# FEDERAL COURT OF AUSTRALIA

## Webb v GetSwift Limited (No 7) [2023] FCA 90

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| File number(s): | NSD 580 of 2018 |
| Judgment of: | **MURPHY J** |
| Date of judgment: | 2 February 2023 |
| Catchwords: | **REPRESENTATIVE PROCEEDINGS** – application for approval of settlement pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – whether proposed settlement is fair and reasonable in the interests of group members and as between group members – heavily discounted settlement because of respondents' insolvency – settlement approved |
| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth)<br>*Corporations Act 2000* (Cth) ss 563A, 674, 1041E, 1041H<br>*Federal Court of Australia Act 1976* (Cth) ss 33V, 33ZF |
| Cases cited: | *Australian Securities and Investments Commission v GetSwift (Liability Hearing)* [2021] FCA 1384<br>*Australian Securities and Investments Commission v Richards* [2013] FCAFC 89<br>*Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330<br>*Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527<br>*Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468<br>*Davison v Commissioner of Police, NSW Police Force* [2021] FCA 1324<br>*Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; 335 ALR 439<br>*Matthews v SPI Electricity Pty Ltd (Ruling No 13)* [2013] VSC 17; (2013) 39 VR 255<br>*McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10<br>*Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47; 291 FCR 116<br>*Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634<br>*Smith v Commonwealth of Australia (No 2)* [2020] FCA |

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| | 837<br>*State of New South Wales v Kable* [2013] HCA 26; 252 CLR 118<br>*Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44; (2016) 259 CLR 212<br>*Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 |
| Division: | General Division |
| Registry: | Victoria |
| National Practice Area: | Commercial and Corporations |
| Sub-area: | Corporations and Corporate Insolvency |
| Number of paragraphs: | 61 |
| Date of hearing: | 2 February 2023 |
| Counsel for the Applicant: | Mr O Bigos KC and Mr E Olivier |
| Solicitor for the Applicant: | Phi Finney Macdonald |

# ORDERS

**NSD 580 of 2018**

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| **BETWEEN:** | **RAFAELLE WEBB**<br>Applicant |
| **AND:** | **GETSWIFT LIMITED (ACN 604 611 556)**<br>First Respondent |
| | **JOEL MACDONALD**<br>Second Respondent |
| **ORDER MADE BY:** | **MURPHY J** |
| **DATE OF ORDER:** | **2 FEBRUARY 2023** |

**OTHER MATTERS:**

The Court notes that Order 9 of the orders made on 19 November 2021, which reads as follows:

9. Subject to any further order of the Court, pursuant to s 33V of the [*Federal Court of Australia Act 1975 (Cth)*], any Group Member who by the Class Deadline has not registered in accordance with the manner provided for in these orders and is not otherwise deemed to be a Registered Group Member (**Unregistered Group Member**):

   (a) will remain a Group Member for the purposes of this proceeding, including for the purpose of being bound by any judgment in this proceeding (save for any person who has opted out of the proceeding); and

   (b) shall not, without leave of the Court, be permitted to seek any benefit pursuant to any settlement of this proceeding,

   (**Class Closure Order**).

**THE COURT ORDERS THAT:**

**Confidentiality**

1. Until further order, pursuant to ss 37AF and 37AG(1)(a) of the *Federal Court of Australia Act 1976* (Cth) (**Act**), and in order and to prevent prejudice to the proper administration of justice, the material identified in the Schedule of Confidential Material annexed to these orders and marked "Annexure A" is:

   (a) to be treated as confidential;

(b) to be sealed on the Court file in envelopes marked "Not to be opened except by leave of the Court or a Judge";

(c) not to be published or made available and any electronic version thereof is to be treated in an analogous fashion;

(d) not to be disclosed to any person other than:

(i) the Court;

(ii) the Applicant and its legal representatives; and

(iii) Therium Litigation Finance A IC (Therium) and its legal representatives; and

(iv) not to be disclosed to the Respondents or their legal representatives, other than to the extent that the material identified in Annexure A has previously been disclosed to them in the course of the proceeding.

**Settlement approval**

2. Pursuant to ss 33V and 33ZF of the Act, settlement of the proceeding upon the terms set out in the Settlement Deed dated 19 August 2021 executed by the Applicant, the Respondents, GetSwift Technologies Limited (GTL), Therium, and Phi Finney McDonald Pty Ltd (**PFM**) (**Settlement Deed**), and the Settlement Distribution Scheme (and any annexures thereto) exhibited to the affidavit of Timothy Michael Luke Finney dated 20 December 2022 (**Settlement Distribution Scheme**) (together, **the Settlement Documents**) be approved.

3. Pursuant to s 33ZF of the Act, the Court authorises the Applicant *nunc pro tunc* for and on behalf of persons who meet the definition of "Group Member" in the third further amended statement of claim filed on 19 February 2021 and who have not opted out of the proceeding (**Group Members**) to enter into and give effect to the Settlement Documents and the transactions contemplated for and on behalf of Group Members.

