IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 03351

BENJUMIN HILLMAN — Plaintiff

v

MAYNE PHARMA GROUP LTD (ACN 115 832 963) — Defendant

JUDGE:	Watson J
WHERE HELD:	Melbourne
DATE OF HEARING:	8 November 2024
DATE OF JUDGMENT:	19 December 2024
CASE MAY BE CITED AS:	Hillman v Mayne Pharma Group
MEDIUM NEUTRAL CITATION:	[2024] VSC 786

REPRESENTATIVE PROCEEDINGS – Part 4A Group Proceeding – Application for approval of settlement – Whether proposed settlement is fair and reasonable – Relevant considerations – Settlement approved – Settlement Distribution Scheme approved – Appointment of Scheme Administrator – Approval for payment of legal costs from settlement sum – Approval of costs of settlement administration – Approval of plaintiff reimbursement payment – Whether funding costs should be approved – Whether funding costs appropriately disclosed – Whether Court has power to reduce amount sought under funding equalisation order – Court has power to reduce funding costs – Funding costs approved – *Supreme Court Act 1986* (Vic) Part 4A, ss 33V, 33ZF.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr W Edwards KC with Ms S Hogan	Phi Finney McDonald
For the Defendant	Mr J Kirkwood SC with Mr M Thomas	Herbert Smith Freehills

HIS HONOUR:

1 This is an application for the approval of a proposed settlement in a class action. The proposed settlement should be approved and orders made with respect to distribution of the money to be paid under the settlement.

The key questions

2 My consideration of the proposed settlement requires an answer to two interrelated questions:

(a) Should the Court approve the proposed settlement under s 33V(1) of the *Supreme Court Act 1986* (Vic) ('the Act')?; and

(b) What orders should be made in respect of the distribution of the settlement sum?

3 To answer those two questions, the matters I need to consider are:

(a) Whether the amount each group member will receive under the proposed settlement is fair and reasonable having regard to:

(i) A reasonable estimate of the value of their claims;

(ii) The risks in the proceeding; and

(iii) The benefits of certainty and payment earlier than proceeding to judgment;

(b) Whether the releases provided by the group members are appropriate;

(c) Whether the proposed Settlement Distribution Scheme is fair and reasonable;

(d) Whether Cameron Myers from PFM should be appointed Administrator of the Settlement Distribution Scheme;

(e) Whether proposed deductions from the settlement sum for a payment to the plaintiff, legal costs, funding costs and settlement administration costs are

appropriate;

(f) Whether a number of group members who failed to register in accordance with Court orders and who now seek to be included as registered group members ('late registrants') should be permitted to participate in the settlement; and

(g) Appropriate orders to give effect to these reasons.

4 The evidence before me comprises:

(a) Two affidavits of Cameron Peter Myers dated 1 November 2024 and 26 November 2024, filed on behalf of the plaintiff;

(b) A report from Kerrie-Ann Rosati of DGT Costs Lawyers, a Court-appointed referee, regarding the reasonableness of the plaintiff's costs;

(c) Two affidavits of Thomas John McDonald filed on behalf of Vannin Capital Operations Limited and Vannin Capital Investments (Australia) Pty Ltd (collectively 'Vannin'), one dated 25 November 2024 and the other 11 December 2024; and

(d) An affidavit of Helen Clare Mould dated 6 November 2024 filed on behalf of the defendant.

5 For the reasons which follow:

(a) The settlement should be approved;

(b) The Settlement Distribution Scheme (as annexed to the affidavit of Mr Myers dated 26 November 2024) should be approved;

(c) Mr Myers should be appointed Administrator of the Settlement Distribution Scheme;

(d) Deductions from the settlement sum should be approved as follows:

(i) $3,075 to the plaintiff as a reimbursement payment;

(ii) $6,032,291.13 on account of the plaintiff's legal costs;

(iii) Up to $180,000 on account of administration costs; and

(iv) $9,769,554.61 to Vannin as recompense for its funding of the proceeding.

