Equity Division
Supreme Court
New South Wales

Case Name:	**Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia Ltd; Bond v Nissan Motor Co (Australia) Pty Ltd; Coates v Mazda Australia Pty Ltd**
Medium Neutral Citation:	**[2022] NSWSC 1076**
Hearing Date(s):	29 June 2022
Date of Orders:	29 June 2022
Date of Decision:	29 June 2022
Jurisdiction:	Equity - Commercial List
Before:	Rees J
Decision:	Settlement approved on agreed terms.
Catchwords:	REPRESENTATIVE PROCEEDINGS – Takata air bags class action – approval of settlement – s 173, *Civil Procedure Act 2005* (NSW) – $52M settlement for 33,000 group members – plaintiffs seek $16M for legal costs – funder seeks $13M for funder's commission – each group member to receive $1,560 but $600 after deductions. REPRESENTATIVE PROCEEDINGS – objections – small number of group members object to "outrageous", "incredible" and "staggering" costs – other group members happy with Takata air bag recall and manufacturers' response. REPRESENTATIVE PROCEEDINGS – settlement sum reasonable given poor prospects of success – legal costs confronting – judge initially taken aback – evidence of complexity of proceedings and costs assessors support sums sought. REPRESENTATIVE PROCEEDINGS – funder's commission – common fund order – *Brewster v*

	BMW does not preclude common fund order on settlement – common fund order made – settlement approved.
Legislation Cited:	*Civil Procedure Act 2005* (NSW) ss 173, 179, 183 *Competition and Consumer Act 2010* (Cth), Sch 2 – Australian Consumer Law, ss 54, 271*Federal Court Act 1976* (Cth), s 33V *Trade Practices Act 1974* (Cth), s 74D
Cases Cited:	*Asirifi-Otchere v Swann Insurance (Aust) Pty Limited (No 3)* (2020) 385 ALR 625; [2020] FCA 1885 *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (in liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330 *BMW Australia v Brewster* (2019) 269 CLR 574; [2019] HCA 45 *Brewster v BMW Australia Ltd* [2020] NSWCA 272 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 *Davaria Pty Limited v 7-Eleven Stores Pty Limited* (2020) 384 ALR 650 *Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia* [2021] NSWSC 715 *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 *Evans v Health Administration Corporation* [2019] NSWSC 1781 *Farey v National Australia Bank Limited* [2016] FCA 340 *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249 *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163 *Hodges v Waters (No 7)* (2015) 232 FCR 97; [2015] FCA 264 *In re the Takata Airbags Class Actions Settlement (Preliminary Orders)* [2021] NSWSC 1153 *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104

	Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd (2016) 245 FCR 191; [2016] FCAFC 148 *Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd (No 4)* [2018] NSWSC 1584 *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925
Category:	Principal judgment
Parties:	**In proceedings 2017/340824:** Louise Haselhurst (Plaintiff) Toyota Motor Corporation Australia Ltd trading as Toyota Australia (Defendant) Regency Funding Pty Ltd (Intervener) **In proceedings 2017/353017:** Kimley Lloyd Whisson (Plaintiff) Subaru (Aust) Pty Ltd (Defendant) Regency Funding Pty Ltd (Intervener) Epiq Systems Australia Pty Ltd (Interested Party) **In proceedings 2017/378526:** Akuratiya Kularathne (Plaintiff) Honda Australia Pty Ltd (Defendant) Regency Funding Pty Ltd (Intervener) **In proceedings 2018/9555:** Owen Brewster (Plaintiff) BMW Australia Ltd (Defendant) Regency Funding Pty Ltd (Intervener) **In proceedings 2018/9565:** Jaydan Bond (Plaintiff) Nissan Motor Co (Australia) Pty Ltd (Defendant) Regency Funding Pty Ltd (Intervener) **In proceedings 2018/42244:** Camilla Coates (Plaintiff) Mazda Australia Pty Ltd (Defendant) Regency Funding Pty Ltd (Intervener)
Representation:	Counsel: Mr D Barnett and Mr R May (Plaintiffs) Mr P Flynn SC with Mr T Kane (Toyota Motor Corporation Australia Ltd) Mr T Boyle (Subaru (Aust) Pty Ltd) Mr A Leopold SC with Mr B Lim (Regency Funding Pty Ltd – Intervener)

	Solicitors: Quinn Emmanuel Urquhart & Sullivan LLP (Plaintiffs) Herbert Smith Freehills (Toyota Motor Corporation Australia Ltd) Clayton Utz (Subaru (Aust) Pty Ltd) K&L Gates (Honda Australia Pty Ltd) Ashurst (BMW Australia Ltd) Allens (Nissan Motor Co (Australia) Pty Ltd) Mills Oakley (Mazda Australia Pty Ltd) Watson Mangioni Lawyers (Regency Funding Pty Ltd – Intervener)
File Number(s):	2017/340824 2017/353017 2017/378526 2018/9555 2018/9565 2018/42244

EX TEMPORE JUDGMENT

1 **HER HONOUR**: This is an application under section 173 of the *Civil Procedure Act 2005* (NSW) for approval of a settlement reached in six representative proceedings (the *Takata Airbag class actions*) and for distribution of the money paid under that settlement. The settlement sum is $52 million. In addition, the litigation funder, Regency Funding Pty Ltd, seeks approval for payment of a funding commission of 25% of the settlement sum, being $13 million, or such other commission as the Court considers just or equitable. Regency also sought leave to intervene in those proceedings and I made orders to that effect during the course of the hearing today.