4. Pursuant to ss 33ZB and 33ZF of the Act, the persons affected and bound by the settlement of the proceedings be the Applicant, the Respondents, and the Group Members.

5. Pursuant to s 33ZF of the Act, the Group Members identified as Late Registrants 1 to 12 in the affidavit of Timothy Michael Luke Finney affirmed 20 December 2022 to be treated as Registered Group Members.

6. Pursuant to ss 33V(2) and 33ZF of the Act, Mr Paul Zawa of PFM be appointed administrator of the Settlement Distribution Scheme (**Administrator**) and is to act in accordance with the rules of the Settlement Distribution Scheme, subject to any direction of the Court.

7. Pursuant to ss 33V and 33ZF of the Act, and for the purposes of the Settlement Distribution Scheme, the following distributions from the settlement sum be approved:

   (a) $100,000 to PFM for the Applicant's legal costs and disbursements on a solicitor and own client basis, incurred in connection with the conduct of the proceeding on its own behalf and on behalf of all Group Members, including the costs of obtaining settlement approval and administering the Settlement Distribution Scheme;

   (b) $6,130 to the Applicant for his time and expenses incurred in prosecuting the proceeding in the interests of Group Members; and

   (c) $393,870 to Therium for part of the contingent component of the insurance premium for after-the event adverse costs insurance to be paid to AmTrust.

8. Upon the making of the distributions as set out in Order 7 above, the proceeding be dismissed with no order as to costs.

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

# REASONS FOR JUDGMENT

## MURPHY J:

### INTRODUCTION

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

2 The proceeding relates to a scandalous episode of corporate misconduct. The first respondent, **GetSwift** Limited (now in liquidation) was an early stage "tech" company that operated a software platform that was promoted as enabling businesses to automate dispatching and tracking of deliveries of goods to customers. It was listed on the Australian Securities Exchange (**ASX**) in December 2016 with an issue price of 20 cents per share, and by December 2017 it had risen to over $4 per share, at which point GetSwift raised another $75 million from investors.

3 How that occurred is sufficiently clear from the witness statements filed in this proceeding and the judgment of Justice Lee in the related civil penalty proceeding, *Australian Securities and Investments Commission v GetSwift (Liability Hearing)* [2021] FCA 1384 (the **ASIC proceeding**). For the purpose of this application, it is plain enough that GetSwift's managing director, the second respondent Mr Joel Macdonald, and its executive chairman and chief executive officer Mr Bane Hunter, embarked on a systematic program to pump up the GetSwift share price through misleadingly positive announcements to the ASX and the media. They caused announcements to be made to the ASX regarding GetSwift's entry into enterprise agreements with national and multi-national clients, marked the announcements as price-sensitive, orchestrated simultaneous media coverage and purposefully drove the GetSwift share price up. Numerous of those announcements were found to be to be misleading in the ASIC proceeding, including because, for example, the announcement was based on an optimistic view as to the value of the enterprise agreements for GetSwift when: the enterprise agreement did not in fact deliver any financial benefit for GetSwift; the announcement did not disclose that the enterprise agreement was only for a trial period; that the trial period was provided without charge; that the trial period had not yet commenced or had been delayed; or the announcement did not disclose that the enterprise agreement could be terminated at short notice during the trial period, and if so, no revenue would flow.

4 Inevitably, the orchestrated mirage of revenue growth and business success dissipated. By 7 December 2018, GetSwift's share price had dropped to 52 cents, a percentage reduction of more than 90 per cent on its all-time high of $4.30 a share on 4 December 2017.

5 The share price plunge led to aggrieved investors bringing this and two other class actions, each making similar allegations. I briefly explain this background because, in my view, the class action enjoyed a high prospect of success on liability. In basketball vernacular it might be called a "slam dunk". It is also sufficiently clear for the purposes of the application that shareholders suffered substantial losses as a result of the conduct of GetSwift and Mr Macdonald. Dr Ramsay Zein, the expert forensic economist engaged by the applicant, estimated shareholder losses at $42.833 million on a "Last In, First Out" (**LIFO**) basis. Allowing for some exuberance in that estimate and for the exigencies of litigation, it might be that the case has a settlement value in the region of $25 to $30 million.

6 Yet, the proposed settlement for which Court approval is sought totals only $1 million. One can readily understand why group members might question how the applicant and his lawyers could conscientiously support a settlement for such an amount. The short answer is that when the true financial position of GetSwift became known to the market its business began to collapse and its share price plummeted. On 29 July 2022 GetSwift was placed into voluntary liquidation. A few days later, on 2 August 2022, GetSwift's Canadian-domiciled parent company, GetSwift Technologies Limited (**GTL**), and its United States subsidiary, GetSwift Inc (**GS Inc**), commenced voluntary Chapter 11 bankruptcy proceedings in the United States. Both GetSwift and GTL have liabilities to secured and unsecured creditors that substantially exceed their assets. Mr Macdonald's financial position is similarly parlous. GetSwift and Mr Macdonald were brought to financial collapse by their own misconduct and were not in a financial position to pay substantial damages.