The class action

6 The plaintiff, Benjumin Hillman, brings a group proceeding ('the class action') under Part 4A of the Act against Mayne Pharma Group Ltd ('Mayne').

7 The group members on whose behalf the plaintiff claims are described as all persons who:

(a) acquired an interest in fully paid ordinary shares in Mayne during the period between 24 November 2014 and 15 December 2016 (inclusive) ('Relevant Period');

(b) had suffered loss or damage by reason of the conduct of Mayne Pharma pleaded by Mr Hillman; and

(c) were not during any part of the Relevant Period, and are not as at the date of [the writ], any of the following:

(i) a related party (as defined by s 228 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') of Mayne;

(ii) a related body corporate (as defined by s 50 of the *Corporations Act*) of Mayne;

(iii) an associated entity (as defined by s 50AAA of the *Corporations Act*) of Mayne;

(iv) an officer or associate (as defined by s 9 and s 11 of the *Corporations Act*) of Mayne; or

(v) a Justice or the Chief Justice of the Supreme Court of Victoria, or a Justice

or the Chief Justice of the High Court of Australia; and

(d) have not opted out of the proceeding.

8 At all material times, Mayne carried on business as a specialised pharmaceutical company, had wholly owned subsidiaries which carried on business in the United States of America ('Mayne USA') and was included in the official list of the Australian Securities Exchange ('ASX').

9 Any approval of the proposed settlement will bind the plaintiff, Mayne and the group members.

10 The class action is a shareholder class action which alleges that Mayne breached its obligations of continuous disclosure under s 674(2) of the *Corporations Act* and that Mayne engaged in misleading and/or deceptive conduct in contravention of s 1041H of the *Corporations Act*, s 12DA of the *Australian Securities and Investment Commission Act 2001* (Cth) and/or s 18 of the Australian Consumer Law. These contraventions are said to have caused loss and damage to the plaintiff and group members.

11 On 15 December 2016, the Attorney General for the State of Connecticut announced that 20 states led by the Attorney General for the State of Connecticut had commenced anti-trust civil proceedings against a number of pharmaceutical companies, including Mayne USA.

12 Broadly, Mr Hillman alleges that Mayne failed to properly inform the ASX that Mayne USA had entered into one or more anti-competitive understandings or arrangements with a competitor, Heritage, in relation to the allocation of customers, bid rigging and/or price fixing in the market for a product known as Doxycycline Hyclate Delayed Release, contrary to US law. He also alleges Mayne failed to inform the market that it and Mayne USA were being investigated by the US Department of Justice and received subpoenas from the DOJ and the Attorney General for the State of Connecticut concerning the anti-competitive behaviour.

13 The pleaded contraventions are alleged to have created a situation where Mayne's share price was 'inflated' throughout the relevant period. The acquisition of Mayne shares at an inflated price during the period is said to have caused the plaintiff and group members loss.

The proposed settlement

14 The proposed settlement is documented in a Deed of Settlement executed on 1 July 2024 ('Deed').

15 Mr Hillman and Mayne are parties to the Deed.

16 Phi Finney McDonald Pty Ltd ('PFM') are the solicitors for the plaintiff. Vannin provided litigation funding to the plaintiff. Each of PFM and Vannin are parties to the Deed.

17 The key terms of the Deed are:

(a) The proposed settlement is subject to Court approval under s 33V(1) of the Act;

(b) The settlement is made without any admission of liability;

(c) Subject to the terms of the deed, Mayne will pay a settlement sum of $38 million in full and final settlement of the plaintiff's and group members' claims;

(d) The plaintiff and group members will provide releases to Mayne;

(e) PFM will prepare a Settlement Distribution Scheme detailing how the Settlement Sum (together with interest but after Court approved deductions) is to be distributed;

(f) The Settlement Distribution Scheme is also subject to Court approval; and

(g) Except as otherwise provided by the Deed, there is to be no order as to costs of the proceeding and no steps taken to enforce any outstanding costs orders.