2 The plaintiffs estimated that the settlement will result in payment to some 33,400 group members of $1,558 per vehicle before deduction of funding commission, legal costs and administration expenses. However, these deductions will reduce this figure to about $600 per vehicle, which I note is less than 40% of the pre-deduction amount.

The *Takata Airbag class actions*

3 The Takata Airbag class actions were commenced on behalf of group members who acquired a vehicle from a manufacturer who had installed an airbag manufactured by Takata Corporation, which was later the subject of a recall notice. The proceedings were brought against the distributors of Toyota, Subaru, Honda, BMW, Nissan and Mazda motor vehicles in Australia. A seventh proceedings – which does not form part of the settlement but gained prominence nonetheless – was brought against the distributors of Volkswagen.

4 The motor vehicle distributors were sued for damages allegedly arising from their conduct in connection with the sale of motor vehicles fitted with Takata airbags. The plaintiffs alleged that the defendants had failed to comply with the merchantable quality guarantee in section 74D of the *Trade Practices Act 1974* (Cth) or the acceptable quality guarantee in section 54 of the *Australian Consumer Law*. Further, the defendants were said to have engaged in misleading or deceptive conduct and unconscionable conduct given

representations concerning the safety of the vehicles. The damages sought fell into four categories: the difference between the price paid and the "true value" of the vehicle; loss of use of the vehicle; out-of-pocket expenses; and disappointment or distress.

5 The seven proceedings were case-managed together, with each of the representative plaintiffs having the same funder, solicitors, counsel and experts. After a complicated procedural history which it is not presently necessary to traverse, the seven proceedings were fixed for hearing in May 2021, with an eight week estimate.

6 From 22 February to 2 March 2021, the parties participated in a seven-day mediation conducted by the Honourable Patricia Bergin AO SC. Following the mediation, further settlement negotiations occurred and, in the result, the parties to the Takata Airbag class actions, that is, apart from the parties to the Volkswagen proceeding, reached a global settlement now before the Court for approval. After lengthy further drafting, a deed of release and settlement was executed on 19 August 2021 (the *Settlement Deed*). If approved, the defendants will be obliged to pay a combined sum of $52 million, with each defendant's portion of that sum equivalent to the proportion of total affected vehicles the subject of the six settled proceedings.

7 The Volkswagen proceedings went to trial. The plaintiff was unsuccessful. Stevenson J found that the plaintiff failed to establish liability and that, even if the plaintiff had succeeded on liability, the plaintiff had not suffered any loss: *Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia* [2021] NSWSC 715. His Honour's judgment was appealed. The appeal has been heard. The appellate judgment is reserved.

Objections

8 Before turning to the principles, it is important to consider whether objections raised by group members identify particular areas of concern. Of the 33,382 registrants, nine objections have been received to the approval of the Settlement Deed, that is, 0.0003% of registered group members. Some of the

objections are not sufficiently detailed to identify the precise ground of the objection, but most of the objections are.

9 The objections fall into two categories. First, the legal costs and the funding commission are very large sums indeed. One objector described the amounts as "outrageously excessive"; another as "incredible" and "staggering". A third described class actions as:

> A greedy cash grab by lawyers. Australia is a fair place and I would hate to see the greedy litigious nature of the society from the United States of America spread to Australia for the sake of lawyers...making a more profit.

10 I do not seek to diminish in any way the opinions expressed by the objectors, many of which are valid. It is certainly the case, as was observed by Ball J in *Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd (No 4)* [2018] NSWSC 1584 at [74]:

> It would be naive not to recognise that the driving force behind many representative proceedings are the lawyers and litigation funders who, through one mechanism or another, fund the proceedings for their own benefit as well as for the benefit of group members.

11 I do, however, note that the laws and procedures of this Court do permit representative proceedings to be brought and I cannot refuse to approve the settlement on the basis of a general opposition to class actions alone. What I must have regard to is the evidence before the Court as to whether the legal costs incurred are fair and reasonable having regard to the particular features of the case. A funding commission is also permissible; the commission sought accords with the average funding commissions which have been permitted by courts in Australia.

12 Without more information from these objectors, I do not think that I can refuse a settlement to which the other group members do not object on this basis alone. As Ball J also observed in *Smith v Australian Executor Trustees*, while it is understandable that group members may be disappointed by a settlement, no objector sought to explain in any detail why the settlement did not fall within

the range of what might be regarded as reasonable having regard to the risks of the case: at [51]. The same observation, with respect, may be made here.

13 Second, a number of objectors wished to convey that they were happy with how manufacturers had dealt with the problem by participating in the Takata airbag recall. One of the objectors considered it highly unlikely that the car companies were knowingly aware of the danger or potential danger of the airbags when the vehicles were sold and Subaru, and presumably all other companies, offered immediate replacement of the airbag at no cost to the owners. Another objector noted:

> I'm very happy with what Subaru has done for me. They repaired at their own cost and made the process a very pleasant one.

14 Those sentiments are laudable. An obvious answer, I suppose, for a group member who does not think it appropriate to receive any compensation in these circumstances is to not participate in the distribution. But I should not move on without noting that some purchasers of motor vehicles are more than happy with how the manufacturers have dealt with the situation, for which the manufacturers can only be congratulated.

15 I noted also that the number of objectors is low in comparison to the number of group members that did not lodge an objection. While I have had regard to the views of all objectors, regardless of their proportion of the total class size, I note the sentiments of Ball J in *Smith v Australian Executor Trustees*, that nine "is a small number and must be weighed against the fact that, absent objections from other group members, the likelihood is that the large majority of group members would prefer to take the settlement rather than run the risk of recovering nothing in the proceedings": at [50].

