

# FEDERAL COURT OF AUSTRALIA

## Kadam v MiiResorts Group 1 Pty Ltd (No 5) [2018] FCA 1086

File number(s): QUD 528 of 2016  
QUD 147 of 2017

Judge: **LEE J**

Date of judgment: 20 July 2018

Catchwords: **PRACTICE AND PROCEDURE** – representative proceeding – Part IVA class action and related proceeding by Indian regulator seeking relief on behalf of investors in large ‘Ponzi’ scheme operated in the Republic of India – questions as to appropriate declaratory and other relief

**EQUITY** – tracing of pooled funds of investors in an Indian “collective investment scheme” being funds transferred from India to Australia and then applied in breach of trust to acquire Australian assets – consideration of recovery of allowance out of trust fund for costs and expenses incurred in getting in trust assets

Legislation: *Corporations Act 2001* (Cth), ss 440D, 564  
*Federal Court of Australia Act 1976* (Cth), Part IVA, ss 33ZB, 33ZF  
*Federal Court Rules 2011* (Cth), Div 14.3  
*Legal Profession Act 2007* (QLD)  
*Probate and Administration Act 1898* (NSW), s 86  
*Securities and Exchange Board of India Act 1992* (Ind), s 11AA

Cases cited: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564  
*Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (in liq)* [2008] FCA 448; (2008) 246 ALR 580  
*Coad v Wellness Pursuit Pty Ltd (in liq)* [2009] WASCA 68; (2009) 40 WAR 53  
*Campden Hill Ltd v Chakrani* [2005] All ER (D) 238  
*Cristovao v Tan & Tan Lawyers Pty Ltd* [2018] FCAFC 41  
*Darwalla Milling Co Pty Ltd (ACN 009 698 631) v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388; (2006) 236 ALR 322  
*Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896;

(2017) 252 FCR 150  
*Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317  
*El Ajou v Dollar Land Holdings plc (No 1)* [1993] 3 All ER 717  
*El Ajou v Dollar Land Holdings Plc (No 2)* [1995] 2 All ER 213  
*Evans v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75  
*Ford v Earl of Chesterfield* (No 3) (1856) 21 Beav 426  
*Foskett v McKeown* [2001] 1 AC 102  
*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540  
*Ide v Ide* [2004] NSWSC 751; (2004) 184 FLR 44  
*IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* [2009] FCAFC 9; (2009) 253 ALR 240  
*In Re Universal Distributing Company Limited (in liq)* (1933) 48 CLR 171  
*International General Electric Company of New York Ltd v Commissioners of Customs and Excise* [1962] Ch 784  
*Kadam v MiiResorts Group 1 Pty Ltd (No 2)* [2016] FCA 1343; (2016) 118 ACSR 1  
*Kadam v MiiResorts Group 1 Pty Ltd (No 3)* [2017] FCA 1138  
*Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139; (2017) 252 FCR 298  
*Latham v Hubbard; Estate of Ross* [2014] NSWSC 805  
*Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; (2016) 245 FCR 191  
*Moodemere Pty Ltd (in liq) v Waters* [1988] VR 215  
*Perera v GetSwift Limited* [2018] FCA 732  
*Re Estate Gowing* [2014] NSWSC 247; (2014) 17 BPR 32,763  
*Re Estate of Edward Simshauser, (dec'd)* (NSW Supreme Court, Holland J, 24 November 1978, unreported)  
*Robinson, in the matter of ACN 069 895 585 Pty Ltd (formerly known as Waterman Collections Pty Ltd) (in liq)* [2013] FCA 706  
*Shirlaw v Taylor* (1991) 31 FCR 222  
*Stewart v Atco Controls Pty Ltd (in liq)* [2014] HCA 15; (2014) 252 CLR 307  
*Thackray v Gunns Plantations Ltd* [2011] VSC 380; (2011) 85 ACSR 144  
*Toksoz v Westpac Banking Corporation* [2012] NSWCA 199; (2012) 289 ALR 577

*The University of Western Australia v Gray (No 6)* [2006] FCA 1825

*Wright v Kirby* (1857) 23 Beav 463

Heydon JD, Leeming MJ and Turner PG, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, Butterworths, 2014)

Nair A, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (Oxford University Press, 2018)

Smith L, *The Law of Tracing* (Clarendon Press, 1997)

Leeming M, "Proprietary Relief and Tracing in Equity" (2016) 90 ALJ 92

Date of hearing:	6-9, 12-13 February, 13 March 2018
Date of last submissions:	9 April 2018
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	155
Counsel for the Applicants in QUD 528 of 2016:	Dr S S Monks
Solicitor for the Applicants in QUD 528 of 2016	Shine Lawyers
Counsel for the Applicant in QUD 147 of 2017:	Mr T Bradley QC, Mr M R Hodge QC, Ms J O'Connor (6, 7, 8, 9, 12, 13 February 2018) Mr T Bradley QC, Ms J O'Connor (13 March 2018)
Solicitor for the Applicant in QUD 147 of 2017:	DLA Piper Australia
Counsel for the First Respondent in QUD 528 of 2016 and QUD 147 of 2017	Mr M T Hickey (6, 12, 13 February 2018) Mr R Cowen, Mr A P Nase (7, 8, 9 February 2018) Mr D O'Brien QC (13 March 2018)
Solicitor for the First Respondent in QUD 528 of 2016 and QUD 147 of 2017	Tucker & Cowen Solicitors

Counsel for the Second Respondent in QUD 528 of 2016

The Second Respondent did not appear

Solicitor for the Second Respondent in QUD 528 of 2016

HWL Ebsworth Lawyers

Counsel for the Fourth Respondent in QUD 528 of 2016

The Fourth Respondent did not appear

Counsel for the Fifth and Sixth Respondents in QUD 528 of 2016

The Fifth and Sixth Respondents did not appear

Solicitor for the Fifth and Sixth Respondents in QUD 528 of 2016

Hall & Wilcox

Counsel for the Second Intervener in QUD 528 of 2016

Mr P A Looney QC, Ms A L Wheatley (6, 7, 8, 9, 12, 13 February 2018)

Solicitor for the Second Intervener in QUD 528 of 2016

Australian Government Solicitor

## **ORDERS**

**QUD 528 of 2016**

**BETWEEN:**                    **SUNANDA BALKRISHNA KADAM**  
First Applicant

**VISHAL DILIP MHETRE**  
Second Applicant

**ABASAHEB RUPNAR**  
Third Applicant

**AND:**                         **MIRESORTS GROUP 1 PTY LTD ACN 140 177 395**  
First Respondent

**PEARLS INFRASTRUCTURE PROJECTS LIMITED (INDIA)**  
Second Respondent

**PACL LIMITED (INDIAI)** (and others named in the Schedule)  
Third Respondent

**SECURITIES AND EXCHANGE BOARD OF INDIA**  
First Intervener

**THE COMMISSIONER OF TAXATION**  
Second Intervener

**JUDGE:**                    **LEE J**

**DATE OF ORDER:**    **20 JULY 2018**

### **THE COURT ORDERS THAT:**

1.     The proceedings be re-listed for a further hearing for the making of orders to be conducted at 10.15 am on 23 July 2018.

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

## ORDERS

QUD 147 of 2017

**BETWEEN:**                    **SECURITIES AND EXCHANGE BOARD OF INDIA**  
Applicant

**AND:**                         **MIRESORTS GROUP 1 PTY LTD ACN 140 177 395**  
First Respondent

**PEARLS INFRASTRUCTURE PROJECTS LIMITED (INDIA)**  
Second Respondent

**SUNANDA BALKRISHNA KADAM**  
Interested Person

**VISHAL DILIP MHETRE**  
Second Interested Person

**ABASAHEB RUPNAR**  
Third Interested Person

**JUDGE:**                      **LEE J**

**DATE OF ORDER:**    **20 JULY 2018**

**THE COURT ORDERS THAT:**

1.     The proceedings be re-listed for a further hearing for the making of orders to be conducted at 10.15 am on 23 July 2018.

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

## REASONS FOR JUDGMENT

### LEE J:

<b>A</b>	<b>Introduction</b>	[1]
<b>B</b>	<b>Events Leading up to the Class Action</b>	[8]
<b>B.1</b>	<b>The Nature of the Business Conducted by PACL</b>	[8]
<b>B.2</b>	<b>The Purpose for which Money was Collected by PACL and the Trust</b>	[11]
<b>B.3</b>	<b>The Application of Trust Monies Collected by PACL</b>	[14]
<b>B.4</b>	<b>Purchase of the Sanctuary Cove Properties</b>	[19]
<b>B.5</b>	<b>Receipt by MiiGroup of Trust Monies Held by PACL</b>	[22]
<b>B.6</b>	<b>Receipt by MiiResorts of Trust Monies Held by PACL</b>	[23]
<b>B.7</b>	<b>Use by MiiResorts of PACL Trust Monies to Purchase the Mirage</b>	[25]
<b>B.8</b>	<b>Use by MiiResorts trust monies to fund the renovation</b>	[28]
<b>C</b>	<b>The Proceeds &amp; THE FUND</b>	[29]
<b>D</b>	<b>SEBI, Procedural Disputation &amp; ‘Standing’ Issues</b>	[32]
<b>E</b>	<b>Partial Resolution of Other Disputes</b>	[40]
<b>F</b>	<b>Identification of the Residual Issues</b>	[44]
<b>G</b>	<b>Resolution of the Residual Issues</b>	[46]
	<b>Issue 1: whether the moneys held in the Fund should be declared as being held on trust on behalf of the investors?</b>	[46]
	<b>Issue 2: should a declaration be made that PPL holds the Sanctuary Cove Properties on trust for the Investors?</b>	[52]
	<b>Issue 3: Is Mrs Kadam entitled to declaratory relief?</b>	[53]
	<b>Issue 4: should a receiver be appointed to the Sanctuary Cove Properties and ancillary orders be made?</b>	[69]
	<b>Issue 5: what is the appropriate juridical basis for paying any allowance out of the Fund representing payment of proper and reasonable costs?</b>	[71]
	<i>The Class Action</i>	[71]
	<i>SEBI Proceeding</i>	[84]
	<b>Issue 6: should any amount be paid out of the Fund to Mrs Kadam and, if so, how should it be calculated?</b>	[86]
	<b>Issue 7: should any amount of Fund be paid to SEBI and, if so, how should it be calculated?</b>	[125]

<b>Issue 8: after payments authorised out of the Fund, how should the residual amount be distributed to the Investors?</b>	[128]
<b>Issue 9: should there be an order that MiiResorts pay the costs of Mrs Kadam?</b>	[150]
<b>Issue 10: what orders should be made under s 33ZB of the FCAA and in relation to the balance of the class action?</b>	[154]
<b>H Conclusion &amp; Orders</b>	[155]

## A INTRODUCTION

1 In *Kadam v MiiResorts Group 1 Pty Ltd* (No 2) [2016] FCA 1343; (2016) 118 ACSR 1 at 9 [35], Edelman J characterised the pleading in the first of these two proceedings as akin to the approach “*taken by a nervous first year law student answering an exam question, unsure about which points are important in the answer: identify[ing] every imaginable cause of action, and every possible permutation of causes of action arising from the facts*”. It is apt to describe the procedural history of this litigation in a similar way. An essentially straightforward case, primarily over funds held in trust, has been made overly complex by the creation of a fog of irrelevancies and collateral disputation. Groping steadily through the brume of false issues to reach the real questions requiring determination, has presented considerable case management challenges.