18 In addition to seeking approval of the proposed settlement and the Settlement Distribution Scheme the plaintiff seeks a range of orders with respect to distributions from the settlement sum:

(a) Payment of the plaintiff's costs in the sum of $6,046,907.29;

(b) A payment to the plaintiff of the sum of $3,075;

(c) Appointment of PFM as the Administrator of the Settlement Distribution Scheme;

(d) Approval of settlement administration costs in an amount of up to $180,000; and

(e) A funding equalisation order.

Principles for approval

19 Section 33V of the Act provides as follows:

> **Settlement and discontinuance**
>
> (1) A group proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court.

20 The principles applying in relation to an approval under s 33V are well established. The central question is whether the proposed settlement 'is fair and reasonable having regard to the claims of the group members who will be bound by it if approved'.[1]

21 The factors which may be taken into account in assessing that fairness and reasonableness have been extensively considered in other cases[2] and a number are listed in clause 16.6 of the Court's *Practice Note SC GEN 10 Conduct of Group Proceedings*

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1 *Iddles & Anor v Fonterra Aust Pty Ltd & Ors* [2023] VSC 566, [24].

2 Ibid [25]–[27]; *Williams v FAI Security Pty Ltd (No 4)* (2000) 180 ALR 459, [19]; *Matthews v Ausnet Electricity Services Pty Ltd* [2014] VSC 663, [43].

(Class Actions) (second revision).

22 In forming a view as to the fairness and reasonableness of the settlement I may have regard to:

(a) the terms of any advice from counsel and/or experts; and

(b) the attitude of group members to the proposed settlement.

23 In this case I have had the benefit of a confidential opinion from counsel for the plaintiff. I have taken the matters in that opinion into account and have found it helpful in forming my views as the proposed settlement.

24 There were six persons who responded to the Notice of Settlement by completing Objection Notices. In truth, four of these were not objections at all, one person indicated that they supported the plaintiff's submissions, two people sought an opportunity to participate in the settlement and will be given that opportunity and one person asked not to be included in the proceeding because of his age. There are therefore only two group members who contend the settlement should not be approved. Of those, one group member provided no grounds and the other in effect sought to say that he should receive full compensation for his loss. Neither objection provides any basis to reject the settlement approval application. Whilst this does not relieve the Court of its obligation to act as a guardian of the interests of group members, it is nonetheless a factor to be taken into account that the proposed settlement has received no objection of any substance from group members.

The settlement sum is reasonable

25 In considering the fairness and reasonableness of the quantum of the settlement sum, it is necessary to consider an estimate of the reasonably anticipated overall quantum of loss for the plaintiff and group members should the proceeding be successful at trial and the risks which the plaintiff and group members face in the litigation (including any recoverability risks associated with a successful outcome).

26 The confidential opinion provides an estimate for group member losses. The estimate is provided for those group members who registered to participate in the settlement pursuant to Court orders ('registered group members'). Group members who have not registered pursuant to those orders are not permitted to seek the benefit of the proposed settlement without leave of the Court. It is thus appropriate to estimate the quantum of loss for the purposes of assessing the settlement by reference to the losses of registered group members only.

27 All litigation has risks. All, or nearly all, class actions have a degree of uncertainty about the extent to which all members of the group will be able to prove their claims, making global estimation of loss inherently more uncertain than in traditional *inter partes* litigation. Shareholder class actions have particular risks in relation to plaintiffs and group members establishing causation and loss. All of those general risks are present here. In addition, as would be expected, there are specific risks in this case for the plaintiff and group members in relation to liability, causation, loss and recovery.

28 Counsel's confidential opinion candidly assesses the overall prospects of success in the proceeding taking into account both general and specific risks.

29 Having regard to the confidential opinion, I am satisfied that the settlement sum (after taking into account the deductions from it which I would allow) falls within the range of reasonableness having regard to the estimate of overall claim value and the general and specific risks for the plaintiff and group members in the proceeding.