16 As such, the objections notified do not cause me to depart from a general assessment as to whether the settlement which has been reached, and the manner in which the settlement moneys are proposed to be distributed, are fair and reasonable.

Principles

17 The principles concerning the approval of this settlement are not in dispute. Section 173 of the *Civil Procedure Act* provides:

> (1) Representative proceedings 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 are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court.

18 If approved, the settlement binds all persons other than those who have opted out of the proceedings: section 179(b), *Civil Procedure Act*. The Court further has the power to "of its own motion or on an 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": section 183.

19 As to the considerations to which the Court will have regard to in determining whether to approve a settlement, Stevenson J set out the principles in *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249:

> [12] The central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole. The Court's role in relation to group members is supervisory and protective. The Court's role is analogous to that which it assumes when approving settlements on behalf of persons with a disability.
>
> [13] When considering the reasonableness of the settlement *inter partes*, the Court is asked to determine whether the settlement is fair and reasonable considering the alternative, which is usually the risks and costs to which the plaintiff group members would be exposed were the matter to proceed to trial.
>
> [14] The question of whether the settlement is reasonable *per se* cannot be separated from ancillary questions concerning the approval of funding and legal costs. The evaluation of whether a settlement is fair and reasonable "must be carried out by reference to what all group members obtain in their hands following the resolution of their individual claims in the event that the settlement is approved".

20 Thus, the first question is whether the settlement is reasonable *inter partes*, that is, between the representative plaintiff and defendant in each proceeding. The

second question is whether the settlement is fair and reasonable *inter se*, that is, between group members. In determining these questions, the Court must be satisfied that the settlement has been undertaken in the interests of the group members as a whole and not just in the interests of the representative plaintiff and the defendant: *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258 (per Branson J). Further, as Goldberg J outlined in *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [19]:

> Ordinarily in such circumstances the Court will take into account the amount offered to each group member, the prospects of success in the proceeding, the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer, the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement.

21 Overall, the Court's task has been described as "an especially onerous one": *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 at [16] (per Finkelstein J); *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8].

Is the settlement fair and reasonable *inter partes*?

22 The first question is whether the settlement sum of $52 million is fair and reasonable between the representative plaintiffs and the defendants in the six proceedings. The plaintiffs and defendants were represented by highly competent legal representatives. The litigation was hard-fought. The defendants made no offers of settlement until the multi-day mediation conducted by Ms Bergin SC. I consider that each of the legal representatives would have had an informed and sophisticated view of the strengths and weaknesses of their respective cases. The point at which offer and acceptance finally coincided is likely to reflect a fair and reasonable sum in respect of the plaintiffs' claims and the classes which they represented after tough negotiation. In order to obtain a better result, the plaintiffs would likely have had to proceed to trial, with the additional costs and risks attendant on that course.

23 The parties envisaged that the trial would have entailed a substantial contest between experts as to the key factual allegations upon which the liability case depended, as well as on the issue of damages. If the proceedings had not settled at mediation, then full ventilation of these issues at an 8-week final hearing on the common questions would have resulted in substantial costs being incurred by the parties, which have been avoided. The plaintiffs (or, more precisely, the funder) faced a substantial risk that, if the plaintiffs did not succeed at trial, they would be liable for the defendants' costs. The plaintiffs had provided security for costs, including some $5 million for Toyota's costs alone. The adverse cost risk was clearly significant and that risk has been avoided by this settlement.

24 The risks inherent in proceeding to trial are exemplified by what in fact occurred in the Volkswagen proceeding, where very similar and, in large part, identical allegations were made and similar causes of action pursued as had been advanced against Toyota, Subaru, Honda, BMW, Nissan and Mazda.

25 As to liability, four particular problems were encountered by the plaintiff in the Volkswagen proceeding, and would likely present similar challenges to the plaintiffs in the six proceedings which have settled subject to approval.

26 First, at the heart of the plaintiff's case was the alleged "propensity" of the Takata airbag to "explode". Some of the complexities involved in this part of the plaintiff's claim can be seen in *Dwyer v Volkswagen* at [117]-[121], [124]-[127], [129]-[131]. The Takata airbag inflators used "phase stabilised ammonium nitrate" (*PSAN*) as a propellant. As the root cause of the degradation of PSAN was thermal fluctuations in the presence of moisture, and since the extent of degradation depended upon the level of moisture present, Volkswagen contended that there was no "propensity to explode" unless and until the PSAN within a particular airbag inflator had actually degraded beyond a critical threshold, and it was for the plaintiff to prove that this threshold had been crossed in each relevant vehicle before the airbags were replaced. That is, it was not enough for the plaintiff to prove "a theoretical possibility that at

some unidentified time in the future there may be a risk of mis-deployment"; Stevenson J this argument in *Dwyer v Volkswagen* at [152], [153].

27 Second, the motor vehicle distributors contended that whether the critical threshold had been crossed was dependent upon variables such as ambient temperature and humidity at each vehicle's usual location, the vehicle's age and usage, whether it was ordinarily parked in a garage or on the street, the vehicle model and characteristics, and the presence or not of desiccant. The importance of such variables had adverse implications for representative proceedings brought on behalf of persons who purchased many different models of motor vehicles over an 18-year period.

28 Third, the motor vehicle distributors relied upon section 271 of the *Australian Consumer Law* as an answer to the plaintiff's case that they had failed to comply with section 54(1) of the *Australian Consumer Law*: even if there was non-compliance with section 54(1), such non-compliance was only because of an act, default or omission of Takata.