7 GetSwift had only $5 million in Directors & Officers liability insurance, an amount that was seriously inadequate for a company of its size. Further, following the liability judgment in the ASIC proceeding, the insurer denied liability on the basis that the breaches of the continuous disclosure regime were wilful. At the time of the settlement approval hearing, the penalty phase of the ASIC proceeding had been heard, and judgment was reserved. ASIC sought a civil penalty of $15 million against GetSwift and $1 million against Mr Macdonald. Any penalties imposed would further damage GetSwift's and Mr Macdonald's already poor financial position. The chances of group members receiving any more than the proposed $1

million by way of judgment or through further negotiations are vanishingly small. That is the essential reason why the applicant and his lawyers are recommending that the Court approve settlement in the amount of $1 million when apart from the respondents' insolvency, the case is worth much more than that.

8 Many thousands of shareholders, both retail and institutional, including mum and dad investors looking after their own superannuation nest eggs and large corporate superannuation trustees looking after the superannuation of millions, have been failed by GetSwift's and Mr Macdonald's serious non-compliance with the continuous disclosure regime. Under the proposed settlement shareholders will recover only a tiny proportion of their losses. In the criticisms that are sometimes made of securities class actions it is often forgotten that non-compliance with continuous disclosure obligations can have devastating real-world consequences. Here, one former shareholder, an objector to the proposed settlement, objects on the basis that the proposed settlement is inadequate to recompense him for his substantial losses which have meant that he was forced to sell his home in Australia and has had move back to Ukraine, where he now lives in straitened circumstances.

9 One can also readily understand why group members might think that the proposed settlement indicates that something has gone terribly wrong with the operation of the class action regime under Part IVA of the FCA Act, and infer that this settlement is one in which the only winners are the lawyers and litigation funders. But the relatively small settlement and consequent low recovery by group members has nothing to do with the utility of the class action regime, and nothing to do with the conduct of the applicant's lawyers and the litigation funder. There are no winners here.

10 The applicant's solicitors, Phi Finney McDonald (**PFM**), and the litigation funder, **Therium** Finance A IC have taken a commendable approach having regard to the low recovery by group members. Upon approval of the settlement PFM will be left with approximately $3 million in unpaid costs and disbursements, and except for $100,000 in costs and disbursements associated with the settlement approval application, the firm does not seek any part of the $1 million proposed settlement. For its part, Therium has paid $5.5 million in legal costs and disbursements over the course of the proceeding and it does not seek recovery of any of that amount. It only seeks to recoup part of the contingent premium it must pay to the insurer, Amtrust, for the After-the-Event (**ATE**) insurance Therium took out in relation to adverse costs orders.

11 Under the proposed settlement distribution scheme (**SDS**), the $1 million settlement will be disbursed in the following proportions:

(a) $500,000 to the applicant and group members on a pro rata basis pursuant to a Court-approved settlement distribution scheme;

(b) $100,000 to PFM for costs associated with the settlement approval application;

(c) $393,870 to Therium, for payment to Amtrust; and

(d) $6,130 to Mr Webb in reimbursement for the time and expense he incurred in representing group members' interests.

12 In the circumstances it is appropriate to approve the settlement. I now turn to explain my reasons in more detail.

## THE MATERIALS IN SUPPORT OF THE APPLICATION

13 The applicant relies on the following materials in support of the application:

(a) affidavits of Mr Timothy Finney dated 2 September 2021, 17 November 2021, 11 February 2022 and 20 December 2022 (the **first, second, third and fourth Finney affidavits**);

(b) the affidavit of Mr Paul Zawa dated 16 August 2022; and

(c) the applicant's written submissions in support of the application.

I have drawn heavily on the affidavit material and the written submissions in these reasons, both directly and indirectly.

14 The annexures to the fourth Finney affidavit include:

(a) the confidential opinion of Mr Finney, the solicitor for the applicant, dated 20 December 2022 regarding the fairness and reasonableness of the proposed opinion (the **Confidential Opinion**);

(b) the Settlement Deed dated 19 August 2021 (the **Settlement Deed**);

(c) the proposed Settlement Distribution Scheme (the **SDS**);

(d) a statutory declaration made by Mr McDonald on 6 August 2021 setting out his financial position;

(e) the most recent report by the liquidators of GetSwift dated 28 October 2022;

(f) GTL and GS Inc's Joint Plan of Liquidation filed in the US bankruptcy proceeding on 31 October 2022; and

(g) the report of the Court-appointed costs referee, Mr Roland Matters, (the **Costs Referee**) dated 21 February 2022.