30 In addition, this was a relatively early settlement and I am satisfied that approval of the settlement will provide the plaintiff and group members with the benefits of certainty and a significant time benefit of money received much earlier than would occur if the matter proceeded to judgment and possibly following judgment to appeals.

The scope of the releases

31 The Deed sets out certain releases and covenants not to sue on behalf of the plaintiff

and group members. The scope of the claims released is defined as claims made against Mayne in the proceeding and:

> any Claims the Plaintiff and Group Members may have against the Defendant and / or its Related Parties:
> (1) which are raised in the Proceeding; or
> (2) which were at any time the subject of the Proceeding or any part of the Proceeding; or
> (3) which directly relate to the matters or issues the subject of the Proceeding,
> and which the Plaintiff makes, made or was reasonably capable of making on his own behalf and on behalf of Group Members in the course of the Proceeding pursuant to Part 4A of the Act, whether arising at common law, in equity or under statute;

32 I am satisfied that the scope of the claims released (including that they inure for the benefit of Mayne's related parties) is permissible having regard to the Court of Appeal's decision in *Laszczuk v Bendigo & Adelaide Bank Ltd*[3] and I am satisfied that the scope of the releases is fair and reasonable.

The settlement distribution

33 The plaintiff initially proposed a Settlement Distribution Scheme which formed part of annexure CPM-5 to the first affidavit of Mr Myers. In the course of hearing the settlement approval application I raised the possibility of an amendment to that scheme to alter the way in which one category of group members had their losses assessed. In his affidavit of 26 November 2024, Mr Myers annexed a scheme which amended the way in which that category of group members were treated consistently with my suggestion. I will approve the version of the Settlement Distribution Scheme annexed to the 26 November 2024 affidavit ('the scheme').

34 Under the scheme, losses are calculated using an inflation per share methodology and registered group members then participate in the distribution sum (being the settlement sum plus interest less allowable deductions) by reference to the proportion

[3] (2020) 61 VR 1, 14–17 [51]–[62] (Whelan, Hargrave and Emerton JJA).

of their individual loss to the total loss. This is standard in shareholder class actions and perfectly appropriate as a mechanism for distribution.

35 Only a few features of the scheme warrant comment:

(a) The scheme provides for deductions from the settlement sum for payment to the plaintiff, the plaintiff's legal costs, and funding costs. I deal with each of these matters below;

(b) The scheme excludes from participation those group members who have not registered in accordance with Court orders. This is appropriate given that is precisely what the orders contemplated;

(c) The scheme provides for differential discounts in relation to estimated inflation values by reference to a broad assessment of differential risk issues; and

(d) The plaintiff seek orders that Mr Myers, be appointed as Administrator of the Settlement Distribution Scheme and that up to $180,000 be approved as administration costs.

36 Mr Myers should be appointed as Administrator and the administration costs of up to $180,000 should be approved because:

(a) PFM have already collected and verified much of the share trading data through the various registration processes;

(b) The amount proposed for the settlement administration costs is fair and reasonable, indeed at the lower end of the range for such a distribution;

(c) A properly run tender process for another scheme administrator would incur substantial costs in the tender process, additional costs in the handover from PFM to any other administrator (if one were appointed) and delay the distribution of the settlement; and

(d) The quantum of the proposed administration costs is such that any benefits to

be gained by a tender process are likely to be far outweighed by the costs of any tender process, the costs of handover and the delays occasioned to the distribution.

The plaintiff payment

37 The proposed payment to the plaintiff of $3,075 should be approved. As plaintiff Mr Hillman undertook duties on behalf of the group. The amount of the proposed payment is modest and the evidence establishes that the amount falls well below the median for such payments.

The plaintiff's costs

38 Mr Hillman seeks reimbursement of his reasonable costs and disbursements in the sum of $6,032,291.13. Ms Rosati, the Court-appointed referee assessed the fair and reasonable costs and disbursements of Mr Hillman (including the referee's own costs) to be $5,686,617.54.

