



Supreme Court New South Wales

Medium Neutral Citation:

Mitchell v Roads and Maritime Services (now known as Transport for NSW) (No 2) [2024] NSWSC 1165

Hearing dates:

8 July 2024

Decision date:

13 September 2024

Jurisdiction:

Equity - Commercial List

Before:

McGrath J

Decision:

Direct that within seven days the parties consult with each other and provide to the Associate to McGrath J agreed short minutes giving effect to these reasons or, failing such agreement, their respective proposed short minutes giving effect to these reasons.

Catchwords:

CIVIL PROCEDURE — parties — joinder — representative proceedings — interlocutory dispute between plaintiffs and litigation funder — plaintiffs seek to join litigation funder as a defendant

CIVIL PROCEDURE — representative proceedings — separate determination of questions — where appropriate — question of whether it is appropriate in this case for a dispute between litigation funder and plaintiffs to be determined at interlocutory hearing or whether proceedings should be stayed and separate proceedings initiated

CIVIL PROCEDURE — representative proceedings — conduct of proceedings — meaning and application of the court's power under *Civil Procedure Act 2005* (NSW) s 183 — whether the court has power to adjudicate the interlocutory dispute by relying on the power in s 183 — whether it is both appropriate and necessary to ensure that justice is done in these proceedings by determining the dispute between the plaintiffs and the litigation funder

COMMERCIAL ARBITRATION — arbitration agreement — stay of proceedings — whether arbitration agreement is null, void, inoperative or incapable of being performed — whether cl 14 of the Funding Agreement is an “arbitration agreement” within the meaning of that expression in s 7(1) of the *Commercial Arbitration Act 2010* (NSW)

EQUITY — fiduciary duties — fiduciary relationships — where the litigation funder attempts to direct and control proceedings — where lead plaintiffs in representative proceedings have the conduct of the proceedings on behalf of the class members and owes fiduciary obligations to them

EQUITY — trusts and trustees — beneficiaries — right to call for distribution of trust property — funds deposited to plaintiffs’ lawyers’ trust account by litigation funder — whether plaintiffs’ lawyers hold money on trust on behalf of the plaintiffs or on behalf of the litigation funder

Legislation Cited:

Civil Procedure Act 2005 (NSW) s 183
Commercial Arbitration Act 2010 (NSW) s 8
Commercial Arbitration Act 2011 (Vic) s 7(1)
Federal Court Act 1976 (Cth) s 33ZF
International Arbitration Act 1974 (Cth) s 7
Legal Profession Uniform Law 2014 (NSW) Part 4.2
Roads Act 1993 (NSW) s 179(1)
Trustee Act 1925 (NSW) s 63
Uniform Civil Procedure Rules 2005 (NSW) r 6.24(1)

Cases Cited:

Alston v Cormack Foundation Pty Ltd (2018) 128 ACSR 33; [2018] FCA 895
Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567
BMW Australia Ltd v Brewster (2019) 269 CLR 574; [2019] HCA 45
Botsman v Bolitho (No 1) (2018) 57 VR 68; [2018] VSCA 278
Caason Investments Pty Ltd v International Litigation Partners No 3 Ltd (2018) 265 FCR 487; [2018] FCAFC 176
Commonwealth Bank of Australia v White [1999] 2 VR 681
Construcciones y Auxiliar de Ferrocarriles S.A. v CPB Contractors Pty Limited [2022] NSWSC 1264
Crowle Foundation v NSW Trustee & Guardian [2010] NSWSC 647

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd [2024] NSWCA 83
Dyczynski v Gibson [2020] FCAFC 120
Giles v Commonwealth of Australia [2014] NSWSC 83
Haselhurst v Toyota Motor Corp Australia Ltd t/as Toyota Australia (2020) 101 NSWLR 890; [2020] NSWCA 66
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19
Kauter v Hilton (1953) 90 CLR 86
Legal Services Board v Gillespie-Jones (2013) 249 CLR 493; [2013] HCA 35
Lepcanfin Pty Ltd v Lepfin Pty Ltd [2020] NSWCA 155
McMullin v ICI Australia Operations Pty Ltd (No 6) (1998) 84 FCR 1
Mitchell v Roads and Maritime Services (now known as Transport for NSW) [2022] NSWSC 500
Mitchell v Transport for NSW [2022] HCASL 214
Mitchell v Transport for NSW [2022] NSWCA 141
Money Max International Pty Ltd v QBE Insurance Group Ltd (2016) 245 FCR 191; [2016] FCAFC 148
Montevento Holdings Pty Ltd v Scaffidi (2012) 246 CLR 325; [2012] HCA 48
Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd [2007] QSC 206
Perara v GetSwift Ltd (2018) 263 FCR 1; [2018] FCA 732
Qantas Airways Ltd v AF Little Pty Ltd (1981) 2 NSWLR 34
R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question) [2024] FCAFC 89
Raskin v Mediterranean Olives Estate Ltd [2017] VSC 94
Raulfs v Fishy Bite Pty Ltd [2012] NSWCA 135
Re BBY Limited (Receivers and Managers Appointed) (in liq) and BBY Holdings Pty Limited (Receivers and Managers Appointed) (in liq) [2022] NSWSC 29
Re GRP [2019] NSWSC 710
Re Rosie (No 2) [2022] NSWSC 1750
Reeves v Reeves (No 2) [2024] NSWSC 386
Ross v Lane Cove Council (2014) 86 NSWLR 34; [2014] NSWCA 50
Shoalhaven City Council v Freedom Civil Engineering Pty Ltd (2011) 244 CLR 305
Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd (2011) 80 NSWLR 398
The Illawarra Community Housing Trust Limited v MP Park Lane Pty Ltd [2020] NSWSC 751

Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28
Victoria v Sutton (1998) 195 CLR 291; [1998] HCA 56
Watpac Construction NSW Pty Limited v Taylor Thompson Whitting (NSW) Pty Ltd [2015] NSWSC 780
WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2) [2022] NSWSC 505
Westfield Management Ltd v AMP Capital Property Nominees Ltd (2012) 247 CLR 129; [2012] HCA 54
Wigmans v AMP Ltd (2021) 270 CLR 623; [2021] HCA 7
WLD Practice Holdings Pty Ltd v Sara Stockham [2020] NSWSC 395

Category:	Procedural rulings
Parties:	Darren Mitchell and Rosaline Mitchell (Plaintiffs/Applicants) Roads and Maritime Services (now known as Transport for NSW) (Defendant) Litigation Fund WCX Pty Ltd (Respondent)
Representation:	Counsel: D McLure SC and H Cooper (Plaintiffs/Applicants) L Johnston (Defendant) R Coshott – Director (Respondent) Solicitors: Ironbridge Legal (Plaintiffs/Applicants) Crown Solicitor (Defendants) Respondent appeared in person
File Number(s):	2021/00088654
Publication restriction:	Nil

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INTRODUCTION

- 1 These representative proceedings have been brought by the plaintiffs, Darren and Rosaline Mitchell, on their own behalf and on behalf of all the persons who have had land compulsorily acquired by the defendant, Roads and Maritime Services (now known as Transport for NSW) (**TfNSW**), for the WestConnex M4–M5 Link **Project**. The

land was acquired from group members for the construction of tunnels forming part of the Project. It was acquired from them without their consent and without compensation. The plaintiffs' claim is founded on s 179(1) of the **Roads Act 1993** (NSW), which proscribes land being acquired by compulsorily process by TfNSW without the owner's approval for the purposes of resale.

In summary, the plaintiffs claim that by acquiring the land without consent, and then granting a long-term lease over that land to privately owned entities for substantial consideration, TfNSW contravened s 179(1) of the *Roads Act*.

In the proceedings, the plaintiffs are represented by solicitors, **Ironbridge Legal**.

The present application by the plaintiffs is primarily two-fold: first, for an order pursuant to r 6.24(1) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) to join Litigation Fund WCX Pty Ltd (**Funder**) as a defendant to the proceedings; and second, for an order pursuant to s 183 of the *Civil Procedure Act 2005* (NSW) (**CPA**) that the funds held by Ironbridge deposited in its trust account by the Funder are held for the benefit of the plaintiffs to be applied towards their legal costs incurred as lead plaintiffs in these proceedings.

During the hearing, the Funder made an oral application to stay the plaintiffs' application on the basis of a dispute resolution clause which it says engages s 8 of the *Commercial Arbitration Act 2010* (NSW) (**CAA**).

TfNSW does not oppose the joinder of the Funder to the proceedings and did not wish to be heard in relation to the issue of the funds held in the Ironbridge trust account.

For the reasons set out below, I have determined that there should be no stay of the application, that the Funder should be joined as a defendant to the proceedings and that s 183 of the CPA does provide the power for the making of an order that the funds held by Ironbridge are held for the benefit of the plaintiffs to be applied towards their legal costs incurred as lead plaintiffs in these proceedings.

RELEVANT FACTS

Short history of the proceedings

On 30 March 2021, the proceedings were commenced by the plaintiffs. Since that date, there have been amendments to the pleadings, interlocutory judgments and changes to the legal representatives of the plaintiffs. The pleadings are now closed, and orders have been made for agreed common questions to be determined along with the plaintiffs' individual claims at an initial trial. The next matters to be completed in advance of the initial trial are the service of lay affidavits, expert reports and tender lists and the issuance of opt-out notices. This matter has not yet been set down for the initial trial.

Changes of solicitors for the plaintiffs

- 9 The plaintiffs have had multiple changes of solicitors on the record for them, with notices of change of solicitor being filed on 14 July 2021, 6 December 2021, 13 February 2023 and 31 October 2023. Since 31 October 2023, Ironbridge have been the solicitors on the record for the plaintiffs in the proceedings, being the fifth set of solicitors to represent them in the proceedings.

Funding arrangements

- 10 The plaintiffs have been funded by the Funder since the proceedings were commenced. The plaintiffs have insufficient means themselves to meet the legal costs necessary to progress or bring the proceedings to a conclusion, by a substantive application for court approval or otherwise.
- 11 On 13 August 2021, Hammerschlag J (as the CJ in Eq then was) ordered that the plaintiffs provide TfNSW and the court with a redacted copy of the litigation funding agreement with the Funder. On 20 August 2021, the redacted copy was provided. The redactions included the name of the Funder.
- 12 TfNSW then applied for security for its costs from the plaintiffs, which application was heard on 26 April 2022 by Ball J. On 28 April 2022, Ball J ordered that the plaintiffs give security for the defendant's costs in the amount of \$415,000, the form of which was to be agreed, failing which it was to be paid into court: *Mitchell v Roads and Maritime Services (now known as Transport for NSW)* [2022] NSWSC 500. After unsuccessful applications for leave to appeal against the order for security to the Court of Appeal of this court (*Mitchell v Transport for NSW* [2022] NSWCA 141) and then to the High Court of Australia (*Mitchell v Transport for NSW* [2022] HCASL 214), the Funder paid the security.
- 13 The Master **Funding Agreement** dated September 2019 between the Funder and the plaintiffs (who are defined as the "Clients" in the Funding Agreement) includes the following relevant terms (leaving all typographical and grammatical errors in place):

4. FUNDING

4.1 Further funding

The Funder shall pay the Costs (excluding any Costs relating to any Appeal) the subject of a Funding Transaction once incurred by the Clients up to the Maximum Amount for the Funding Transaction, such payment to be made within 14 days of the receipt of the Clients' written notification requiring payment and supported with copies of substantiating documentation to the reasonable satisfaction of the Funder.

4.2.1 Duration of funding obligations

(a) The Funder's obligation to make payments under clause 4.2 will continue until the conclusion of the relevant Proceedings at first instance (as the case may be) or termination of the Funding Transaction under clause 9, which ever is the earlier.

(b) The occurrence of the Termination Date will not affect the obligations of the parties under any Funding Transaction which has commenced on or prior to the Termination Date which will continue in full force and effect despite the occurrence of the Termination Date and continue to be governed by the provisions of this Agreement.

5 REPAYMENT AND ADDITIONAL SUM

5.1 Repayment of Costs

The Clients must repay Costs paid by the Funder under clause 4.1 and 4.2 on the Repayment Date.

5.2 Payment of Additional Sum

In addition to any amounts to be repaid to the Funder in accordance with clause 5.1, the Clients agree to pay to the Funder the Additional Sum for the Funding Transaction on the Repayment Date.

5.3 Maximum amount of payment

Despite clauses 5.1 and 5.2, in any Funding Transaction the Clients will not be required to pay any amount to the Funder under either clause 5.1 or 5.2 in excess of the Final Amount less any Applicable GST.

5.4 Payments to Third Party

Subject to clause 9.6(b), the Clients agree that the payment of any amount to a Third Party in terms of a Third Party Agreement will only be made after all repayments due to the Funder under clause 5.1 and 5.2 in respect of the relevant Proceedings have been made.

6 ADDITIONAL FUNDING

6.1 Increase in Maximum Amount

As and when Costs in Proceedings (excluding any Costs relating to any Appeal) funded by a Funding Transaction approximate the Maximum Amount less 5% thereof, the Funder may notify the Clients in writing that it offers to vary the terms of the Funding Transaction by increasing the Maximum Amount and Percentage applying to the Funding Transaction.

6.2 Deemed acceptance of Offer

If the Funder gives a notification referred to in clause 6.1 the Clients will be deemed to accept the offer if, at the expiry of 30 days from receipt of the offer, it has failed to enter into a Third Party Agreement (and the Clients must advise the Funder on the expiry of the 30 day period whether it has entered into a Third Party Agreement).

6.3 Variation of Maximum Amount

If the Funder's offer in clause 6.1 is accepted or deemed to be accepted pursuant to clause 6.2, the Funding Term Sheet for the Funding Transaction shall thereby be varied in accordance with the terms of the Funder's offer.

7. FUNDER'S INDEMNITY

7.1 Indemnity for Order for Costs

In respect of any Proceedings the subject of a Funding Transaction the Funder must indemnify and keep indemnified the Clients from and against any Order for Costs against the Clients but only so far as it relates to the period from the date of the Funding Term Sheet for the Funding Transaction up to the date which is the earlier of:

- (a) the date of termination of the Funding Transaction under clause 9; or
- (b) the conclusion of the Proceedings at first instance;

whether or not the Order for Costs is made during the period or after the end of the period.

7.3 Security for costs

In any Proceedings at first instance which are the subject of a Funding Transaction, if a defendant in the Proceedings obtains an order against the Clients for security for costs in the Proceedings, the Funder will provide such security for costs as the Clients may be ordered to provide. The Clients shall use all reasonable endeavours to oppose an order for security for costs against them and if ordered, to minimise the amount of the security required to be provided.

8. REPRESENTATIVES AND CONDUCT OF PROCEEDINGS

8.1 Firm to be instructed

The Clients acknowledge and agree, subject to clause 8.2, that the Firm unless terminated by agreement with the Clients (in which case the termination and any replacement for the Firm must be first approved by the Funder), will continue to be

instructed by the Clients in all matters relating to Proceedings, any Appeal therefrom and any Examination the subject of a Funding Transaction and that the Clients have the right to direct, conduct and conclude the Proceedings or any Appeal therefrom by way of settlement. If the clients breach of this Clause or discontinue the Proceedings they will forthwith pay to the Funder an amount of \$350,000.00 and repay to it all monies advanced by the Lender.

8.2 Client's undertakings

Notwithstanding the provisions of clause 8.1, the Clients undertake to and will:

- (a) keep the Funder advised of the progress and status of any Proceedings, any Appeal therefrom and any Examination which is the subject of the Funding Transaction;
- (b) consult with and consider the views of the Funder in relation to any material issues arising from the conduct and/or progress of the Proceedings, any Appeal therefrom and in particular, in relation to any offer of settlement;
- (d) provide and instruct their solicitors to provide such information from time to time to the Funder as may be reasonably required by the Funder in relation to the Proceedings, any Appeal therefrom which is the subject of a Funding Transaction and will instruct the Firm to make available to the Funder its file for inspection at all times.

8.3 Provision of other information

The Clients agree to disclose to the Funder upon such information coming to his knowledge, all information received from time to time which may have a material impact on the Proceedings, any Appeal therefrom which is the subject of the Funding Transaction, or the continuation of payments under this Agreement.

9 TERMINATION OF FUNDING TRANSACTION

9.1 Termination of Funding Transactions

Each Funding Transaction will continue, subject to clause 9.2, until the Repayment Date therefor.

9.2 Ability to terminate early without cause

Subject to clause 9.3, the Funder may at any time terminate a Funding Transaction on the giving of reasonable notice in writing, such notice to be no less than a reasonable period to enable the Clients to source alternate funding for the Proceedings or any Appeal therefrom (but not exceeding 60 days from the date of the notice terminating the Funding Transaction). The obligations of the Funder under this Agreement in respect of the Funding Transaction will continue until the termination of the Funding Transaction.

9.3 When Funder cannot terminate Funding Transaction

The Funder may not terminate a Funding Transaction pursuant to clause 9.2 if an Appeal in the relevant Proceedings is filed.

9.4 Finalisation of Proceedings

If Proceedings (or any Appeal therefrom) which are the subject of the Funding Transaction which has been terminated pursuant to clause 9.2 or by the Clients pursuant to clause 9.5 are finalized by way of settlement, judgment or otherwise and a Final Amount is received by the Client, the Clients agree to repay to the Funder any amounts paid by the Funder from the Final Amount, provided however, that if the Final Amount is less than the aggregate of Costs & disbarments paid by the Funder plus any Applicable GST, the Clients will not be required to repay to the Funder any amount in excess of the Final Amount less any Applicable GST.

9.5 Termination for breach

The Clients or the Funder may terminate a Funding Transaction immediately by notice in writing to the other party if the other party is in breach of any term of this Agreement and such breach is not remedied within 14 days of written notice by the party not in breach advising the breach and requiring its rectification. For the purposes of this clause 9.5, a breach of a term of this Agreement by the Funder includes the Funder's failure to make payment in terms of clause 4.2 or to provide security in terms of clause 7.2.

9.6 Limits on payments after termination

In the event that a Funding Transaction is terminated pursuant to clause 9.2 or by the Clients pursuant to clause 9.5 above:

- (a) the Additional Sum in respect of the Funding Transaction will not be payable to the Funder; and
- (b) the repayment of any Costs under clause 5.1 and clause 9.4 paid under the Funding Transaction will only be made after repayment of any Costs and disbursements if any, has been made in terms of a Third Party Agreement in the relevant Proceedings.

9.7 Other Funding Transactions not affected

Termination of a Funding Transaction does not affect the obligations of the Funder or the Clients which obligations will continue in full force and effect.

...

11 CLIENTS' OTHER OBLIGATIONS

The Clients must:

- (a) conduct Proceedings which are funded by the Funder in a proper, skilful, diligent and efficient manner;
- (b) where appropriate, consult with the Funder as to the identity and use of consultants, advisors and legal representatives proposed to be engaged in Examinations or Proceedings;
- (c) not act or omit to act in a manner which results in any of the information or statements made by her being incorrect without the prior written consent of the Funder; or
- (d) not apply any funding paid by the Funder under a Funding Transaction except in payment of Costs.
- (e) quantify and collect any party and party costs orders made in the clients' favour and pay the monies so collected to the Funder within 14 days of receipt thereof.