## THE RELEVANT PRINCIPLES

15 The applicable principles in relation to settlement approval under s 33V of the FCA Act are now well-established. The Court's fundamental task is to determine whether the settlement is fair and reasonable and in the interests of the group members who will be bound by it, including as between the group members *inter se*: see for example, *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [7]-[8]; ***Kelly*** *v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; 335 ALR 439 at [68]-[77]; *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 at [81]; ***Caason*** *Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [12]; *McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10 at [23]-[24]; *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837 at [6]-[12]; and *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [85]-[88].

16 In undertaking that task, the Court:

(a) assumes an onerous and protective role in relation to group members' interests, in some ways similar to Court approval of settlements on behalf of persons with a legal disability;

(b) must be astute to recognise that the interests of the parties before it, and those of the group as a whole (or as between some members of the group and other members), may not wholly coincide;

(c) relatedly to the second point, should be alive to the possibility that a settlement may reflect conflicts of interest or conflicts of duty and interest between participants in the common enterprise which has conducted the representative proceeding;

(d) should understand that at the point of settlement approval, the interests of the parties will ordinarily have merged in the settlement. It is likely that they both will have become "friends of the deal". As a result, both sides may not critique the settlement

from the perspectives of any group members who may suffer a detriment or obtain lesser benefits through the settlement; and

(e) must decide whether the proposed settlement is within the range of reasonable outcomes, rather than whether it is the best outcome which might have been won by better bargaining.

17 The *Class Actions* ***Practice Note*** (GPN-CA) at [15.5], sets outs the factors that are ordinarily required to be addressed in the material filed in support of an application for settlement approval. These factors, drawn from the remarks of Goldberg J in *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at [19], are to be approached as a guide, insofar as they are relevant to the circumstances of the case and not as a mandatory requirements: *Caason* at [13]; *Davison v Commissioner of Police, NSW Police Force* [2021] FCA 1324 at [47].

## OVERVIEW OF THE PROCEEDING

18 The proceeding was commenced on 13 April 2018 as a representative proceeding brought by the applicant on his own behalf and on behalf of an 'open' class of persons (**group members**) who acquired an interest in shares in GetSwift between 24 February 2017 and 19 January 2018 (**Claim Period**) and suffered loss or damage by reason of the alleged misconduct of the respondents, relevantly pleaded in the third further amended statement of claim filed on 19 February 2021.

19 The proceeding alleges that during the Claim Period, GetSwift made a series of public announcements concerning agreements that it had entered into with customers which contained representations that were misleading or deceptive and omitted material information relating to these agreements in breach of s 1041H of the *Corporations Act 2000* (Cth) (**Corporations Act**), equivalent provisions of the *Australian Securities and Investments Commission Act 2001* (Cth), and the Australian Consumer Law. It is also alleged that the conduct constituted the making of false statements or dissemination of misleading information in breach of s 1041E of the Corporations Act. It is alleged that Mr Macdonald engaged in equivalent misleading or deceptive conduct in the making of false statements, including by approving the misleading announcements that were lodged with the ASX. The same conduct is said to give rise to a breach of GetSwift's continuous disclosure obligations under s 674 of the Corporations Act. It is alleged that Mr Macdonald knowingly participated in GetSwift's breaches of the continuous disclosure regime in contravention of s 674(2A) of the Corporations Act.

20 Broadly, the key allegations of misconduct are that:

(a) GetSwift's announcements of new contracts with "enterprise clients" were misleading in that they did not disclose that, in most instances, those contracts were subject to initial free trial or "proof of concept" periods;

(b) further, by GetSwift describing the above contracts as "exclusive" or "multi-year" (or by the use of similar terms), GetSwift misrepresented that the customer was obliged to use the GetSwift software platform and did not disclose that the contracts could be terminated for convenience at any stage (or in the alternative, simply not used);

(c) GetSwift's inclusion of estimated delivery numbers of revenue projections in certain announcements lacked any reasonable basis; and

(d) during the Claim Period, GetSwift failed to disclose certain matters which impacted on the likelihood of certain contracts resulting the generation of any material benefit for GetSwift, including but not limited to the termination of certain customer contractual matters going to the likelihood of a customer making any extensive use of the GetSwift platform.

## THE PROPOSED SETTLEMENT

21 The parties to the Settlement Deed are GetSwift, Mr Macdonald, GTL, Therium and PFM.

22 Under the Settlement Deed, GetSwift, Mr Macdonald and GetSwift's Canadian-domiciled parent company GTL, jointly and severally agreed to make an initial settlement payment of $1.5 million in three instalments of $500,000 each, with further settlement payments to be made over the following three years to be calculated as a portion of the capital raised by GTL and/or the revenue generated by GTL and its subsidiaries over that period, doing so in full and final settlement of the applicant's and group members' claims.

### Non-compliance with the Settlement Deed

23 The first two $500,000 instalments of the initial settlement payment, totalling $1 million, were paid into the trust account of Quinn Emanuel, GetSwift's then solicitors, on 10 September 2021 and on or around 11 October 2021, to be held on trust for the applicant and group members pending settlement approval. The third instalment of $500,000 was not paid, nor were the instalment payments that were to be generated from GTL's capital raisings.