2 The *first* of the two proceedings is a representative action commenced pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) by, among others, Mrs Sunanda Kadam, the President of a community action group, Janlok Prathishtan Sanghata (**JPS**), representing 45,000 to 46,000 group members who invested and lost approximately \$8 million (**class action**). The group members invested in a ‘Ponzi’ scheme purporting to be a managed investment scheme by the Pearls Group of companies operated by PACL Limited (**PACL**), which operated in India for two decades. The group members are a subset of a larger group of investors of in excess of 58.5 million people who, it is said, invested a sum equivalent to about \$10 thousand million. As I will explain in detail below, PACL transferred investors’ funds to other entities, including a related entity, Pearls Infrastructure Projects Limited (**PIPL**). PIPL in turn transferred some of the investors’ funds to the first respondent (**MiiResorts**) and to a related entity (**MiiGroup**), both in Australia. As I will explain below, those respondents used the transferred funds to purchase and improve the property known as the Sheraton Mirage Resort located on Sea World Drive, Main Beach, on the Gold Coast in Queensland (**Mirage**);



and also used some of the investors' funds to purchase two properties in Sanctuary Cove (**Sanctuary Cove Properties**), also on the Gold Coast.

- 3 The *second* proceeding (**SEBI Proceeding**) was commenced by the Securities and Exchange Board of India (**SEBI**) being the body charged under the laws of the Republic of India with vindicating the rights of investors who contributed funds to PACL. SEBI alleged that PACL held the funds collectively as pooled funds on trust for the purpose of acquiring and developing agricultural land in various parts of India, allocating individual plots of such land to individual investors and transferring legal ownership of each allocated plot to each investor by a sale deed over time.
- 4 The relationship between those conducting the class action and SEBI has not been characterised by a high degree of cooperation. There is history behind this antagonism, which has its genesis in the refusal of SEBI (and a committee, set up pursuant to orders made by the Supreme Court of India), to instruct Australian solicitors to secure assets said to have been purchased by the use of the pooled investors' funds. The bulk of the disputation in case managing these proceedings has arisen by reason of arguments raised by the class action applicants as to the appropriateness of SEBI belatedly taking action on behalf of investors and as to perceived deficiencies in the case advanced by SEBI. Curiously, by way of contrast, the case as between the applicants in both proceedings and the respondents was eventually conducted with a degree of efficiency and was confined and narrowed during the conduct of the hearing in accordance with the duties of the parties under Part VB of the FCAA. Most of the complex issues set down for determination at the initial trial have been resolved. The reason why the class action applicants and SEBI became protagonists needs some further explanation, as this antagonism is reflected in the residuum of contested issues I need to resolve.
- 5 The balance of these reasons will be divided into the following topics:
  - B Events Leading up to the Class Action
  - C The Proceeds & the Fund
  - D SEBI, Procedural Disputation & 'Standing' Issues
  - E Partial Resolution of Other Disputes
  - F Identification of the Residual Issues
  - G Resolution of the Residual Issues

## H Conclusion & Orders

6 Before coming to these topics, it is convenient to deal with a preliminary issue. On 17 May 2018, after reserving, my Associate received a communication from the solicitors for MiiResorts (copied to the other parties) informing the Court that Administrators had been appointed to MiiResorts. Section 440D of the *Corporations Act 2001* (Cth) relevantly provides that during the administration of a company, a proceeding against the company cannot continue except with the administrator's written consent or with the leave of the Court.

7 In circumstances where, as explained below, admissions have been made by MiiResorts and declaratory relief is appropriate, and in the absence of any opposition, it is appropriate to grant leave for both of the proceedings against MiiResorts to proceed to the extent that they have not already resolved, for the purpose of making final orders.

## B EVENTS LEADING UP TO THE CLASS ACTION

### B.1 The Nature of the Business Conducted by PACL

8 PACL was incorporated as "Gurwant Agrotech Limited" in February 1996. In May 1996, the board agreed that PACL would focus on the acquisition and development of land in India on behalf of investors. The proposal was for investors to pay PACL for land under a scheme by which payments would be made by investors over time and, when all payments were made, PACL would transfer ownership of the land to the investor (**Scheme**). A Rule Book was adopted (which was later supplemented and amended by circulars) which set out the terms upon which PACL would invite offers to invest in the Scheme.

9 In order to invest in the Scheme, investors were required to apply using a prescribed form. This form comprised of an application form and an agreement between PACL and the investor. While the evidence reveals there were slight variations to the form over time, PACL used a common agreement for each type of investment.

10 The Scheme, from the point of view of attracting duped investors, was remarkably successful. During the period from 1996 to 2014, approximately 58.5 million people, often poorly educated and with very modest means, invested in the Scheme. Lamentably, of those, only approximately 12.23 million were allotted land. On one level, its popularity is not surprising. It was marketed to vulnerable people and the Scheme had a patina of respectability. By way of example, the financial years ended 2008 through to 2014, PACL's financial reports each included a statement with words to the following effect:

The company was engaged in the purchase of agricultural and non-agricultural land and its development thereof on behalf of customers. Land acquired from land owners directly or through intermediaries individuals and various companies are being shown as “Stock in Trade”. Land is being subsequently transferred in the name of customers after allotment by execution of the registered Sale Deed in favour of customers on fulfilment of other conditions.

## **B.2 The Purpose for which Money was Collected by PACL and the Trust**

- 11 There is no remaining contest between the parties as to the purpose for which money was obtained from investors. Apart from the finding consequent upon the adoption of a report from a referee (to which I will return below), the apparent legal effect of the documents signed by the investors was far from *recherché*. It is plain that PACL and the investors agreed that PACL would hold the money it collected from investors for the purpose of acquiring and developing agricultural land in India, and for subsequently allocating parts of that land to individual investors with legal title. It is also apparent from the contemporaneous business records that PACL pooled the monies it received (as there was no separate allocating of funds) and the relevant financial reports demonstrate that land was acquired and developed ‘globally’, hence investor’s funds were pooled to acquire and develop land prior to any allocation.
- 12 As a matter of Indian domestic law, there is no contest that the monies collected by PACL from investors were monies that were collected by PACL pursuant to a “collective investment scheme” within the meaning of s 11AA of the *Securities and Exchange Board of India Act 1992* (Ind). That provision, in a fashion not dissimilar to the Australian law relating to managed investment schemes, defines a “collective investment scheme” as a scheme by which, among other things, contributions or payments made by investors are pooled and utilised for the purposes of a scheme. In these circumstances, it is unsurprising that despite initial disputation and the need to appoint a referee as to questions of Indian domestic law, it was accepted that: all monies collected by PACL were monies that, as a matter of Indian law, were held on trust for investors; and as trustee, PACL held the pooled funds for the purpose of acquiring and developing agricultural land and for otherwise allocating that land to investors; and could not disburse or apply the funds collected for another purpose.
- 13 Indeed, given the documentation and arrangements in evidence, it is difficult to see why the nature of legal relations between PACL and the investors, or the terms pursuant to which the monies were held, was not evident from a preliminary review of the materials. Nor is it easy to understand why there could be any doubt that the apparent transfer by PACL of monies through a network of companies under its control to Australia to acquire property in the names

of PIPL or MiiResorts would not amount to conduct whereby trust monies were used for a purpose extraneous to the purpose of the trust. The only real complexity was not legal, but rather factual: being how the Scheme trust monies were allocated and the tracing of those monies, topics to which I now turn.

### **B.3 The Application of Trust Monies Collected by PACL**

14 The extent of the monies PACL received is contained in a letter from PACL's representatives to SEBI in August 2014 in which PACL confirmed it had not allotted land to approximately 46.31 million investors and that the extraordinary amount outstanding to those investors was, at that point in time, INR 29,420.65 crores (approximately \$5.7 thousand million).

15 In a report adduced in evidence dated 30 March 2017 (**Deloitte Report**), Mr Amit Bansal analysed each of the financial reports, bank statements and bank books for PACL for the periods 2009 to 2014. The results of his analysis were, in summary, as follows:

- (a) that during 2009 to 2014, PACL transferred funds to PIPL and to a number of other Indian-based companies and the amounts transferred were recorded in a number of different ways by using words such as "Purchase of Goods/Service", "Investments", "Remuneration to KMP", "Dividend Payments", "Expenses Reimbursed", "Advances for the purchase of land", "Loans and Advances – Others" and "Share application Money paid";
- (b) there were discrepancies between the financial reports and the bank books; in the financial year ended 2009 to 2010, the bank books recorded net payments of INR 722.62 crores whereas the financial statements recorded net inflows of only INR 152.62 crores; during the financial years ended 2009 to 2014, PACL transferred the total sum of 220.16 crores to PIPL; and 643.01 crores to other Indian based entities.

16 At page 15 of the Deloitte Report, Mr Bansal observes that following an analysis of the bank statements for PIPL, he identified that INR 220.16 crores was transferred by PACL directly to PIPL during the financial years ended 2009 through to 2014. In addition to the amounts transferred directly by PACL to PIPL, Mr Bansal also reports a series of transfers from PACL to other companies and then from those companies to PIPL (being INR 490.21 crores as identified at Annexure 3 to the Deloitte Report). It was on this basis, that Mr Bansal concluded

that, during the period 2009 to 2014, PIPL received the total sum of INR 710.37 crores directly or indirectly from PACL.

