiction, the amount of $725,000 paid into Court by AFPL as security for costs in proceeding no VID 91 of 2017 (prior to the consolidation of that proceeding with the present proceeding by order 1 of the orders made on 30 April 2018) be returned to AFPL within three business days.

5. Pursuant to s 33ZF of the Act, Maurice Blackburn be appointed as the administrator of the Scheme and act in accordance with the rules of the Scheme, subject to any direction of the Court.

6. Pursuant to ss 33V(2) and 33ZF of the Act:

   (a) the Applicants' Reimbursement Payment as defined in the Scheme is approved in the amount of $25,000 for each Applicant;

   (b) the Applicants' Legal Costs as defined in the Scheme are approved in the amount of $9,282,363.82 (being $9,279,888.82 of the Special Referee's 19 August 2019 report, plus $2,475 for the Supplementary Special Referee report of 22 August 2019) and are to be apportioned on a pro rata basis between all participating Group Members (being those who are to receive a distribution from the Scheme) and deducted from the settlement sum;

   (c) Order 17 of the 26 June 2019 orders capping the Special Referee's fees be varied so that the Special Referee's fees be allowed in the sum of $31,845 (inclusive of GST);

   (d) the Administration Costs as defined in the Scheme are approved in the amount of $275,000 (including GST);

   (e) the Funding Costs as defined in the Scheme are approved in the amount of $10,214,529.60 (including GST) and are to be apportioned on a pro rata basis between all participating Group Members (being those who are to receive a distribution from the Scheme) and deducted from the settlement sum.

7. Pursuant to ss 22, 23 or 33ZF of the Act, FCR 1.32 and/or the Court's implied jurisdiction, the proceeding be dismissed with no orders as to costs and on the basis that all previous orders for costs be vacated with effect from the date of the completion of the administration of the Scheme, being the date on which the final distribution from the Settlement Distribution Fund is confirmed by Maurice Blackburn (**Effective Date**).

8. Pursuant to s 33ZF of the Act, that the releases and pleas in bar in the Settlement Deed operate without prejudice to:

   (a) the right of any party to the Deed to make an application to enforce the Settlement Deed in a new proceeding;

   (b) the right of any Registered Group Member to make an application to the Court in accordance with the terms of the Scheme; or

   (c) the right of Maurice Blackburn to refer any issues relating to the Scheme to the Court for direction or determination in accordance with the terms of the Scheme.

9. Pursuant to ss 37AF and 37AG(1)(a) of the Act, until further order, in order to prevent prejudice to the proper administration of justice, that the contents of the exhibits marked "Confidential Exhibit BJS-8" to the affidavit of Ben Slade affirmed 16 August 2019, and the exhibit marked "Confidential Exhibit BJS-10" to the affidavit of Ben Slade affirmed 21 August 2019, not be disclosed to any person or entity except to the docket Judge, his or her personal staff, any officer of the Court authorised by the docket Judge, the Applicants, their legal representatives, IMF and AFPL, such permitted disclosures to be upon terms that none of those parties or persons disclose that material or any part thereof to any person or entity.

10. Grant leave to Maurice Blackburn to apply to the Court for approval of any Administration Costs in addition to the amount referred to in order 6(d) above.

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

REASONS FOR JUDGMENT

BEACH J:

1 Last Friday I made orders approving of a settlement in these consolidated representative proceedings under s 33V(1) of the *Federal Court of Australia Act 1976* (Cth) (FCA). Under the settlement the respondent agreed to pay $40 million to the applicants and group members. In so approving of the settlement, I made a common fund order and also permitted payments by way of re-imbursement amounts to the two applicants.

2 In terms of the approval application generally, the principles to be applied were not in doubt and were conveniently summarised in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330 at [81] to [85], *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [12] and [13] per Murphy J and *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5], [32], [53] and [54] per Moshinsky J.

3 I made relevant orders for the reasons discussed with the applicants' counsel and on the basis of their helpful written submissions, their more detailed joint confidential opinion, and upon the basis of detailed reports from Ms Elizabeth Harris an expert costs consultant who acted as a special referee appointed by Murphy J. Moreover, I saw no need to have an amicus curiae appointed. In the present circumstances that would have been a waste of time and expense which would have been borne by the applicants and group members; sensibly the respondent did not urge that upon me with the professed sincerity that respondents in other cases have so urged unconvincingly. Moreover, I had a contradictor (Mr Barrow on behalf of a group member) who made submissions on the question of legal costs, although this was not necessary given the independence and usual thoroughness with which Ms Harris carried out her role in assessing the legal costs.