24 The applicant seeks approval of the proposed $1 million settlement, being the amount held in Quinn Emmanuel's trust account, on the basis that the further payments due under the Settlement Deed will not be made.

## THE REASONABLENESS OF THE PROPOSED SETTLEMENT

### The Confidential Opinion

25 I have had the benefit of considering the Confidential Opinion of Mr Finney. He is an experienced class action lawyer and the partner of PFM with the carriage of the proceeding since its commencement. It is usual practice to require an opinion from independent counsel in a settlement approval application, but I decided that was not necessary in this case. I did not require counsel's opinion, first, because expenditure on such an opinion would have further diminished the monies available for distribution to group members. And, second, because Mr Finney is known to the Court as a competent and reputable legal practitioner, and it is appropriate to rely on his opinion.

26 The Confidential Opinion was provided on a confidential basis to assist the Court in deciding whether the proposed settlement is fair and reasonable in the interests of group members to be bound to it, including as between group members. Mr Finney was obliged to provide the opinion as an officer of the Court, rather than as an advocate for the applicant and class members and to candidly canvass the matters relevant to settlement approval.

27 The Confidential Opinion addresses the following factors relevant to whether the proposed settlement is fair and reasonable (being those set out in the *Practice Note*): (a) the complexity and likely duration of the litigation; (b) the stage reached in the proceeding when the settlement was agreed; (c) the risks of establishing liability; (d) the risks of establishing causation and loss and damage in the amounts claimed; (e) the ability of the respondents to withstand greater judgment; and (f) the reasonableness of the proposed settlement, in light of the best recovery if the matter were to proceed to trial and all the attendant risks of the litigation. Because the opinion is confidential I cannot go to the detail of it. It must suffice to note that the opinion is careful and considered and Mr Finney concludes that the proposed settlement is fair and reasonable in the interests of group members to be bound to it, and as between group members.

28 It is appropriate to give substantial weight to the Confidential Opinion.

**The respondents' insolvency**

29 The insolvency of GetSwift, GTL and Mr Macdonald (who are jointly and severally liable under the Settlement Deed) is of central significance in the application.

30 GetSwift is in voluntary liquidation on grounds of its insolvency. The Statutory Report of the Liquidators, KordaMentha, dated 28 October 2022, states that the liquidators do not anticipate that unsecured creditors will receive a dividend. Further, under s 563A of the Corporations Act the claims of present or former GetSwift shareholders in a liquidation are "subordinated claims", and the payment of their claims must be postponed until all other debts payable by and claims against the company are satisfied. It should also be kept in mind that at the time of the settlement approval application GetSwift faced the prospect of a substantial civil penalty in the ASIC proceeding. In my view, the chances of group members recovering any significant monies through the liquidation of GetSwift are very low.

31 In relation to GTL, the Joint Chapter 11 Plan of Liquidation dated 31 October 2022 (**Chapter 11 Plan**) identifies that GTL has assets in the amount of US$100 and unsecured claims in the amount of US$1.39 million. It states that upon its liquidation the estimated dividend to general unsecured creditors will be zero. If, however, GTL is permitted to proceed with its Chapter 11 Plan, the estimated payment to unsecured creditors will be $110,600. Again, in my view, there is little chance of group members recovering any significant monies through the liquidation of GTL or if it continues under its Chapter 11 Plan.

32 In relation to Mr Macdonald, his statutory declaration shows that he owns a residential property in Queensland which is heavily mortgaged, has a small amount of cash, and some digital assets in the sum of approximately $1.2 million. However, having regard to loans taken out against his digital assets and his tax liabilities, his net asset position is approximately AUD$503,437. He also has a substantial cost liability in the ASIC proceeding pursuant to costs orders made on 20 December 2021, and he faces the prospect that a substantial civil penalty will be ordered against him in that proceeding. In my view, there is little chance of group members recovering any significant monies from Mr Macdonald.

33 I consider it is unlikely that there will be any further payments made under the Settlement Deed and little chance of group members recovering materially more than the $1 million currently held on trust for them. That points strongly in favour of approving the proposed settlement.

**The relevant factors under the Class Actions Practice Note**

34 The factors ordinarily required to be addressed in the material filed in support of an application for settlement approval are those prescribed by the *Practice Note.*

35 In light of the insolvency of the respondents and GTL it is unnecessary to go to these factors in any detail. It suffices to note: that the proposed settlement was reached when the evidence had been filed, enabling the parties to assess the strengths and weaknesses of their respective positions; that the proceeding is legally and factually complex and if it ran to trial it would run from the order of four weeks; and that there would have been a real risk of appeals following any judgment because of the uncertainty surrounding a number of legal issues, including in relation to market-based causation. Those matters support settlement approval.