29 Fourth, insofar as the plaintiff alleged misleading or deceptive conduct or unconscionable conduct by the motor vehicle distributors, the motor vehicle distributors contended that they had a reasonable basis for any representations made as to the safety of the vehicles, including because the airbag inflators were supplied by Takata, a specialist airbag manufacturer who supplied most other major vehicle manufacturers with airbags throughout the world. Takata had provided contractual assurances and warranties as to quality and fitness for purpose. Takata had supplied numerous design, production and other test results over time purporting to show that the airbag inflators complied with specifications. Takata had represented on numerous occasions that the relevant airbag inflators did not contain any defect that made them or the vehicles in which they were installed unsafe.

30 As to quantum, the lead plaintiff in the Volkswagen proceeding was awarded no "out of pocket" damages because his airbag was replaced during a scheduled service and his wife drove him to and from the service centre. Here,

the motor vehicle distributors submitted that, even if the plaintiffs had succeeded on liability, the most probable outcome on damages was that group members were unlikely to be awarded any damages unless they established that they had individually incurred “out of pocket” expenses such as taxi fares incurred whilst their airbag inflator was replaced. The lead plaintiff in the proceedings against Toyota only claimed $48.16 by way of “out-of-pocket” damages. The process of seeking to prove such losses would likely have been uneconomic. There was a very substantial risk that any claim for damages referrable to the difference between the price paid and the “true value” of the vehicle would fail. The estimated return from the proposed settlement therefore exceeded, by a substantial margin, the “out-of-pocket” expenses, if any, that were likely to have been recoverable by group members.

31 Having regard to each of those matters, I am satisfied that the total settlement sum of $52 million was fair and reasonable *inter partes*.

Is the settlement fair and reasonable *inter se*?

32 The next matter to consider is whether the proposed distribution of the settlement moneys is reasonable when one looks at how each of the members of the class will be treated.

33 It is proposed under the Settlement Deed that the same amount will be paid to each group member, regardless of the brand or type or cost of the motor vehicle that they owned. The amount which they will receive will be $1,558 per vehicle before deduction of legal costs and any funding commission. The net figure, after deduction of those amounts, if approved, will result in the owners receiving some $600. This is a figure to be considered against the fact that airbags were replaced at no cost to group members and the recall and replacement of airbags is now 99.9% complete, according to a media release by the Australian Competition and Consumer Commission.

34 The element of the plaintiffs' claim for damages which was considered the least controversial and the most likely to be compensated, should liability be established, was out-of-pocket expenses. These expenses provide a useful

touchstone to assess whether the proposed amount to be paid to each group member is fair and reasonable. On average, $300 out-of-pocket expenses per motor vehicle were incurred by the plaintiffs and group members surveyed as to expenses incurred as a consequence of the Takata airbag in their car being recalled and replaced. Looked at from this perspective, the $600 which each group members can expect to receive is twice the average out-of-pocket expense.

35 Also relevant in assessing this proposed figure is that it is not intended to cover any group member's claim for damages for personal injury, which is excluded from the terms of settlement: clauses 2.1, 2.2, Settlement Deed.

36 I consider that the distribution of a standard figure to group members is an approach supported by common sense and practicality where the main component of the claim is likely to be out-of-pocket expenses. The amount of out-of-pocket expenses is unlikely to differ by reason of the type of motor vehicle. The costs of separately assessing an amount to be paid to each group member is otherwise uneconomic, given the likely modest nature of each group member's claim.

Costs and deductions

37 In addition to approval of the settlement sum and the distribution of the settlement in accordance with the Settlement Deed and the Scheme, it is necessary to approve the subtraction of costs and other deductions sought by the plaintiffs pursuant to section 173(2) of the Act. These deductions amount to some $31.7 million, or nearly two-thirds of the settlement sum. Some care is obviously required. I will deal with the deductions in order of magnitude.

Plaintiffs' legal costs

38 The plaintiffs seek approval of deduction of their legal costs to be paid to the funder, being $15,570,741.05 for costs incurred to 31 March 2022 and a further $536,181.25 to date, both figures inclusive of GST. The first figure is sought to be paid to the funder and the second to the plaintiffs' solicitors.

39 The Court's role when approving the deduction of legal costs in a representative proceeding was described by Murphy J in *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [91]:

> The Court has a supervisory role in relation to costs paid by class members and should scrutinise costs in the settlement approval process: *Kelly* at [11], [333] and [346]. The Court should satisfy itself that the arrangements in relation to legal costs meet any relevant legal requirements, contain reasonable and proportionate terms relative to the commercial context in which they were entered, and that the costs and disbursements are in accordance with the terms of the relevant agreements and are otherwise 'reasonable'.

See also *Smith v Australian Executor Trustees* at [24] (per Ball J).

40 The evidence of costs assessors does not displace the protective role of the Court in the approval of representative proceedings, nor is it determinative as to question of whether such costs ought to be deducted from the settlement. As Stevenson J noted in *Findlay v DSHE Holdings* at [44]: "It is, of course, for me and not [the independent costs referee] to determine whether the costs incurred were reasonable and proportionate". That said, the evidence of an experienced costs assessor may be of great assistance to the Court in highly complex and expensive proceedings. As Beach J observed in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (in liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330 at [180]:

> Generally, let me say that my role is not that of a taxing registrar or master. Further, subject to the question of proportionality, if unchallenged expert opinion is put before the Court which sets out a commercial and reasonable methodology consistent with the terms of any retainer and which demonstrates that it has been accurately and thoroughly applied to sufficient and probative source records of the solicitors, then it is no part of my function to:
>
> (a) reject that evidence as to whole or part without very good reason; or
>
> (b) apply one's own subjective view of what the legal work is "really worth", divorced from the reality of the commercial context within which the work was carried out and the expenses incurred.