...

13. CONFIDENTIALITY

The Clients and the Funder agree to keep confidential the existence and terms of this Agreement and each Funding and will not disclose the existence and terms of this Agreement to any person other than their legal and financial advisors or as required by law.

14. DISPUTE RESOLUTION

If a dispute arises out of or relates to this [Funding] Agreement or a Funding Transaction, or the breach, termination, validity or subject matter of a Funding Transaction, or as to any claim in tort, in equity or pursuant to any statute or law concerning this [Funding] Agreement or a Funding Transaction, the Funder and the Clients agreed to settle the dispute by expert determination administered by the Australian Commercial Disputes Centre (ACDC) and in such a case the following provisions apply:

- (a) A party claiming that a dispute has arisen, must give written notice to the other party ("recipient") specifying the nature of the dispute.
- (b) On receipt by the recipient of notice specified in paragraph (a), the Funder and the Client must within 7 days of such date of receipt meet to seek to resolve the dispute.
- (c) If the dispute is not resolved within such 7 day period or within such further period as the Funder and the Client agree, then the dispute is to be referred to ACDC.
- (d) The expert determination shall be conducted in accordance with the rules and guidelines of the ACDC including the procedures to be adopted, the process of selection of the expert and the costs involved.

...

16.3 Waivers

- (a) Waiver of any breach or provision of, or any default under, this Agreement must be in writing and signed by the party granting the waiver.
- (b) A breach of, or default under, this Agreement is not waived by any failure or delay in exercising any provision of this Agreement.
- (c) A failure or delay in exercising or the partial exercise of any provision of this Agreement is not a waiver of that provision.

...

16. GENERAL

16.1 Governing Law and Jurisdiction

(a) This Agreement is governed by the laws of New South Wales.

(b) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales.

14 The definitions contained in cl 1.1 of the Funding Agreement include the following:

"Costs" in relation to the Proceedings means the aggregate of:

(a) the Legal Costs;

(b) the Enforcement Costs;

(c) such other fees and expenses incurred by the Client in respect of which the Client obtains the prior written consent of the Funder, and

"Enforcement Costs" means the legal costs and disbursements incurred by the Client, if any, in recovering the Final Amount agreed or awarded in Proceedings or in relation to the subsequent action to enforce the result of the Proceedings including the obtaining possession and sale of the Property.

"Final Amount" in relation to any Proceedings means the gross amount received by the Clients, whether by way of settlement, orders made or judgment entered or from the sale of the Property.

"Firm" means the legal practice instructed by the clients are specified in item 4 of the Schedule. [item 4 of the Schedule states the firm to be Murphy Lyons]

"Funding Transaction" means a funding transaction between the Funder and the Clients made on the terms and conditions of this [Funding] Agreement in respect of the funding transaction which has been signed by both the Funder and the Client.

"Legal Costs" means all legal costs and disbursements (including expert witness fees and counsel's fees) incurred by the Client in relation to or incidental to Proceedings, an Appeal therefrom, other than those incurred prior to the date hereof which are not specified in the Funding Term Sheet.

"Maximum Amount" in relation to a Funding Transaction means the amount of \$500,000.00 as the maximum amount which will be available from the Funder in relation to the Funding Transaction subject to adjustment in accordance with clauses 6.1 to 6.3.

"Order for Costs" means in relation to Proceedings or an Appeal therefrom, any orders made against the Client for the payment of costs of another party in the Proceedings or Appeal.

"Proceedings" means:

(a) any demand or claim made by the Client; and

(b) any court proceedings commenced by the Client pursuant to such a demand or claim

(c) Any Action to enforce the result of the proceedings including the cost & disbursement relating to the sale of the Property

"Termination Date" means 30 July 2018.

15 The Funding Agreement is an unhappily drafted document, with numerous errors, grammatical mistakes and oddities in it, such as:

(1) clause 4.2.1 refers to "[t]he Funder's obligation to make payments under clause 4.2" but there is no cl 4.2 of the Funding Agreement;

(2) "Termination Date" being defined to be 30 July 2018 (more than a year before the Funding Agreement came into existence) and then defined again in item 5 of

the Schedule as 31 December 2020;

- (3) many of the defined terms not being used in a capitalised way (such as “clients” in cl 11(e)); and
- (4) some capitalised terms not being defined at all (for example, “Lender” as used in cl 8.1, “Action” as used in the definition of “Proceedings” and “Property” as used in the definitions of “Enforcement Costs”, “Final Amount” and “Proceedings”).

16 The sole director, secretary and shareholder of the Funder is Robert Coshott. Michael Coshott, the son of Robert Coshott, is also involved in the business of the Funder. Where I refer to the “Funder” being involved in communications such as letters and emails, I mean either or both of Robert Coshott and Michael Coshott acting on behalf of the Funder.

Engagement of Ironbridge by Funder and the plaintiffs

- 17 Since 27 February 2023, Ironbridge had been acting for the Funder in other proceedings it had brought in this court against Rosario Aversa and Antonia Aversa (**Aversa Proceedings**). On this application, the Funder provided to the court a significant number of emails in which Ironbridge and the Funder communicated about issues concerning the Aversa Proceedings and then, in May 2023, began communicating about Ironbridge potentially becoming the solicitors for the plaintiffs in these proceedings. I have determined that none of those emails are relevant to any of the issues I have to decide on this application, other than to establish that Mr Withane (the principal of Ironbridge) and Robert Coshott knew each other from their interactions in relation to the Aversa Proceedings.
- 18 On 14 September 2023 at 4:11PM, the Funder sent an email to Trevor Withane (the principal of Ironbridge) and asked him if he was interested in taking over conduct of these proceedings on behalf of the plaintiffs. In response, Mr Withane indicated that Ironbridge was willing to act.
- 19 On 14 October 2023 at 11:01AM, the Funder sent an email to Mr Withane stating that he had sent by express post a USB containing all the documents relevant to the question of liability and proposing a teleconference on the following Monday to discuss a number of matters, including the signing of the Ironbridge retainer agreement by the plaintiffs and the Funder, following which a video conference with the plaintiffs should be arranged for them to sign the retainer.
- 20 On 15 October 2023 at 9:03PM, Mr Withane sent an email to the Funder stating that he was in Hong Kong for business all of the following week with a very tight schedule. He asked for the plaintiffs to send their identification documents and for a teleconference and video conference with the plaintiffs to be arranged.
- 21 On 16 October 2023 at 6:03PM, Thomas Goring of Ironbridge sent an email to the Funder which attached the engagement letter dated 16 October 2023 from Ironbridge (**Ironbridge engagement letter**) and a trust direction to be sent to, and signed by, the

plaintiffs. The Ironbridge engagement letter was addressed to the plaintiffs, copied to the Funder and contained the following relevant provisions:

Westconnex Resumption Class Action

We write to thank you for instructing us to act and to set out the terms of our engagement.

In this matter, Darren Mitchell and Rosaline Mitchell are our clients (**Clients**). We will receive all instructions from the Clients in relation to the conduct of the matter, and will not act upon instructions from Litigation Fund WCX Pty Ltd (**Funder**).

Unless the context requires otherwise, any references in this letter to 'you', is a reference to the Clients.

This letter, together with our attached General Terms of Business, comprise our offer to provide legal services to you and constitutes our costs agreement and disclosure required under the *Legal Profession Uniform Law 2015* (NSW) (**Uniform Law**).

...

Background

We understand:

1. You are, respectively, the first and second plaintiffs in a class action proceeding brought against Transport for New South Wales (formerly Roads and Maritime Services) and the Registrar General of NSW (together, the **Defendants**) in the Supreme Court of New South Wales (proceeding number 2021/8865) (the **Proceeding**).
2. You are instructing us to act for you in the Proceeding.
3. Currently, Quinn Emanuel is acting on your behalf in the Proceeding. We understand that Quinn Emanuel will be dis-instructed on 16 October 2023 at which point we will be engaged upon the terms of this letter.

Scope of work

We understand the scope of work to include:

1. Reviewing all documents provided by you; and
2. Taking all relevant steps to further the Proceeding.

The scope of work may be varied from time to time through further written agreement between us, including by you requesting advice by email.

...

Disclosure

We disclose that Ironbridge Legal has previously acted for the Funder, advising them in respect of certain aspects of the Proceeding. That advice has included seeking prospects advice from counsel. A copy of that advice is attached to this engagement letter.

We have not found any conflict of interest which would prevent us from acting for you in this matter.

Upon signing this engagement letter, any arrangements that we had with the Funder shall automatically come to an end and we shall no longer be engaged by them. By signing this engagement letter, both the Funder and you agree that we are not conflicted from acting for you and, to the extent there is a conflict, such conflict is waived.

Funding arrangements

We understand that you have made arrangements with the Funder to the effect that the Funder will be providing litigation funding in respect of the Proceeding.

Upon signing this engagement letter, Ironbridge Legal, the Clients and the Funder agree to be bound by the terms set out in this letter. Ironbridge Legal is not bound by the terms of any funding agreement that exists between the Clients and the Funder. We shall take the terms of this engagement letter to be the only contractual relationship that exists between the Clients, the Funder and Ironbridge Legal.

...

Payment terms

Our payment terms are 7 days from the date on which we send our invoice. We do expect and require payment promptly in accordance with agreed terms. If invoices are not paid on time, there might come a time when we need to stop work until the arrears are cleared.

You and the Funder are jointly and severally liable for our invoices.

Estimate of costs

We have not yet received all the documents relevant to the Proceeding and we are therefore unable to provide you with an accurate costs estimate. However, we expect that the costs to conduct the Proceeding to judgment will be between \$300,000 and \$1,000,000 (ex GST). After the directions hearing on 20 October 2023, and once we have had the opportunity to review the relevant documents and have had the input of counsel, we can provide you with a more accurate estimate.

We will issue you and the Funder with a trust direction in the amount of \$200,000. The balance of funds in our trust account must remain at the amount of \$200,000 throughout our engagement. When money is paid from that trust account to cover our legal fees, disbursements, or any other reasonable costs incurred by Ironbridge Legal during the course of our engagement, we will issue a further trust direction, to replace the funds in the trust account. Such a trust direction must be paid immediately upon receipt. Until such time as that further trust direction is paid, we are not obliged to continue working or deliver any work product to you.

...

Point of contact

For the purposes of our engagement, the Funder, represented by Robert Coshott, will be our primary contact. You confirm that Robert Coshott and the Funder are entitled, on the basis of common interest legal professional privilege, to be provided with all information about the Proceeding, including all advices, documents, correspondence and updates. In doing so, all parties acknowledge that confidentiality in such information and legal professional privilege has not been waived.

You also confirm that Robert Coshott and the Funder are authorised to receive, review and manage all invoices and trust directions that we issue and that we are entitled to communicate directly with him in respect of those matters.

...

22 The important matters which arise from the Ironbridge engagement letter are:

- (1) The "Clients" are the plaintiffs and all instructions are to come from them, not the Funder.
- (2) Ironbridge, the plaintiffs and the Funder agree to be bound by the terms set out in the Ironbridge engagement letter.
- (3) Ironbridge is not bound by the terms of the Funding Agreement.
- (4) The invoices issued are to be paid within 7 days of being issued.
- (5) The plaintiffs and the Funder are jointly liable for the invoices of Ironbridge.
- (6) Ironbridge will issue the plaintiffs and the Funder with a trust direction, with the balance of \$200,000 to be maintained in the trust account of Ironbridge at all times.
- (7) Robert Coshott representing the Funder is the primary contact for Ironbridge, and is authorised to receive, review and manage all invoices and trust directions issued by Ironbridge.

23 On 23 October 2023 at 1:51PM, Mr Goring sent an email to the Funder stating:

...

Further to your previous emails, regarding the trust arrangements in respect of the Westconnex Resumption Class Action matter, we have consulted the Law Society of NSW and they have advised us that we should only hold money in trust on behalf of the client, citing s. 138 of the Legal Profession Uniform Law (NSW):

- 1) Except as otherwise provided in this Part, a law practice must –
 - a. hold trust money deposited in the law practice's general trust account exclusively for the person on whose behalf it is received; and
 - b. disburse the trust money only in accordance with a direction given by the person.
- 2) Subsection (1) applies subject to an order of a court of competent jurisdiction or as authorised by law.
- 3) The law practice must account for the trust money as required by the Uniform Rules

As such, we propose progressing with the trust direction **attached** and we will ensure that, when issuing an invoice for the payment of our fees, we will include the funder in our correspondence with the client.

...

- 24 Attached to this email was the trust direction dated 23 October 2023 addressed to the plaintiffs and copied to the Funder, the relevant parts of which were in the following form:

Dear Darren and Rosaline

DIRECTION TO TRANSFER FUNDS INTO IRONBRIDGE LEGAL'S SOLICITORS TRUST ACCOUNT

The amount below is sought by our firm on account of our legal fees and external disbursements in relation to the WestConnex Resumption Class Action matter.

Please make the following transfer into our Trust Account:

Amount	\$200,000.00
Client	Darren Mitchell and Rosaline Mitchell
Matter reference	Westconnex Resumption Class Action

...

Please transfer the requested amount on receipt of this direction. There is no obligation to transfer the amount requested but delay in doing so may result in your matter not being progressed.

...

- 25 On 24 October 2023 at 8:39PM, Mr Withane sent an email to the plaintiffs which relevantly stated:

Dear Darren and Rosaline

I trust this email finds you well.

By way of introduction, I am Trevor Withane, principal of Ironbridge Legal. Robert Coshott of Litigation Fund WCX Pty Ltd (**Funder**) has been liaising with us on your behalf.

We understand that both you and the Funder would like to change solicitors, from Quinn Emanuel, and in this regard approached us to take over the matter. As discussed with Robert, we would be pleased to act for you on the basis of the **attached** costs agreement – which has already been signed by the Funder.

Can you each kindly:

1. carefully read, sign and return a copy of the attached costs agreement (engagement letter) to us. If there is any term or matter within the cost agreement which you do not both fully understand, please can you let us know before signing it; and
 2. Provide us with a copy [of] your driver's license or passport, and recent utility bill with your home address, to enable us to comply with our regulatory obligations.
- Once you have provided the items in 2 above, we will need to arrange a video call or in person meeting to complete our identity checks. Can you please provide a suitable date and time this week for either the call or in-person meeting.

...

- 26 Attached to the email was a copy of the Ironbridge engagement letter which was dated 16 October 2023 and signed on each page and on the execution page by Robert Coshott on behalf of the Funder on 21 October 2023. This constituted the acceptance of the Ironbridge engagement letter by the Funder.
- 27 On 25 October 2023 at 6:51PM, the Funder sent an email to Mr Withane saying he had just spoken to Mr Mitchell who was concerned that Mr Withane had told Mr Mitchell on the phone "the hearing in this case is a long way off". The Funder asked Mr Withane whether Mr Mitchell had misunderstood Mr Withane.
- 28 On 27 October 2023 at 3:52PM, Mr Withane sent an email to the Funder, copied to the plaintiffs, which referred to a call Mr Withane had with Mr Mitchell on 24 October 2023 in which he asked him to provide identity documents and sign the Ironbridge engagement letter, and stated that Mr Withane was still waiting for these. The relevant parts of the remainder of the email are as follows (removing obvious formatting errors):

...

Our clients

Mr Mitchell asked me to clarify that we would be instructed by him and Rosaline and would exercise independent judgement. I, of course, reassured Mr Mitchell that would be the case – as we have discussed with you previously.

For the sake of providing the Mitchells clarity: under the conduct rules and laws, we are dutybound to act upon our client's reasonable and lawful instructions. In this case, our clients will be Darren and Rosaline (**Clients**). Therefore, any step in the proceeding will naturally be on the basis of instructions received from the Clients.

Further, we note that, the funder has the ability to provide input as to the progression of the matter (which is expressly provided for under the funding agreement between the Mitchells and the Funder). For our part, this input and steer is welcomed and appreciated.

Liability for our fees

In answering Mr Mitchell's question to me by SMS on Wednesday asking us to confirm that he "and Rosaline will have no financial responsibility if the funder does not pay the costs". I take it that Mr Mitchell is asking that if our fees (and disbursements) are not paid by the funder, whether the Mitchells will have to pay our fees and disbursements. We can answer that as follows:

1. Under our engagement letter (costs agreement), attached for convenience, the Mitchells and the funder are jointly liable for our invoices (being for our fees and disbursements). This means that we can seek recovery of our unpaid invoices from either the Mitchells or the funder.
2. However, we note that:
 - a. We have agreed with the funder that we must have \$200,000 in our trust account at all times, and if this amount is depleted, the funder is responsible for promptly topping it up. We are entitled to have our unpaid invoices paid from the funds held in trust on direction from the Mitchells or if our invoices not been paid within 7 days of its issuance.

b. While we are not advising the Mitchells or the funder on the terms of the funding agreement between themselves, it appears to us that cl[a]use 4.1.2 requires the funder to fund the proceedings until the proceedings conclude or when the funding agreement is terminated. As to what this means, we assume you all took advice at the outset of this matter.

- 29 The email concluded by Mr Withane saying that Ironbridge needed the plaintiffs to provide their identity documents and sign and return the Ironbridge engagement letter.
- 30 On 30 October 2023 at 9:28AM, Mrs Mitchell sent an email to the Funder to which was attached copies of the plaintiffs' driver licences and the signature page of the Ironbridge engagement letter which was dated 30 October 2023 and signed by each of the plaintiffs. This constituted the acceptance of the Ironbridge engagement letter by the plaintiffs. In the email, Mrs Mitchell said she had been asked by Mr Mitchell to send the documents to the Funder "for the new solicitors".
- 31 On 30 October 2023 at 10:04AM, the Funder sent an email to Mr Withane forwarding on the email he had received from Mrs Mitchell with the attached driver licences and completed signature page from the Ironbridge engagement letter.
- 32 On 30 October 2023 at 6:02PM, Mr Withane sent an email to the plaintiffs, copied to the Funder, in which he said that they were nearly there on completing the engagement process, asked for a video call to be arranged that night or the following morning and requested that the plaintiffs provide a full copy of the Ironbridge engagement letter with all pages preferably initialled at the bottom by each of the plaintiffs.
- 33 On 30 October 2023 between about 7:10PM and 7:30PM, Mr Withane had a video conference with the plaintiffs for the purposes of them confirming their identities and that they had each read, understood and signed the Ironbridge engagement letter.
- 34 On 30 October 2023 at 7:28PM, Mr Goring sent an email to the plaintiffs thanking them for engaging Ironbridge and for their time that evening allowing them to confirm their identities and that they each read, understood and signed the Ironbridge engagement letter. Mr Goring requested that the plaintiff send Ironbridge a full copy of the Ironbridge engagement letter with their signatures attached.

Ironbridge invoicing and trust account

- 35 On 13 November 2023 at 3:25PM, Emily Belling (the practice manager of Ironbridge at that time) sent an email to the Funder which attached an Ironbridge invoice dated 13 November 2023 addressed to the plaintiffs for the period from 20 October 2023 to 31 October 2023. The email also stated that:
- We currently hold \$100,000.00 in trust on your behalf.
- Please kindly authorise payment of the above from monies we hold in trust on your behalf.
- 36 The invoice included a page headed "Important Information", one section of which was titled "Proposed Withdrawal of Trust Money" which stated:

If funds are held in trust, it is intended to withdraw the above amount from money held in our trust ledger at the expiration of 7 business days from the date this bill was given unless an objection is made.