17 Mr Bansal also analysed the bank books and bank statements available for PIPL and identified 43 outward remittances from PIPL to Australia aggregating to INR 633.25 crores. The details of those remittances are identified at Annexure 5 to the Deloitte Report.

18 A FIFO (first-in, first out) exercise was undertaken by Mr Bansal in relation to each of these 43 outward remittances for the purpose of identifying the source of those funds. The result of that exercise was that, of the INR 633.25 crores transferred by PIPL to Australia, INR 602.35 crores could be traced directly to PACL. The balance, being INR 30.9 crores, comprised the sum of INR 18.34 crores (attributable to dividends, overdraft and credit card facilities, tax refunds and cancelled direct debits), and INR 12.56 crores (attributable to monies which could not be traced due to account statements not being available, payee details not being provided or a gap in the FIFO methodology). It follows that PIPL received at least the sum of INR 602.35 crores from the monies collected by PACL from investors.

#### **B.4 Purchase of the Sanctuary Cove Properties**

19 In July 2011, PIPL purchased the Sanctuary Cove Properties for \$5,218,243.30. In his report dated 6 December 2017 (**Lytras Report**), Mr Elia Lytras considered the source of funds used, and identified the source as a disbursement of INR 250,764,748 (25.08 crores) from PIPL's ING Vysya Bank Statement on 4 July 2011. Three reasons were provided: *first*, he could identify no equivalent payments in the bank statements for any of MiiGroup, MiiResorts or the MiiGroup Master Unit Trust; *secondly*, the settlement amount is consistent with a remittance advice from PIPL to ING Vysya dated 1 July 2011 in which PIPL requested the sum of \$5,218,243.30 be remitted to the solicitors acting on the conveyance; and *thirdly*, the exchange rate for INR 250,764,748 to Australian dollars equates to an amount very similar to the amount paid to those solicitors, Hickeys Lawyers, being \$5,218,243.30.

20 Mr Bansal provides further support for this conclusion as of the INR 633.25 crores transferred to Australia, the sum of 25.08 crores was noted in PIPL's bank books as being transferred for the purpose of "acquiring immovable properties in Australia". This is identical to the amount identified by Mr Lytras as comprising the source of the funds used by PIPL to purchase the Sanctuary Cove Properties.

21 There was no dispute that the Court can safely draw the conclusion that the monies used to  
purchase the Sanctuary Cove Properties were sourced from the original pooled trust monies.

#### **B.5 Receipt by MiiGroup of Trust Monies Held by PACL**

22 The Lytras Report also considers the amount of money transferred directly by PIPL to  
MiiGroup and to MiiResorts during this period. Mr Lytras identifies that between 13 November  
2009 and 20 January 2014, PIPL transferred directly the total sum of \$97,990,000 to MiiGroup.  
The detail is unnecessary to recount, but the Deloitte Report demonstrates the connexion  
between the trust monies held by PACL and the monies ultimately transferred by PIPL to  
Australia.

#### **B.6 Receipt by MiiResorts of Trust Monies Held by PACL**

23 Similarly, in addition to the transfer of monies to MiiGroup, the Lytras Report also considers  
the transfer of monies by PIPL directly to MiiResorts; and by PIPL to MiiGroup and then to  
MiiResorts. Mr Lytras identifies that between 13 November 2009 and 20 January 2014, PIPL  
transferred the total sum of \$35,000,000 directly to MiiResorts. He also provides a summary  
of the cash flow received from MiiGroup during the financial years ended 2010 through to  
2016. A review of that summary reveals that almost all of the cash flow received by MiiGroup  
came from “investing cash”.

24 There was no dispute that MiiResorts received the total sum of \$109,608,611.86 from PIPL,  
comprising \$35,000,000 received directly from PIPL and \$74,608,611.86 received from PIPL  
through MiiGroup.

#### **B.7 Use by MiiResorts of PACL Trust Monies to Purchase the Mirage**

25 In November 2009, MiiResorts entered into two related contracts by which it agreed to  
purchase the Mirage. Under those contracts, the purchase price for the Mirage was to be paid  
as follows: an initial deposit of \$57,500 on or around 6 November 2009; a subsequent deposit  
of \$6,192,500 by 27 November 2009; and a final payment of about \$56,250,000 (subject to  
adjustment).

26 On 20 May 2010, MiiResorts became the registered owner of the Mirage.

27 Mr Lytras sets out a detailed investigation into the source of the monies used by MiiResorts.  
It is again unnecessary to recount the details, but the uncontested conclusion was that regarding  
the total sum of \$62,104,447.86 used to purchase the Mirage, \$57,500.00 was paid by

MiiGroup and \$62,046,947.86 by MiiResorts. Based on an analysis of the contemporaneous bank statements, Mr Lytras concluded that the amount paid to purchase the Mirage came from the monies that have been directly identified as having been transferred by PIPL. It follows that it can be safely inferred that there is a connexion between the pooled trust monies held by PACL with the entirety of this amount of money transferred by PIPL and ultimately to MiiResorts.

### **B.8 Use by MiiResorts trust monies to fund the renovation**

28 Shortly after MiiResorts executed the contracts for the purchase of the Mirage, the board of MiiResorts considered a proposal to refurbish the hotel. Mr Lytras concluded that the amount expended by MiiResorts on the renovation of the Mirage was \$16,951,110 and that this expenditure was incurred between 15 February 2011 and 1 September 2015. Again, evidence was given as to possible sources of these funds, however, due to the mixing of loan funds in MiiResorts' bank account, it was not possible to conclude definitively the quantum of trust funds used to fund the renovation (the consequence of this lacuna in the evidence is addressed below).

### **C THE PROCEEDS & THE FUND**

29 In October 2016, a number of contracts were entered into for the sale of the Mirage and the associated intellectual property for a total consideration of \$140 million plus any applicable adjustments. On 24 January 2017, this Court made an order by consent on terms that the solicitors, McCullough Robertson were to receive the entire balance proceeds of the sale of the Mirage and invest those monies in an interest-bearing account with an Australian trading bank until 24 February 2017.

30 On or about 27 January 2017, settlement occurred of the sale of the Mirage and the balance of the proceeds of sale, in the amount of \$87,368,033.50, was received by McCullough Robertson and invested into an interest-bearing account. On 24 February 2017, the Court made a further order directing that McCullough Robertson hold and invest these proceeds in an interest-bearing account, until further order (**Fund**).

31 It is no doubt obvious, but worth noting, that the only basis upon which McCullough Robertson received the proceeds (and continues to hold the Fund) is pursuant to the orders of the Court. It was common ground that those orders do not affect the beneficial ownership of the Fund (including the alleged equitable interest of the investors in the traceable proceeds of the trust

property, to the extent those proceeds constitute the Fund). I will deal with my conclusions as to tracing later, in Section G, Issue 1 below.

## **D SEBI, PROCEDURAL DISPUTATION & ‘STANDING’ ISSUES**

32 The circumstances by which there came to be two proceedings before the Court, being the class action and the SEBI Proceeding, are discussed in some detail below, and more briefly in *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139; (2017) 252 FCR 298 at 301-4 [7]-[16]. As was noted at 303-4 [13]-[15]:

The two proceedings have been case managed together. A dispute has arisen between the Janlok applicants and SEBI as to whether SEBI has (what has been described as) ‘standing’ to seek the relief it seeks in the originating application in the separate proceeding. The matter came before Murphy J on 16 June 2017, at which time his Honour made orders that both sets of proceedings be heard together and that evidence in one proceeding be evidence in the other. His Honour also made a number of detailed orders to ready the matter for a separate trial of issues which arise in each proceeding. Those questions were set out in annexure A to the orders made by Murphy J. Relevantly for present purposes, those orders included the following questions:

(1) Does the court have jurisdiction to determine the claims made in these proceedings?

...

(9) Does SEBI have standing to bring the claims for relief set out in Originating Application in Federal Court proceeding QUD147/2017?

The matter came before me for the first time on 13 July 2017. At that time there was a lengthy case management hearing in which I considered the most efficient way to bring all the issues identified in the orders of 16 June 2017 to a final hearing. During the course of that case management hearing, I raised with the parties my view that questions of jurisdiction and ‘standing’ ought be resolved with celerity and my preliminary view that the most efficient way of resolving any questions which arise in relation to expert evidence on Indian domestic law may be to refer those questions to a referee for report (while concurrent and unrelated interlocutory steps could take place readying the matter for hearing next February).

I was told that rather than adopting the approach of a reference, a timetable could be put in place for the exchange of expert evidence, and I was content to allow such a course to occur; however, I foreshadowed that if the preparation of opinion evidence could not be completed in a satisfactory form within the then expected timeframes, it may then be appropriate for the parties to each nominate an expert, and for the Court to order a referee to liaise with the experts and prepare a reference report.

33 In the events that happened it was necessary for a referee (the Hon Ian Callinan AC QC), to prepare a report for reasons explained in *Kadam (No 4)*. Three questions were posed and eventually a report was prepared and filed. The referee gave very detailed reasons in his comprehensive report, but it is unnecessary to set them out here, as the referee’s conclusions



were adopted by the Court by consent of the parties. It suffices to note that in relation to the three questions identified, the referee concluded:

1. *Under the law of the Republic of India, was the scheme operated by PACL pursuant to which it collected funds from Indian investors a “collective investment scheme” within the meaning of s 11AA of the SEBI Act?*

Yes.

2. *Under the law of the Republic of India, did PACL hold the monies that it received from Indian investors on trust for those investors?*

Yes.