36 However, the applicant's case on liability is a strong one, and while there are risks associated with establishing causation and loss in the amounts claimed, it is likely that the applicant and group members would be able to establish substantial damages. It is noteworthy that, the initial in-principle settlement was for a greater amount than $1 million, but following further deterioration in the respondents' financial position, the respondents became unable to make the further settlement instalments that are due under the Settlement Deed. Further, in my view, the respondents do not have the capacity to withstand a greater judgment than $1 million and the expenditure of further time and money by the applicant is unlikely to result in group members receiving materially more by way of judgment. These matters weigh strongly in favour of settlement approval.

**The reaction of the class**

37 PFM received a total of 880 inquiries regarding the proposed settlement, and out of 1,305 registered group members, there was just one objection to the proposed settlement.

38 Mr Illia Fito claims to have suffered substantial losses from the decline in value of his GetSwift shares. He says that, as a result of the collapse in GetSwift's share price he had to sell his homes in South Australia and in Ukraine in order to repay the debts he incurred to fund the purchase of those shares, and that he has become "disillusioned with Australia as a country for safely investing in an honest transparent company". He says that he was forced to return to Ukraine were he now lives in a small village with his young family, in deep depression.

39 One can easily understand Mr Fito's discontent with the proposed settlement. Under the proposed settlement he will recover only a tiny portion of his direct losses and none of any

consequential losses. This does not however show that the settlement is not fair and reasonable. Having regard to the respondents' insolvency, it is highly unlikely that any further payment will be made under the Settlement Deed, and it is unlikely that pushing on with the case will lead to group members receiving materially more money.

**The scope of the releases under the Settlement Deed**

40 The Settlement Deed includes releases of the respondents from the claims of the applicant and group members (clause 6.1(b)). Having regard to the definition of 'Applicant's and Group Members' Claims' in clause 1.1, these releases are appropriately confined to the claims made in the proceeding and common claims arising out of, or in connection, with the subject matter of the proceeding, being within the scope of the common issues that are the subject of the proceeding for which the applicant has representative authority under the FCA Act: see *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44; (2016) 259 CLR 212 at [53]-[54] (French CJ, Kiefel, Keane and Nettle JJ), [122] and [141]-[142] (Gordon J). The scope of the releases do not stand in the way of settlement approval.

**The preclusion of unregistered group members**

41 The proceeding was commenced as an "open class" proceeding. On 7 February 2019 the Court made orders for any group member who wished to opt out of the proceeding to do so by 28 March 2019, and the group members were given notice accordingly. There were 474 group members who filed an Opt Out Notice by the deadline.

42 On 1 October 2019 the Court made "soft class closure" orders which required any group member who wished to benefit from any in-principle settlement of the proceeding in a pending second mediation to register to do so by 22 November 2019 (the **first class closure orders**). Group members who failed to register by the deadline would be bound by any settlement, but not entitled to share in the benefits of settlement. If settlement was not reached within the specified period then the proceeding would revert to being an "open" class action. The group members were given notice accordingly.

43 On 17 December 2019 the Court extended the class closure deadline for any group member who had registered by 16 December 2019, had provided an incomplete registration form or had indicated in writing their intention to register and did so by 10 January 2020. The Court also ordered that the second mediation commence no later than 10 February 2020 and be completed by 2 March 2020. On 16 March 2020 the second mediation terminated unsuccessfully.

44 On or about 15 May 2020, pursuant to the first class closure orders, the proceeding reverted to an "open class" proceeding.

45 On 3 November 2020 a third mediation commenced. On 15 February 2021 that mediation terminated unsuccessfully. On 11 June 2021 further negotiations ensued which ultimately resulted in the proposed settlement.

46 Following their reaching agreement on the proposed settlement, the Court made further class closure orders on 19 November 2021 by consent, doing so under s 33V of the FC Act (the **second class closure orders**). The orders provided that:

(a) group members wishing to benefit from the proposed settlement of the proceeding were required, by 4 February 2022, to register their claims with PFM (**registered group member**);

(b) any group member who had registered their claims pursuant to the first class closure orders made in October 2019 for the purposes of the second mediation was also deemed to be a registered group member for the purpose of receiving a benefit under the proposed settlement; and

(c) any group member wishing to oppose the proposed settlement was required to file a notice of objection by the deadline.

47 The orders further provided for a **Notice** of Proposed Settlement and Registration to be sent to the email or postal address of all persons who acquired an interest in shares in GetSwift in the Claim Period, as recorded on the share register. The orders required that the Notice go to both registered and unregistered group members. I am satisfied on the evidence that the Notice was sent to group members in accordance with the orders.

48 On 16 December 2022 orders were made for a Supplementary Notice to be given to registered group members updating them as to the failure to pay the third settlement instalment under the proposed settlement. I am satisfied on the evidence that the Supplementary Notice was sent to group members in accordance with the orders.