39 In her report the referee applies a global 9% reduction to all of PFM's professional costs incurred prior to 31 July 2024. Her conclusion in this respect is in the following terms:

> Due to the scope of this matter, I do not consider that it is possible or appropriate to make specific reductions to the incurred professional costs to account for these matters. As such, I have taken a high level approach and applied an overall percentage reduction to the professional costs incurred by PFM to account for the costs that might not have been reasonably incurred for the reasons outlined above. I consider, from my analysis of all of the material provided to me, that only a relatively modest **reduction of 9%** need be made to account for professional costs that might not be considered to be fairly and reasonably incurred on a solicitor client basis as outlined above. I note that this equates to an overall reduction of around 14% when the costs that were written off, recorded in error or not charged are taken into account.
>
> (emphasis in original)

40 As is clear from the above passage, the 9% reduction is applied after PFM had of its own volition written off 5% of its recorded hours because it accepted that they should not be charged. I do not regard the 9% reduction as 'modest' even if regard is not had to the 5% already written off by PFM – it amounts to a conclusion that one in every 11

hours recorded had been unreasonably charged by PFM. If account is taken of the 5% reduction which PFM applied of its own volition, then the 14% reduction is in effect a conclusion that one hour in seven was not reasonably incurred. The generalised matters relied upon in the report as to areas where there 'might' be costs which were not reasonably incurred do not provide a sound basis for a reduction of this level. Without some clear evidence that amounts were not reasonably incurred, I would not allow a globalised reduction of this magnitude (if indeed a globalised reduction is appropriate at all in these circumstances).

41 The referee applied a 5% global reduction to costs incurred in August and September 2024. Mr Hillman accepts this reduction. Mr Hillman accepts a 5% reduction in PFM's costs to 31 July 2024. If account is taken of the 5% reduction already made to PFM's costs this equates to a 10% reduction in those costs incurred prior to 31 July 2014. My inclination is to consider an effective 10% reduction is still too high to be justified on a globalised and generalised basis but in circumstances where the plaintiff and his solicitors accept it, I am content to adopt it.

42 The difference between the 9% global reduction and the 5% reduction for PFM's professional costs incurred to 31 July 2014 equates to approximately $164,971.36 (inclusive of the increase in uplift on PFM's deferred professional fees).

43 The referee allowed a total for the plaintiff's costs and disbursements to settlement approval of $140,834.60 (inclusive of uplift) based on Mr Myers' estimate of those costs and disbursements. Mr Myers now accepts his estimate provided to the referee was considerably out. His current estimate is that total costs and disbursements from 1 October 2024 to settlement approval will be $344,087.65. Initially, PFM had sought an uplift on these costs. In circumstances where the estimate has been so substantially exceeded and the costs are to be paid shortly after they have been incurred, I did not regard it as appropriate to allow an uplift on PFM's professional fees for this period. PFM agrees and now seeks the amount above without any uplift. The amount I would allow is an increase of $203,253.05 on the amount allowed by the referee.

44 The plaintiff and PFM also accept that allowance needs to be made for an overestimate by the referee of the amount allowable to PFM for uplift on its August 2024 fees. The referee allowed for uplift on all of these fees but only 25% of the fees were conditional. The effect of this is to reduce the amount which the referee certified as reasonable by $22,550.31.

45 Once account is taken of:

(a) a 5% reduction in fees instead of the 9% reduction for fees incurred prior to 31 July 2024;

(b) the increase in costs and disbursements from 1 October 2024 until settlement approval; and

(c) the over-allowance of uplift for August 2024

the fair and reasonable costs of the plaintiff are $6,032,291.13.

46 In the Notice of Proposed Settlement group members were advised that PFM's estimated costs and disbursements were $5.82m representing approximately 15% of the settlement sum. My view is that the allowable costs are $6.03m representing 15.9% of the settlement sum. In the circumstances, I do not regard the difference between the amount notified to group members and the amount claimed by the plaintiff and PFM as sufficiently large to bear on the reasonableness of allowing the amount claimed.