3. *Under the law of the Republic of India, having regard to the terms of the three Orders of the Supreme Court of India dated 2 February 2016, 5 April 2016 and 25 July 2016, the provisions of the SEBI Act, the SEBI Regulations and the law of India, what is the right, interest, power or authority of SEBI (if any) as distinct from the Lodha Committee or Lodha CJ, in seeking relief in a foreign Court (being the Federal Court of Australia) being:*

- *a determination of the Court as to whether the proceeds of the sale of the Sheraton Mirage are held on trust for the Indian investors who invested monies in the collective investment scheme operated by PACL;*
- *a determination of the Court as to whether the Indian investors who invested monies in the collective investment scheme operated by PACL are entitled to equitable compensation and an account of profits from MiiResorts;*
- *a determination of the Court as to whether a restitutionary order should be made against MiiResorts in favour of the Indian investors who invested monies in the collective investment scheme operated by PACL;*
- *a determination of the Court as to whether the Sanctuary Cove Properties (which are Lots 19 and 20 o Group Titles Plan 107217 on the Gold Coast, Queensland) are held on trust for the Indian investors who invested monies in the collective investment scheme operated by PACL;*
- *a determination of the Court as to whether the Indian investors who invested monies in the collective investment scheme operated by PACL are entitled to equitable compensation and an account of profits from PIPL; and*
- *a determination of the Court as to whether a restitutionary order should be made against PIPL in favour of the Indian investors who invested monies in the collective investment scheme operated by PACL?*

My answer is, having regard to the relevant three Orders of the Supreme Court of India dated 2 February 2016, 5 April 2016 and 25 July 2016, as well as to the SEBI Act, the SEBI Regulations, the Trusts Act and the unwritten law of India, that SEBI has a full right, interest, power and authority to seek the relief in Australia of the kind set out in ... Question 3.

34 The eventual consensual resolution of these matters of Indian law was gratifying, but the internecine dispute between the class action applicants and SEBI prior to service of the report was unnecessary and, in certain respects, unedifying. The fundamental rationale for the resistance to the involvement of SEBI (as either an intervener in the class action or as an

applicant in its own proceeding) when the Indian authorities did decide to become involved, appears to be related to a misapprehension as to the nature of the interests that Mrs Kadam sought to vindicate on behalf of group members and the way in which equity fashions remedies.

35 Shorn of unnecessary complications, Mrs Kadam's position, repeated on a number of occasions, was that group members had suffered 'loss' in respect of which they sought the payment of money (sometimes described as damages or sometimes as 'equitable damages'). It was further said that SEBI was not in a position to 'prove loss' and hence obtain 'damages' on behalf of those investors who were not group members. Enough has already been said to indicate that this reasoning broke down on a number of levels. The central difficulty was the notion that in making a claim on the Fund, investors were somehow vindicating a right to obtain damages or equitable compensation. I attempted to dispel this heterodoxy on a number of occasions. I raised the question with senior counsel then acting for Mrs Kadam; why would equity fashion a remedy which would allow Mrs Kadam and group members to have access to the entirety of the Fund in circumstances where the evidence would prove overwhelmingly that it was impossible, in the light of the pooling of investors' funds, to demonstrate a direct connexion between group members' contributions and the Fund and why other investors, whose contributions had also been pooled, would not have precisely the same entitlements to the Fund as Mrs Kadam and the group members? No answer to this central difficulty with the complicated case theory of Mrs Kadam was ever forthcoming; the question provoked the repetition of the *non sequitur* that relief should be denied to SEBI because it could not prove the 'loss' of the investors. I will deal further with this argument in Section G, Issue 8 below.

36 Whether SEBI commenced its own proceedings or was involved in the case as an intervener protecting the interests of investors generally, the same issue would arise at the stage of granting relief. For this reason, it seemed to me that the issue of 'standing' (or, more precisely, SEBI's rights and duties pursuant to Indian domestic law, which impact, or may impact, on its ability to seek relief in a foreign court of the type sought) was a costly distraction.

37 Another problem with the way the class action was run, was that until orders were made readying the matter for an initial trial of the claim of Mrs Kadam and common issues, there seemed to be an expectation that the group members would somehow prove their individual cases for entitlement with regard to the Fund. Of course, that was never going to be the case because the lead applicant, Mrs Kadam, would run her individual case (perhaps with one or two others if necessary) and, in accordance with usual Part IVA procedure, seek a

determination of their individual claims together with a determination of common issues. Indeed, this confusion as to the appropriate form of declaratory relief persisted until final submissions. Apart from obscuring the true nature of the rights of the class action applicants and group members, the resistance to SEBI advancing a claim on behalf of all investors was difficult to understand, other than as reflecting past antagonism or a concern that it may impact upon recovery of costs of the class action (another topic to which I will return in Section G Issue 6 below). In reality, it is difficult to see why there was ever a principled basis for resisting SEBI pursuing its role as the statutory body entrusted with recovering funds on behalf of the investors when it finally decided to advance their interests.

38 This tension between Mrs Kadam and SEBI went so far as to result in the retention of two experts who were unable to work constructively together to assist the Court in relation to the position under Indian law. Nor, oddly, could agreement even be reached on a suitable Indian referee, which necessitated the appointment of an Australian referee to resolve the contested issue of 'standing' once and for all.

39 I have been critical in these reasons as to the way in which the class action was pleaded and advanced, but I should record that things did change immediately before and during the initial hearing. The court obtained assistance from the submissions of Dr Monks who appeared for Mrs Kadam at the initial hearing, and once the referee report was obtained, those acting for Mrs Kadam and SEBI did, for the most part, work cooperatively and attention was then directed to the true issues that needed to be resolved.

## **E PARTIAL RESOLUTION OF OTHER DISPUTES**

40 Apart from Mrs Kadam, the group members and the balance of the investors (through SEBI), there were other demands on the Fund.

41 The *first* was the vendor of the Mirage, MiiResorts which had expended substantial funds on the renovation of the Mirage. It will be recalled that there was a mixing of loan funds in MiiResorts' bank account, meaning it was not possible to determine the quantum of trust funds used to fund this renovation of the Mirage. During the initial hearing, a Statement of Agreed Facts and Contentions (**agreed facts**) was filed as between SEBI and MiiResorts, noting that the investors are the beneficial owners of the proceeds of sale of the Mirage consisting, together with accrued interest, the Fund, save for the sum of \$5 million (paragraph 51) and that SEBI did not press its claims against MiiResorts with respect to the sum of \$5 million (paragraph 52). Hence, by reason of a want of evidence in proving a beneficial entitlement to all the

monies held in the Fund, SEBI no longer sought relief against MiiResorts, with respect to that sum of \$5 million and amended its Originating Application accordingly. No such agreement was reached in the class action, but no forensic accountant's report or other admissible evidence was adduced to prove that funds of Mrs Kadam, or any other group member, can be traced into funds used for the renovation and repair of the Mirage and, in the end, there was no contrary position, taken by Mrs Kadam, to the course proposed by SEBI. In the circumstances, without opposition from Mrs Kadam, an order was made on 14 March 2018 that MiiResorts be paid a sum of \$5 million out the Fund.

42 The *second* claimant was the Commissioner of Taxation (**Commissioner**). In February 2017, the Commissioner was granted leave to intervene. The initial trial, which commenced on 6 February 2018, initially involved the Court determining various questions being Mrs Kadam's claims for relief and certain other issues specified in orders made in December 2017. Relevantly, the Commissioner sought determination as to whether following the issue of garnishee notices, the Fund was the subject of a statutory charge in favour of the Commissioner in the amount of either \$20,272,684.50 or \$35,494,651.85. In the event it was determined that the Fund was held on trust other than for MiiResorts in its own right, the Commissioner submitted that it was entitled to be subrogated to MiiResorts in respect of MiiResorts' right of indemnity in respect of its tax liability of \$35,494,651.85. Further, the question arose that if any amount was determined to be ordered to be paid to the investors, allowance should initially be made for payment to the Commissioner for the tax liability of \$35,494,651.85. Again, this aspect of the case resolved by consent and on 12 February 2018 a sum (\$13,746,643.13 together with 10% of accretions on the Fund less withholding tax payable) was agreed to be paid to the Commissioner in resolution of all the Commissioner's claims.

43 For the purposes of the balance of these reasons, when I refer to the Fund, it will be to the residuum of the initial monies held, less the payments made to resolve the disputes as to claims on the Fund involving MiiResorts and the Commissioner.

## **F IDENTIFICATION OF THE RESIDUAL ISSUES**

44 Following the attenuation of the controversy in the way I have explained, the following matters still require resolution:

- Issue 1: whether the moneys held in the Fund should be declared as being held on trust on behalf of the investors?

- Issue 2: should a declaration be made that PPL holds the Sanctuary Cove Properties on trust for the Investors?
- Issue 3: Is Mrs Kadam entitled to declaratory relief?
- Issue 4: should a receiver be appointed to the Sanctuary Cove Properties and ancillary orders be made?
- Issue 5: what is the appropriate juridical basis for paying any allowance out of the Fund representing payment of proper and reasonable costs?
- Issue 6: should any amount be paid out of the Fund to Mrs Kadam and, if so, how should it be calculated?
- Issue 7: should any amount of Fund be paid to SEBI and, if so, how should it be calculated?
- Issue 8: after payments authorised out of the Fund, how should the residual amount be distributed to the Investors?
- Issue 9: should there be an order that MiiResorts pay the costs of Mrs Kadam?
- Issue 10: what orders should be made under s 33ZB of the FCAA and in relation to the balance of the class action?

45 I will deal with the resolution of each of these residual issues separately in the following section.

## **G RESOLUTION OF THE RESIDUAL ISSUES**

### **Issue 1: whether the moneys held in the Fund should be declared as being held on trust on behalf of the investors?**

46 As would be now be clear, on the basis of the evidence summarised above, SEBI contends that the transfers of the pooled investors' funds by PACL to PIPL and other entities, and ultimately to Australia, were in breach of trust and the investors' funds can be traced to the Fund. The investors therefore together have a beneficial interest in the Sanctuary Cove Properties and the proceeds of sale. This necessarily involves an application of principles of tracing.

47 In an oft-cited passage, the nature of tracing was explained by Lord Millett in *Foskett v McKeown* [2001] 1 AC 102 at 128 as follows:

Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds

can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset.

(citations omitted)

48 Tracing is an evidentiary process, not a remedy itself: see *Evans v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75 at 103 [134] per Spigelman CJ (with whom Handley and Santow JJA agreed). The process is concerned with identifying a causal chain or connexion from the original property owned by the claimant to other property in the hands of another. As Allsop ACJ explained in *Toksoz v Westpac Banking Corporation* [2012] NSWCA 199; (2012) 289 ALR 577 at 579 [8]: “[m]oney can be traced notwithstanding an inability of the follower to connect each link in the chain of accounts. Common sense and reasonable inference play their part, especially if there is fraud involved and if there is a lack of explanation”. It is unnecessary in this case to have regard to the differences, if any, in tracing at law and in equity, because both SEBI and the class action applicants rely on the findings in the referee’s report, and the concession in the agreed facts, to assert that any claim is an equitable one.