4 In terms of my reasons for approving the settlement, I only desire to elaborate on three topics being: (a) the common fund order; (b) the reimbursement amounts paid to the applicants; and (c) the quantum of legal costs.

5 Let me deal with the first topic being the making of the common fund order and the effective commission rate that I have allowed on the gross settlement sum.

6 Now no party contended that I did not have the power to make such an order whether within the amplitude and dynamism of s 33ZF of the FCA, s 23 of the FCA more generally, or my implied or incidental powers even more generally in case managing a Part IVA proceeding. Further, given that I am dealing with this all in the context of a settlement, s 33V(2) answers the power question. It has no express limit on the identity of the recipient. And any implied limit arises only from and is bounded by the purpose for which the s 33V(2) power was conferred and the necessary condition for its exercise "…such orders as are just…". Further, no party put forward any cogent reason to postpone the present determination pending the disposition of the current common fund order challenges before the High Court, which in any event do not deal with an *extant* application under s 33V(2). For the moment I must apply the law as it is.

7 As to the commission rate, I have allowed 25% on the *gross* settlement sum. This is well within the range that I would consider reasonable and proportionate for the risk undertaken by the external funder. Let me elaborate on my reasons.

8 First, in *Blairgowrie (No 3)* I allowed a 22.1% commission rate on the gross settlement sum. As I explained at [124]:

> Before dealing with the particular case before me and the suitability of a common fund order, it is not unhelpful to make a comparative analysis of funding commissions in Australia and certain foreign jurisdictions. Under the proposed settlement, a common fund with a 30% funding commission on the net settlement sum (ie after deduction of costs) is proposed. This would result in ILFP receiving a funding commission of approximately $8.85 million, or approximately 22.1% of the gross settlement sum of $40 million. Funding commission and contingency fee percentages are generally expressed as a percentage of the gross settlement sum. Accordingly, for present purposes, the appropriate comparator (to the extent that any comparison can be made) is the figure of 22.1%, rather than the figure of 30%.

9 I have set this out to explain the difference between the two types of percentages, one calculated on the gross settlement sum and the other calculated on the net settlement sum, that is, after the deduction of all legal costs; the latter percentage on the net settlement sum is necessarily substantially higher. Much commentary seems to confuse the two percentages, either inadvertently or for rhetorical effect to support a philosophical position concerning funding commissions. But it is necessary to keep the distinction in mind for comparative purposes to ensure like is compared with like when looking at commission rates allowed in other cases. This leads me to the next point.

10 Second, Professor Vince Morabito of the Monash Business School (Monash University) published earlier this year as part of an ongoing and fundamental research project titled "An Evidence-Based Approach to Class Action Reform in Australia" a paper "Common Fund Orders, Funding Fees and Reimbursement Payments" (January 2019) setting out some general statistics. In relation to his analysis of the data over the last 5 years, which differs in insignificant respects from the valuable work of Justice Sarah Derrington and others in the recent comprehensive report of the Australian Law Reform Commission, he stated (at 12):

> It is also important to have accurate data on funding commissions received in more recent periods. In light of the fact that the ALRC provided data with respect to the period between 2013 and 2018 I will use a virtually identical period; the only difference being that my selected period goes up to end of 2018 whilst, in light of its deadline of December 2018, the ALRC's selected period went up to October 2018. What I found is set out below:
>
> - Median percentage of settlement funds "consumed" by funding fees in funded federal cases settled during the January 2013 - December 2018 period = 26%
> - Median percentage of settlement funds "consumed" by funding fees in all funded cases settled during the January 2013 - December 2018 period = 25.5%

11 So, in substance such median percentages are good proxies for an objective standard of a percentage on the gross settlement sum that *may* but not necessarily be appropriate. What I have allowed in the present case (25%) is commensurate. What I permitted in *Blairgowrie (No 3)* (22.1%) was below that median.

12 Let me say something further. I do not subscribe to any "race to the bottom" philosophy in setting commission rates. As a corollary, I do not accept that rates should be set that do not properly provide a reward for the risk undertaken. In this context I would note that lower rates in some cases may simply be a reflection of the lower risks. Moreover, in the context of competing class actions for the same matter, the fact that price competition has produced lower rates in *that* matter may simply be a manifestation of why the competition has arisen in the first place. The claims and the competition to run them may be attractive to fund for the very reason that such claims are strong and therefore have lower risk. So, the lower risk may explain the competition in the first place which competition may be able to tolerate the lower price in *that* context for that matter.