37 Mr Withane gave evidence that the email and invoice of 13 November 2023 were sent when Ms Belling was not provided with instructions on how the matter was to be invoiced. That said, the email addressed to “Robert Coshott” and the attached invoice addressed to the plaintiffs appeared to be in keeping with the provisions of the Ironbridge engagement letter which made it plain that the plaintiffs were the clients of Ironbridge and that Robert Coshott representing the Funder was the primary contact for Ironbridge, and was authorised to receive, review and manage all invoices.

38 On 13 November 2023 at 3:42PM, the Funder sent an email to Ms Belling authorising the payment of the invoice dated 13 November 2023.

39 On 15 November 2023 at 5:43PM, Ms Belling sent an email to the Funder stating that the trust account balance for the WestConnex resumption class action was \$100,000.

40 In around early December 2023, Ironbridge outsourced its invoicing related tasks to an offshore company called SBA, which effectively became Ironbridge’s accounts team and sent invoices and trust directions directly to clients.

41 On 19 December 2023 at 9:14PM, SBA sent an email on behalf of Ironbridge to the Funder which attached an invoice and trust direction. The email relevantly stated (emphasis in original, with grammatical errors left in place):

...

Please find **attached** invoice 202783, which itemises professional fees and disbursements accrued on this matter file.

This invoice is for \$45,940.97 (inc. GST), bring your total outstanding balance to \$45,940.97.

We currently hold \$198,300.50 in trust on your behalf.

...

Please also kindly authorise payment of invoice 202783 from monies we hold in trust on your behalf.

...

42 On 25 January 2024 at 10:02PM, SBA sent an email on behalf of Ironbridge to the Funder which attached an invoice and trust direction. The email relevantly stated (emphasis in original, with grammatical errors left in place):

...

Please find **attached** invoice 202812, which itemises professional fees and disbursements accrued on this matter file.

This invoice total outstanding balance is \$86,576.00 (incl. GST), there is currently \$45,940.97 left outstanding in your account from unpaid invoice 202783, resulting in a current outstanding balance of \$132,516.97.

We currently hold \$198,300.50 in trust on your behalf. **Please authorise payment of invoice 202812 and 202783 from monies we hold on to your behalf in trust.**

Please kindly deposit \$132,516.97 into trust to cover ongoing legal costs.

...

- 43 On 9 February 2024 at 5:30PM, SBA sent an email to the Funder which attached a receipt for the payment of invoice 202783, relevantly stating (emphasis in original, with grammatical errors left in place):

...

Please find **attached** your receipt for the payment of Invoice 202783 from monies we hold in trust for you.

This payment was made in accordance with term eight of our general terms of business, which states that:

"[i]f any tax invoice we render to you is not paid by the due date, you irrevocably authorise us to transfer any funds held in our trust account to your order to satisfy such invoices."

...

- 44 On 12 February 2024 at 6:40PM, SBA sent an email to the Funder which attached a receipt for the payment of invoice 202812. The email was otherwise in precisely the same form as the email of 9 February 2024.

- 45 On 20 February 2024 at 4:17PM, SBA sent an email to the Funder which attached invoice 202854 in the amount of \$57,684.60 and a trust direction. The email relevantly stated (emphasis in original, with grammatical errors left in place):

...

We currently hold \$165,783.53 in trust on your behalf. **Please authorise payment of invoice 202854 from monies we hold on to your behalf in trust.**

Please kindly deposit \$91,000 into trust to cover ongoing legal costs.

...

- 46 On 6 March 2024 at 4:41PM, SBA sent an email to the Funder which attached a receipt for the payment of invoice 202854. The email was otherwise in precisely the same form as the emails of 9 and 12 February 2024.

- 47 On 12 March 2024 at 5:34PM, SBA sent an email to the Funder which attached invoice 202858 in the amount of \$50,114.70 and a trust direction, relevantly stating (emphasis in original):

...

We currently hold \$200,000.00 in trust on your behalf. **Please authorise payment of invoice 202858 from monies we hold on your behalf in trust.**

Please kindly deposit \$50,114.70 into trust to cover ongoing legal costs.

...

- 48 Mr Withane gave evidence that after he became aware of SBA's emails to the Funder enclosing invoices and making statements to the effect that Ironbridge held "monies in trust on your behalf", he instructed SBA to send such emails to the plaintiffs as opposed to the Funder.

- 49 On 21 March 2024 at 1:44PM, SBA sent an email to the plaintiffs, copied to the Funder, which relevantly stated (emphasis in original):

...

Please find attached invoice 202882, which itemises counsel disbursement accrued on this matter file.

This invoice total outstanding balance is \$33,000.

We currently hold \$200,000 in trust on your behalf. **Please authorise payment of invoice 202882 from monies we hold on your behalf in trust.**

Please kindly deposit \$33,000 into trust to cover ongoing legal costs.

...

- 50 On 25 March 2024 at 5:14PM, SBA sent an email to the Funder which attached a receipt for the payment of invoice 202858. The email was otherwise in precisely the same form as the emails of 9 and 12 February 2024 and 6 March 2024.
- 51 Mr Withane gave evidence that it has always been Ironbridge's practice in these proceedings to obtain the plaintiffs' approval to use funds held in its trust account before dispersing any funds from that account.

Status of the proceedings

- 52 On 11 March 2024, Ball J made orders in the proceedings, including that particular common questions be determined at the initial trial, any questions of the quantum of compensation or damages be determined separately and after the initial trial, and listed the matter for directions on 22 March 2024.
- 53 On 22 March 2024 and 5 April 2024, the matter was listed for a directions hearing, however, on both occasions, the directions hearing was vacated and adjourned by consent.
- 54 On 19 April 2024, Ball J adjourned the proceedings for three weeks to 10 May 2024 to enable the parties to ascertain the nature of the dispute between the Funder and the lead plaintiffs.
- 55 Since 10 May 2024, further time in these proceedings has been spent on the preparation, hearing and determination of this application.

Dispute between Ironbridge and the Funder

- 56 In April 2024, the Funder and Ironbridge fell into significant dispute over the further conduct of the proceedings, including the Funder's desire to terminate the retainer of senior counsel, the Funder's objection to the use of particular experts and the Funder's statement of the directions to be sought at the directions hearing on 19 April 2024.
- 57 On 18 April 2024 at 4:08PM, Mr Withane sent a letter by email to the Funder detailing the issues in the dispute which had arisen between Ironbridge and the Funder over the conduct of the proceedings. The letter relevantly stated:

...

Since our engagement, it has always been our policy, and practice, to take and act upon the lawful and informed instructions of the Mitchells. To this extent, we have not taken any action without the express authority of the Mitchells. We have also operated on the basis of ensuring that there was appropriate communication between us, the Mitchells and the Funder in respect of the progress of the Class Action. Consistently with the Funding Agreement (referred to below), this often included:

1. Informing the Funder of the orders that were being sought at or before each directions hearing;

2. Informing the Funder of the steps being taken by us and counsel in progressing the Class Action; and

3. Consulting with the Funder as to the orders and steps that may be appropriate to progress the Class Action.

58 The letter then detailed what was said to be the achievement of significant milestones, but referred to a lack of progress of expert evidence due to the interference of the Funder expressed in these terms:

At the same time, the kind of critical expert evidence advised by counsel many months ago as necessary has not progressed satisfactorily arising from (and only from) various objections and unusual interventions by you on behalf of the Funder. We have patiently endeavoured to work through these issues with you, but it has been time-consuming and resulted in significant delay and the incurring of unnecessary cost [privileged material redacted] and interference with briefing experts to assist the legal team in considering the prospects and the directions required. This has meant that the plaintiffs still are not in a position to propose sensible timetabling orders for the efficient progression of the Class Action. In addition, many of your emails directed to us have been tantamount to an attempt by you to control and direct us and counsel (including by

the use of apparent and veiled threats) as to basic forensic decisions, including those involving procedural matters, in the Class Action that clearly should be primarily for the legal representatives of the plaintiffs, not the commercial funder.

59 The letter then catalogued the concerns of Ironbridge as to the Funder's conduct and the class action which can be summarised as follows:

- (1) Ironbridge do not take instructions from the Funder and their clients are the plaintiffs, to whom Ironbridge owe duties to act in their interests and the interests of the broader group members of the class action.
- (2) It is not appropriate for the Funder to be suggesting that it has the unilateral power to terminate the retainer of senior counsel, which is ultimately and solely the plaintiffs' decision and the plaintiffs have provided express instructions that they do not want to terminate senior counsel's retainer.
- (3) Under the Funding Agreement, the Funder is entitled to be consulted as to how the class action could be progressed but it does not allow the Funder to control the conduct of the class action and nor does it entitle the Funder to terminate senior counsel's retainer.
- (4) It is the strong advice of Ironbridge that terminating senior counsel's retainer is against the best interests of the plaintiffs and the group members of the class action.
- (5) It is very concerning the Funder would seek to terminate senior counsel's retainer in response to him advising the plaintiffs about their duties in relation to the class action and issues in relation to the Funding Agreement.
- (6) The list of orders provided by the Funder as those it wishes to be sought at the directions hearing on 19 April 2024 are not appropriate and detrimental to the group members and the plaintiffs.
- (7) Undue pressure has been placed on the plaintiffs by the Funder, and any communication from the Funder to the plaintiffs is required to be sent to Ironbridge to consider and pass on to the plaintiffs.

60 The letter concluded with an outline of matters concerning the funding arrangements which Ironbridge considered needed to be clarified, together with an offer to attend an in-person meeting with the Funder and the plaintiffs to resolve the serious issues set out in the letter.

61 On 18 April 2024 at 7:23PM, the Funder sent an email to Mr Withane, copied to Mr Mitchell, in response to the letter sent earlier that day. The Funder's email relevantly stated:

The funder has, without legal obligation to do so, provided funds above and beyond its obligations under the funding agreement. The total monies provided by the funder so far is close to \$2 million. The funder is not under any obligation under the funding agreement to provide any further funding. The funder, having performed its obligations under the funding agreement, has acquired rights and entitlements under the funding agreement.

I trust you have advised the Mitchells of the financial consequences for them personally upon termination of the funding agreement. These include liability to the funder for the funds provided to date.

The funder's obligations under the funding agreement did not include putting funds in trust to secure costs. Its obligation was to pay tax invoices issued to the plaintiffs as each is issued up to the amount specified in the funding agreement.

The above having been said, the funder wishes the remaining funds in your trust account paid into your trust account by it to be paid out to the funder forthwith.

The funder will not be communicating further with you or the Mitchells except through its legal representatives appointed to protect and enforce its rights and entitlements with whom I am meeting tomorrow.

...

- 62 On 19 April 2024 at 12:56PM, the Funder sent an email to Mr Withane terminating the Ironbridge engagement letter as far as it applies to the Funder and demanding the return of all monies in the Ironbridge trust account deposited by the Funder by close of business that day.
- 63 On 20 April 2024 at 8:38AM, the Funder sent an email to the plaintiffs purporting to exercise its rights under cl 8.2(d) of the Funding Agreement by requesting that the plaintiffs instruct their solicitors to make available to the Funder the file in the class action for inspection by it.
- 64 On 20 April 2024 at 2:45PM, Mr Withane sent an email to the plaintiffs saying that Ironbridge would not be returning the funds until they had worked through the issues.
- 65 On 21 April 2024 at 7:57AM, the Funder sent an email to SBA stating that the Funder does not authorise and objects to deduction/payment out of the funds deposited into Ironbridge's trust account by the Funder, save for the payment out to the Funder of those monies requested by it. The email concluded by stating that the Funder trusted that it would not need to seek the intervention of the Law Society of New South Wales to ensure this payment is received forthwith.
- 66 On 23 April 2024, Mr Withane sent a letter by email to the Funder in response to the Funder's emails of 18 April 2024, referring to alleged threats made by the Funder to Mr Mitchell and relevantly stating:

3. Third, leaving to one side whether the Funding Agreement gives rise to any binding and enforceable rights and obligations enforceable against our clients given the troubling circumstances noted in Our Letter, our clients have not breached any purported obligation under that agreement giving rise to the termination. As Your Email acknowledges, the Funder exhausted its funding obligations under the funding agreement long ago.

4. Fourth, it follows that we do not consider there is any basis upon which our clients are personally liable to the Funder for any termination by them of the Funding Agreement. In any event, the stipulation in clause 8.1 of the Funding Agreement is unenforceable on multiple bases based on our instructions, including because it is a penalty.

5. Fifth, the funds put into our trust account were for the proper conduct of the proceedings and neither the funding agreement nor applicable law requires us to pay that over to the funder "forthwith". In this regard, we refer you to s 138 of the *Legal Profession Uniform Law (NSW)*, which states:

"Except as otherwise provided in this Part, a law practice must--

(a) hold trust money deposited in the law practice's general trust account exclusively for the person on whose behalf it is received; and

(b) disperse the trust money only in accordance with the direction given by the person."

The trust funds held in our trust account were deposited by the Funder on behalf of the Mitchells to progress the conduct of the Class Action (as defined in Our Letter). Accordingly, we are under no obligation to follow the Funder's demands to pay funds held in trust to it. This is solely at the discretion of the Mitchells acting consistently with their duties to group members. If you and the Funder hold a different view, please explain the legal basis upon which it is entitled to have those funds returned to it immediately.

...

- 67 On 23 April 2024 at 2:20PM, the Funder sent an email to Mr Withane suggesting that he reconsider the assertion that Ironbridge do not hold trust monies on the Funder's behalf, referencing 12 written confirmations from Ironbridge that it holds the monies in

trust on behalf of the Funder and stating that if the trust monies are not received into the Funder's bank account by 5PM the following day, a complaint would be lodged with the Law Society of New South Wales.

68 On 10 May 2024, the Funder sent a notice of breach of Funding Agreement to the plaintiffs, asserting that they are in breach of cl 8 of the Funding Agreement and requiring them to rectify those breaches within 14 days. In the notice, the particulars of the breaches are stated to be the following:

- (1) failure to keep the Funder advised of the progress and status of the proceedings (cl 8(a) of the Funding Agreement);
- (2) failure to consult with and consider the views of the Funder in relation to any material issues arising from the conduct and/or progress of the proceedings (cl 8(b) of the Funding Agreement); and
- (3) failure to provide or instruct their solicitors to provide to the Funder such information from time to time as may be reasonably required by the Funder in relation to the proceedings.

69 On 13 May 2024, the Funder sent a notice of breach of Funding Agreement to the plaintiffs, asserting that they are in breach of cl 13 of the Funding Agreement. In the notice, the particulars of the breach are stated to be the filing and service of an affidavit in the proceedings which disclose the terms of the Funding Agreement to persons other than the plaintiffs' legal and financial advisors.

70 On 15 May 2024, the Funder sent a notice of dispute to the plaintiffs stating that disputes had arisen between the plaintiffs and the Funder under the Funding Agreement and giving notice pursuant to cl 14 of the Funding Agreement of these disputes. The particulars of dispute are stated to be the following:

- (1) failure to keep the Funder advised of the progress and status of the proceedings (cl 8(a) of the Funding Agreement);
- (2) failure to consult with and consider the views of the Funder in relation to the separate hearing of the liability questions and the legal representation (cl 8(b) of the Funding Agreement);
- (3) failure to provide instruct the plaintiffs' solicitors to provide such information from time to time to the Funder as may be reasonably required by the Funder in relation to the proceedings; and
- (4) filing and serving an affidavit in the proceedings which disclosed terms of the Funding Agreement to persons other than the plaintiffs' legal and financial advisors (cl 13 of the Funding Agreement).

71 On 17 May 2024, the Funder sent a notice of dispute to the plaintiffs stating that a further dispute had arisen between the plaintiffs and the Funder under the Funding Agreement and giving notice pursuant to cl 14 of the Funding Agreement of this

dispute. The particulars of dispute are stated to be the following:

- (1) were the monies provided by the Funder, after reaching the funding limits set under the Funding Agreement, namely \$500,000.00, monies provided under the Funding Agreement or monies had and received by the plaintiffs outside of the Funding Agreement and repayable to the Funder forthwith; and
- (2) the total provided by the Funder exceeds \$1,500,000.00, the excess over the funding limit exceeds \$1,000,000.00, and the \$135,000.00 in the Ironbridge trust account would, if not paid out to the Funder as requested, increase the amount payable by the plaintiffs to an amount in excess of \$1,135,000.00.

72 On 23 May 2024, Radith Khan of Ironbridge sent a letter by email to the Funder referring to the three notices of dispute. The letter asked that the Funder provide Ironbridge with details of how and when the plaintiffs failed to:

- (1) advise the Funder of the progress and status of the proceedings;
- (2) consult with and consider the views of the Funder in relation to the separate hearing of the liability questions and legal representation; and
- (3) provide and instruct Ironbridge to provide information from time to time as may be reasonably required by the Funder.

73 The letter also asked for details of the information that the Funder reasonably required and how that information was not provided.

74 The letter also noted that a copy of the Funding Agreement was provided to TfNSW on 20 August 2021 and was disclosed to the court on 15 February 2022. Mr Khan asked that the Funder provide Ironbridge with details of how any further disclosure of the Funding Agreement amounts to a breach of cl 13 of the Funding Agreement.

75 In relation to the dispute resolution provisions in the Funding Agreement, the letter concluded as follows:

In the interim, we note that clause 14(b) of the funding agreement provides for the parties to meet within 7 days of receiving any notices of a dispute.

We confirm that we are open to discussing the above-mentioned notices on behalf of our clients to seek a resolution of these matters. That said, it has always been our clients' and our preference to discuss these issues and such a preference was indicated to the Funder since, at least, our letter of 23 April 2024.

If you wish to pursue such a meeting, please provide us with your available dates and times to meet to discuss the notices.

76 On 24 May 2024 at 2:34PM, the Funder sent an email to Mr Khan stating that the seven days provided for in cl 14 of the Funding Agreement for the parties to meet expired before Mr Khan's email was sent/received. In the letter, the Funder said that cl 14 of the Funding Agreement provides that the next step is for the disputes to go for expert determination administered by the Australian Commercial Disputes Centre (**ACDC**) and that "[t]his process has been commenced by the Funder". The Funder also said that, under the rules and guidelines of the ACDC, the parties are to share the experts and the ACDC's fees and expenses of the expert determination equally, which

will be very substantial. The Funder questioned whether the plaintiffs are able to put up their half of the fees and expenses and asked that they provide evidence before the Funder incurs costs and expenses.

77 The Funder also questioned where in cl 14 the Funder is obliged to provide any “better particulars”.

78 The Funder admitted at the hearing before me that beyond the service of the notices of dispute, no steps have been taken by the parties in adherence to cl 14 of the Funding Agreement to meet and have any expert determination take place under the auspices of the ACDC (T14.34–15.37).