41 The sums sought to be deducted from the settlement for legal costs and disbursements are confronting, and I confess to having been initially taken aback. However, as the plaintiffs' solicitor, Damian Scattini, explains, there is

a lot more to these proceedings and the work that was done to advance the plaintiffs' and group members' claims than group members may otherwise appreciate. Without going into the detail of Mr Scattini's comprehensive affidavit, it is apparent that these proceedings were hard-fought, went to the High Court of Australia and back, involved some novel issues and claims. The plaintiffs retained expert witnesses from the United States in support of both liability and damages. The costs were incurred over more than four years and involved progressing multiple proceedings and numerous interlocutory applications. That, of course, is not enough of itself to approve these figures.

42 In support of the plaintiffs' application, the plaintiffs relied on the evidence of two experienced costs assessors. The first was Ian Ramsey-Stewart, who was retained by the funder throughout the course of these proceedings to review the legal fees submitted for payment. In that sense, Mr Ramsey-Stewart is not an independent expert but he does have a degree of familiarity with the proceedings, which no doubt assisted him in his task. Mr Ramsey-Stewart conducted a line-by-line review to extract professional costs which he considered to be unrecoverable on a solicitor and client basis and then applied a general reduction to the balance of the costs of between 5% and 7.5%, in line with his experience in other class action matters which he has reviewed.

43 Mr Ramsey-Stewart said, despite the scale of the Takata proceedings, with a large number of lawyers on the opposing side making numerous interlocutory applications and contesting every point, this matter has been run efficiently by a relatively small team of solicitors with minimal overlap and duplication of the work done. Mr Ramsey-Stewart arrived at a figure of between $16.2 million and $16.7 million in legal costs. From this he deducted a further amount to reflect costs incurred in the Volkswagen proceeding, which were not properly attributable to group members in these proceedings.

44 In addition, the plaintiffs relied on an independent costs assessor, Kerrie-Ann Rosati, who generally agreed with Mr Ramsey-Stewart's approach but arrived at a higher figure. However, it is the lower figure which is now put before the Court for approval.

45 An issue that arose during the hearing was how to deal with the legal costs that relate to the Volkswagen proceeding. It will be recalled that, until the settlement of the six proceedings now before the Court, all seven proceedings were run together using the same solicitors, counsel and experts. Costs incurred in relation to specific proceedings were charged to that particular matter, albeit those costs were frequently for the benefit of all of the proceedings, such as the appeal to the High Court in the BMW proceedings. Some $300,000 in costs were charged specifically to the Volkswagen proceedings, albeit that some of those costs likely benefited the plaintiffs in the other six proceedings as well. Other than costs charged to specific proceedings, other costs were treated as costs common to all seven proceedings.

46 As to how to allocate a portion of the common costs to the Volkswagen proceedings, such that that portion is not borne by the group members in the six proceedings now before the Court, three methodologies were proposed. Suffice to say that the methodology which I consider fair and reasonable is to exclude the costs specifically billed to the Volkswagen proceeding, being some $300,000, and also to exclude one-seventh of the remaining common costs. This reduces the prospect that all costs which assisted group members in the Volkswagen proceedings are not borne by the remaining group members, even though, theoretically, they may have benefited other group members. It also apportions a fair share of the common costs to the Volkswagen proceedings, such that group members in the remaining proceedings are not overly burdened by more than their fair share. The plaintiffs' counsel and solicitors have revised the short minutes of order now before the Court to take into account these figures.

47 Ultimately, assessing an appropriate figure for costs is a matter for the Court. However, in this matter, I have placed weight on what both of the experienced costs assessors have done in their work and I have no reason to depart from the figure ultimately now in the proposed short minutes of order. As to whether this figure is proportionate and reasonable in the circumstances, I adopt the views expressed by Stevenson J in *Findlay v DSHE Holdings* at [60]:

> The costs are, obviously, a very high proportion of the Settlement Sum. But proportionality in the context of the settlement achieved here must take into account the prospects of the representative plaintiffs achieving a better result were I to refuse to approve the settlement and, in effect, send them back to the Court to continue the battle. Those prospects appear most uncertain. What has been achieved by the proposed settlement does appear to be the best that can be done. I fear that, were I not to approve the settlement, the group members represented by the plaintiffs would in the end be worse off than were I to approve the settlement and thereby cause them to achieve the admittedly modest return that would result. Overall, my conclusion is that the proposed costs are not, in all the circumstances, disproportionate to the result achieved.

48 Having regard to the evidence of Mr Scattini, Mr Ramsey-Stewart and Ms Rosati, I consider that the deduction of the plaintiffs' legal costs as now contained in the proposed short minutes of order, following the incorporation of various amendments to remove costs associated with the Volkswagen proceedings as much as possible, is fair and reasonable.

Funder's commission

49 The funder seeks an order pursuant to section 173(1) or (2) of the *Civil Procedure Act*, or pursuant to the general law and in the equitable jurisdiction of the Court, approving a funding commission of 25% of the settlement sum, being $13 million. The first question is whether the Court has power to approve the commission; the second question is whether it should.