13 Further, I have only dealt with one dimension of risk, but it is a mistake to look at risk only in the context of the particular action. There is a broader dimension of risk to be considered. As I said in *Blairgowrie (No 3)* at [122]:

> Yet another argument suggests that the judge ought not be the market setter. But the judge is not setting a market rate, but rather a rate referable to the individual circumstances of the particular case before him or her. But the rate set may be contextually informed by an actual or putative market rate, including reference to rates in foreign jurisdictions, particularly where demand side or supply side substitutability is not necessarily confined by geographic limitations. The rate set may also be informed by the risks faced by litigation funders in investing in litigation generally, not just the case in question, which may also be affected by whether a funder has a diversified spread of litigation investments and not a small pool of such investments thereby producing overall higher risk for the undiversified funder. In other words, what is the equity beta for funders locally or globally? And consequently, what is the rate of return on equity that a funder locally or globally might reasonably expect given the level of risk for such a business, ie funding litigation? And is the funder earning disproportionate returns? If so, that may indicate that there is no true "price" competition in the litigation funding market and that the commission rates are higher than what a workably competitive market might be expected to deliver. Now these are all interesting questions. And no doubt a judge is not in a position to investigate such questions in any detail. But a review of the financial accounts of the funder and other funders, as I have done in the present case, might quickly allay concerns that standard commission rates are somehow producing rates of return on equity so outside a reasonable range such as to cast doubt on whether standard commission rates should be used as a benchmark or at least for a contextual check. But if the judge's concerns are not allayed, all that means is that the judge might put to one side standard or putative market rates as a benchmark and set a rate based only on evidence concerning the case before him. In other words, it is no argument for not setting a rate at all, but rather it may justify putting to one side putative market rates or comparable data.

14 But I should say that in the present case I did not see any need to enquire further given the confidence that I have in Professor Morabito's statistics and the comfort that I can draw therefrom in terms of at least being a suitable prima facie benchmark.

15 There is a further point to be made. On 30 April 2018, Murphy J made a considered interim common fund order on the material before him. As part of that order, group members were properly notified that subject to further order, there would be deducted from any settlement or judgment "a percentage proportion, to be determined by the Court at a future date, of the amount for which the claims [were] settled or judgment [was] given, but group members [were to] be informed [that] such percentage [would] be no more than 28%". As I say, I have allowed 25%.

16 Finally on this aspect, I should say that I have carefully considered Lee J's discussion in *Lenthall v Westpac Life Insurance Services Ltd* (2018) 363 ALR 698 at [12] where he said that "it is possible to argue that abnormally high returns have likely been enjoyed by funders in securities class actions in recent times". It is difficult to verify or falsify a conclusion so heavily qualified. For the moment, it is sufficient for me to rely upon the January 2019 statistics of Professor Morabito. But I do accept, as Professor Michael Legg has written in the article Lee J

cited discussing *Blairgowrie (No 3)*, that the continued entry of new funders *may* suggest that above normal returns, which I take him to mean above a rate of return based on the weighted average cost of capital reflective of an equity beta referable to the risks associated with a litigation funding business, locally and globally, are being earned. But there are other reasons why such new entry may also be consistent with no more than normal returns being earned by the incumbents. For example, post the introduction of common fund orders the pie has grown with greater demand for funding producing an increased supply of funding; there are more class actions because of a return to open class actions consistent with the Part IVA model and without the necessity to book build. But if existing funders have reached their capacity or appetite to fund, say, because of their risk tolerance limits being reached looking at the diversification (or otherwise) in their entire portfolio of cases or because of their own funding limits, you will have new entry without any a priori assumption that the existing funders have charged above normal returns. In any event, speculation is cheap and it is not productive to pursue this discussion in this context. Some detailed empirical and quantitative analysis is needed of the funders, their capital models and how they price risk for funding individual actions and across their entire portfolios before useful conclusions can be drawn one way or the other. Further, one can also not draw conclusions from falling commission rates in some cases of some prior above normal returns. Those lesser rates, as I have said, may simply reflect lesser perceived risk in an individual matter explaining both the lower price and the price competition. Other cases where there is perceived to be much higher risk (and indeed less competition accordingly) may justify the higher price for funding.

17 Let me deal with another matter although I do not propose to detail the arithmetic. In terms of the settlement sum paid by the respondent, group members are to receive after all deductions very close to 50% of that sum; that is very similar to the 51% in *Blairgowrie (No 3)*.