49 The second class closure orders (in combination with the releases provided) operate to bind both registered and unregistered group members to the proposed settlement, but if the proposed settlement is approved, it will preclude unregistered group members from receiving a benefit under the settlement. Even so, I am satisfied that the settlement is fair and reasonable having regard to the interests of group members to be bound to it because:

(a) in my view, the second class closure orders are within the Court's power having regard to the reasoning in *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47; 291 FCR 116 (Murphy, Beach and Lee JJ). And even if they are not, the orders were not challenged. As orders of a superior court they are valid until and unless set aside: *State of New South Wales v Kable* [2013] HCA 26; 252 CLR 118 at [32];

(b) in large, part the legitimacy of class closure orders depends on the adequacy of the notice given to class members: see *Matthews v SPI Electricity Pty Ltd (Ruling No 13)* [2013] VSC 17; (2013) 39 VR 255 at [79(c)] (J Forrest J); *Kelly* at [153]-[160]. Here, the Notice informed group members in clear terms that they would be bound by the settlement if approved by the Court; and of the requirement to register if they wished to receive a benefit under the settlement; and to file a Notice of Objection if they wished to object to the proposed settlement or any aspect of it. No group member objected to the requirement to register;

(c) it was not unfair or unreasonable not to provide a further registration opportunity to group members when the costs involved in re-opening group member registration would have been disproportionate having regard to the small settlement sum and in circumstances where group members had already been given several opportunities for registration; and

(d) it was open to unregistered group members to apply to share in the benefits of the settlement, and 12 unregistered group members did so. By orders made on 2 February 2022, they were permitted to participate in the settlement.

**The proposed settlement distribution scheme**

50 A settlement distribution scheme will usually be fair and reasonable if group members receive a fair share of the settlement proceeds, there is a fair division of those proceeds as between group members, and the settlement administration process does not involve unreasonable costs or delay: *Caason* at [91]; *Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719 at [11].

51 The salient terms of the proposed SDS include the following:

(a) Mr Paul Zawa, a Principal Lawyer with PFM, is to be appointed as the Court-approved Administrator;

(b) The settlement proceeds are to be held on trust by PFM in the Settlement Distribution Fund and PFM will make distribution from the fund at the direction of the Administrator;

(c) Only registered group members are eligible to receive a distribution from the settlement proceeds;

(d) Prior to distribution of the Settlement Sum, registered group members are to be given the opportunity to confirm their share trading data (i.e. records of their purchase and sales of GetSwift shares held by PFM) as listed in the Claimant Database;

(e) A procedure is established for the assessment of the individual claims of registered group members by reference to the Loss Assessment Formula (**LAF**) in Schedule A to the proposed SDS. It provides for registered group member's "inflation loss" to be calculated by applying an inflation series to the group member's trading data. The inflation series is an assessment of daily inflation in GetSwift's share price over the Claim Period attributable to the claims made in the proceeding;

(f) The methodology of the loss assessment is described in detail in paragraph 4 of the LAF, including that it:

  (i) adopts the inflation series prepared by the Applicant's independent event study expert, Dr Zein, which formed the basis of his evidence filed in the proceeding;

  (ii) reflects the Applicant's primary case that was likely to be pursued at trial;

  (iii) uses a LIFO approach to share-matching to calculate the net losses of each group member;

  (iv) accounts for intra-period losses and gains of registered group members; and

  (v) divides each registered group member's inflation loss by the aggregate inflation loss to yield the percentage of the aggregate inflation loss suffered by the registered group member, imposing a $10 monetary threshold before a registered group member qualifies for distribution. The percentage of the aggregate inflation loss suffered by each eligible group member is then applied to the available $500,000 settlement amount to give the individual distribution that each group member is to receive from the settlement proceeds. Thus, each eligible group member will receive a pro rata share of the total settlement proceeds to be distributed.

(g) The distribution of the Settlement Sum will be in accordance with the procedures and priorities set out in the SDS;

(h) The SDS contemplates distribution of $1 million, being the sum of payments made into trust, as follows:

(i) 50% (being $500,000) is to be distributed to the applicant and group members on a pro rata basis, in accordance with the LAF ;

(ii) $100,000 to be paid to PFM for the legal work associated with securing settlement approval and administering settlement distribution;

(iii) $6,130 is to be paid the applicant as reimbursement for his time and expenses in undertaking the proceeding on behalf group members; and

(iv) $393,870 is to be paid to Therium in respect of the contingent component of the premium payable by Therium to AmTrust for the ATE adverse costs insurance. This is about one third of the amount due to be paid by Therium for the contingent component of the premium, the full amount being AUD$1,167,390.