Amounts held in trust and owing to Ironbridge

79 Ironbridge currently holds \$135,180.55 in its trust account.

80 There is an amount of around \$100,000.00 owing in respect of outstanding invoices and unbilled work in progress from Ironbridge and the plaintiffs’ barristers. Of that amount, \$40,545.00 (excluding GST) relates to work carried out by Ironbridge prior to the Funder’s purported termination of the Ironbridge retainer on 19 April 2024. Since 19 April 2024, Ironbridge has accrued work-in-progress of approximately \$27,925.00 directly referable to the work carried out in respect of and incidental to this application.

81 The plaintiffs only intend to seek recourse to the trust funds to the extent necessary to meet the legal expenses in their role as lead plaintiffs in the proceedings, which does not include the costs of this application. Mr Withane considers that any surplus funds in the trust account of about \$35,000 would then revert to the benefit of the Funder and be returned to it. Mr Withane also believes that if the Funder is unwilling to provide further funding and if an alternative funder cannot be arranged, the plaintiffs will need to consider whether they should make an application under s 173 of the CPA for approval to discontinue the proceedings.

ISSUE 1: STAY UNDER COMMERCIAL ARBITRATION ACT

Legal principles

82 Section 8 of the CAA provides:

A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party’s first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

83 The definition of “arbitration agreement” is to be found in s 7(1) of the CAA which states:

An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

84 The threshold question of whether there is an “arbitration agreement” turns on whether there is an agreement between the parties to “submit to arbitration” their dispute. There is an important distinction between an expert determination and an arbitration which

turns on the construction of the particular provisions of the contract. In *Lepcanfin Pty Ltd v Lepfin Pty Ltd* [2020] NSWCA 155, Bell P (as the CJ then was) (with whom Payne and McCallum JJA agreed) at [94] endorsed the following statement of principle by Hammerschlag J (as the CJ in Eq then was) in *The Illawarra Community Housing Trust Limited v MP Park Lane Pty Ltd* [2020] NSWSC 751 at [60]–[64]:

[60] Some cases have endeavoured to catalogue differences between the characteristics of arbitration and those of expert determination: see e.g. *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134 at [22]–[23]; *Zeke Services v Traffic Technologies* [2005] QSC 135; *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160 at [118]; *Lighter Quay* at [50]–[51]. The view has been expressed that a characteristic of expert determination is that there will ordinarily be a dispute of a kind which can be determined in an informal way by reference to the specific technical knowledge or learning of the expert. In *Nylon Capital* at [28], Thomas LJ expressed the view that in contradistinction to arbitration, expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the Court (or if there is an arbitration provision, by arbitrators). I do not consider that this approach reflects orthodox canons of construction which apply in this jurisdiction.

[61] What the parties intend is to be determined from the words they choose read in the context in which they chose them.

[62] It is to be borne in mind that expert determination is simply a private contractual mechanism to which parties agree. The determination does no more than create binding contractual rights and obligations. It has no statutory backing as a process. It does not resolve the dispute by the exercise of judicial, quasi-judicial, administrative, statutory, or other power or jurisdiction: *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd* [2019] NSWSC 576 at [59]. Agreement to expert determination does not bring with it an assumed expectation that procedures which are the hallmark of judicial or quasi-judicial proceedings will apply.

[63] In my view, it is contrary to the orthodox approach to construction to make an a priori presumption or generalisation:

- (1) as to the type of disputes parties will agree should be covered by an expert determination provision;
- (2) that parties did not intend any dispute to be resolved quickly and informally without procedures reminiscent of judicial or quasi-judicial proceedings if it is complex and involves disputes of fact or questions of mixed fact and law;
- (3) that commercial parties intend certain types of disputes to be dealt with procedurally in one way and other types of disputes to be dealt with procedurally in another;
- (4) that parties intended multiple venues or occasions for their disputes even though they never said so; and
- (5) that a single person selected by them to be the expert is not considered by them to be competent to resolve the dispute, including by adopting an appropriate procedure to achieve resolution.

[64] Regularly, significant and complex commercial transactions which come before the Commercial List and the Technology and Construction List contain provisions that all disputes in connection with the transaction are to be resolved by expert determination.”

85 The fundamental differences between arbitration and expert determination were described in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2007] QSC 206 by Mullins J at [72]–[73] in the following way:

[72] What is significant is that an arbitration entails the mandatory requirement that the arbitrator must act judicially. Experts are not bound to act judicially and it is inconsistent for an expert to do so where the expert is required to make use of the expert's own expertise. That does not preclude an expert from acting judicially, if that is how the expert chooses to act and, in the particular case, the expert is acting in a way that accords with the terms of the expert's appointment. Although it is usual for an expert to be chosen under the contractual method of appointment by reference to a particular

expertise, it is not an essential characteristic of an expert determination that the expert is obliged to make use of the expert's expertise in making the expert determination, provided the expert acts in accordance with the terms of the appointment.

[73] Because arbitration has a statutory framework, but expert determination is governed by the terms of the contract between the parties and depends on the content of the contractual terms chosen by the parties, it is easier to identify the indicia of an arbitration, than the indicia of an expert determination. The analysis of what parties have agreed upon will usually be in terms of whether the process is or is not arbitration.

86 In considering the question of the difference between an arbitration and an expert determination in the context of the identical s 7(1) of the *Commercial Arbitration Act 2011* (Vic), in **Raskin v Mediterranean Olives Estate Ltd** [2017] VSC 94, Hargrave J at [19]–[24] referred to **Shoalhaven City Council v Freedom Civil Engineering Pty Ltd** (2011) 244 CLR 305, in which French CJ, Crennan and Kiefel JJ at [25] cited two English decisions as explaining the distinction. In *Raskin*, Hargrave J said at [22]–[24] (citations included from footnotes):

[22] Thus, the High Court accepted that the distinction between expert and arbitrator is that enunciated by the Court of Appeal in England in two cases. First, *re Dawdy and Hartcup* (1885) 15 QBD 426 at 429-30. In that case, Lord Esher MR described an arbitration as a process:

to be conducted according to judicial rules, where the person who is appointed arbitrator is bound to hear the parties, to hear evidence if they desire it, and to determine judicially between them. He must have a matter before him which he is required to consider judicially. As a consequence of this, it has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge.

[23] In the course of considering whether the agreement was a submission to arbitration, Lord Esher noted that the agreement contained ‘nothing to shew the mode in which’ the relevant valuation was to be made, and there was ‘nothing to shew that they are to hear the parties, and determine judicially between them’.

[24] Second, *In re Carus-Wilson and Greene’s Arbitration* (1886) 18 QBD 7 at 9. In that case, Lord Esher MR put the matter in the following way:

If it appears from the terms of the agreement by which a matter is submitted to a person’s decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. ... There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases, it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances.

87 In *Shoalhaven*, French CJ, Crennan and Kiefel JJ at [26] described the expert determination process in that case as “neither arbitral, nor judicial”.

88 Section 34(2) of the CCA sets out the circumstances in which an arbitral award may be set aside, which relevantly includes the following:

An arbitral award may be set aside by the Court only if:

...

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or

(ii) the award is in conflict with the public policy of this State.

89 In **Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd** (2011) 80 NSWLR 398 (a case involving an arbitration clause, not an expert determination), Ball J said at [36]–[38]:

[36] ... In my opinion, an arbitration agreement is “inoperative or incapable of being performed” if, among other things, its subject-matter is not capable of settlement by arbitration under the laws of New South Wales. That conclusion is support by section 34(2) of the CA Act 2010 ... [quoting s 34(2)]. It would be odd to interpret s 8(1) of the CA Act 2010 as requiring the court to refer to arbitration a dispute if any award arising from that reference was not enforceable under s 34(2)(b).

[37] Whether a particular dispute is capable of settlement by arbitration or not depends on the subject matter of the dispute and, in some cases, the mechanism that has been established to resolve it. In general, an arbitrator is required to resolve a dispute according to the laws of the relevant jurisdiction — which is normally the jurisdiction selected by the parties to the arbitration agreement to govern the resolution of their dispute. As Stephen J explained in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1979-81) 146 CLR 206 at 235:

The principle to be extracted from this line of authority is that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable and [sic] the matter been determined in a court of law. What lies behind that principle is that arbitrators must determine disputes according to the law of the land. Subject to certain exceptions, principally related to forms of equitable relief which are of no present relevance and which reflect the private and necessarily evanescent status of arbitrators, a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction.

Applying this principle, courts have held that, as well as a claim for interest, an arbitrator has power to determine various statutory claims such as those arising under ss 82 and 87 of the Trade Practices Act for contraventions of s 52 of that Act (see *Comandate Marine Corp and IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466) and those under ss 175, 233, 247A and 1071B of the *Corporations Act 2001* (Cth) (*ACD Tridon v Tridon Australia* [2002] NSWSC 896).

[38] However, in certain circumstances, it may be apparent from the nature of the subject matter or the way that it is dealt with by the legislature that it is appropriate for disputes concerning that subject matter to be resolved by the courts, or specialist tribunals established for that purpose. What normally distinguishes this class of case is the existence of some legitimate public interest in seeing that disputes of the type in question are resolved by public institutions or in accordance with structures that are established by parliament rather than institutions and structures established by the parties: see *Comandate Marine Corp* at [200] per Allsop J. Examples include proceedings to recover fines, proceedings relating to insolvency and competition law claims: see *ACD Tridon v Tridon Australia* at [189]–[194] per Austin J; *Comandate Marine Corp* at [200] per Allsop J. In *Metrocall Inc v Electronic Tracking Systems Pty Ltd* [2000] NSWIRComm 136, the Full Bench of Industrial Relations Commission sitting in Court Session thought that the same approach should apply to claims under s 106 of the *Industrial Relations Act 1996*. In reaching that conclusion, the Full Bench pointed to the fact that jurisdiction in respect of claims under s 106 was conferred on a specialist tribunal and the matters that that tribunal is required to take into account in determining whether to grant relief under that section include matters such as whether the contract is “against the public interest”.

Submissions of the Funder

90 The Funder says that cl 14 of the Funding Agreement contains a dispute resolution procedure which has been activated by the Funder serving the notices of dispute of 13, 15 and 17 May 2024 on the plaintiffs, the effect of which is that the plaintiffs cannot

seek to have the question of “to whom does the money in the Ironbridge trust account belong” in these proceedings. The Funder says that issues in the plaintiffs’ application question must be referred to arbitration.

91 In support of this submission, the Funder referred to passages of the following cases, making the submissions indicated:

- (1) ***Construcciones y Auxiliar de Ferrocarriles S.A. v CPB Contractors Pty Limited*** [2022] NSWSC 1264, Ball J at [51]. It is mandatory, not discretionary, for the issue to be referred to arbitration because of s 8 of the CAA, in circumstances where there is a dispute resolution clause in a commercial contract which has been activated by a notice of dispute even where there have been delays carrying out the next steps.
- (2) ***Watpac Construction NSW Pty Limited v Taylor Thompson Whitting (NSW) Pty Ltd*** [2015] NSWSC 780, Ball J at [49] and [66] (which I note do not say anything substantive). This case answers any submission the plaintiffs might make that the arbitration clause cannot be applied because it is not a technical or other issue; but is a legal issue.
- (3) ***WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)*** [2022] NSWSC 505, Rees J at [116], [119] and [121]. Section 8 of the CAA is mandatory, and a stay must be granted if a dispute resolution clause is activated.

92 The Funder gave no further assistance in stating how the reasoning in any of those passages had any relevance to the present case.

Submissions of the plaintiffs

93 The plaintiffs made the following submissions on the issue of the operation of the dispute resolution provision in cl 14 of the Funding Agreement.

- (1) The notice of dispute dated 17 May 2024 refers to the \$135,000.00 in the Ironbridge trust account as part of the particulars of dispute. The Funder has not taken any of the steps stated in cl 14(b)-(d) of the Funding Agreement, so there

has been no meeting of the Funder and the plaintiffs to resolve the dispute (even after Ironbridge offered to meet in the letter of 23 May 2024), no referral of the dispute to the ACDC and no expert determination conducted.

- (2) The Funder has not sought to stay the plaintiffs' application and seek an order referring the case to an alternative dispute resolution process.
- (3) The plaintiffs oppose the matter being stayed and referred for expert determination for the following reasons:
 - (a) the court's power in s 183 of the CPA to make the orders sought in this case is exclusively judicial and cannot be referred to private expert determination; and
 - (b) the Funder has not complied with the requirements of the dispute resolution clause and has waived its right to rely on it.
- (4) The general principles to be applied for enforcing a contractual agreement between parties which would have the effect of ousting the jurisdiction of the court are set out in *Siemens*. The present case is not capable of settlement by expert determination having regard to the subject matter of the dispute, which arises within the protective jurisdiction of the court, and the mechanism prescribed under the dispute resolution clause being an expert determination of what amounts to a complex legal problem.
- (5) The plaintiffs' application invokes the court's supervisory function or protective jurisdiction in s 183 under Part 10 of the CPA, and the court would be loath to find the parties are capable of excluding that function or jurisdiction by agreeing to reserve matters within it for private and confidential expert determination beyond the supervision of the court. Courts have declined to enforce exclusive jurisdiction clauses where doing so would deprive a party of access to a legislative scheme designed for their protection. Examples are:
 - (a) In *Commonwealth Bank of Australia v White* [1999] 2 VR 681, Byrne J at [89] said "It is undesirable that parties should, by entering into an exclusive jurisdiction agreement, be able to circumvent a legislative scheme established by Parliament to protect investors purchasing interests or prescribed interests".
 - (b) In *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129; [2012] HCA 54, French CJ, Crennan, Kiefel and Bell JJ at [46] said (citations omitted):

The fact that Ch 5C does not contain any express prohibition against a unitholder contracting not to exercise the right given by s 601NB31 does not conclude the question as to the enforceability of such an agreement between scheme members and a responsible entity. Windeyer J observed in *Brooks v Burns Philp Trustee Co Ltd* that a person upon whom a statute confers a right may waive or renounce his or her rights unless it would be contrary to the statute to do so. It will be contrary to the statute where the statute contains an express prohibition against "contracting out" of rights. In addition, the provisions of a statute, read as a whole, might be inconsistent with a power, on the part of a person,

to forego statutory rights. It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text.

- (c) *WLD Practice Holdings Pty Ltd v Sara Stockham* [2020] NSWSC 395 concerned the operation of a contractual provision which required a trustee to procure the determination of a fair market value of units in a unit trust and a further contractual provision which contained a dispute resolution mechanism and prevented the bringing of court proceedings unless there had been compliance with that mechanism. The question arose of whether parties could contract out of s 63 of the *Trustee Act 1925* (NSW) pursuant to which a trustee can seek judicial advice in circumstances where the statute did not expressly prohibit them from doing so. Sackar J concluded that it would be against public policy to allow parties to contract out from that statutory provision even if the clause purports to have that express effect (at [31]). In doing so, Sackar J as [24] referred to and applied the principle stated in *Westfield*.
- (6) The court's power under s 183 of the CPA is one which is supervisory and protective in a class action regime where the plaintiffs are not just acting in their own interests but also in the interests of the other class members. Whatever private rights might exist in the Funding Agreement, parties cannot contract out of the court's supervisory jurisdiction.
- (7) The decision in *Construcciones* is distinguishable from the facts in this case, which only involves an expert determination. It concerned the operation of s 7 of the *International Arbitration Act 1974* (Cth) in circumstances where the dispute resolution clause had a cascade of mechanisms which proceeded through negotiation, expert determination and then arbitration on a limited basis if there was a dispute about the expert determination. There had already been the referral of the dispute to expert determination and what was sought to be enforced was the arbitration clause, not the expert determination clause.
- (8) The decision in *WCX M4-M5 Link* is also distinguishable on the same basis as *Construcciones* because it also involved the same steps of negotiation, expert determination, and arbitration, with the final step to arbitration occurring if one or

other party was dissatisfied with the outcome of the expert determination. Again, this case involved the enforcement of the arbitration clause, not the expert determination clause.

- (9) The decision in *Watpac* is also distinguishable because no submission was advanced by any party in that case that the expert determination clause ought not be enforced because it was contrary to public policy, having regard to the nature of the court's protective and supervisory powers being excluded.
- (10) The legal issues that are generated by this application are complex and involve a number of issues to do with contract law and trust law. Those factors make them unsuitable for determination by an expert, particularly when this is not a tiered dispute resolution clause which would have various procedural fairness safeguards that are supervised by a court and also enforcement mechanisms. Having regard to the fact that there is extant litigation in this court in these proceedings and the issue between the plaintiffs and the Funder needs to be determined authoritatively and quickly provides another factor in favour of not enforcing the dispute resolution clause in this case.

Consideration

- 94 I consider that there should be no stay of the plaintiffs' application for a number of reasons.
- 95 First, I consider that cl 14 of the Funding Agreement is not an "arbitration agreement" within the meaning of that expression in s 7(1) of the CAA because the plaintiffs and the Funder do not, by that contractual provision, submit their disputes to arbitration. Instead, the parties have agreed to submit their disputes to expert determination. As stated in *Illawarra Community Housing, Northbuild* and *Raskin*, the key difference between the two dispute resolution procedures is that, in an arbitration, the dispute is resolved by the decision-maker acting judicially, whereas an expert does not have to (and, in fact, does not) act judicially at all. None of the rules and guidelines of the ACDC were placed in evidence before me so I am unable to make any determination as to whether I would have reached a different decision about this issue if they had been. The onus lies with the Funder to provide such evidence if it wished to rely on it to show that those rules and guidelines were more in keeping with an arbitration. But based on the use of the expression "expert determination" in cl 14, I conclude that what is contemplated by the parties is the submission of their dispute to expert determination, not arbitration.
- 96 Secondly, even if I had concluded that cl 14 of the Funding Agreement was an arbitration agreement within s 7(1) of the CAA, applying the test contained in *Westfield* I think that it would be contrary to public policy to allow the parties to contract out of the protective and supervisory jurisdiction that is provided by s 183 of the CPA in circumstances where the plaintiffs are not only representing their own interests but also the interests of all other members of the class, to whom they owe fiduciary duties.

Applying s 34(2) of the CCA and the reasoning in *Siemens* at [38], I consider that it is apparent from the protective and supervisory nature of the statutory provisions in Part 10 of the CPA that it is appropriate for disputes over the funding of class actions to be determined by this court rather than by way of private agreement between the parties through arbitration. I have set out more reasoning on this aspect in more detail when dealing with Issue 3 below.

97 In the circumstances, it is not necessary for me to deal with the submissions made by the plaintiffs concerning an alleged waiver of the Funder's rights under cl 14 of the Funding Agreement.

98 I was not assisted by any of the Funder's submissions concerning the application of the principles in *Construcciones*, *WCX M4-M5 Link* or *Watpac*, none of which involved a stand-alone expert determination provision of the type I have considered in this case.

99 Accordingly, I refuse to stay the determination of the plaintiffs' application before me.

ISSUE 2: JOINDER OF THE FUNDER

Legal principles

100 Rule 6.24(1) of the UCPR states:

If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party.

101 Where a party requests that a court make orders which directly affect the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined: ***John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*** (2010) 241 CLR 1; [2010] HCA 19, French CJ, Gummow, Hayne, Heydon and Kiefel JJ at [131].