18 Further, such a 50% level compares favourably with other contexts. But one has to be careful with such a metric, let alone some general assertion that "in every class action, group members should get at least 50% of the gross settlement sum". Take the following situation. Assume that a litigation funder and external lawyers take on a very complex and high risk case (with a commensurably higher commission rate than normal) on behalf of say a large group of persons who have contracted cancer. Say that proving causation by the alleged carcinogen is extremely difficult. Assume that the action has been launched on the basis only of problematic epidemiology showing a heightened risk and some biology that shows only a *possible* biological pathway. Then assume that after extensive discovery and expensive expert reports

it becomes clear that there is no viable biological pathway demonstrated, such that it is apparent that the group members have no cause of action for damages. Let it also be assumed that nevertheless the respondent is prepared to pay a modest amount to settle the matter, and let it also be assumed that legal expenses and the funding commission would soak up 90% of that modest settlement sum. Is it seriously suggested that the group members should receive at least 50% of the settlement sum for what, after forensic investigation that group members did not have to pay for and where the risk for this on their behalf was taken on and funded by others, are shown to be likely valueless claims? One can multiply such examples.

19 No power contained in or philosophy underpinning Part IVA provides a proper basis for giving group members something for what turned out to be nothing or to give them something beyond what the true value of their claims are worth, reflecting the product of the face value times the probability of success times the probability of recovery. Moreover, to so artificially allocate is economically distortive and unnecessarily disincentivises the reasonable investment of time and expense in investigating, funding and prosecuting class actions.

20 Let me turn to the next matter being the re-imbursement amounts that I have allowed to the two applicants.

21 In *Farey v National Australia Bank Ltd* [2016] FCA 340 I allowed such payments and referred (at [43]) to earlier work carried out by Professor Morabito in the following terms:

> Professor Vince Morabito has undertaken empirical analysis of the justification for and the quantum of reimbursement payments to applicants (V Morabito, "An Empirical and Comparative Study of Reimbursement Payments to Australia's Class Representatives and Active Class Members" (2014) 33 CJQ 175). On any view, the amount to be deducted for the applicants for the time expended is very modest when one considers the ranges reported by Professor Morabito. It is also to be noted that I am not approving any deductions for time spent on their individual claims. Moreover, the deductions are not some proxy for any incentivisation award; I am using "incentivisation" to refer here to reward rather than restitution in the sense of reasonable recompense for the time and effort expended. The deductions are just and there is adequate power to approve them as part of approving the settlement (ss 33V(2) and 33ZF(1)). But to say that the present proposed payments are not incentivisation payments should not be taken to indicate that such reward style payments cannot ever be authorised or justified. There is adequate statutory power (ss 33V(2) and 33ZF(1)) to approve incentive reward payments and their deduction from the settlement proceeds. But if such incentive mechanisms are to be invoked, in the usual case they should be approved at least in a preliminary or contingent way (subject to further order) at or close to the inception of the proceedings and then unconditionally approved (if appropriate) in the subsequent formal s 33V process. Of course, where there is an external litigation funder who has taken on the costs risk, including any exposure to an adverse costs order, it may be difficult to see how any such incentivisation award could ever be justified in addition to reasonably remunerating the applicant for the time spent

> in pursuing the proceeding for the *benefit* of the group members and any out of pocket expenses. I do not need to discuss the position where the applicant is a funder. Interestingly, and finally on this point, I note that Professor Morabito has reported on statistics that in one sense might seem to be counterintuitive. The Australian mean and median awards per class representative based upon a "restitution-only" approach have been substantially greater than the US awards that have been based upon the "reward/incentive" philosophy.
>
> (Original emphasis.)

22 In the present case, what I have allowed are reimbursement payments rather than incentivisation amounts.

23 Professor Morabio has updated his analysis in the January 2019 publication that I discussed earlier. In terms of the extensive period that he has analysed, he reported that the median payment per class representative in Federal Court class actions was $19,105, with the average payment per class representative being $30,408. Clearly, some outliers distorted the average such that in this context the median number rather than the average number is a more useful statistic to show the central tendency.

24 I have allowed $25,000 per applicant which although above the median is well justified on the material before me. Further, that there are two applicants and a reimbursement payment for each is explained by the fact that there were originally two proceedings that were consolidated; consolidation is now an increasingly preferred model whether consensual or otherwise to deal with competing class actions.

25 Let me conclude with the third topic concerning the allowance for legal expenses. I have carefully reviewed the two reports of Ms Harris who discounted the claimed legal costs by some $1.1 million (or about 10%). Her methodology was transparent and compelling, based as it was on appropriate sampling and specific enquiries of the two sets of applicants' lawyers that had been involved.