Funding costs

47 The plaintiff and Vannin seek an order from the Court commonly described as a 'funding equalisation order'. The purpose of the order is to ensure that all group members share equally the costs of funding the action.

48 In the Notice of Proposed Settlement group members were notified of a proposed amount payable to Vannin for funding costs of up to $10,605,000. This amount was comprised of:

(a) approximately $8,479,000, representing 25% commission on amounts which will be received by funded group members;

(b) approximately $125,000 for a reimbursement of costs incurred by the funder; and

(c) $2,000,000 being an amount described in funding agreements as an 'adverse costs fee'.

49 Overall, the amount notified to group members comprised approximately 27.9% of the settlement sum. No group member has objected to that amount.

50 At the settlement approval hearing and subsequently, I raised two concerns regarding the amount sought by Vannin under the proposed funding equalisation order.

51 First, in *Allen & Anor v G8 Education Ltd (No. 4)*[4] I referred to evidence establishing average funding commissions being in the range of 23% to 24% of settlement sums.[5] In the circumstances of this case, having regard to the risks of the litigation and the amounts which Vannin had at risk, I was not persuaded that it was fair and reasonable for Vannin to recover substantially more than the average percentage of the settlement sum.

52 Secondly, I had concerns whether the reimbursement of Vannin for the adverse costs fee was appropriate particularly given what had been disclosed in the Funding Information Summary Statement filed with the Court.

53 Vannin obtained an after the event insurance policy ('ATE policy') in the sum of $5 million. It paid an upfront premium, paid an amount for a deed of indemnity and will pay a contingent premium from the amount it receives upon settlement. The total of those amounts is substantially less than $2 million. Under the funding agreements which Vannin entered with the plaintiff and funded group members, it would be entitled to recover the amounts it paid for the ATE policy and the adverse costs fee

4 [2024] VSC 487.
5 Ibid [101].

which is calculated as being 40% of the value of the ATE policy (in this case being $2 million). Under the funding equalisation order proposed by the plaintiff Vannin would only have been paid the adverse costs fee.

54 Neither the amounts payable for the ATE policy or the adverse costs fee were properly disclosed as amounts Vannin would seek to deduct from any settlement sum in the Funding Information Summary Statement.

55 The relevant portion of the Funding Information Summary Statement is:

> **What Litigation Funding Charges are Vannin entitled to if there is a successful outcome?**
>
> In the event of a successful outcome (such as a settlement that is approved by the Court or a judgment by the Court awarding damages to group members), Vannin will be entitled to recover both:
>
> • the legal costs and disbursements it paid during the course of the proceeding; and
>
> • the Funding Commission, being 25% percent of all proceeds recovered on behalf of group members who have signed a litigation funding agreement.
>
> Before any amounts can be deducted from any recovery, the legal costs and disbursements and the Funding Commission must first be approved by the Court as reasonable. The Court will also consider whether to make either a common fund order or a funding equalisation order so that all group members contribute to the legal costs and disbursements and the Funding Commission.

56 In addition to the failure to disclose recovery of costs of the ATE or the adverse costs fee, the Funding Information Summary Statement expressly states that the amount deducted from any recovery must be approved by the Court.

57 Vannin now seeks to recover the amount it will actually pay for the ATE policy, although it seeks to do so by redefining the term 'adverse costs fee' in the scheme. The practical effect of this change in the amount sought together with a shift in the proportion of funded to unfunded group members as a result of:

(a) the inclusion of late registrants in participation; and

(b) the change in the scheme referred to in paragraph 33;

is that Vannin now seeks a payment of $9,769,554.61 representing 25.7% of the settlement sum.