102 The principle derives from the rules of natural justice, which were summarised in *State of Victoria v Sutton* (1998) 195 CLR 291 at 316; [1998] HCA 56, at [77], by McHugh J as follows (footnotes omitted):

The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order. That practice also assists in avoiding duplication of hearings on the same issues and in avoiding the spectre of inconsistent decisions by courts or the judges of the same court.

103 In ***Ross v Lane Cove Council*** (2014) 86 NSWLR 34; [2014] NSWCA 50, Leeming JA (with whom Meagher AJ and Tobias AJA agreed) at [51]–[54] and [57]–[58] set out the relevant principles in the following way (emphasis in original):

[51] It is settled law that a person who is directly affected by the orders sought in a proceeding is a necessary party, and that the obligation to join that person rests upon the plaintiff or applicant or person applying for those orders.

[52] In the *Superleague* case (*News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410) at 524–526, the Federal Court (Lockhart, von Doussa and Sackville JJ) applied the test stated by Lord Diplock delivering the advice of the Judicial Committee of the Privy Council in *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 criticising the dichotomy between “legal” and “commercial” interests. His Lordship said at 56:

A better way of expressing the test is: will [a non-party's] rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

[53] That test has very regularly been followed. Most recently, in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19 ; 241 CLR 1 at [131], a unanimous High Court said:

Walker Corporation submitted that where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined. That submission is correct.

[54] Sometimes it is said, as it was said in the present appeal, that merely giving notice to the person affected by the order is sufficient. It will be necessary to return to this in more detail below, but it should be recognised immediately that joinder, not notice, is the default position. In the *Superleague* case, their Honours said at 526:

In our opinion, the notice given to the players before trial does not, and could not, extend the jurisdiction of the Court to make orders which offend the test stated in *Pegang Mining*. Absent an application for joinder by a defendant, or by a third party who claims to be directly affected by the proposed orders, *it is for the party prosecuting the proceedings to choose who are the necessary parties to enable the Court to make the orders sought*. Generally speaking, to permit [the party prosecuting the proceedings] to transfer to others who might be affected by the outcome of the proceedings the responsibility of deciding whether or not they should apply to be joined could be productive of uncertainty and inconvenience. At times, it could lead to the need to halt expensive litigation part-way through, because a third party insufficiently understood the proceedings, or, through impecuniosity or some other reason, was not adequately advised. (emphasis added)

...

[57] Contrary to Council's submission that "the line of authority from the Super League case must be read in the context of the overriding purpose set out in the *Civil Procedure Act*", nothing in ss 56-59 of the *Civil Procedure Act* undermines this principle, at least in its application to the present case. The joinder of a party directly affected by an order is not, at least not ordinarily, a matter of discretion: it is a matter of obligation upon the party seeking the order. That is why the High Court referred to the position of the non-party Walker Corporation in *John Alexander's Clubs* at [153] as depending on "matters of right affecting non-parties which rest on general law principles of natural justice".

[58] For that proposition, the High Court cited *Victoria v Sutton* [1998] HCA 56; 195 CLR 291 at [77], where McHugh J said:

The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order.

- 104 It is clear that the expression "all matters in dispute in any proceedings" in r 6.24(1) of the UCPR is not limited to matters arising on the existing pleadings: *Qantas Airways Ltd v AF Little Pty Ltd* (1981) 2 NSWLR 34, Glass JA (with whom Samuels JA agreed) at 39.
- 105 In the context of litigation funding for representative proceedings, the joining of a litigation funder as a party when orders are proposed that affect the rights and liabilities of the litigation funder is not uncommon. In *Botsman v Bolitho (No 1)* (2018) 57 VR 68; [2018] VSCA 278, Tate, Whelan and Niall JA at [23]–[25] made the following comments on the importance of joining a funder as a party to the proceedings when its interests are affected (footnote omitted):

[23] As will become apparent, the group proceeding was funded by Australian Funding Partners Limited ('funder') which was incorporated for the purpose of funding the group proceeding. Although the funder was represented before the judge, the applicant did not initially join it as a party to the application for leave to appeal. After the conclusion of the

second day of argument, this Court raised with the parties the question whether the funder should be joined to the proceeding on the basis that the application is centrally concerned with the reasonableness of the commission to be paid to the funder out of the settlement and involved questions concerning the construction of the settlement deed to which the funder was a party.

[24] Subsequently, the funder was joined as a party and was given the opportunity to file written submissions. The Court indicated that it would list the matter for further hearing to give the funder the opportunity to make oral submissions. The funder availed itself of the opportunity to file written submissions but advised the Court that a further oral hearing was not required.

[25] It is regrettable that the funder was not joined as a party at the commencement of the application for leave to appeal. Its interests were clearly liable to be affected, not least because two of the contentious aspects of the settlement concerned the size of the payments made on account of legal costs and the funder's commission. That said, the funder did not identify any prejudice that it had suffered by reason of its late joinder and it was afforded the opportunity to make both written and oral submissions. It elected only to avail itself of the former.

106 The joinder of a litigation funder was held to be appropriate under r 9.05(1)(b)(ii) of the *Federal Court Rules 2011* (Cth), which is the equivalent of r 6.24 of the UCPR, in ***Caason Investments Pty Ltd v International Litigation Partners No 3 Ltd*** (2018) 265 FCR 487; [2018] FCAFC 176, Allsop CJ, Middleton and Perram JJ at [63]–[64]. In that case, there was a dispute between the lead applicant in an investor class action and the litigation funder (ILP), and in the course of the hearing for the approval of a settlement, the primary judge resolved the disputes without the litigation funder being a party to the proceedings. The lead applicant sought to be reimbursed for various expenses and be paid for legal, accounting, and administrative work it had done pursuant to a contract with the litigation funder. The lead applicant sought these amounts pursuant to s 33ZF of the *Federal Court Act 1976* (Cth) (**FCA**) which permits the court to make any order “the Court thinks appropriate or necessary to ensure that justice is done in the proceedings”.

107 On the issue of the joinder of the funder, at [64] the court said (emphasis in original):

It remains, in that particular regard, to note some matters which Caason did *not* pursue. It did not submit that ILP ought to have been made a party to the proceeding below. Such a joinder would have been appropriate under r 9.05(1)(b)(ii) of Federal Court Rules 2011 (Cth) which permits joinder of a person where the joinder ‘is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined’.

Submissions of the plaintiffs

108 The plaintiffs submitted that the Funder should be joined as a defendant pursuant to r 6.24(1) of the UCPR because it is a necessary party to determine the dispute between the plaintiffs and the Funder over the funds held in the Ironbridge trust account. The plaintiffs say that applying the settled principles expounded in *John Alexander’s Clubs* and *Ross*, the relief sought by the plaintiffs under s 183 of the CPA affects the rights of

the Funder, being its asserted beneficial right to those funds. In short, the plaintiffs submit that the court could not properly resolve the substantive dispute over those funds without making the Funder a party.

- 109 The plaintiffs also say that by the Funder advancing active opposition to the plaintiffs' application in its own name, the Funder tacitly acknowledged its personal interest in the relief. The plaintiffs submit that the only person who wishes to be heard against the relief sought by the plaintiffs is the Funder and, having taken advantage of the opportunity to be heard against that relief, it is necessary that the Funder be formally joined to ensure that it is bound by the court's resolution of the application.
- 110 The plaintiffs say that the arguments which are raised by the Funder concern the substance of the court's resolution of Issue 3 on this application, which is whether the court has the power under s 183 of the CPA to grant the relief sought.

Submissions of the Funder

- 111 The Funder submits that the plaintiffs seek to apply the power in r 6.24 of the UCPR to the dispute over the trust funds in a manner beyond its clear meaning without citing any authority for this widening. The Funder says that the reliance on *Caason Investments* and *Botsman* is misplaced because those cases involved different legislation. The Funder says that the question of to whom the funds in a solicitor's trust account belongs is not something necessary to the determination of this representative action.
- 112 The Funder also submits that the plaintiffs' submissions are contrary to the appellate authorities in New South Wales regarding the operation of Part 10 of the CPA, citing passages from *David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd* [2024] NSWCA 83 at [95]–[96] (Bell CJ) and [142] (Leeming JA) and *Haselhurst v Toyota Motor Corp Australia Ltd t/as Toyota Australia* (2020) 101 NSWLR 890; [2020] NSWCA 66 at [14] (Bell P), [106], [113], [119] (Payne JA) and [138] (Emmett JA). The Funder also relied on passages in *Re Rosie (No 2)* [2022] NSWSC 1750 at [128]–[129] and [138] (Meek J) and *Re GRP* [2019] NSWSC 710 at [53]–[56], [60] and [68].
- 113 The Funder recognises that *Pallas*, *Haselhurst* and *Rosie* do not relate to r 6.24(1) of the UCPR but argues that Part 10 of the CPA, including s 183, should not be construed in a manner contrary to the scheme established by that Part. The Funder says that Part 10 of the CPA establishes the scheme for representative proceedings, and representative proceedings should not be used as a vehicle to determine matters which are not in dispute in those proceedings. The Funder particularly relies on the operation of s 56 of the CPA, saying that the court must seek to give effect to an overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings when it exercises any power given to it by the CPA and any rules of court, and that the issue of the money held in trust by Ironbridge is not a real issue in dispute in these representative proceedings. The Funder says that to whom the monies in a trust account belongs is not a matter that needs to be determined in order to resolve

the matters in dispute in these representative proceedings. The Funder asserts that the ownership of the monies in the trust account is totally irrelevant to the determination of the representative proceedings.

Consideration

- 114 In my opinion, applying the principles stated in *John Alexander's Clubs* as confirmed in *Ross* on the application of r 6.24(1) of the UCPR, the Funder is a necessary party and ought to be joined as a defendant in these proceedings because the plaintiffs have requested that the court make orders which directly affect the rights of the Funder to the money currently held in the Ironbridge trust account. Determining that issue on this application should not be countenanced without hearing from the Funder and having the Funder bound by the orders of the court with respect to it.
- 115 My finding that the Funder is a necessary party is underlined by the fact that the Funder has actively opposed the substantive part of the plaintiffs' application in relation to the money held in trust by appearing at the hearing, leading evidence, and making written and oral submissions.
- 116 As recognised in *Qantas*, there is flexibility and width in what the court should consider as falling within the "determination of all matters in dispute in any proceedings" as used in r 6.24(1) of the UCPR. Frequently in proceedings in this court, it is necessary for the court to consider matters which fall outside the issues directly raised by the parties which affect the rights and liabilities of non-parties to the proceedings. The court should be conscious of not causing additional time and expense to be incurred by parties and non-parties by requiring that such issues be determined in separate proceedings. This consideration should be particularly acute in the Commercial List of this court, where the procedures are tailored for the court to avoid formality, operate flexibly and achieve the just, quick and cheap resolution of the real issues between the parties.

ISSUE 3: POWER TO MAKE ORDERS UNDER S 183 OF THE CPA

Legal principles

- 117 Part 10 of the CPA is titled "Representative Proceedings in Supreme Court" and contains s 183, which is in the following terms:

183 General power of Court to make orders

In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

118 The equivalent provision in near identical terms is contained in s 33ZF of the FCA, which resides within Part IVA of the FCA, the Federal equivalent of Part 10 of the CPA. In my view, the relevant authorities on the nature and the extent of s 33ZF within Part IVA of the FCA equally apply to s 183 within Part 10 of the CPA.

119 In *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4; [1998] FCA 658, Wilcox J made the following observations about the operation of s 33ZF of the FCA:

Section 33ZF appears in Div 6 of Pt IVA which is headed “Miscellaneous”. It bears the marginal note “General power of Court to make orders”. These two features support the conclusion, that would in any event arise from its wording, that s 33ZF(1) was intended to confer on the court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding. It is understandable parliament should have thought it appropriate to make such a provision. In enacting Pt IVA of the *Federal Court of Australia Act*, Parliament was introducing into Australian law an entirely novel procedure. It was impossible to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to parliament for amendments to the legislation, it was obviously desirable to empower the court to make the orders necessary to resolve unforeseen difficulties; the only limitation being that the court must think the order appropriate or necessary to ensure “that justice is done in the proceeding”.

120 The width of the power in s 33ZF of the FCA to deal with novel problems and the supervisory and protective nature of the court’s function within Part IVA of the FCA were explained by the Full Court in *Money Max International Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148, where Murphy, Gleeson and Beach JJ said at [165] and [171]:

[165] ... In s 33ZF “necessary” identifies a connection between the proposed order and an identified purpose as to which the Court must be satisfied before making an order. The expression “necessary to ensure that justice is done” has shades of meaning and admits of degrees of comparisons and in context the expression should not be given a narrow construction. The requirement that a proposed order be “necessary to ensure that justice is done in the proceeding” does not require that the Court be satisfied that unless the order is made the administration of justice will collapse or that justice in the proceeding will not be “ensured” in the sense of being certain. Section 33ZF provides a wide power directed at enabling the Court to make orders to deal with the novel problems that might arise through a new statutory procedure for representative proceedings, and the expression “necessary to ensure that justice is done” requires that the proposed order be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.

...

[171] ... Under Part IVA, the Court has a supervisory function to protect the interests of class members. This is not unlike other protective jurisdictions that a Court may have, such as with persons under a disability. Moreover, the exercise of judicial power is analogous to that described in *Cominos v Cominos* (1972) 127 CLR 588 at 608 per Mason J (as he then was); see also *Precision Data Holdings Pty Ltd v Wills* (1991) 173 CLR 167 at 190 and 191. More generally, there is little doubt that a Court can make orders creating rights or liabilities as an exercise of discretionary power, provided the power is exercised according to legal principle and by reference to an objective standard. That is the present case, with s 33ZF(1) setting out that objective standard, albeit a broad one.

121 The following further observations about the general and wide nature of s 33ZF of the FCA were made in *Perara v GetSwift Ltd* (2018) 263 FCR 1; [2018] FCA 732, by Lee J at [142]:

... the argument unduly restricts s 33ZF and fails to have sufficient regard to the reality that it is a deliberately general power which operates as a 'gap-filler' where specific powers in Part IVA are not apt to resolve the relevant issue which is presented. It represents a legislative intention to equip the Court with the "widest possible power" such that the Court can resolve the peculiar difficulties encountered in representative proceedings: *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4C-4D per Wilcox J. Moreover, as with any provision conferring jurisdiction or granting powers to a Court, s 33ZF should not be construed narrowly by the making of implications or imposing of limitations not found in its express words: *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421. An example of its width in a not entirely dissimilar circumstance can be seen by its use to make directions for the formation of a litigation committee constituted by group members to oversee an action and provide the views of the group members to the Court: *Kirby* at 74 [37] per Finkelstein J.

- 122 Section 33ZF of the FCA was considered in *Caason Investments* (as explained above) in the context of a dispute between the lead applicant in representative proceedings and the litigation funder concerning the reimbursement of expenses from the settlement, in which the funder challenged the entitlement to the payments and the jurisdiction and power of the court to determine the issue. In *Caason Investments*, there was no dispute that the reimbursement of funds was within the power conferred by s 33ZF, with Allsop CJ, Middleton and Perram JJ indicating the potential of s 33ZF to create new rights and liabilities and not necessarily being limited to procedural matters, saying at [70] and [73]:

[70] ... Section 33ZF(1) is a good case in point. It authorised Caason to seek to be reimbursed for the expenses incurred by it in the discharge of its role as lead applicant. Although that issue did not form part of the justiciable controversy between the lead applicant and the respondents, the operation of s 33ZF created the potential for new rights and liabilities attached to or arising from the same fabric. By that mechanism, what was involved in the matter was expanded.

...

[73] A related argument about s 33ZF was that it was not sufficiently broad to resolve the debate between Caason and ILP. It is not in doubt that s 33ZF 'was intended to confer on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding': *McMullin v ICI Australia Operations Pty Ltd* [1998] FCA 658 at 4 per Wilcox J. What s 33ZF authorises in a representative proceeding depends on what the interest of justice in the case require. Caason is correct when it submits that in many cases orders made under s 33ZF may have a procedural flavour to them but this is not a necessary feature of every order made under the provision. Bearing in mind that s 33ZF was not the source of jurisdiction to resolve those debates (jurisdiction deriving instead from s 39B(1A)(c) of the *Judiciary Act 1903* (Cth)), once seized of jurisdiction it is clear that s 33ZF, to the extent necessary, provided power to make the orders the primary judge did.

- 123 The High Court of Australia had cause to consider the operation of both s 33ZF of the FCA and s 183 of the CPA in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; [2019] HCA 45 in relation to whether those provisions gave power to the court to make a common fund order in representative proceedings (known as a CFO), which "provides for the quantum of a litigation funder's remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all group

members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys so recovered” (Kiefel CJ, Bell and Keane JJ at [1]).

124 There were five judgments delivered by the members of the High Court in *Brewster*. Kiefel CJ, Bell and Keane JJ wrote the principal majority judgment which held that s 33ZF of the FCA and s 183 of the CPA did not empower the making of a common fund order, each of Nettle and Gordon JJ wrote separately agreeing with the result arrived at by the majority and each of Gageler J (as the Chief Justice then was) and Edelman J wrote separately in dissent. The following general observations about the statutory provisions were made in the majority judgments (footnotes omitted):

- (1) Kiefel CJ, Bell and Keane JJ observed the breadth, generality, procedural and essentially supplementary nature of the provisions, saying at [3] and [43]–[48]:

[3] Properly construed, neither s 33ZF of the FCA nor s 183 of the CPA empowers a court to make a CFO. Section 33ZF of the FCA and s 183 of the CPA each provide relevantly that in a representative proceeding, the court may make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding. While the power conferred by these sections is wide, it does not extend to the making of a CFO. These sections empower the making of orders as to *how* an action should proceed in order to do justice. They are not concerned with the radically different question as to whether an action *can* proceed at all. It is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return upon its investment to secure its support for the proceeding, is beyond the purpose of the legislation.

...

[43] The determination of the true construction of s 33ZF of the FCA and s 183 of the CPA requires consideration of the text of these provisions in their context and having regard to the mischief that Pt IVA of the FCA and Pt 10 of the CPA were intended to remedy. The scope of each of ss 33ZF and 183 is “not confined by matters not required by [their] terms or context; however, the terms must be construed and the context considered”. And context must be regarded in its widest sense to include the state of the law prior to the enactment of these sections.

[44] There can be little doubt that when Pt IVA of the FCA was enacted, the Parliament could not have been understood to contemplate that s 33ZF might be invoked to support a CFO. That must be so because, at that time, an agreement to maintain legal proceedings by another in return for a piece of the action was unlawful under the laws against champerty in States other than Victoria. But the question here is not about the intention with which these sections were originally enacted; rather, the question is whether, given the breadth and generality of their language, and the absence now of any objection on the ground of champerty, the making of a CFO falls, on a fair construction, within their terms.

[45] In *Johnstone v HIH Ltd*, Tamberlin J rightly said that the power conferred on the court by s 33ZF is not limited to the actual determination of the matter in question in the proceeding, “but extends to encompass all procedures necessary to bring the matter to a fair hearing on a just basis”. Section 33ZF has been invoked to support a wide range of procedural orders such as reinstating group members after they exercised the right to opt out under s 33J, requiring discovery from group members, regulating multiple class actions, and making a “funding equalisation order” (“FEO”) to redistribute settlement funds from unfunded group members to all group members.