49 Recently, Dr Aruna Nair, in *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (Oxford University Press, 2018), at page 138 ([4.05]-[4.06]) explained:

Tracing usually requires a claimant to affirmatively prove the transactional links between his original asset and the asset that he wishes to identify as its traceable product. It is not usually enough for him to show that the defendant has, in the past, misappropriated his assets and that she cannot, or refuses to, identify the source of every asset that she now holds: it is up to the claimant ‘to adduce evidence to prove the necessary nexus’ (see *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443, [53] (Keene LJ). See also *Islamic Republic of Pakistan v Zardari* [2006] EWHC 2411, [61]-[63] (Lawrence Collins J)...

This does not, however, mean that the claimant must be able to positively, and with total certainty, identify each and every transaction that leads from her asset to the substitute asset. The ordinary civil standard of proof applies, so that courts may infer the existence of transactional links based on various factors that suggest the likelihood of such links, on the balance of probabilities. Absence of alternative funds to make a purchase (eg *Lane v Dighton* (1762) Amb 409, 27 ER 274; *Willis v Willis* (1740) 2 Atk 71, 26 ER 443; *Harford v Lloyd* (1855) 20 Beav 310, 52 ER 622; *Wilkins v Stevens* (1842) 1 Y & CCC 431, 62 ER 957; *Black v Freedman & Co* (1910) 12 CLR 105; *El Ajou v Dollar Holdings plc (No 1)* [1993] 3 All ER 717 (HC)), the intentions motivating the original misappropriation (eg *Lane v Dighton* (1762) Amb 409, 27 ER 274; *Harford v Lloyd* (1855) 20 Beav 310, 52 ER 622; *Relfo Ltd (In Liquidation) v Varsani* [2014] EWCA Civ 360), and the timing, amounts (*El Ajou v Dollar Holdings plc (No 1)* [1993] 3 All ER 717 (HC), *Relfo Ltd (In Liquidation) v Varsani* [2014] EWCA Civ 360), and context of payments have all been used as evidence justifying the relevant inference.

50 When, like here, one is tracing out of an asset into a fund (such as the money held in the Fund arising from the sale of the Mirage), it is necessary to first determine the extent to which the beneficiary's traceable value existed in the asset immediately before sale: see Lionel Smith, *The Law of Tracing* (Clarendon Press, 1997) at 157 and 181. In doing so in this case, the starting point is establishing, with regard to the Scheme, that there is both a trust and also a breach of trust. For reasons already explained, in the present circumstances, the existence of the trust and its breach are established beyond peradventure.

51 There is no dispute, for reasons already detailed, that the necessary causal connexion exists between the Fund and the monies paid over to PACL by the investors (including Mrs Kadam and the group members) and then, after pooling, transferred by PACL to PIPL and other entities, and ultimately to Australia, in breach of trust. The sensible, robust approach, characteristic of the Australian approach to tracing (see Justice Mark Leeming "*Proprietary Relief and Tracing in Equity*" (2016) 90 ALJ 92 at 94), provides an answer in the present circumstances on the uncontested evidence, and there is no reason why declaratory relief should not follow to vindicate the claims of the investors on the Fund.

**Issue 2: should a declaration be made that PPL holds the Sanctuary Cove Properties on trust for the Investors?**

52 The answer to Issue 2 is no different to the answer to Issue 1 and the process of reasoning is the same. It is also made out on the evidence, and not in contest, that the transfers of investors' pooled funds by PACL to PIPL and other entities, and ultimately to Australia, were in breach of trust and the investors' funds can be traced to the Sanctuary Cove Properties. Declaratory relief should follow.

**Issue 3: Is Mrs Kadam entitled to declaratory relief?**

53 Whether more granular declaratory relief vindicating the claim of Mrs Kadam should be granted is more controversial.

54 As noted above, by orders made in December 2017, the Court ordered that it determine the claims of Mrs Kadam but not that of group members at the initial trial, consistent with usual Part IVA procedure. Although as President of JPS, Mrs Kadam gave evidence that JPS had 34,313 members who had made 47,153 investments with PACL, proving these individual group member claims in some sort of collective fashion was not the subject of the hearing.

55 More relevantly, at the hearing, an affidavit was read sworn by Mrs Kadam, in which she gave uncontested evidence that she made three investments with PACL being:

- (a) INR 30,000, consisting of six annual instalments each of INR 5,000 made between January 2006 and January 2011, which resulted in receipt by Mrs Kadam of an “allotment letter” in or about January 2009, and the payment of INR 46,200 on the maturity of the investment in January 2012.
- (b) INR 39,600, by 72 monthly instalments each of INR 550, commencing on 30 April 2009 (however, these ceased in about August 2014, when Mrs Kadam became aware of the SEBI investigation into PACL); Mrs Kadam has not recovered any of the approximately INR 35,200 she paid to PACL.
- (c) INR 75,000, by six annual instalments each of INR 12,500. Mrs Kadam paid the first four instalments between May 2011 and May 2014, but again, not the remaining instalments due in May 2015 and May 2016; Mrs Kadam has not recovered any of the INR 50,000 she paid to PACL.

56 For the purposes of determining Mrs Kadam’s individual claim, it is evident, on the basis of her unchallenged evidence, that Mrs Kadam understood at the time of making each investment that the money invested would be used to purchase land in India and that she did not give her permission (and was never asked for her permission) to use the money she invested to purchase land in Australia, or for the money to be transferred out of India or used for any other purpose. Like the other investors, Mrs Kadam’s claim to a proprietary interest must be determined pursuant to the principles of claiming. Mrs Kadam must be able to establish that there was a relevant trust, that there was a breach of trust and that the trust property can be traced.

57 Unsurprisingly, no specific evidence was led to demonstrate that the particular monies invested by Mrs Kadam in PACL were monies that can be individually traced to either the Sanctuary Cove Properties or the proceeds of sale of the Mirage. The evidence is that Mrs Kadam was an investor in PACL, her contributions were pooled with other investors as part of the Scheme and that part of her investments remain unpaid. It follows that her evidence taken together with the findings based on the evidence led by SEBI, is that Mrs Kadam invested monies which formed part of the monies that were collected by PACL and held by it on trust for the investors. I accept the submission by SEBI, which accords with common sense, that no finding can be made, that just because Mrs Kadam was an investor, this means that her money (as distinct from the general pool) was used to purchase either the Sanctuary Cove Properties or the Mirage



or was used to renovate (or refurbish) the Mirage. There are a number of reasons why this is so, including that during the period that Mrs Kadam invested, PACL acquired some land for investors and it is possible that some amounts invested by Mrs Kadam were used towards, at least notionally, the acquisition of land in India, consistently with the terms of the relevant trust. Further, even assuming that the amount of Mrs Kadam's investment was expended on the Sanctuary Cove Properties and the Mirage, it is not possible to identify which property or properties and in what proportions.

58 Although Mrs Kadam has not established a proprietary interest arising by reason of the specific use of the monies she invested, she has established that she falls within the class of investors that together hold a proprietary interest in the Sanctuary Cove Properties and are the beneficial owners of the Fund in the way explained above.

59 By the conclusion of the hearing, the declaratory relief sought by Mrs Kadam was as follows:

Part of the balance of the proceeds of sale of the Sheraton Mirage that are held in the trust account of McCullough Robertson Lawyers pursuant to Order 1 made in proceeding QUD528 of 2016 on 23 May 2017 (**the Trust Account Monies**) is held on trust or subject to an equitable charge in favour of the first applicant, Sunanda Balkrishna Kadam.

Part of Lots 19 and 20 on Group Titles Plan 107217 (being the property at 1019-20 Edgecliff Drive, Hope Island, Queensland) (or part of the proceeds of its sale) is held on trust or subject to an equitable charge in favour of the first applicant, Sunanda Balkrishna Kadam.

60 SEBI opposes the declarations sought by Mrs Kadam. Leaving aside the precise terms of the declarations, at the level of theory, this opposition is surprising as no declaratory relief is now sought which is contrary to that sought by SEBI. Indeed, as Mrs Kadam submits, the relief now sought reflects that sought by SEBI. If all of the investors have a beneficial interest in the Funds, and Mrs Kadam is an investor (which SEBI acknowledges is established), it follows that Mrs Kadam also has an entitlement.

61 The effect of SEBI's submissions was that it was sufficient for SEBI to prove that investors generally provided money which went into the mixed fund, from which funds were taken that were ultimately expended upon the properties in question. If SEBI is correct that it was unnecessary to identify out of the vast class of unpaid investors whose funds went to purchases in India, whose funds were sent to Australia, then this is also true of Mrs Kadam. As Mrs Kadam submitted, she either has an interest or she does not, and every other Indian investor is in the same position.

62 Two further substantive points seem to be raised by SEBI as to why the declaratory relief should be refused: *first*, is the suggestion by SEBI that the declarations sought would have no utility: see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2; and *secondly*, that that the making of the declarations would offend principles of comity.

63 Neither point has any substance.

64 *First*, this is no hypothetical or abstract question. Apart from enforcing her entitlement to be treated as an investor who, together with others, has beneficial interest in the Fund and in the Sanctuary Cove Properties, a failure to make the declaration could have costs consequences. MiiResorts has asserted that Mrs Kadam has been wholly, or almost wholly, unsuccessful and that as a result MiiResorts should not have to pay costs.

65 Having said this, any declaratory relief needs to be carefully framed, particularly in the context of a class action. As I explained in *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896; (2017) 252 FCR 150, the declaration of right must be limited to a party whose claim is being finally determined at the initial hearing (as has been belatedly recognised in the relief sought by Mrs Kadam). In *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540, a final judgment at an initial trial was entered in relation to the individual claim of the representative applicant but the primary judge went on to make a declaration in connexion with claims of group members. As I explained in *Dillon* at 156 [25]:

...the Court purported to make an interlocutory order in the form of a declaration affecting the rights of the respondent and group members. In noting that the making of such a declaration was “wrong”, Gummow and Hayne JJ said (at 590 [128]) that an: “‘(i)nterlocutory declaration’ is a form of order not known to the law”. The same point was made in another representative proceeding by Hayne and Callinan JJ in *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at [143].

66 The nature of declaratory relief is to determine, on a final basis, the whole or part of the justiciable controversy between the actors to a dispute: see, for example, *International General Electric Company of New York Ltd v Commissioners of Customs and Excise* [1962] Ch 784 (Upjohn LJ and also Diplock LJ) and the cases collected in Heydon JD, Leeming MJ and Turner PG, *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies* (5th ed, Butterworths, 2014) at [19-140].