52 In my view, the SDS is fair and reasonable in the interests of group members and as between group members. It will achieve a distribution that properly reflects the value of each group members claim, and should do so in a timely way, including because:

(a) it is appropriate that Mr Zawa be appointed as Administrator of the SDS. He is known to the Court as a competent senior lawyer of good repute;

(b) the requirement that only registered group members be eligible for a distribution is consistent with the second class closure orders, and therefore appropriate;

(c) the methodology for calculating group members' distributions under this SDS is objective, applies consistently to all group members' claims and reasonably adopts the inflation series prepared by Dr Zein, which is consistent with the primary case that was to be advanced at trial. Doing so promotes fairness in the distribution of the settlement monies because the distribution will be based on the actual claims expressed by the applicant and the evidence that the applicant intended to rely upon in support of those claims; and

(d) although the evidence shows that approximately 298 of 1305 registered group members will not receive any payment if the $10 monetary threshold is applied, the requirement for that threshold before registered group members qualify for a distribution is

reasonable because otherwise the cost of distributing such nominal payments would be excessive relative to the value of the payments.

**The applicants legal costs and disbursements**

53 PFM was paid $3.5 million in fees by Therium through the course of the proceeding, but the firm is left with more than $3 million in unpaid costs and disbursements, comprising of: (a) $1.45 million in fees for work done on a conditional basis; (b) $858,413 in fees incurred from January to December 2021; (c) $480,000 in fees and disbursements incurred from December 2021 to the present; and (d) $229,553 in estimated costs and disbursements for administering the settlement distribution.

54 Under the SDS PFM will receive $100,000 for costs and disbursements associated with the settlement approval application. Other than that, the firm does not seek any part of the proposed $1 million settlement sum. I accept that $100,000 will not cover the actual legal costs and expenses associated with that work, which PFM estimates will be approximately $229,553. PFM must be commended for its approach. The fact that PFM is seeking to recover only a fraction of its unpaid legal costs and disbursements through the SDS points in favour of approving the settlement.

55 There is, though, one matter in relation to the applicant's legal costs which should not pass without comment. The Costs Referee's report shows that PFM ran up costs which substantially exceeded the case budget that the firm put forward when it won carriage of the proceeding in the multiplicity hearing in April 2018. The Costs Referee, however, opined that this did not show that PFM's costs were not fair and reasonable because of various matters that arose in the course of the proceeding that PFM could not have anticipated. It is unnecessary to decide, but I am disinclined to accept that. It is important that case budgets that are proposed by competing law firms in a carriage motion are realistic and not a "race to the bottom". I accept that some of the issues that confronted PFM in the litigation were unexpected, but the case budget PFM put forward was low and very difficult to achieve unless the case could be speedily settled, and obtaining a speedy yet adequate offer of settlement from GetSwift was not within PFM's control. Unless there is good reason to think this will eventuate (and that is expressed as an assumption) a realistic case budget should not be based on a prediction that the opposing party will make a reasonable settlement proposal at an early stage, and it should include a significant buffer for costs that may arise from unforeseen events in the litigation. Such costs

are “known unknowns”; they commonly arise in strenuously contested class action litigation and they are often substantial.

**The litigation funding charges**

56 Therium took out the ATE insurance policy with AmTrust in order to guarantee to the applicant that it would meet any adverse costs order made against him in the proceeding. It paid AmTrust $659,130 in upfront premiums under the insurance policy and for the issuance of related deeds of indemnity by AmTrust in favour of the respondents in relation to security for costs. The full contingent component of the premium payable under the policy (meaning the amount payable to AmTrust in the event of a successful outcome in the proceeding, such as a settlement) is approximately $1.16 million.

57 Under the litigation funding terms it entered into with the applicant, Therium was entitled to recover its costs and a litigation funding commission from any successful outcome the litigation. As at the date of the Notice, Therium had paid approximately $5.5 million in legal costs and disbursements and $659,130 in upfront insurance premiums. It was also liable to pay the contingent component of the insurance premiums.

58 Under the SDS, Therium will receive $393,870, which represents only part payment of the contingent premium payable under the policy. The fact that Therium does not seek to recover from the $1 million settlement any of the costs and disbursements, any of the upfront insurance premiums it has paid, nor any percentage litigation funding commission, is commendable. This weighs in favour of settlement approval.

**The reimbursement payment to the applicant**

59 The SDS provides for a reimbursement payment to the applicant of $6,130 in recognition of, and reimbursement for, the time and expense he incurred in representing the interests of group members in the proceeding. The applicant provided a spreadsheet of the nature of the work he undertook and the time taken, which is confined to work performed for the common benefit of group members and excludes work performed predominantly for the applicant’s own benefit as a claimant. Allowing an hourly rate of $75 per hour (excl GST) the total charges come to $6,130. That is well below the amounts commonly allowed for reimbursement payments in similar cases.

60 In my view, such a reimbursement payment is fair and reasonable.

## CONCLUSION

61 In circumstances where the chances of group members recovering more than the $1 million currently held on trust are vanishingly small, and where only a fraction of the legal costs and litigation funding charges incurred will be paid out of the settlement, I am satisfied that the proposed settlement is fair and reasonable and in the interests of group members who will be bound by it, including as between group members. For these reasons I made the attached orders.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy.

Associate: 

Dated: 22 February 2023