50 The funder seeks payment of its commission from the settlement sum, being a deduction from the amounts payable to group members whether they have entered into a funding agreement with the funder or not, being a "common fund order". Whether the Court has the power to make common fund orders has been subject to some controversy. The High Court, in one of the proceedings subject to this settlement, *Brewster v BMW*, held that section 183 of the *Civil Procedure Act* does not permit the Court to make common fund orders prior to settlement: *BMW Australia v Brewster* (2019) 269 CLR 574; [2019] HCA 45. The Court did not consider the extent of the Court's power to make a common fund order under to section 173(2) of the *Civil Procedure Act*. The Court of Appeal refused to answer a separate question referred to it by Sackar J on this subject: *Brewster v BMW Australia Ltd* [2020] NSWCA 272. Relevantly, Bell P (as his Honour then was) noted that no *dicta* could be identified in the High

Court's judgment deciding any power under section 173 of the Act; the extent of the *ratio* in that judgment was confined to the operation of section 183: at [28].

51 The High Court's decision in *Brewster* does not preclude a common fund order being made once proceedings have settled. Such common fund orders have since been made in the Federal Court under of the equivalent provision of the *Federal Court Act 1976* (Cth), being section 33V: *Asirifi-Otchere v Swann Insurance (Aust) Pty Limited (No 3)* (2020) 385 ALR 625; [2020] FCA 1885 at [14]-[15] (per Lee J); *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163 at [24] (per Beach J); *Davaria Pty Limited v 7-Eleven Stores Pty Limited* (2020) 384 ALR 650 at [41] (Lee J, with whom Middleton and Moshinsky J agreed). Following these authorities, I am thus satisfied that the Court has the power to make a common fund order under to section 173(2) of the *Civil Procedure Act*.

52 As to whether I should make such an order in this case, in *Smith v Australian Executor Trustees Limited*, Ball J noted at [24]-[25]:

> In considering the reasonableness of any funding fee, it is necessary to take into account all relevant circumstances including relevantly:
>
> (a) The information provided to group members concerning the funding commission;
>
> (b) Whether the funding commission reflects market rates;
>
> (c) The litigation risks of providing funding in the proceeding;
>
> (d) The quantum of adverse costs exposure that the funder assumed;
>
> (e) The legal costs expended and to be expended and the security for costs provided by the funder;
>
> (f) The amount of any settlement; and
>
> (g) Any substantial objections made by group members in relation to any litigation funding charges.

See also *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148 at [80] (per Murphy, Gleeson and Beach JJ); *Hall v Arnold Bloch Leibler* at [30]-[37] (per Beach J).

53 The evidence of the plaintiffs' solicitor is that it was necessary to obtain a litigation funder in these proceedings because significant resources were needed to communicate with a large number of group members, where each group member was likely to have a modest claim. Further, the proceedings were likely to be seriously contested by the defendants, exposing any unsuccessful plaintiff to a substantial adverse costs order. Given these factors, it was unlikely that any individual plaintiff would be willing to fund the proceedings. Nor were the plaintiffs' solicitors prepared to fund the proceedings on a contingency fee basis given the risks inherent in doing so and the fact that, if successful, the plaintiffs' solicitors would only be entitled to uplift their fees by 25%.

54 In those circumstances, funding was ultimately obtained from Regency, who initially established a website to invite people to participate in the proceedings. However, the funder ceased doing so when the defendants and the ACCC suggested that this publicity was interfering with the messages then going out for an ongoing safety recall. The funder took what was obviously an appropriate and responsible course of ceasing any potential book building activity, also having regard to the observations of Lee J in *Asirifi-Otchere* that where individual claims are likely to be modest, the expenses of book building are not warranted. The funder, however, proceeded on the basis that they intended to seek a common fund order, which is now sought.

55 Looking at the risk which the funder has undertaken in committing to funding these representative proceedings, the evidence indicates the risk was significant. The funder provided funding for over four and a half years. In total, the funder has expended some $18 million in legal costs. In addition, the funder provided security for costs of $8.43 million. The funder was exposed to adverse costs orders being made against it, which Mr Scattini has estimated would have exceeded $31 million. There is no doubt that the funder took on risk. I consider a commission is appropriate in these circumstances.

56 The question is whether the rate of commission as now sought is appropriate. In this regard, Regency relied on the evidence of Greg Houston, who is an

expert in this field. Mr Houston assessed the rates of commission evident from some 58 legal decisions in the Australian judicial system and assessed that the average and median rate of commission was 25%. Regency is entitled, under the funding agreement entered into with some of the group members, to a higher rate of 30% but nonetheless seeks 25% today. Mr Houston added that not only is the rate of commission now sought the average or median rate, but it is also, in his opinion, an appropriate internal rate of return having regard to the rate of return enjoyed on listed securities to which should be added a premium for the illiquidity of the funder's investment and an additional risk premium.

57 Having regard to the evidence before the Court and the careful review undertaken by Mr Houston and Regency's counsel, it appears that the rate is reasonable and proportionate having regard, not only to rates charged commonly in Australia, but also to the particular features of these proceedings, which I have sought to outline. In addition, the funder also bears the gap between the actual costs which it has funded and the amount which is the subject of the orders I am asked to make today. This will effectively reduce its commission. I consider it fair and reasonable that a funder's commission of 25% be deducted from the settlement sum.

Administrator's Costs

58 Clause 10.2 of the Settlement Deed provides that the Administrator's Fees are to be paid out of the Total Settlement Sum. It is proposed that up to $2,500,856.60 (inclusive of GST) be distributed by the plaintiffs' solicitor to the Administrator for payment of their invoices related to the administration of the settlement. It is estimated that the cost of processing each group member's claim will be $57.

59 The Administrator, Epiq, is experienced in this sort of work and is likely to be able to do it more cheaply than if it is done by the plaintiffs' solicitors. The estimated costs to be charged by Epiq has been reviewed by the costs assessors, who considered those costs to be fair and reasonable. I have no

reason to disagree. I will approve this deduction from the Total Settlement Sum and make orders appointing Epiq as the administrator of the settlement.