67 The problem identified in *Graham Barclay Oysters* and *Dovuro* does not exist in this case. I am not making a ‘declaration’ which is, in effect, a form of provisional statement of entitlements of the represented persons, by declaring that each of them is an investor entitled

to succeed in same way as Mrs Kadam. Rather a determination is being made on the evidence as to the position, on a final basis, of Mrs Kadam in relation to the Fund and the Sanctuary Cove Properties. The broad discretionary power to grant declaratory relief is “*confined by the considerations which mark out the boundaries of judicial power*” so that “*declaratory relief must be directed to the determination of legal controversies*”: *Ainsworth* at 582 per Mason CJ, Dawson, Toohey, Gaudron JJ. An appropriately expressed declaration of right in favour of Mrs Kadam performs such a role.

68 *Secondly*, the making of a declaration would not offend principles of comity. SEBI relies on the referee’s report to support the assertion that Mrs Kadam would not obtain declarations in India. Mrs Kadam is not, however, suing in India. She is suing in Australia in relation to assets located in Australia, and she is entitled to the protections and remedies available under Australian law. As counsel for Mrs Kadam points out, there is a certain irony in the position taken by SEBI in this regard. As I will explain below, Mrs Kadam only brought proceedings in Australia because SEBI would not, or believed it could not, do so. In effect Mrs Kadam was forced to take action to vindicate her rights and the rights of group members. As a matter of discretion, there does not seem to me to be any basis why the Court would refuse relief to Mrs Kadam in the present circumstances. Her claim was resisted, and she is entitled to the vindication of her position as someone who has established that she was an investor, whose funds were pooled, being funds that were then used in breach of trust. Moreover, the evidence has established that those pooled funds can be traced to both the Fund and the Sanctuary Cove Properties. Declaratory relief in favour of Mrs Kadam should follow, although the precise form of that relief should be directed at declaring that she is one of the investors on whose behalf the Fund and the Sanctuary Cove Properties are held.

**Issue 4: should a receiver be appointed to the Sanctuary Cove Properties and ancillary orders be made?**

69 Division 14.3 of the *Federal Court Rules 2011* (Cth) (**FCR**) provides for receivers. The power of the Court to appoint a receiver is, given the nature of this Court, statutory, but it has its origin in an equitable remedy and can be made pursuant to s 23 of the FCAA: see *The University of Western Australia v Gray (No 6)* [2006] FCA 1825 at [71] per French J. As was explained by French J in *Gray*, the “*class of circumstances in which such a power may be exercised is not closed*”.

70 Here the relevant circumstance is to allow for a realisation of the Sanctuary Cove Properties for ultimate distribution to those entitled to the proceeds. To allow for distribution to investors, it is accepted that it is necessary that the Sanctuary Cove Properties be sold. There was no suggestion by any party that this could not be most effectively performed by a receiver who, as an officer of the Court, will both manage the property until sale can be settled and arrange for distribution of the net proceeds to augment the Fund which, pursuant to orders I will make, will then be distributed to those entitled to them. An order for a receiver to be appointed will be made acting, in effect, as a trustee for sale. Further orders should be made arming the receiver with powers to realise the Sanctuary Cove Properties to allow remission of the net proceeds to the Fund. Given the very limited scope of the role, there is no reason why tenders should not be sought by SEBI from appropriately qualified individuals and, following upon this process, orders can be made setting a cap on costs for the completion of the task, subject to further order.

**Issue 5: what is the appropriate juridical basis for paying any allowance out of the Fund representing payment of proper and reasonable costs?**

*The Class Action*

71 The basis upon which an order should be made for the payment of an allowance out of the Fund to Mrs Kadam, was articulated as a right to an indemnity. It was not suggested in terms, at least as I understood it, that Mrs Kadam had an entitlement to an equitable lien or charge over the Fund *to the extent of her costs* (that is, an equitable interest that went beyond her entitlement to an equitable charge over the Fund as an investor). What was put in final submissions was that “*the Janlok Applicants...and those acting on their behalf (including Shine, counsel, Mr Coburn, and lawyers and other parties who provided assistance in India)*” should be entitled to “*a full indemnity for the costs incurred in securing the [Fund]*”. The difficulty that arises with putting the matter this way is that if such various persons claimed such an individual entitlement, apart from Mrs Kadam, they did not come before the Court and make any application to assert such a right.

72 Leaving aside the precise way it was initially put, the argument of Mrs Kadam as it developed relied upon the principle that where a person (in this case, Mrs Kadam by her obligation to pay third parties) has provided resources and taken on risk that allows the recovery of a sum, that person ought to be entitled to recompense for so doing. This general notion that recovery by a person who, through their efforts, has allowed for recovery of a fund, is well established. As Finkelstein J explained in *Australian Securities and Investments Commission v GDK Financial*

*Solutions Pty Ltd (in liq)* [2008] FCA 448; (2008) 246 ALR 580 at 584 [13] there is “a long-settled rule that the costs incurred for the benefit of all persons having an interest in an asset (usually a fund that is subject to various claims) must be borne by the fund. The rule is sometimes described as the rule in *Ford v Earl of Chesterfield (No 3) (1856) 21 Beav 426*”. As the High Court explained in *Stewart v Atco Controls Pty Ltd (in liq)* [2014] HCA 15; (2014) 252 CLR 307 at 323 [35]:

In cases involving the general administration of an estate, the usual rule was that all proper and necessary parties were paid their costs before the estate’s fund was distributed. In cases involving the ranking, in priority, of mortgages, the mortgagees’ costs were recoverable according to their ranking, but only “after the payment of such costs as may be proper to the [p]laintiff, in the first instance, where all persons obtain the benefit of the suit.

73 Put generally, it is well established that where a party has, by the party’s exertions, brought into court a fund, in the administration of which various parties are interested, the costs and expenses of that party should be a first claim upon the fund: see *In Re Universal Distributing Company Limited (in liq)* (1933) 48 CLR 171 at 174 (Dixon J); *Shirlaw v Taylor* (1991) 31 FCR 222 at 228 (Sheppard, Burchett and Gummow JJ). Although the rationale for the existence of the right of indemnity or equitable lien has not been articulated on a consistent legal basis (see *Coad v Wellness Pursuit Pty Ltd (in liq)* [2009] WASCA 68; (2009) 40 WAR 53 at 80-81 [91] (Buss JA)) the rule in *Ford v Earl of Chesterfield (No 3)*, or at least the general principle arising from that case, finds reflection in, and is analogous to, the well-recognised and standard entitlements in Australian law of:

- (a) a receiver (whether appointed to realise assets of another by private contractual arrangement or by the Court) to recover from the fund once realised, the receiver’s costs, expenses and remuneration referable to the realisation: see *Moodemere Pty Ltd (in liq) v Waters* [1988] VR 215 (Kaye, Murphy and Tadgell JJ);
- (b) a liquidator, including a provisional liquidator, to recover as a first charge or priority on a fund, the expenses incurred by the liquidator in the actual realisation of that fund: see *Universal Distributing Company; Shirlaw v Taylor*; those expenses can include the consideration given by a liquidator to a litigation funder for the funding of proceedings by which a liquidator enforces a chose in action of the company and thereby realises an asset: see *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* [2009] FCAFC 9; (2009) 253 ALR 240 at 257 [73] (North, Emmett and Rares JJ);

- (c) a creditor, who makes an application pursuant to s 564 of the *Corporations Act 2001* (Cth), which provides an incentive for creditors to indemnify a liquidator to undertake litigation, public examinations and other steps towards the recovery of property by allowing the creditor a priority on funds expended in getting in the assets of a company in liquidation: see *Robinson, in the matter of ACN 069 895 585 Pty Ltd (formerly known as Waterman Collections Pty Ltd) (in liq)* [2013] FCA 706 at [13] (Gordon J);
- (d) a legal personal representative, who ordinarily needs to act gratuitously but who may apply to Court for commission under statutory provisions (such as s 86 of the *Probate and Administration Act 1898* (NSW)), which permits such commission for the representative's "pains and troubles as is just and reasonable", it being established that such commission can be awarded on a lump sum basis, assessed by reference to the cost of services, and that the process of fixing commission involves taking into account numerous factors and all the circumstances of the case: see, for example, *Re Estate Gowing* [2014] NSWSC 247; (2014) 17 BPR 32,763 at 98635 [44] ff; *Re Estate of Edward Simshauser, (dec'd)* (NSW Supreme Court, Holland J, 24 November 1978, unreported) at 4;
- (e) a trustee, who though he has a right of indemnity out of the trust estate for expenses properly incurred in the administration of the trust, will sometimes be in the position whereby assets need to be realised before that right of indemnity can be satisfied; in circumstances where the trustee is engaged in litigation; for example, costs orders are frequently made on a "trustee basis" (so as to allow full recoupment by the trustee out of the estate): see, for example, *Latham v Hubbard; Estate of Ross* [2014] NSWSC 805.