[46] The power conferred by s 33ZF is broad, but it is essentially supplementary. And the words of limitation should not be ignored. In *McMullin v ICI Australia Operations Pty Ltd*, Wilcox J said:

“In enacting Pt IVA of the [FCA], Parliament was introducing into Australian law an entirely novel procedure. It was impossible to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously

desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties; the only limitation being that the Court must think the order appropriate or necessary to ensure 'that justice is done in the proceeding'.

... The criterion 'justice is done', involves consideration of the position of all parties. An order preventing unfairness to a particular party may be necessary to ensure justice is done in the proceeding."

[47] While it has rightly been acknowledged that the power conferred by each of s 33ZF and s 183 is broad, it is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court. Whether an action can proceed at all is a radically different question from how it should proceed in order to achieve a just result.

[48] In the resolution of this issue, textual and contextual considerations must be addressed together with considerations of purpose. These considerations all point to the conclusion that ss 33ZF and 183 do not empower the making of a CFO. That conclusion can be reached without reliance upon any implication to narrow the scope of their operation, whether by reference to the principle of legality or otherwise. Nor is it dependent upon acceptance of the appellants' attempt to invoke the approach to construction for which *Anthony Hordern* stands as authority. Nor is it necessary to accept that the task of ensuring "that justice is done in the proceeding" is confined to the resolution of the substantive issues in dispute between the parties.

- (2) Nettle J emphasised that the purpose of the provisions and the context of their history is to ensure that justice is done in the representative proceeding, stating at [125]–[126]:

[125] ...The power conferred by s 33ZF is to make orders the purpose of which is to ensure justice is done in a representative proceeding. The limits of what may properly be described as the demands of justice in a particular case, and so the court's power under s 33ZF, must be determined by the text of the Act read as a whole, taking into account the relevant context and purpose. With respect to those who may take a different view, that has precious little to do with the entitlement to restitution of salvors under admiralty law or of barristers and solicitors, who have long been subject to the "general jurisdiction of the Court ... to regulate the charges made for work done". As the plurality observe, the provisions of Pt IVA, in which s 33ZF sits, make specific provision for the entities in respect of whom, and the point in time at which, orders distributing cost burdens and judgment or settlement proceeds may be made. None of those provisions expressly or impliedly contemplates the kind of CFOs sought in these matters nor the issues to which they were addressed. The context of s 33ZF strongly implies exclusion of a construction of that provision that permits of the making of a CFO.

[126] The broader context of legislative history points to the same conclusion. For, whatever Parliament may have foreseen to be the consequences of its enactment of Pt IVA of the FCA Act, what Parliament could not, and therefore most certainly did not, foresee was that a majority of this Court would later give its imprimatur to the maintenance of group proceedings that are dependent "on a harnessing of the alleged wrongs of the plaintiffs and of the curial processes established to remedy alleged wrongs for the primary purpose of generating profits" for entrepreneurial litigation funders. It is one thing to hold, as this Court did in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, that representative proceedings involving a litigation funder are no longer considered invariably to be an abuse of process and contrary to public policy. It is, however, quite another thing to accept that the commercial interests of those funders formed part of the mischief that the introduction of Pt IVA was intended to confront. Plainly, the legislative purpose of the enactment of Pt IVA did not extend to addressing uncertainties on the part of litigation funders as to the financial viability of funding such proceedings.

- (3) Gordon J regarded the provisions as supplementary or gap-filling powers to advance the objective to provide a procedure for representative proceedings, saying at [146]–[147]:

[146] Section 33ZF(1) is a broad power and it may be accepted that it should not be read down by reference to limitations not found in the express words of Pt IVA.¹⁷³ But the text of the provision - that "[i]n any proceeding ... conducted under [Pt IVA], the Court may, of its own motion or on application by a party or a group member, make any

order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding” (emphasis added) - does not permit the making of a common fund order even when taken at its widest.

[147] Considered in the context of Pt IVA as a whole and ss 33C, 33J, 33M, 33N, 33V, 33Z, 33ZA and 33ZB in particular, s 33ZF(1) as a supplementary or gap-filling power is a power to do what is appropriate or necessary to advance the objective of Pt IVA - to provide a procedure for representative proceedings. As has been seen, none of the provisions mentioned envisages a Court being engaged in making a common fund order.

- 125 Following *Brewster*, the Court of Appeal of this court considered the operation of s 183 of the CPA in *Haselhurst v Toyota Motor Corp Australia Ltd t/as Toyota Australia* (2020) 101 NSWLR 890; [2020] NSWCA 66. In *Haselhurst*, the issue was whether s 183 of CPA provided power for a “class closure” order in representative proceedings by which causes of action held by group members who had neither registered nor opted out within three months of advertisement would be extinguished by the order in the event of an “in principle” settlement before the commencement of the trial on the common issues. Payne JA wrote the primary judgment, with which Bell P (as the CJ then was), Macfarlan and Leeming JJA and Emmett AJA agreed, and Bell P also made some additional observations, all of which were agreed by the other judges.
- 126 After Payne JA considered the judgments of the plurality, Nettle and Gordon JJ in *Brewster*, his Honour concluded that s 183 of the CPA did not provide the power to make the order closing the class (at [114]). In relation to the construction of s 183 of the CPA, Payne JA observed at [106] and [113]:

[106] Critically, for present purposes, the plurality [in *Brewster*] explained that s 183 was not a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show the section was intended to supplement:

[70] It was submitted on behalf of the first respondent in the BMW appeal that the topics addressed in ss 168, 169, 170 and 177 of the CPA (which are to the same effect as ss 33Q, 33R, 33S and 33Z of the FCA respectively) also fall within the scope of s 183. According to this submission, Pt 10 of the CPA is ‘redundant where it is convenient’. That submission is not helpful in seeking to come to grips with the meaning to be given to the words of limitation ‘appropriate or necessary to ensure that justice is done in the proceeding’. Further, it exalts the role of s 183 (and s 33ZF) above that of a supplementary or gap-filling provision, to say that it may be relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement. The work which the respondents require s 183 (and s 33ZF) to do is beyond the scope of the other provisions of the scheme. As will be seen, those other provisions are engaged upon a different occasion and address materially different circumstances from those that are involved in the making of a CFO. Section 183 (and s 33ZF) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To accept this submission would be to use s 183 (and s 33ZF) as a vehicle for rewriting the scheme of the legislation.

(Footnotes omitted.)

...

[113] It is correct, as the respondents submitted, that the plurality’s reasons in *Brewster* should not be over-read. It is also correct that the majority of the Court in *Brewster* confirmed that the power conferred by s 183 is “wide”, “broad” and intended to deal with new and unforeseen circumstances. Section 183 should not be construed by reference to limitations not found in its text: *The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404; [1994] HCA 54.

- 127 Payne JA also referred to the secondary materials relating to Part 10 of the CPA, saying at [119]:

[119] There are two significant matters to consider. The first is that the scheme of Part 10 is inconsistent with an interpretation of s 183 as empowering the Court to make orders for pre-settlement class closure. The secondary materials provide that Part 10 was modelled on and intended to be interpreted consistently, save for some presently irrelevant express exceptions, with Part IVA of the *Federal Court of Australia Act*. The Australian Law Reform Commission in its report Number 134, 2018, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, at [1.54] noted that the Federal Government implemented the open class regime after careful consideration and quoted the Attorney-General at the time of the passage of the *Federal Court of Australia Act* amendments introducing Part IVA as follows:

“It [the regime] ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.”

128 In relation to the additional observations made by Bell P, unanimously agreed by all other members of the court, his Honour considered that the power in s 183 of the CPA had limitations built into it, saying at [4]–[6]:

[4] As the High Court’s decision in *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51 (**BMW**) makes plain, s 183 of the *Civil Procedure Act* is not “at large” and is not a power conferred on the Supreme Court simply to make such orders “as the Court thinks fit” or which are “in the interests of justice” or which will promote or facilitate settlement. This can be contrasted to, for example, the much more open-ended powers conferred on the Supreme Courts of the States under ss 84, 86 and 89(1) of the *Matrimonial Causes Act* 1959–1966 (Cth) considered in *Cominos v Cominos* (1972) 127 CLR 588; [1972] HCA 54.

[5] The words “appropriate or necessary to ensure that justice is done in the proceedings” are words of limitation which “should not be ignored”: *BMW* at [46] and [70]. If it cannot be concluded that an order meets this description, s 183 of the *Civil Procedure Act* does not authorise it: cf. *McGuirk v University of New South Wales* [2010] NSWCA 104 at [144] per Sackville AJA (McGuirk). As that case demonstrates, even a power to give such directions as a court “thinks fit ... for the speedy determination of the real issues between the parties to the proceedings” is not “an open-ended power to make any directions the court considers appropriate”: see *McGuirk* at [139], referring to s 61(1) of the *Civil Procedure Act*.

[6] As Beach J observed in *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469; [2015] FCA 328 at [33] (*Earglow*) of the equivalent provision in the *Federal Court of Australia Act* to s 183 of the *Civil Procedure Act*:

... although in a general sense s 33ZF(1) has been described as a plenary power, nevertheless it is not unlimited. It is in one sense both trite and question begging to assert that the power must be exercised judicially. But let me pass to the language of s 33ZF(1) itself. It uses the language ‘make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding’. Grammatically, ‘thinks’ is to be applied distributively, so that it reads ‘thinks appropriate’ or ‘thinks necessary’; there is no ‘is’ before ‘necessary’. But as applied distributively, ‘thinks appropriate’ has a lower threshold than ‘thinks necessary’. But in the composite phrase, the concept is ‘thinks appropriate ... to ensure that justice is done in the proceeding’ (emphasis added). In other words, although the words ‘thinks appropriate’ have a lower threshold than ‘thinks necessary’, nevertheless the relevant element of necessity in another guise is enshrined in the coupling of the words ‘to ensure that’. In summary, the question becomes whether I think it is appropriate, to ensure that justice is done in the proceeding, to make the orders sought by Newcrest. It is not whether I think it to be merely convenient or useful per se. Section 33ZF(1) is not a licence for me to impose my own expansive case management philosophy. Rather, I must be satisfied that any order that is made satisfies the statutory test.

[7] This passage, or relevant excerpts of it, has been cited with approval in a large number of decisions: see, for example, *Johnston v Endeavour Energy* [2015] NSWSC 1117 (Garling J) (**Johnston**); *Timbercorp Finance Pty Ltd (In Liq) v Collins* [2015] VSC 461 (Robson J) (**Timbercorp**); *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194; (2016) 343 ALR 662 (Beach J); *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (Murphy J); *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2016] VSC 784 (Digby J); *Jones v Treasury Wine Estates Ltd (No 2)* [2017] FCA 296 (Foster J); *Kamasae v Commonwealth of Australia (No 8)* [2017] VSC 167 (McDonald

J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (Beach J); *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 3)* [2018] FCA 990 (Beach J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 2)* [2019] FCA 215; (2019) 135 ACSR 278 (Beach J).

[8] In *Timbercorp*, Robson J observed (at [416]):

Further, to enliven the power to make an order the court must think it appropriate or necessary to ensure justice is done in 'the proceeding'. Although a broad power, it does not appear to enable general case management. In *Earglow Pty Ltd v Newcrest Mining Ltd*, Beach J distinguished between orders that facilitate or improve the efficiency of the resolution of issues and those that are 'appropriate or necessary to ensure justice is done in the proceeding' which is the necessary prerequisite to enliven s 33ZF. (footnote omitted, emphasis in original).

[9] In *Johnston*, Garling J said (at [92]):

I am conscious that even though s 183 of the Civil Procedure Act is properly to be regarded as a broad power, it is not an unlimited one. It is not to be used as a vehicle to rewrite the legislative precision of Part 10 of the Civil Procedure Act : Courtney at [52]. Nor is the statutory formulation '... to ensure that justice is done ...' to be ignored: *Earglow Pty Ltd v Newcrest Mining Ltd* [2015] FCA 328 at [33].

129 Importantly, Bell P at [10] specifically stated disagreement with a significant portion of what is *Money Max* at [165] (quoted above), saying:

Notwithstanding the statement of the Full Court of the Federal Court (Murphy, Gleeson and Beach JJ) in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148 at [161] (**Money Max**) that it "largely agree[d]" with the passage from *Earglow* which I have extracted at [6] above, there is, in my opinion, a real tension between this passage and the observations of the Full Court in *Money Max* at [165], which are as follows:

...[T]here is less of a difference between 'appropriate to ensure justice' and 'necessary to ensure justice' than might initially appear. In s 33ZF 'necessary' identifies a connection between the proposed order and an identified purpose as to which the Court must be satisfied before making an order. The expression 'necessary to ensure that justice is done' has shades of meaning and admits of degrees of comparisons and in context the expression should not be given a narrow construction. The requirement that a proposed order be 'necessary to ensure that justice is done in the proceeding' does not require that the Court be satisfied that unless the order is made the administration of justice will collapse or that justice in the proceeding will not be 'ensured' in the sense of being certain. Section 33ZF provides a wide power directed at enabling the Court to make orders to deal with the novel problems that might arise through a new statutory procedure for representative proceedings, and the expression 'necessary to ensure that justice is done' requires that the proposed order be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding. (emphasis added).

Whilst I agree with their Honours observation in the first sentence of this passage, the balance of the analysis and conclusion results, in my opinion, in an illegitimate glossing of s 33ZF of the Federal Court of Australia Act (the counterpart to s 183 of the Civil Procedure Act) and a dilution of the meaning of the word "ensure", especially when coupled with the words "appropriate or necessary".

130 It is also important in the context of Part 10 of the CPA to recognise that the lead plaintiff in representative proceedings has the conduct of the proceedings on behalf of the class members and owes fiduciary obligations to them: *Wigmans v AMP Ltd* (2021) 270 CLR 623; [2021] HCA 7 at [117], citing *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28, French CJ, Bell, Gageler and Keane JJ at [40] and *Dyczynski v Gibson* [2020] FCAFC 120, Murphy, Lee and Colvin JJ at [209].

131 It is also the case that lawyers acting for the lead plaintiffs in representative proceedings owe proscriptive duties to group members at the time of any settlement application for the group members claims generally and at the time of seeking to obtain

a judgment for the benefit of a group member on an individual basis: *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89, Murphy, Beach and Lee JJ at [62]–[65].

Submissions of the plaintiffs

- 132 The plaintiffs identify the source of the court's power to grant the relief sought by them on this application as that which resides in s 183 of the CPA. The plaintiffs say that s 183 gives broad powers to the court which, since early on in the life of statutory representative proceedings in Australia, it and its Federal equivalents have been recognised as empowering the court to make orders necessary to resolve unforeseen difficulties (citing *McMillan*), to be used as a gap filling power (citing *Perara*) and deal with novel problems that might arise in the statutory procedure for representative proceedings (citing *Money Max*).
- 133 The plaintiffs submit that it is well within the supervisory function and protective jurisdiction of Part 10 of the CPA (as the Federal equivalent was described in *Money Max*) to resolve contests involving divergent interests between a commercial entity which seeks to use the processes of the court to make money (the Funder) and lead plaintiffs and group members. The plaintiffs say that if the court lacks the power to resolve such a dispute under Part 10 of the CPA, there would be a significant gap in the supervisory function and protective jurisdiction of the court.
- 134 The plaintiffs say that in the application they do not ask the court to make orders “creating rights or liabilities” that do not already exist (citing *Money Max*), but the orders sought are intended essentially to be declaratory of the position that already exists in equity. The plaintiffs say that if the court concludes that, properly analysed, the trust funds do belong wholly to the Funder such that they can be recalled by it, the plaintiffs do not ask the court to make any substantive alterations to that position through an exercise of power under s 183 of the CPA.
- 135 The plaintiffs point to the decision in *Caason Investments* as being an instance in which the court used the Federal equivalent of s 183 of the CPA to resolve disputes between a representative party and a litigation funder. The plaintiffs rely on the reasoning in *Caason Investments* to show that, even though the issue between the representative party and the litigation funder did not form part of the justiciable controversy between the lead applicant and the respondents in that case, it cannot be doubted that the mere fact that the orders affect the rights and obligations as between the plaintiffs and the Funder does not mean that the relief sought is not within s 183 of the CPA.
- 136 The plaintiffs submit that, in a practical sense, the current unresolved dispute as to the beneficial entitlement to the funds held on trust by Ironbridge is hampering the progress of the representative proceedings. They say that if the Funder's assertion as to its absolute beneficial entitlement is right, there is a risk that the plaintiffs will incur substantial legal costs without any recourse to third-party funding. They reason that this

would be apt to affect the instructions the plaintiffs may give and it would not be reasonable to expect or require the plaintiffs to give instructions as to the next steps in the proceedings until the dispute is resolved and the position made clear.

137 The plaintiffs say that this dispute is peculiar to representative proceedings under Part 10 of the CPA (and equivalent regimes in other courts). They contend that the confluence of the position of lead plaintiffs with duties to group members in progressing proceedings, the presence of third-party litigation funders taking part in the proceedings for their own commercial benefit, and lead plaintiffs with an acknowledged inability to fund the proceedings themselves, creates the unique problem. The plaintiffs submit that none of these problems would ordinarily exist in traditional inter-partes proceedings and in that sense the circumstances are squarely within the kind of “unforeseen difficulties” with representative proceedings (citing *McMullin*), or part of the “peculiar difficulties encountered in representative proceedings” (citing *Perara*) for which it is said that the s 183 power was included in the statutory regime.

138 The plaintiffs also submit that the function to be performed by the court on this application is neither novel nor unfamiliar but is highly analogous to the functions exercised by courts of equity for centuries in respect of the administration of trusts. They highlight the inherent jurisdiction of the court to see that trusts are properly executed (citing as an example *Crowle Foundation v NSW Trustee & Guardian* [2010] NSWSC 647, Ball J at [29]) and the equitable and statutory jurisdiction to advise trustees (citing *Reeves v Reeves (No 2)* [2024] NSWSC 386, Meek J at [135]–[136]). The plaintiffs say that in the circumstances of this case, where there is doubt as to the power of the trustee (Ironbridge) to pay out trust funds to a person who claims to be entitled to them, it would likely be within the equitable or statutory power for the trustee to seek the court’s advice as to whether its proposed course was lawful.

139 The plaintiffs explicitly state that the inherent and statutory jurisdiction of the court is not the power or jurisdiction which is sought to be invoked on this application, but say that the fact that it likely could have been used underscores the conclusion that the exercise of judicial power under s 183 of the CPA is orthodox and likely not beyond the contemplation of Parliament. The plaintiffs submit that in the circumstances of this case, s 183 is a more appropriate source of power than the jurisdiction to advise trustees because it:

- (1) is more flexible (not involving the procedural requirements of judicial advice);
- (2) is more efficient (being achieved through a simple notice of motion rather than initiating new proceedings);
- (3) avoids multiplicity of proceedings (citing s 63 of the *Supreme Court Act 1970* (NSW));
- (4) ensures that all relevant parties (including TfNSW), can be heard on the application; and
- (5) recognises that the question before the court arises in the specific context of this

representative proceedings and its resolution may have a significant effect upon the proceedings.