26 Mr Barrow, a solicitor for an objecting group member but only as to the quantum of legal fees, put copious but captious written material before me seeking to challenge the quantum of the legal costs claimed. He also asserted a lack of procedural fairness in being denied source material referable to Maurice Blackburn's invoicing; he sought, unsuccessfully, the foundational material that Ms Harris had accessed and more.

27 Putting to one side the fact that Mr Barrow's client, who was a group member in both a personal capacity and a trustee capacity, had not signed a fee and retainer agreement with Maurice Blackburn or a litigation funding agreement with the external funders (although Mr Barrow

initially wrongly deposed that his client had), putting to one side any question of legal professional privilege (although for the sake of argument I will assume in favour of the objecting group member that this provides no bar to production and inspection) and putting to one side Mr Barrow's shift from attempting to be an amicus to that of acting for an objector, I had no hesitation in refusing him access to these underlying records.

28 First, Ms Harris has carried out the necessary and independent assessment.

29 Second, there was no potential value add for group members by Mr Barrow's independent assessment of the value of Maurice Blackburn's work product. So much was made clear by his background.

30 In his first affidavit of 24 June 2019, he stated at [5] to [10]:

> I am the sole director of Fighting Koala Pty Ltd (ACN 093 575 010), which actively trades under the business name of Fighting Koala (ABN 96 093 575 010). The company was formed on 7 August 2000. The company's name was changed to the current name on 27 October 2018. The current business name of Fighting Koala was registered on 22 May 2019.
>
> Fighting Koala is in start-up phase to investigate and facilitate the formation of potential class actions in Australia, including book building of potential class members. Any legal services, including the analysis of the merits and prospects of a claim, are performed through retaining external Australian legal practitioners, including Kingsnake Class Action Lawyers. In essence, the Fighting Koala business is a facilitator and litigation broker for class actions, bringing together potential class members, class action lawyers and litigation funders.
>
> I am the sole director and principal lawyer of Kingsnake Class Action Lawyers Pty Ltd (ACN 633 332 064), an incorporated legal practice in the State of Victoria, which actively trades under the business names of Kingsnake Class Action Lawyers and Kingsnake Lawyers (both ABN 48 633 332 064). The company was formed and the business names were registered on 8 May 2019.
>
> I am the sole director of Count Legal Costing Pty Ltd (ACN 633 626 801), which will commence trading as an incorporated legal practice in the State of Victoria on 1 July 2019, and will actively trade in costs consulting from that date under the business name of Count Legal Costing (ABN 19 633 626 801). The company was formed and the business name was registered on 22 May 2019. It is intended that Count Legal Costing will become a CPA Australia multidisciplinary practice, for which I have the requisite, current CPA Australia 2019 Public Practice Licence.
>
> Count Legal Costing is in start-up phase to provide general legal costing services and also seeks to position the business to investigate the fairness of applicant legal fees in class action proceedings, particularly the settlement approval phase.
>
> In the event that the current and future intended activities of myself and the businesses that I depose to in this affidavit are of such a nature that the Court considers my interests may be affected by the outcome of this proceeding, I crave leave to make an application under rule 9.12 of the *Federal Court Rules 2011* (including an oral application) for leave to be an intervener in this proceeding on the issue of the

applicants' legal costs for the proposed settlement approval process.

31 Now I allowed Mr Barrow to act for an objector and to make submissions before me. But his limited experience provided no basis or justification permitting him to trawl through what he sought. Moreover, no matter how generously one stipulates the boundaries and content of procedural fairness to be given to a group member who is objecting to legal costs on a s 33V application, nothing would justify the detriment to the class as a whole caused by indulging the extravagance that Mr Barrow urged upon me.

32 Third, Mr Barrow has provided detailed written submissions criticising Ms Harris' approach, which I have considered and rejected.

33 Finally, late in his oral submissions Mr Barrow complained that the Registry had refused him access to otherwise restricted documents on the Court file. I enquired whether he had sought such documents at an earlier time when asserting a right to act as amicus or "intervener", but not then asserting that he was acting for a specific group member. He thought that the former was the case. But if the former, the request was properly refused. And if the latter, the point takes him nowhere in any event. After the matter was referred to me by Murphy J, he was given all the material that could reasonably be required for an objecting group member who was only objecting as to the legal costs. He had all of the applicants' legal submissions and affidavits including all annexures, save for those in respect of which he had refused to sign a confidentiality undertaking, and all of Ms Harris' reports. His complaint lacked substance.

34 For the foregoing reasons I approved the relevant settlement and made the 23 August 2019 orders.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:

Dated: 26 August 2019