Payments to the representative plaintiffs

60 The representative plaintiffs have made an application to the Court for the payment of $20,000 each in recognition of the time spent and expenditure reasonably incurred by them in bringing the proceedings for the benefit of all group members. The provision of such special allowances is permissible given the time, stress, burden, and personal inconvenience likely to arise as a result of a representative plaintiff's involvement in the proceedings. Such payments are not intended to serve as compensation for a person's participation in litigation, which would not ordinarily be compensable, but rather out of recognition of their special role as a representative plaintiff: *Findlay v DSHE Holdings* at [67]; *Money Max* at [212] (per Murphy J); *Farey v National Australia Bank Limited* [2016] FCA 340 at [42] (per Beach J). Where the quantum of the allowance is rational and reasonable, it will not diminish the reasonability of the settlement distribution: *Hodges v Waters (No 7)* (2015) 232 FCR 97; [2015] FCA 264 at [102] (per Perram J); *Evans v Health Administration Corporation* [2019] NSWSC 1781 at [45] (per Ward CJ in Eq); *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [176].

61 As to whether the amount sought by the representative plaintiffs in these proceedings is reasonable in the circumstances, the amount sought is less than the amounts that have typically been paid to lead applicants or plaintiffs in other proceedings: see, for example, *Money Max* at [215]-[218] (per Murphy J); *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 at [129] (per Lee J); *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 at [23] (per Beach J). I consider that reimbursement of $20,000 for each representative plaintiff is fair and reasonable and, as indicated by the authorities cited, modest. I approve this deduction.

Late registrants

62 In September 2021, Hammerschlag J made preliminary orders pending this final settlement approval hearing: *In re the Takata Airbags Class Actions Settlement (Preliminary Orders)* [2021] NSWSC 1153. Relevantly, his Honour fixed 18 February 2022 as the date by which group members were to register to participate in the proposed settlement. By that date, 33,382 people had registered (*group members*); 109 people have sought to register after that date.

63 No party opposes the inclusion of these late registrants in the class. I consider it appropriate to follow the approach taken by Stevenson J in *Findlay v DSHE Holdings*, where his Honour noted that the participation of late entrants would make no significant difference to distributions to other group members, prompting his Honour to grant leave for the late registrants to participate: at [97]. While the inclusion of these late entrants will result in a slight reduction in the distribution to be received by the group members that registered on time, it is not expected that the inclusion of these late registrants will make any material difference to the existing registrants or compromise the reasonableness of the settlement *inter se*. I will grant leave accordingly.

ORDERS

64 Finally, may I congratulate the parties on reaching a commercial settlement of what has been, no doubt, a long and difficult set of proceedings. May I also congratulate *in absentia* the Honourable Ms Bergin SC for her work as a mediator in assisting the parties to resolve their differences.

65 For these reasons, I make the following orders, directions and notations as set out in the short minutes of order, with certain terms to have the meaning given to them in Appendix A to these orders:

Consolidation of Proceedings

(1) Pursuant to rule 28.5 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**), the separate Takata Airbag Class Actions are consolidated into a single proceeding (the **Settled Takata Proceeding**).

Intervention of Funder

(1A) Regency Funding Pty Ltd ACN 619 012 421 (**Funder**) be granted leave to intervene in the Settled Takata Proceeding for the purpose of seeking order 8(d) below.

Settlement of Proceedings

(2) Pursuant to section 173 of the *Civil Procedure Act 2005* (NSW) (the **Act**), the settlement of the Settled Takata Proceeding is approved on the terms set out in:

(a) the Deed of Settlement and Release dated 19 August 2021 (**Settlement Deed**); and

(b) the Settlement Distribution Scheme dated 2 June 2022 (**SDS**),

subject to these orders.

(3) Pursuant to section 183 of the Act, the Plaintiffs are authorised, *nunc pro tunc*, to enter into the Settlement Deed for, and on behalf of all group members.

(4) Pursuant to section 179 of the Act, the persons affected and bound by the Settlement Deed and the SDS are the Plaintiffs, the Defendants, the group members and Funder Regency Funding Pty Ltd (ACN 619 012 421) (**Funder**)**.**

Administration of Settlement

(5) Pursuant to sections 173 and/or 183 of the Act, Epiq Systems Australia Pty Ltd be appointed as administrator of the SDS to act in accordance with the SDS and these orders subject to any direction from the Court, and to have the powers and immunities conferred by the SDS on the administrator, subject to any direction of the Court (**Settlement Administrator**).

(6) The Settlement Administrator is granted liberty to relist the Settled Takata Proceeding for the purpose of seeking orders consequential to or in connection with the Settlement Deed and/or the SDS.

(7) The Settlement Administrator is joined as a party to the Settled Takata Proceeding pursuant to rule 6.24 of the UCPR for the limited purpose of exercising the liberty granted under order 6 above.

Deductions from the Total Settlement Sum

(8) Pursuant to section 173 of the Act, and for the purposes of the SDS, the Court approves the following deductions from the Total Settlement Sum under the SDS:

(a) the Plaintiffs' legal costs, comprising the Plaintiffs' reasonable costs and disbursements incurred, or estimated to be incurred in the conduct of the Settled Takata Proceeding, including:

(i) $15,570,741.05 (inclusive of GST) in costs incurred up to 31 March 2022, to be paid to the Funder; and

(ii) $536,181.25 (inclusive of GST), in costs incurred, or estimated to be incurred, between 1 April 2022 and 29 June 2022 (being the date of the hearing of the Approval Application), to be paid to Quinn Emanuel; and

(b) $20,000 to each of the Plaintiffs for the time spent and expenditure reasonably incurred in the Settled Takata Proceeding for the benefit of the group members; and

(c) up to $2,500,856.60 (inclusive of GST) to be paid to Quinn Emanuel or the Settlement Administrator (as the case may be) for costs and disbursements incurred in connection with the administration of the SDS;

(d) pursuant to sections 173(1) or (2) of the Act, or pursuant to the general law and in the equitable jurisdiction of the Court, a funding commission to be paid to the Funder, in the amount of $13 million,

(together, the **Settlement Deductions**).