Submissions of the Funder

- 140 The Funder says that s 183 of the CPA is not a source of power to make the orders sought by the plaintiffs regarding the ownership of the funds held in trust by Ironbridge. The Funder asserts that the plaintiffs have overlooked the authorities in relation to s 183 of the CPA, being *Hazelhurst* at [106], [113], [119] (Payne JA) and [138] (Emmett AJA) and *Pallas* at [44] (Bell CJ).
- 141 The Funder says that these authorities are binding on this court without any explanation as to how these authorities are to be applied in the circumstances of this case.
- 142 The Funder submits if the separate questions in these proceedings are listed for hearing at the earliest date convenient to the court with a new representative plaintiff and new legal representatives, the Funder would provide the funds necessary for the separate questions to be determined under an agreement with the new lawyers and the new representative plaintiff. The Funder says that it understands that there is new legal representation willing to take over conduct of the representative proceedings and there is another group member ready to replace the plaintiffs as the representative plaintiff. The Funder says that the early determination of the separate questions is in everybody's best interests; being those of the group members, TfNSW and the Funder.
- 143 The Funder said that it had nothing further to put in oral submissions (T39.41–.42).

Consideration

- 144 At the outset, I note that the plaintiffs placed the whole of their argument for the power and jurisdiction they wish me to exercise on s 183 of the CPA. The plaintiffs do not ask me to exercise any inherent or other statutory power, which they acknowledge could only be done by commencing separate proceedings against the Funder to determine the interests of the plaintiffs and the Funder in the money held in trust by Ironbridge.
- 145 I am conscious that I must recognise the parameters within which s 183 of the CPA was interpreted by the High Court in *Brewster*, a decision which post-dates the decisions of the Full Court of the Federal Court of Australia in *Money Max* and *Caason Investments* and the decision of the Federal Court in *Perara*, and the observations made by the Court of Appeal of this court in *Hazelhurst*. While those decisions indicate the manner in which s 183 of the CPA (and its Federal equivalent) has been interpreted and applied, the essence of what I am required to do is to apply the words used in s 183, keeping in mind the guidance that has been given by the authorities.
- 146 Applying those words, I consider that it is both appropriate and necessary to ensure that justice is done in these proceedings for me to determine the dispute that has arisen between the plaintiffs and the Funder over the money which is held in the trust account of Ironbridge. I accept that this dispute is preventing these proceedings from

progressing because the plaintiffs are unable to fund the proceedings themselves in circumstances in which they cannot just act in their own interests but owe wide fiduciary duties to all the other class members.

147 The presence of a funder is part of the fabric in which representative proceedings exist. Disputes between funders and lead plaintiffs will arise from time to time but not every such dispute will come within the power of s 183 for the court to resolve. But this dispute does come within s 183 because these proceedings will effectively stall unless and until it is resolved. The stalling of the proceedings will affect the justice that can be given to the plaintiffs, the other class members and TfNSW. I consider that justice cannot be done in these proceedings without the resolution of this dispute between the plaintiffs and the Funder.

148 There is absolutely no evidence before me that there is a new representative plaintiff and new lawyers willing to take over the conduct of these proceedings as the lead plaintiff in place of the plaintiffs, and as the legal representatives in place of Ironbridge. The Funder simply asserted that to be the case but did not provide any evidentiary support for that submission.

149 As *Caason Investments* illustrates by reference to the Federal equivalent, the breadth of the power in s 183 of the CPA extends to matters which do not necessarily form part of the issues to be resolved between the plaintiffs and TfNSW and even have the potential to create new rights and liabilities. But the nature of the relief which is sought by the plaintiffs in this case is not that extensive, because what is sought is merely declaratory of the existing rights to the trust money as between them and the Funder.

150 I consider that the dispute which has arisen between the plaintiffs and the Funder is in the nature of an unforeseen or peculiar difficulty which has arisen in these representative proceedings for which s 183 of the CPA was intended to be utilised, as recognised in *McMullin* and *Perara* respectively. The majority in *Brewster* specifically endorsed the observations which were made about the power in *McMullin*. I am acutely conscious of the observations in *Brewster* and *Hazelhurst* that I must recognise that the words of limitation in s 183 of the CPA only provide a power to make any order that I think is appropriate or necessary to ensure that justice is done in these proceedings.

151 I think that it would be antithetical to ensuring that justice is done in these proceedings for me not to exercise the discretion in s 183 of the CPA to resolve the dispute before me but instead require the plaintiffs to commence separate proceedings against the Funder to have this court resolve the dispute at some future and indeterminate time. Doing so would only further delay the determination of the dispute and create greater costs for all parties. I have all necessary parties before me, and they have led all the evidence they wish to lead and made all the submissions they wish to make to me to enable the dispute over the trust money to be determined. I am in substantially the same position as I would be in if the plaintiffs had commenced separate proceedings

against the Funder to determine their dispute. In fact, I am in a better position to determine their dispute because I have also had the benefit of the confined submissions made by TfNSW during the hearing.

- 152 Approaching the issue by requiring separate proceedings to determine the dispute would not meet the overriding purpose of the CPA in its application to civil proceedings in this court, which is to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s 56(1) of the CPA. I must seek to give effect to that overriding purpose when I exercise any power in the CPA: s 56(2) of the CPA. In seeking to give effect to the overriding purpose, I must have regard to the objects of the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of available judicial and administrative resources, and the timely disposal of the proceedings at a cost affordable by the respective parties: s 57(1) of the CPA.
- 153 All of those matters favour me exercising the power in s 183 of the CPA to determine the dispute between the plaintiffs and the Funder in these proceedings, to which I will now turn.

ISSUE 4: BENEFICIAL OWNERSHIP OF TRUST FUNDS

Legal principles

- 154 In *Kauter v Hilton* (1953) 90 CLR 86, Dixon CJ, Williams and Fullagar JJ at 97 made reference to the:
- ... established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries.
- 155 This principle was cited with approval in *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493; [2013] HCA 35, Bell, Gageler and Keane JJ at [116].
- 156 Whether a trust has been created turns on the question of whether there is an objective intention to create a trust, which may be express or inferred. In *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135, Campbell JA (with whom Meagher and Barrett JJA agreed) said at [48]:
- ... it is now clear that in deciding whether there is an intention to create a trust, the court ascertains that intention by inference from the outward manifestations of intention: *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253 at [53]–[59], [102]–[115]. Thus, the task of ascertaining whether there is an intention to create a trust and, if so, on what terms is a similar one to ascertaining the intention of parties to a contract for the purpose of deciding whether there is an intention to enter contractual relations and the terms of any contract that has been entered. ...
- 157 The words in any document said to give rise to the trust are to be given their ordinary meaning and be construed in the context of the whole document: *Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325; [2012] HCA 48, French CJ, Hayne, Crennan, Bell and Gageler JJ at [25].
- 158 In *Re BBY Limited (Receivers and Managers Appointed) (in liq) and BBY Holdings Pty Limited (Receivers and Managers Appointed) (in liq)* [2022] NSWSC 29, Gleeson J at [48]–[49] expressed the governing principles in the following way:

[48] The question of whether such a trust arises depends on the mutual intentions of the parties, assessed objectively: *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135 at [48]. Subjective intentions are irrelevant as the Court is concerned not with “the real intentions of the parties” but with the outward manifestation of those intentions: *Commissioner of State Revenue (Vic) v Snowy Hydro Limited* (2012) 43 VR 109; [2012] VSCA 145 at [83], citing *Byrnes v Kendle* (2011) 243 CLR 253; [2011] HCA 26 at [59], [114]–[115].

[49] Where the language employed by the parties for the transaction is inexplicit, the court is left to infer the relevant intention from other language used by them, from the nature of the transaction and from the circumstances attending the relationship between the parties: *Re Antqip Hire Pty Limited (subject to deed of company arrangement) (in liquidation)* [2020] NSWSC 487 at [90], citing *Associated Alloys Pty Limited v ACN 001 452 106 Pty Limited (in liq)* (2000) 202 CLR 588; [2000] HCA 25 at [34], *Walker v Corboy* (1990) 19 NSWLR 382 at 397; *Alston v Cormack Foundation Pty Limited* (2018) 358 ALR 263; [2018] FCA 895 at [190]; *Re Kit Digital Australia Pty Ltd (in liq)* [2014] NSWSC 1547 at [64]; *Compass Resources* at [69]. Nonetheless, there is no need for particular caution in drawing the inference that a trust was intended: *Re Australian Elizabethan Theatre Trust* at 503; *Raulfs v Fishy Bite Pty Ltd* at [47].

159 The subject matter and context in the ascertaining of the requisite intention are also important and may be even more so than the language used: *Alston v Cormack Foundation Pty Ltd* (2018) 128 ACSR 33; at [2018] FCA 895, Beach J at [190].

160 In *Legal Services Board*, Bell, Gageler and Keane JJ considered the particular context of a lawyer receiving money from a client, saying at [113] (citations and footnotes omitted):

“[U]nless there is something in the circumstances of the case to indicate otherwise, a person who has ‘the custody and administration of property on behalf of others’ or who ‘has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit’ is a trustee in the ordinary sense”. ... A legal practitioner who receives money from a client to be held for and on behalf of the client or another person archetypally answers that description.

161 It is not only the outward manifestations of intention which have relevance in the inquiry to be undertaken in circumstances where the relationship is also governed by statute. In *Legal Services Board*, Bell, Gageler and Keane JJ said at [119] (citations and footnotes omitted):

Whether or not parties intend to create in a third party an interest that is appropriate to be created by a trust relationship falls in each case to be determined by reference to the outward manifestation of the intentions of the parties within the totality of the circumstances. Those circumstances centrally include the nature of the relationship between the parties together with such rights or obligations pertaining to that relationship as might arise under statute or at common law. “The contractual relationship provides one of the most common bases for the establishment or implication and for the definition of a trust”; a relationship established or regulated by statute can provide another basis. Such trust relationship as may arise to give effect to the inferred intention of the parties must mould to statutory rights and obligations of the parties. A trust relationship is not to be recognised or enforced, and is therefore not to be inferred, if and to the extent the trust relationship would give rise to rights or obligations inconsistent with those conferred or imposed by statute.

162 In the present case, certain provisions in Part 4.2 of the *Legal Profession Uniform Law 2014* (NSW) (**LP Uniform Law**) are relevant to the totality of the circumstances to which regard must be had.

163 Section 129(1) of the *LP Uniform Law* relevantly inclusively defines “trust money” in the following way:

129 Meaning of trust money

(1) For the purposes of this Law, **trust money** is money entrusted to a law practice in the course of or in connection with the provision of legal services by the law practice, and includes—

(a) money received by the law practice on account of legal costs in advance of providing the services;

...

164 Section 135 of the LP Uniform Law regulates the dealing with trust money, stating:

135 Dealing with trust money

(1) A law practice must deal with trust money in accordance with this Law and the Uniform Rules and not otherwise.

Civil penalty: 50 penalty units.

(2) Trust money held by a law practice may be dealt with only by the law practice or an associate of the law practice.

165 Section 136 of the *LP Uniform Law* provides that a law practice receiving trust money to which Part 4.2 of the *LP Uniform Law* applies must maintain a general trust account.

166 When it comes to the subject of holding, dispersing and accounting for trust money held in the general trust account of a law practice, s 138 of the *LP Uniform Law* states:

138 Holding, disbursing and accounting for trust money in general trust account

(1) Except as otherwise provided in this Part, a law practice must—

(a) hold trust money deposited in the law practice's general trust account exclusively for the person on whose behalf it is received; and

(b) disperse the trust money only in accordance with the direction given by the person.

Civil penalty: 50 penalty units.

(2) Subsection (1) applies subject to an order of a court of competent jurisdiction or as authorised by law.

(3) The law practice must account for the trust money as required by the Uniform Rules.

Civil penalty: 50 penalty units.

167 Seeking to determine whether or not a trust is a "*Quistclose* trust" (named after *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567) is apt to mislead the nature of the inquiry to be conducted by the court. The modern Australian position that there is no separate species known as a *Quistclose* trust has been authoritatively expressed in *Raulfs* by Campbell JA at [49]–[51] as follows:

[49] Young, Croft and Smith, *On Equity* (2009) Lawbook Co, at [6.1020] said, correctly:

Cases in this area will often depend on a close analysis of the facts, and in particular, whether the person who provided the money annexed a trust or equitable obligation that it was only to be used for the nominated purpose. The mutual intention of the parties ... will be important. A trust will not necessarily arise just because a lender inquires into the purpose for which a loan is sought and money is paid over for that particular purpose.

[50] A footnote to the last sentence of that passage refers to Lord Millett in *Twinsectra* at 185. In paras [73]–[74] on 185, his Lordship said:

"A *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often enquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower. Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and maybe used as part of his cashflow. Commercial life would be impossible if this were not the case.

The question in every case is whether the parties intended the money to be at the free disposal of the recipient ...

[51] In my respectful view, this statement by his Lordship has the potential to mislead in two respects. The first is in its assumption that there is such a thing as "a *Quistclose* trust". Rather, consistently with *Byrnes v Kendle*, and the remarks of Gummow J in *Australian Elizabethan Theatre Trust*, one needs to analyse an individual fact situation for the purpose of deciding whether there is an intention to create a trust, and, if so, on what terms. *Quistclose* recognises that sometimes there can be a trust whose terms are that the trust property is to be paid to particular people, and if it is not paid to those people, it is to be held for someone else. That is a matter arising from analysis of the facts of the particular case in accordance with well established principles for identifying when there is a trust, not because there is any separate legal institution known as a "Quistclose trust". Further, it is a gloss upon the law concerning identification of the terms of a trust to say that the "question in every case is whether the parties intended the money to be at the free disposal of the recipient". That suggests that being at the free disposal of the recipient marks a dividing line between a "Quistclose trust" and something else. Facts about the intention with which a person has parted with an item of property cannot usefully be categorised in such a cut and dried fashion. However, the more limited statements in the passage I have quoted from *On Equity* are correct.

Submissions of the plaintiffs

- 168 The plaintiffs submit that the funds deposited by the Funder in Ironbridge's trust account were held on an express trust under which the plaintiffs had a beneficial interest in the funds which enabled them to use them for the purpose of conducting these proceedings as lead plaintiffs. They say that for as long as that purpose remains incomplete, the Funder does not have the right to direct the funds be returned to it. The plaintiffs further say that the Funder retains a beneficial interest in the funds, but that beneficial interest is subject to that of the plaintiffs and may only be asserted once the purpose has been fully carried out and completed.
- 169 Applying the test of determining the objective intentions of the relevant parties, the plaintiffs say that I should consider the potentially relevant intentions of the Funder, Ironbridge, and the plaintiffs. Applying the principles gathered in *BBY Limited* and *Alston*, the plaintiffs submit that the parties have not been explicit in characterising their relationship or enumerating all of their obligations and that the relevant intention should be inferred from the other language used by them, the nature of the transaction and the circumstances attending their relationship, in other words, having particular regard to the subject matter and context.
- 170 The plaintiffs submit that regard for the context in the present case requires consideration of the statutory setting, the contractual setting and the mutually known intentions of the parties as manifested by their statements.
- 171 The plaintiffs say that two statutory regimes bear on the question to be determined.
- 172 First, the provisions in Part 4.2 of the *LP Uniform Law*, specifically those in ss 129 (definition of trust money), 135 (dealing with trust money) and 138 (holding, dispersing and accounting for trust money), all of which are quoted above. The plaintiffs say that the parties expressly averted to the operation of s 138 of the *LP Uniform Law* in the form of the email on 23 October 2023 from Ironbridge to the Funder in which they stated that they had consulted the Law Society of New South Wales who had advised that they should only hold money in trust on behalf of the client by reason of s 138 of the *LP Uniform Law*. The plaintiffs contend that there is no doubt that the reference to "the client" in the email was intended to be a reference to the plaintiffs, not to the

Funder, who did not demur. The plaintiffs say that this is important contextual evidence of the mutual understanding of the Funder and Ironbridge that the funds deposited by the Funder would be held “exclusively for the client” and could be disbursed “only in accordance with the direction” given by the client, in each case being the plaintiffs.

173 Secondly, the provisions in Part 10 of the CPA in relation to representative proceedings. The plaintiffs say that this statutory regime is critical for understanding the unique suite of rights and obligations between commercial litigation funders, legal representatives, lead plaintiffs and group members in representative proceedings. They point to the following passage in *Perara* in which Lee J said at [3] about the Federal equivalent regime:

It is beyond the scope of these reasons to conduct an economic analysis of litigation funding and to deal, in any exhaustive way, with how the commercial opportunities presented to funders, and to solicitors with commercial relationships with funders, intersect with the role of the Court as an arm of government and the roles of solicitors as fiduciaries and officers of the Court in the administration of justice — these are very large and complex topics. What requires present attention is how the Court deals with competing commercial enterprises which seek to use the processes of the Court to make money and the role of the Court in ensuring the use of those processes for their proper purpose and informed by considerations including: (a) the statutory mandate (s 37M(3) of the *Federal Court of Australia Act 1976* (Cth) (Act)) to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively and efficiently as possible; and (b) the furtherance of the Court’s supervisory and protective role in relation to group members.

174 The plaintiffs submit that, in depositing funds with Ironbridge for use in these representative proceedings, the Funder must be taken to have understood that it was being permitted to participate in the proceedings for its own commercial benefit, but in a known statutory context where it had the capacity to affect the interests of the lead plaintiffs (and thus the group members) and where those individuals are under the court’s supervisory and protective jurisdiction. The plaintiffs also submitted that the Funder must be taken to have understood that it was not free to act in a way that prejudiced the just, quick, cheap and efficient resolution of disputed claims, meaning that the Funder was not free to pursue its commercial interests to the exclusion of all others. The plaintiffs say that this means that the context is one in which the interests of the litigation funder may readily yield to countervailing rights and interests of the parties, group members and the court.

175 The plaintiffs submit that, in practice, this is relevant because the Funder’s assertion that it was free to immediately cease funding these proceedings and demand return of all deposited sums forthwith, would inevitably cause significant prejudice to lead plaintiffs and be apt to frustrate the proper and efficient conduct of the proceedings. The plaintiffs contend that otherwise it would enable litigation funders, without warning or cause, to leave lead plaintiffs without the financial means to carry out their high duties to group members (even if only for an application for discontinuance or substitution as lead plaintiffs, which are themselves significant and costly applications). The plaintiffs reason that, against this background, the mutual purpose of the parties in having funds deposited on trust should be taken to be to prevent such a power on the part of the funder and that by depositing the funds the funder should be taken to recognise that

legal fees are incurred on a rolling basis, such that the tap cannot simply be turned on and off. The plaintiffs argue that the objective purpose of requiring the advanced deposit of funds for future legal expenses is to guard against precisely the set of circumstances that has arisen here and to ensure that the lead plaintiffs have the means available to them to carry out their duties to the court and to the group members effectively.