58 I am prepared to approve the reduced amount which Vannin now seeks as fair and reasonable. It is still higher than the average figure but plainly much closer to that number. I am particularly concerned that the disclosure in the Funding Information Summary Statement did not refer to the deduction of ATE policy costs or the adverse costs fee. Every effort should be made to ensure that the information provided in a Funding Information Summary Statement is accurate and comprehensive. This statement was neither. Counterbalancing the disclosure failure in the Funding Information Summary Statement is the fact that the amount disclosed in the settlement notice is substantially greater than the amount Vannin now seeks and included the adverse costs fee.

59 At the settlement hearing the plaintiff's counsel submitted that I did not have power to make an order in the nature of a common fund order which would override Vannin's contractual entitlements and further submitted that, if I did have that power, I should not exercise it. Vannin now seeks the deduction of an amount which I agree can be approved but I would specifically reject the submission that I do not have power to make a common fund order for a lesser amount than the plaintiff and Vannin sought by way of a funding equalisation order.

60 There are two reasons why this is so. One which is specific to the terms of the funding agreements in this case and another which arises in any application for funding equalisation.

61 Schedule C of each of the funding agreements contains the following special term:

> [Vannin] agrees and acknowledges that to the extent an Expense Sharing Order … is made, its terms will supersede those of this Agreement and to the extent of any inconsistency, the terms of the Expense Sharing Order … made will apply.

62 The plaintiff and Vannin contend that properly construed an 'expense sharing order' is a common fund order, not a funding equalisation order. Accepting that

construction does not answer the question of the power of the Court to make such an order. Here, the plaintiff and Vannin contended for a funding equalisation order but if the Court were to make a common fund order (or an expense sharing order for the purposes of the funding agreements), then the 'contractual entitlement' of Vannin would be whatever that order provides. The plaintiff and Vannin contend I should construe the above special condition as only operating where the plaintiff has made application for an expense sharing order. I do not accept that the provision is so limited.

63 Further, where a litigation funder seeks a funding equalisation order they seek the exercise by the Court of its powers under s 33V(2) and s 33ZF of the Act to achieve a situation where funded group members do not bear all of the burden of funding the proceeding. The exercise of the power in s 33V(2) has to be on a basis which is fair and reasonable having regard to the claims of group members. The exercise of the power in s 33ZF has to be conditioned on an order being appropriate or necessary to ensure justice is done in the proceeding. If the plaintiff or the funder seek the exercise of power under those sections and the Court is not satisfied that the amount of funder's commission is fair and reasonable or that the redistribution of that amount is appropriate in order to ensure justice is done in the proceeding, the Court has, in my view, power to modify the effect of any contractual entitlement to ensure one or both of those preconditions for the exercise of its power are met.

64 In the circumstances, I do not intend to make a 'funding equalisation order' but will make an order pursuant to s 33V(2) permitting a deduction from the settlement sum of $9,769,554.61 in satisfaction of the entitlements of Vannin under the scheme.

Late Registrants

65 There are 80 group members who did not register their claims in accordance with the registration orders who now seek to participate in the settlement. I am satisfied that it is appropriate to permit the late registrants to participate in the settlement. Individually and in aggregate, their impact on the returns to existing registered group

members under the settlement is negligible. Mr Hillman and Vannin support permitting their participation.

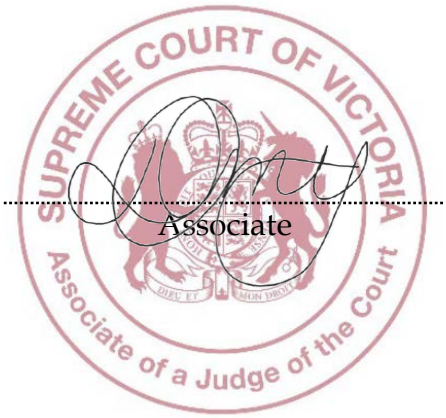
Conclusion

66 Having regard to all of the above matters, I will make orders reflecting these reasons.

CERTIFICATE

I certify that this and the 17 preceding pages are a true copy of the reasons for Judgment of the Honourable Justice Watson of the Supreme Court of Victoria delivered on 19 December 2024.

DATED this nineteenth day of December 2024.



Associate