74 As can be seen, the underlying principle is a broad one finding reflection in a number of different contexts. In *Thackray v Gunns Plantations Ltd* [2011] VSC 380; (2011) 85 ACSR 144 at 154-5 [41], in the context of an assertion of an equitable lien, Davies J recognised that although the general principle is often stated by reference to liquidators, as I have already explained, it is not limited in its application in that manner and may, instead, extend to other classes of person. Her Honour noted:

Although Robson J [in *Re S & D International Pty Ltd (in liq) (rec & mgr apptd)* [2009] VSC 225 at [254]-[276]] analysed the principles "referable to a liquidator", the existence of the lien does not depend on the status of the person claiming it. The categories of persons to whom the principle may apply are not closed. For present purposes it is sufficient to note that the principle has been applied with respect to receivers and receivers and managers. **The underlying principle in each case is that it would be inequitable for the person who has created or realised a valuable asset,**

**in which others claim an interest, not to have his or her costs, expenses and fees incurred in producing the asset paid out of the fund or property created.**

(Emphasis added)

- 75 These principles, in the context of liquidation, have been emphasised by the High Court in *Stewart v Atco Controls*. A mark of the degree of entrenchment of the *Universal Distributing* principle is that the High Court proceeded on the basis that where the fund constituted by the settlement sum was created by the efforts of the liquidator in pursuing the litigation and realising the company's chose in action, it was for the party seeking to show it did not apply to point to some fact or circumstance which rendered the principle inapplicable: *Stewart v Atco Controls* at 320-1 [24]-[25].
- 76 Another example is *IMF v Meadow Springs* (see especially at 257-258 [74]-[80]), where it was held that consideration payable by a liquidator to the funder, which comprised reimbursement of litigation costs incurred by the funder (for example, security for costs, payment of the liquidator's legal costs) as well as a share of any resolution sum, was an expense reasonably incurred by the liquidator and referable to the realisation. The liquidator was entitled to an indemnity from the fund realised for those expenses, such indemnity having priority over the interests of any secured creditor.
- 77 Together, the cases and specific illustrations to which I have referred, establish that: (a) there is a general principle that a person who has enabled the recovery of a sum should be entitled to their costs and expenses from that fund; (b) those costs and expenses include reasonable remuneration; and (c) such reasonable costs can include the payment of legal and associated costs. In such circumstances, these principles provide an adequate basis for the payment of an allowance out of the Fund.
- 78 Although not advanced in submissions, it seems to me that there is a further juridical basis for an entitlement, bespoke to the nature of representative proceedings. In the somewhat different context of a settlement fund, the Court has previously recognised that, where a representative applicant has reasonably incurred expenses or made a particular contribution, in time or outlay, in prosecuting the claims of group members, it is appropriate that the representative be compensated. Thus, in *Darwalla Milling Co Pty Ltd (ACN 009 698 631) v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388; (2006) 236 ALR 322 at 347 [76], Jessup J stated:

I consider it prima facie reasonable that particular parties who have sacrificed valuable time and incurred expenses in the interests of prosecuting this proceeding on behalf of group members as a whole should be able to look to the corpus of the settlement sum

for some degree of compensation and reimbursement. More importantly, perhaps, I would hold that group members who have benefited from the proceeding could not be heard to deny the reasonableness of such a proposition.

79 Although no order has been sought under s 33ZF of the FCAA, the breadth of this power conferred by the Court has been recognised by courts on multiple occasions. As I recently noted in *Perera v GetSwift Limited* [2018] FCA 732 at [142]:

[Section] 33ZF... is a deliberately general power which operates as a ‘gap-filler’ where specific powers in Part IVA are not apt to resolve the relevant issue which is presented. It represents a legislative intention to equip the Court with the “widest possible power” such that the Court can resolve the peculiar difficulties encountered in representative proceedings: *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4C-4D per Wilcox J. Moreover, as with any provision conferring jurisdiction or granting powers to a Court, s 33ZF should not be construed narrowly by the making of implications or imposing of limitations not found in its express words: *The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421.

80 There does not seem to me, to be any reason in principle as to why orders under s 33ZF are not available to a representative applicant to recover costs incurred to benefit group members and others, out of a Fund secured by the conduct of a representative proceeding. Indeed, at least to an extent, the ability to make orders allowing recovery out of such a fund is how common fund orders have been justified. See *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; (2016) 245 FCR 191 (Murphy, Gleeson and Beach JJ) where, relying on s 33ZF, the Court has indicated its willingness to allow a funder of litigation, who had borne the costs and risks of the litigation, to be recompensed from the common fund of proceeds obtained by the group as a whole.

81 Either way, whether by reference to general equitable principles or s 33ZF, I am satisfied a legal basis exists to allow payment out of the Fund if reasonable costs and expenses are proved to have been incurred by Mrs Kadam in getting in and securing the assets, being those costs and expenses that were incurred for the benefit of *all* of the beneficiaries.

82 That the amount recoverable should not be all costs incurred, but only reasonable costs incurred for the general benefit, is consistent with the equitable nature of the principle. This limitation is well established and can be seen, for example, in *Wright v Kirby* (1857) 23 Beav 463 at 467, where Sir John Romilly MR, in considering a case in which one mortgagee had commenced proceedings to realise a fund, held that:

If a mortgagee institutes a suit for the administration of the estate of his deceased mortgagor, it is to be considered that, in so acting, he is suing as a creditor for the benefit of creditors generally, and not as a mere mortgagee enforcing his securities,



and his costs are the costs of a Plaintiff in an ordinary administration suit ... If, however, a mortgagee institutes a suit to redeem prior and to foreclose subsequent incumbrancers, his costs are added to his debt, and have no priority over the prior charges.

83 The only additional preliminary point that needs to be made is that the onus to demonstrate the reasonableness of the charges and that they were incurred for the benefit of beneficiaries generally will lie on the party seeking the amount be paid: see Young CJ in Eq in *Ide v Ide* [2004] NSWSC 751; (2004) 184 FLR 44 at 49 [42]-[43].

### ***SEBI Proceeding***

84 SEBI made clear that the allowance that it seeks out of the Fund are costs secured by an equitable lien or charge in favour of SEBI, which it also contends, has incurred costs for the benefit of all the beneficiaries of the Fund.

85 The question of whether any amount should be paid to SEBI and, if so, how it should be fixed upon is dealt with in Issue 7 below. It suffices for present purposes to note that the juridical basis of such an amount being paid is identical to the way in which I will deal with the claim of Mrs Kadam save that s 33ZF (which is only applicable in relation to the Part IVA proceeding) does not apply, at least directly, in the context of the SEBI Proceeding.

### **Issue 6: should any amount be paid out of the Fund to Mrs Kadam and, if so, how should it be calculated?**

86 Reference was made above to the decision of Young CJ in Eq in *Ide v Ide*. In that case at 50 [49], the Chief Judge in Equity made the observation that when considering the issue of remuneration by receivers, a court constituted by a judge, never considers a review of quantum, but only matters of principle. Historically, such matters have often been dealt with by Masters or Registrars. During the course of submissions I indicated to both parties that it seemed to me that the precise question of quantification is one which is probably best done by a referee with unfettered access to the relevant materials held by the solicitors for Mrs Kadam. This is provided that such a referee has guidance from the Court as to the 'heads' or types of costs and expenses which would fall within those costs and expenses that were incurred for the benefit of all beneficiaries and could be characterised, in accordance with the principles I have explained above, as being reasonably incurred.

87 This proposed course was not opposed by any party although, in order to facilitate the identification of the types of costs that would be recoverable, there was contested evidence as to the costs incurred adduced by Mrs Kadam.

88 Before returning to issues of quantum, there is a necessity to address initially the question as to whether there should be any recovery by Mrs Kadam in accordance with the principles I have explained.

89 When this matter came for a case management hearing before Murphy J on 23 May 2017, counsel appeared on behalf of Mrs Kadam and counsel appeared on behalf of SEBI (as intervener in the class action and also as the applicant in the SEBI Proceeding). His Honour commenced the case management hearing with customary frankness, by indicating that the proceedings, at that time, were a “*nice old mess*”.

90 After being told that the class action was very complex and that this complexity was the reason for the pleading involving such a large number of different causes of action and resulting in the rise of pleading disputes, the following exchange occurred:

HIS HONOUR: So what that view pushes me towards, without having heard from you yet, is not to have strike-out applications now, based on a pleading which, for mine, appears to go well beyond what it needs to. It might be necessary. But if you win on that simple ground [being tracing into the Fund], why would you want to have the fight on the large ground, other than it's your pleading? So if the case was successful on the basis that these moneys were paid, there's a fraudulent scheme in India, the moneys were paid across to Miireorts, either an unauthorised application or an unauthorised use, and you succeed, if you prove that case, then why would I want to hear about whether or not there was some knowing involvement by anybody?

And why would the court be tied up and why would the parties be tied up when you've got a finite fund which, no doubt, is being eaten up by hordes of lawyers? So that's your task now, to persuade me away from that preliminary view. I can't see what the problem is. Because it strikes me that your interest in this from day 1, having read every bit of paper in this file, is that you've been trying to assist your clients to recover their moneys. The tension between you and SEBI is: SEBI says, well, everyone has an interest and not just your 46,000. I understand that argument. You say you should go first. That doesn't need to be dealt with at the start. That can be dealt with when it's worked out whether or not that money is the investors' money and not Miireorts.

MR MONKS: I mean, one of the problems from our point of view of dealing with it that way, and in a way your Honour has just touched on it a minute or so ago, is that we are required to participate in the entire proceeding, obviously along with SEBI. And then we have an argument at the end where your Honour determines what orders to make and we perceive the risk for us to be that your Honour makes orders where your Honour says, “No, no, no, what SEBI is right,” and all the money goes to them. And then it's put against us, “Well, why should you have your costs? Because you've hung around in this proceeding for the whole time.”

HIS HONOUR: I follow, Mr Monks. I did this work for 20 years. I understand that concern. I could read it dipping through your submissions. That should not be a problem. It is plain from the paperwork that you have done valuable work. If not, probably, for your work at the start of this case, the moneys might have gone elsewhere. So - - -

MR MONKS: Yes, your Honour. With respect, quite, your Honour.

HIS HONOUR: But that does not mean that your interests in being paid, which are legitimate, ought to trump the interests of a speedy and efficient determination of this case. So I understand that concern. It's legitimate. And I can't determine it now. What I can say is it's plain you've done valuable work.

MR MONKS: I mean, it may be, of course, that some of those comments that have fallen from your Honour might assist in assuaging some of the concerns of those who are instructing me. Your Honour, I wonder whether I might - - -

HIS HONOUR: So if you take that on board.

MR MONKS: Yes, your Honour.

91 It was at that time that his Honour, as it were, 'cut through' a myriad of pleading disputes and the miasmic complexity of the case and eventually set the matter down for the hearing of preliminary questions which had the anticipated effect of facilitating the resolution all relevant issues in an expeditious way. What was evident from the exchange at the case management hearing, and the continued resistance thereafter by Mrs Kadam in relation to the involvement of SEBI, was the twin concerns as to the recovery of costs and also the misguided argument that Mrs Kadam and the group members in the class action should be able to obtain recovery of the entirety of the Fund even though it represented a pooling of the monies of investors well beyond those of the group members.

92 I have set out this exchange in some detail because of the recognition of his Honour, which following the initial trial I share, that valuable work was initially done on the instructions of Mrs Kadam to secure and get in assets. This conclusion requires some detailed explanation as to how it was that the class action was commenced in the first place.

93 Although when SEBI was roused to vindicate the claims of investors it did so with commendable efficiency, its initial reluctance to discharge its responsibilities to secure the assets remains puzzling.