176 As for the contractual setting, the plaintiffs made the following submissions on the intentions of the parties which could be drawn from the provisions in the Funding Agreement and the Ironbridge engagement letter:

- (1) The Funding Agreement is between the Funder and the plaintiffs, and Ironbridge is not a party to or otherwise bound by it. Because cl 4.1 of the Funding Agreement requires the Funder to pay the legal costs “once incurred by the [plaintiffs] up to the Maximum Amount for the Funding Transaction” which continues by operation of cl 4.2.1 “until the conclusion of the relevant Proceedings at first instance”, subject to early termination, this underscores the parties’ mutual understanding that legal fees would be incurred on a rolling basis, and that the Funder would immediately be liable for them once incurred.
- (2) The Ironbridge engagement letter between the Funder, the plaintiffs and Ironbridge for the engagement of Ironbridge as the plaintiffs’ legal representative was issued by Ironbridge, addressed to the plaintiffs but also directed to the Funder, who accepted obligations under it. Relevant parts of the Ironbridge engagement letter are:
 - (a) Page 3: Ironbridge, the plaintiffs as ‘the clients’ and the Funder agree to be bound by the terms set out in the Ironbridge engagement letter and Ironbridge is not bound by the terms of any funding agreement between the plaintiffs and the Funder.
 - (b) Page 4: The plaintiffs and the Funder are jointly and severally liable for Ironbridge’s invoices. The trust fund was identified, with Ironbridge to issue the plaintiffs and the Funder with a trust direction in the amount of \$200,000, with the balance of funds in Ironbridge’s trust account to remain at \$200,000 throughout the engagement. When money is paid from that trust account to cover legal fees, disbursements or any other reasonable costs incurred by Ironbridge, Ironbridge will issue a further trust direction to replace the funds in the trust account. A trust direction must be paid immediately upon receipt and until such time as that further trust direction is paid, Ironbridge is not obliged to continue working or deliver any work product.
 - (c) Page 5: Robert Coshott and the Funder are authorised to receive, review and manage all invoices and trust directions that Ironbridge issue and Ironbridge is entitled to communicate directly with him in respect of those

matters. These terms reflect the mutual understanding and agreement that the primary responsibility for payment of legal fees would be with the Funder.

- 177 The plaintiffs say that the purported termination of the Funder's agreement with Ironbridge as of 19 April 2024 does not affect the agreement as between Ironbridge and the plaintiffs. The plaintiffs also say that the purported termination post-dated the deposit of the trust funds by the Funder pursuant to the costs agreement, which is the time at which the court should focus its inquiry to identify the objective intentions of the parties.
- 178 The plaintiffs argue that, in accordance with the Ironbridge engagement letter, Ironbridge issued a trust direction on 23 October 2023 and the Funder was informed that the direction was to be specifically issued to the plaintiffs as the funds would be held for their benefit and subject to their directions under s 138 of the *LP Uniform Law*. The plaintiffs say that the trust direction was addressed specifically to the plaintiffs, copied to the Funder, asking them to transfer \$200,000 into Ironbridge's trust account, with the client specifically listed as the plaintiffs and the amount transferred specifically came from the Funder. The plaintiffs submit that the trust direction is highly probative in showing the mutual understanding and intention that by transferring the funds, the Funder was giving up its absolute beneficial ownership of them and placing them with a trustee (Ironbridge) who was holding them for the benefit of another (the plaintiffs) for the purpose of these proceedings.
- 179 The plaintiffs embrace the notion that the relevant inquiry is not whether there is a *Quistclose* trust. Instead, they say that the focus in each case is on the objective manifestation of intentions of the parties as to the terms on which the property is to be held, to determine whether there is an intention to create a trust and, if so, on what terms.
- 180 The plaintiffs say that this mutual understanding and intention was reinforced in the email of 27 October 2023 from Ironbridge to the Funder, copied to the plaintiffs, which stated that Ironbridge had agreed with the Funder that Ironbridge must have \$200,000 in its trust account at all times, and if the amount is depleted, the Funder is responsible for promptly topping it up and that Ironbridge was entitled to have its unpaid invoices paid from the funds held in trust on direction from the plaintiffs. The plaintiffs say that the Funder did not demur from the statements to the effect that the funds, whilst deposited by the Funder, were for the benefit of and at the unilateral direction of the plaintiffs.
- 181 The plaintiffs' principal submission is, in light of the statutory, contractual and evidentiary background submitted above, that the Funder's assertion of an absolute beneficial entitlement to the funds held in trust by Ironbridge is unsustainable. The plaintiffs contend that, properly analysed, the trust funds are held for the benefit of the plaintiffs for the purpose of discharging their obligations as lead plaintiffs in the conduct of these proceedings. They further contend that when those obligations cease (such as

through discontinuance of these proceedings or substitution of lead plaintiffs), any surplus funds remaining in the trust fund would revert back to the Funder. The plaintiffs say that for as long as the plaintiffs remain as the lead plaintiffs with duties to fulfil, the funds belong to them in equity for the limited purpose of meeting their legal costs to conduct these proceedings.

182 In the plaintiffs' submission, it was mutually understood that substantial legal costs were going to be incurred on a rolling basis, and the objective purpose of the requirement to deposit \$200,000 on trust in advance was to ensure that the plaintiffs had certainty as to having sufficient funds available to meet their obligations as lead plaintiffs. The plaintiffs say that this certainty would be illusory if the Funder's position was accepted, such that it could unilaterally demand the return of the funds without the consent of the plaintiffs, leaving the plaintiffs without any financial means to fulfil their duties as lead plaintiffs.

183 According to the plaintiffs, the purpose which sustains the plaintiffs' interest in the trust funds as lead plaintiffs, which is meeting their legal fees as lead plaintiffs, has not yet been exhausted and whilst they remain lead plaintiffs, they are going to require legal representation regardless of the next steps in these proceedings. As a result, the plaintiffs submit that they retain their beneficial interest in the trust funds and the Funder is not permitted unilaterally to direct the return of them.

184 The plaintiffs accept that if and when the purpose is exhausted, such as through discontinuance or substitution of lead plaintiffs, it is a term of the trust that any surplus funds should be returned to the Funder. The plaintiffs submit it could not possibly be suggested that such a surplus would belong to the plaintiffs or Ironbridge which means there is no other plausible contention than one that such a surplus would be returned to the Funder. The plaintiffs say that the court should infer that the parties actually intended that any surplus remaining in Ironbridge's trust fund would be returned to the Funder because no other intention is plausible. They say that properly understood, the term requiring return of surplus funds to the Funder is simply an incident of the express trust pursuant to which Ironbridge holds the funds.

Submissions of the Funder

185 The Funder says that cl 4.1 of the Funding Agreement only obliges the Funder to pay the Costs up to the Maximum Amount, which is defined in cl 1.1 to be \$500,000. The Funder says that the tax invoices which have been paid by the Funder in the course of these proceedings and the security for costs lodged by the Funder on behalf of the plaintiffs before Ironbridge was retained total in excess of \$500,000. The Funder says that, as a result, the obligations of the Funder had been already performed totally before Ironbridge came into the picture.

186 The Funder submits that under the Ironbridge engagement letter the Funder is jointly and severally liable for the costs of Ironbridge from the date of it until it was terminated on 19 April 2024. The Funder says that it paid money into the Ironbridge trust account

and authorised money to be taken out of that trust account to satisfy its liabilities. The Funder contends that this is evidenced by the demands and trust receipts issued by Ironbridge to the Funder which were addressed to the Funder, not to the plaintiffs. The Funder argues that the amount which it lodged in the Ironbridge trust account was not deposited on trust for the plaintiffs but was deposited to cover the liability for costs of the Funder under the Ironbridge engagement letter.

187 The Funder submits that s 138 of the *LP Uniform Law* operates so that the trust money deposited in Ironbridge's general trust account by the Funder is held exclusively for the person on whose behalf it is received, which is the Funder. The Funder says that the documents demonstrate that the money in the Ironbridge trust account was subject to the direction of the Funder, not the plaintiffs. The Funder contends that there is no evidence of any outstanding invoices owing to Ironbridge and, as a result, the amount remaining in the Ironbridge trust account should be returned to it now that Ironbridge's retainer has been terminated on 19 April 2024 pursuant to cl 11 of the General Terms of Business which form part of the Ironbridge engagement letter.

188 The Funder submits that the Ironbridge engagement letter entirely constitutes the relationship between the plaintiffs, Ironbridge, and the Funder. The Funder says that there is no express trust as submitted by the plaintiffs and that this submission cannot be accepted as it contradicts the Ironbridge engagement letter. The Funder submits that the balance of monies paid by the Funder into Ironbridge's trust account belong to the Funder and Ironbridge should have paid that money out to the Funder pursuant to its request in April 2024.

189 The Funder says that the only person who would benefit from the order sought is Ironbridge.

190 The Funder says that the documents sent by Ironbridge to the Funder regarding trust money should not be accepted as having been mistakenly sent to the Funder because they are consistent with the terms of the Ironbridge engagement letter. The Funder submits that it is clear from these documents that the money paid by the Funder to Ironbridge was paid pursuant to its liability for costs under the Ironbridge engagement letter.

Consideration

191 I accept the submissions and analysis put forward by the plaintiffs on the form and terms of the trust pursuant to which Ironbridge holds money in its trust account. I reject the submissions made by the Funder which simply fail to grapple with the key components of the test that I am required to apply of determining the objective mutual intentions by reference to the outward manifestation of the intentions of the parties

within the totality of the circumstances. The Funder only analyses the position by reference to its own position, without proper consideration to the totality of the circumstances.

192 The totality of the circumstances does require the statutory context to be considered in which Ironbridge operates a legal practice governed by the *LP Uniform Law* and these proceedings have been brought by the plaintiffs as lead plaintiffs which are governed by Part 10 of the CPA.

193 Ironbridge is holding “trust money” as defined in s 129 of the *LP Uniform Law* because it has money entrusted to it as a law practice in the course of or in connection with the provision of legal services by it. Acting in accordance with the requirements of s 138 of the *LP Uniform Law*, Ironbridge must hold that trust money in its trust account exclusively for the person on whose behalf it is received and disburse that trust money only in accordance with a direction given by the person.

194 The particular issue of the operation of s 138 of the *LP Uniform Law* in the circumstances in which Ironbridge was acting was drawn to the Funder’s attention in the email of 23 October 2023 by Ironbridge, which was after the Ironbridge engagement letter had been sent to the Funder on 16 October 2023 and before the Funder signed the Ironbridge engagement letter on 21 October 2023. In the email of 23 October 2023, Ironbridge stated that it had been told by the Law Society of New South Wales that Ironbridge should only hold money in trust on behalf of the “client”. The email of 23 October 2023 separately distinguishes between the “client” and the Funder. When that email is also read in light of the clear identification of the plaintiffs as the “clients” in the introductory parts and following of the Ironbridge engagement letter, it is obvious that Ironbridge had indicated to the Funder that the plaintiffs were those persons on whose behalf Ironbridge had received the trust money for the purposes of the operation of s 138 of the *LP Uniform Law*. The Funder did not contend otherwise in any communication with Ironbridge.

195 Part 10 of the CPA is also relevant statutory context, as is the existence of the fiduciary duties which the plaintiffs owe as lead plaintiffs to other members of the group. In relation to this context, I gratefully adopt the description of the overlapping interests of litigation funders, solicitors, lead plaintiffs and group members within which the court exercises a supervisory and protective role given in *Perara* by Lee J at [3] as quoted above.

196 The following advantages and disadvantages of representative proceedings under the legislative scheme in Part 10 of the CPA which were identified in *Giles v Commonwealth of Australia* [2014] NSWSC 83, by Garling J at [81]–[82] are also relevant:

[81] Representative actions have a number of recognised advantages and benefits. These include:

- they are a cost effective means for enabling the pursuit of a legal remedy (or remedies) relating to wrongful acts or omissions by one or more defendants where there is commonality of conduct;

- they are a means of providing access to justice where there are a number of claimants for whom access to justice on an individual basis is not possible for a variety of reasons including impecuniosity and the small amount of damages being claimed;
- they provide an effective means for a court to resolve claims involving common questions of fact and law, where damages may be sufficient to justify the bringing of individual claims but the impact on court resources of the hearing of a multitude of claims would be more satisfactorily managed through a representative proceeding;
- the avoidance of injustice which may be occasioned to parties, which may arise from inconsistent judgments in individual cases relating to the same, or substantially similar subject matter where these are heard separately and at different times;
- they achieve a balance between the ordinary rights of claimants and defendants to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner;
- they provide a means whereby defendants can limit their liability in a timely and cost effective way, by enabling finalisation of claims from all group members including those who are not specifically identified other than as within the description of the group. By use of an opt out procedure, the liability of a defendant can be determined on a final basis for all group members, although the members of the group are not specifically identified;
- they promote efficiency in the administration of justice, and in particular, provide for the sensible and careful use of judicial resources; and
- by combining individual claimants together, problems arising from inequality in bargaining power and any significant discrepancy between the resources of the parties, can be effectively minimised.

[82] However, representative actions also have disadvantages. These include:

- the number of, and the identities of, group members and the amount of damages of their claims may not be known, or else may be difficult to ascertain — at least during the early stage of the proceedings, including at the time of hearing of common questions of fact and law;
- there can be a difficulty for defendants in settling proceedings or else rationally estimating their value, at an early stage because of these unknowns;
- apart from the named plaintiffs, members of the group lose any real degree of control over the manner and conduct of the proceedings, and have a role in the proceedings which is much diminished in its influence and relevance;
- particularly in claims involving personal injury, a representative action is rarely, if ever, capable of resolving the calculation of individual damages.

197 These matters demonstrate that Part 10 is all about balancing the rights and interests between plaintiffs, group members and defendants to give access to justice on a cost-effective basis while recognising the need for the court to efficiently administer justice by the sensible and careful use of judicial resources. While Part 10 of the CPA makes no mention of litigation funders, it does provide the context into which the Funder stepped by providing funding to the plaintiffs as lead plaintiffs in these proceedings. It is a context in which the Funder must be taken to have understood that it is not free to pursue its own commercial interests when they run contrary to the rights and interests of the plaintiffs, the group members, TfNSW and the court.

198 While the Funding Agreement is a relevant contractual document, it is not the paramount one which requires consideration in this case. Only the Funder and the plaintiffs are parties to the Funding Agreement. Ironbridge is not bound by the Funding Agreement, a point which is explicitly made in the Ironbridge engagement letter. The Funding Agreement provides the background context in which Ironbridge, the plaintiffs and the Funder expressly agreed to be bound by the terms set out in the Ironbridge

engagement letter by signing it – on 16 October 2023 in the case of Ironbridge, 21 October 2023 in the case of the Funder and 30 October 2023 in the case of the plaintiffs.

199 The fact that the Funder was only obliged to provide funding to the plaintiffs up to the Maximum Amount of \$500,000 in accordance with cl 4.1 of the Funding Agreement is of no consequence to the proper characterisation of the basis on which Ironbridge holds money on trust. For reasons of its own concern, the Funder has decided to provide funding in excess of that Maximum Amount.

200 The terms of the Ironbridge engagement letter are then to be considered in this context. Relevantly:

- (1) As mentioned, the plaintiffs are explicitly identified as the “clients”.
- (2) Ironbridge is instructed to act for the plaintiffs in these proceedings.
- (3) The payment terms are seven days from the date of the invoice.
- (4) The plaintiffs and the Funder are jointly and severally liable for Ironbridge’s invoices.
- (5) Ironbridge will issue the plaintiffs and the Funder with a trust direction in the amount of \$200,000 and the balance of funds in Ironbridge’s trust account must remain at the amount of \$200,000 throughout the engagement.
- (6) When money is paid from Ironbridge’s trust account to cover their legal fees, disbursements and any other reasonable costs incurred by Ironbridge during the course of the engagement, Ironbridge will issue a further trust direction to replace the funds in the trust account.
- (7) Mr Coshott and the Funder are authorised to receive, review, and manage all invoices and trust directions that Ironbridge issue and Ironbridge is entitled to communicate directly with Mr Coshott in respect of those matters.

201 In my opinion, these provisions make it clear that the money to be paid into Ironbridge’s trust account was for the purpose of paying the invoices issued by Ironbridge which stated the legal fees, disbursements and any other reasonable costs incurred by Ironbridge for the work done by them on behalf of the plaintiffs in these proceedings. While the plaintiffs and the Funder were jointly and severally liable for Ironbridge’s invoices, it was the Funder who was given the role of managing those invoices and the trust directions. This reflected that the basis for the engagement of Ironbridge rested on the fact that the Funder was providing litigation funding for the plaintiffs as lead plaintiffs in these proceedings. In other words, the mutual intention was that the funds to be placed in the Ironbridge trust account were to come from the Funder.

202 These matters are then confirmed in the form of the trust direction dated 23 October 2023 issued by Ironbridge and addressed to the plaintiffs (“Dear Darren and Rosaline”), copied to the Funder, which specifically identified the plaintiffs as the “Client”. This trust direction was attached to the email of 23 October 2023 from Ironbridge to the Funder

which set out the requirements of s 138 of the *LP Uniform Law* and again identified the plaintiffs as the clients. When the email and the trust direction are read together, it is pellucidly clear that the trust money to be received by Ironbridge in accordance with the direction is held on behalf of the plaintiffs for the purpose of paying the invoices issued by Ironbridge, so is held for their benefit and at their direction.

203 The email of 27 October 2023 from Ironbridge to the Funder, copied to the plaintiffs, also reinforces the position. Once again, this email explicitly states that “our clients” are the plaintiffs, the plaintiffs and the Funder are jointly liable for Ironbridge’s invoices, it is the Funder who is responsible for promptly topping up the Ironbridge trust account to \$200,000 at all times, and the unpaid invoices are to be paid from the funds held in trust on direction from the plaintiffs.

204 In my assessment, the outward manifestation of the intentions of the parties within the totality of the circumstances amply demonstrate that the Funder paid funds into the Ironbridge trust account to be held on trust for the benefit of the plaintiffs for the purpose of paying the legal fees, disbursements and any other reasonable costs incurred by Ironbridge for the work done by them on behalf of the plaintiffs in these proceedings.

205 I also hold that the Funder does not have an absolute beneficial entitlement to the funds held in the Ironbridge trust account. The beneficial entitlement of the Funder to the funds held in the trust account is to any surplus funds remaining in the trust account after the purpose for which those funds are held for the benefit of the plaintiffs has been completed. This will only occur when all legal fees, disbursements and costs incurred by Ironbridge are satisfied.

206 For completeness, I further hold that the purported termination of the Ironbridge engagement letter by the Funder on 19 April 2024 post-dates the deposit of the trust funds by the Funder in the Ironbridge trust account pursuant to the Ironbridge engagement letter. As a result, that purported termination is of no operative effect on the matters I have found above.

ORDERS

207 For the reasons set out above, I propose to make orders in favour of the plaintiffs, including by making a declaration with respect to the funds held in the Ironbridge trust account and ordering the Funder to pay the plaintiffs’ costs.

208 I direct that within seven days the parties consult with each other and provide to my Associate, by email, agreed short minutes giving effect to these reasons or, failing such agreement, their form of proposed short minutes giving effect to these reasons. I will then make orders in chambers.

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Decision last updated: 13 September 2024