Calculation and distribution of group member payments

(9) The Settlement Administrator is to calculate the Group Member Settlement Payment (as that term is defined in the SDS) in accordance with clause 12.3 of the SDS).

(10) The Group Member Settlement Payments are to be paid from the Total Settlement Sum after the Settlement Deductions have been deducted.

Confidentiality Orders

(11) Pursuant to section 7 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (**Suppression Act**):

(a) In the affidavit of Damian John Scattini affirmed 10 June 2022 (**Scattini Affidavit**):

(i) paragraphs 331; 332; 333; 334; 336; 337(b); 337(c); 337(d); 337(e); 337(g); 337(h); 337(i); 337(j); 337(p);

337(r); 337(s); 337(t); 337(u); 337(v) and 337(w); 338; 347; 348; 351; 354; 355; 356; and 357;

(ii) paragraph 335, line six, second sentence onwards;

(iii) paragraph 337, line six, second sentence;

(iv) paragraph 337(a), line four, second sentence;

(v) paragraph 337(f), line three, second sentence;

(vi) paragraph 337(n), line four, third sentence;

(vii) paragraph 337(q), line three, second sentence; and

(b) Confidential Exhibit DS-4 to the affidavit of Damian John Scattini affirmed 15 June 2022 (**second Scattini Affidavit**),

be kept confidential and not be disclosed to any person save the Judge with the carriage of the matter (and officers of the Court to whom it is necessary to disclose the evidence) until further order on the grounds that the order is necessary to prevent prejudice to the proper administration of justice.

(12) Pursuant to section 10 of the Suppression Act:

(a) Confidential Exhibit DS-2 (other than pages 1 to 95 and 393-394); and

(b) Confidential Exhibit DS-3 to the Scattini Affidavit,

be kept confidential and not be disclosed to any person save the Judge with the carriage of the matter (and officers of the Court to whom it is necessary to disclose the evidence) until 7 days from the date of any

order approving the proposed settlement under section 173 of the *Civil Procedure Act 2005* (NSW) in the Takata Class Action.

(13) Any party wishing to maintain the confidentiality of material referred to in order 12 must make such an application within 7 days from the date of any order approving the proposed settlement under section 173 of the *Civil Procedure Act 2005* (NSW) in the Takata Class Action.

Late registrants

(14) The persons identified at pages 393-394 of Exhibit DS-2 are deemed to have registered by the Registration Deadline (as that term is defined in the SDS).

Dismissal and costs

(15) All costs orders in the Settled Takata Proceeding and any Related Costs Proceedings (as that term is defined in the Settlement Deed) are vacated.

(16) The Settlement Administrator is to notify the Court by way of affidavit once the SDS has been completed.

(17) Upon the filing of the affidavit referred to at order 16 above, the Settled Takata Proceeding and (except to the extent that they have already been finally determined) the Related Costs Proceedings be dismissed with no order as to costs.

(18) Such further or other orders as the Court sees fit.

(19) Liberty to apply on three days' notice.

APPENDIX A

In these orders:

“Group Members" means all persons who fall within the group definitions in any of the Takata Airbag Class Actions and, for the avoidance of any doubt, does not include any persons who opted out of the Takata Airbag Class Actions or who opt out pursuant to leave at any subsequent time.

"Plaintiffs" means, in respect of proceeding:

2017/00340824, Louise Haselhurst;

2017/00353017, Kimley Whisson;

2017/00378526, Akuratiya Kularathne;

2018/00009555, Owen Brewster;

2018/00009565, Jaydan Bond; and

2018/00042244, Camilla Coates.

"Defendants" means, in respect of proceeding:

2017/00340824, Toyota Motor Corporation Australia Limited;

2017/00353017, Subaru (Aust) Pty Limited;

2017/00378526, Honda Australia Pty Limited;

2018/00009555, BMW Australia Ltd;

2018/00009565, Nissan Motor Co (Australia) Pty Limited; and

2018/00042244, Mazda Australia Pty Limited.

“Related Costs Proceedings” means the following proceedings:

BMW Australia Ltd v Owen Brewster, High Court of Australia proceedings S152/2019;

Louise Haselhurst v Toyota Motor Corporation Australia Limited t/as Toyota Australia, NSW Court of Appeal proceedings 2019/403346;

Owen Brewster v BMW Australia Ltd, NSW Court of Appeal proceedings 2020/274909; and

Louise Haselhurst v Toyota Motor Corporation Australia Limited t/as Toyota Australia, Costs Assessment 2021/6228.

"**Takata Airbag Class Actions**" means:

2017/00340824 Louise Haselhurst v Toyota Motor Corporation Australia Limited;

2017/00353017 Kimley Whisson v Subaru (Aust) Pty Limited;

2017 /00378526 Akuratiya Kularathne v Honda Australia Pty Limited;

2018/00009555 Owen Brewster v BMW Australia Ltd;

2018/00009565 Jaydan Bond v Nissan Motor Co (Australia) Pty Limited; and

2018/00042244 Camilla Coates v Mazda Australia Pty Limited.

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