94 From February 2016 until June 2016, Mr Coburn, a barrister who is a principal of an investigating company (Coburn Corporate Intelligence Pty Ltd) was conducting what he described as 'due diligence' in relation to a possible action in relation to Australian assets purchased with investor funds, apparently on behalf of all investors. He sent or caused to be sent by Piper Alderman (solicitors he had sought to interest in the case), numerous letters and emails which brought to SEBI's attention a need to act urgently to prevent the dissipation of assets (as the Mirage was reported to be in the process of a sale to Chinese investors).

95 For example, on 7 March 2016, Mr Coburn sent an email, to the Chairman of SEBI and a Mr Srivasdav (apparently of SEBI) which made reference to a prior email. Mr Coburn noted:

I believe the matter of the PACL fraud is most urgent and that if India leaves the pursuit of assets so long (sic), it is unlikely that investors will recover anything.

... I am conducting a due diligence on whether there is sufficient to evidence to take proceedings in the Federal Court of Australia to obtain freezing orders in relation to approximately AUD\$150-500 million of investor funds obtained through illegal collective investment schemes [by PACL].

The PACL collected monies by using hundreds of agents and under the use of two business names ... the Pearls Group after landing on Australian shores, changed its name to Miigroup (sic) in 2010 and transferred approximately AUD\$150-500 million from India to invest in property on the gold coast (sic). The money trail of illegal funds from India lead to the now cancelled sale of Miigroup (sic) properties including the Sheraton Mirage on Gold Coast and other multi-million dollar developments in Brisbane, Australia. We're investigating how these funds were mixed with Indian investor funds.

Can you please advise if the Indian Government is interested in assisting me to conduct the litigation. I understand that the Chief Justice of India is looking into the matter. My fear is that this is urgent as the people involved in the fraud are already moving funds or diluting the interests of the assets. I request if you could reply to me on an urgent basis. I am prepared to litigate the matter on a "win only basis with no cost to any Indian investors".

96 A letter to similar effect was sent, on the same day, to the High Commissioner for India, located in Canberra (described mistakenly in the letter as an Ambassador). The reference to the Chief Justice of India was in fact a reference to a former Chief Justice, the Honourable Mr Justice R M Lodha.

97 I pause to remark that this Lodha Committee ought not to be confused with another Lodha Committee (appointed by the Supreme Court of India in 2015 while disposing of litigation involving the Board of Control for Cricket in India, and which committee provided, in 2016, its *Report on Cricket Reforms* to the Court). The Lodha Committee with which we are concerned is dealing with a very different corridor of uncertainty.

98 In any event, on 12 April 2016, a letter was sent by Piper Alderman to former Chief Justice Lodha, with a copy to the Chairman of the SEBI. In that letter, Piper Alderman explained that they had been asked to act on behalf of two associations which represented a total of 60,000 investors. The background was explained and then the letter went on:

Given the role of the Lodha Committee, it would seem to us that maintaining multiple actions for recovery could likely delay matters further for investors. Accordingly, undertaking a single action to recover funds may be most appropriate.

We have been approached by Mr Niall Coburn who has been investigating PACL assets in Australia for 2 months. Mr Coburn has informed us that he:-

(a) travelled to India to meet many key individuals and investors; and

- (b) has traced approximately AUD\$170 million worth of assets in Australia so far in entities controlled by Bhangoo's Family and there appear to be many more assets held in complex structures.

Obviously, sharing information and working together is likely to give investors the best prospects of any substantial recovery.

### **Australian Proceedings**

Having considered the matter, we consider that there are strong prospects of undertaking prompt recovery proceedings in Australia to return funds to India to Lodha Committee for distribution to investors.

99 Reference was also made in this letter to a willingness to act on behalf of the Lodha Committee to commence cross-border proceedings in the Federal Court to bring under control any assets which were acquired by improper means and to appoint receivers and liquidate all Australia assets and provide proceeds of those assets (after the costs incurred in recovering and realising the assets), to the Lodha Committee for distribution.

100 By 16 May 2016, Piper Alderman were again writing to the Lodha Committee and the Chairman of SEBI. By this stage there had apparently been correspondence from Piper Alderman dated 12 April 2016 and 20, 23 and 26 and 28 April 2016. There had obviously been some request made by SEBI for further information. In any event, Piper Alderman wrote:

In response to your request for further information, further information and details are set out below.

As you would appreciate we are aware of the information set out herein following extensive investigations (and expenditure of not inconsiderable funds) over the past few months. Whilst we are willing to provide you with the results of these investigations, all information provided herein is provided on a strictly commercial and confidence nature and is not to be disclosed to any parties outside of SEBI and the trusts of the Lodha Committee without our express consent.

Once you have had the chance to review the information contained herein, we would appreciate if time could be scheduled for us, and Mr Coburn, to discuss the matter in more detail and to determine a way forward on this so that we can assist you in making recoveries for the investors in India.

As set out in our letter of 26 April as negotiations of the main asset located in Australia are advancing, to ensure that the interests of the investors are protected as best as possible, we would recommend that we talk sooner rather than later.

101 This letter further noted that Mr Coburn had discovered that a contract for the sale of the Mirage had been signed and noted that there was a "*strong case to obtain injunctions on relevant properties*" and that Piper Alderman was "*confident that we would be able to obtain orders on your behalf*". The entreaty was again made that SEBI act urgently.

102 Interestingly, at this time, in what I assume was an ongoing dialogue concerning estimated costs, Piper Alderman provided details as to the anticipated costs associated with obtaining interlocutory relief:

**Estimated costs and timing**

Timing

Given the investigations already undertaken, once we receive instructions to act we will be able to prepare the necessary court documents in a relatively short time frame (three to four weeks) – if required to assist the process of getting court orders and affidavit material from India, we will be able to travel over there to get the material finalised and sworn to avoid unnecessary delays.

Once we have all the material finalised (including any court orders required from India) we will be in a position to apply to Court for hearing in about one to two weeks to seek the orders.

Costs

Our estimated costs are as follows:

<b>Step</b>	<b>Piper Alderman professional fees</b>	<b>Counsel fees</b>
Preparing formal advice as to process, including any conferences with the Lodha Committee	\$3,000.00 – \$6,000.00	Junior Counsel – \$2,400
Preparing all relevant material including affidavits and applications, liaising to get material filed, including travel to India to take statements to finalise affidavits, liaising with the Lodha Committee to get any necessary orders from India	\$15,000.00 – \$20,000.00	Senior Counsel – \$12,000 Junior Counsel – \$8,000
Preparing for hearing – including giving requisite notice to relevant parties and preparing submissions to the Court	\$6,000.00 – \$12,000.00	Senior Counsel – \$3,200 Junior Counsel – \$2,400

Attendance at Court hearing	\$1,000.00 – \$3,000.00	Senior Counsel – \$3,200 Junior Counsel – \$2,400
TOTAL	\$25,000 – \$41,000	Senior Counsel – \$18,400 Junior Counsel – \$15,200

There may be some other expenses such as travel and accommodation costs as well as Court filing and hearing fees, service costs and the like. They will be charged at cost.

103 As can be seen, the total estimated legal costs (sans travel costs) in securing the assets ranged from between \$58,600 to \$74,600.

104 Somewhat curiously, the step then taken by the Secretary to the Lodha Committee was to contact the High Commissioner for Australia located in New Delhi by letter dated 30 May 2016. The letter explained the role of the Lodha Committee and then said as follows:

The Committee has received various communications informing them that PACL Ltd., its Chairman Mr. Nirmal Bhangoo and its Promoters and Directors including Mr. Tarlochan Singh, Mr. Sukhdev Singh, Mr. Gurmeet Singh and Mr. Subrata Bhattacharya have interests in various assets including immovable properties in Australia. An overview of Corporate PAGL interests in Australia and details of properties/assets purchased in Australia that have been received by the Committee including letters dated 12/04/2016, 16/05/2016 & 30/05/2016 received from Piper Alderman are annexed hereto and marked as **Exhibit – E(Colly)**.

The Committee constituted under orders of the Supreme Court of India, therefore seeks your assistance in tracing out all assets including immovable properties in Australia, wherein PACL and/or its Promoters and Directors including Mr. Tarlochan Singh, Mr. Sukhdev Singh, Mr. Gurmeet Singh and Mr. Subrata Bhattacharya and its Chairman Mr. Nirmal Singh Bhangoo have an interest and freeze assets in Australia on behalf of Indian investors who have been the subject of fraud in India under the various PACL illegal collective investment schemes.

The aforesaid Committee could be contacted through the undersigned at the address/e-mail id given herein below.

105 It is not entirely clear what it was that the Lodha Committee thought the High Commissioner could do to trace trust assets in Australia. What then occurred is that this, or some similar, communication appeared to provoke a response from Piper Alderman noting that they had become aware that enquiries had been made by the Lodha Committee with what the solicitors described as ‘Australian governmental bodies’ *“using the information provided by us along with correspondence from us to you”*. Piper Alderman then went on to ask:

Given the confidential basis on which we provided the information to you, may we take that as acceptance of our retainer? We can provide a formal letter of engagement

promptly.

In relation to matters:-

(a) Investigations by Mr Coburn have revealed that it is likely that from the proceeds of sales of assets (which are being conducted by interests associated with that of PACL / Pearls / Mr Banghoo), some substantial funds are being retained in Australia - ie they will not be repatriated to India; and

(b) We are also informed that another firm is interested in conducting a class action in Australia for a number of investors - around 60,000 - and some additional investor associations are wishing to join in such an action. Obviously, if that occurs, those associations and investors would be looking to gain a priority to the Lodha Committee and protect their own interests.

Given the looming sales of assets and the matters in this email, kindly respond as a matter of some priority.

106 Pausing for a moment, what is set out at (b) above by the solicitors acting, as I understand it, on Mr Coburn's instructions, is again somewhat odd. This appears to be a reference to the prospect of the class action being commenced by Shine Lawyers (organised by Mr Coburn), as being an alternative course of action to that which had been proposed to SEBI (also arranged by Mr Coburn). I have not received any evidence as to this representation made to SEBI, but it seems it was made to try to jolt the Indian authorities into retaining Piper Alderman and suggesting that unless this occurred, some investors might gain some form of 'first mover' advantage. In any event, the form of the communication is unexplained on the evidence.

107 In response to this letter from Piper Alderman, the Secretary of the Lodha Committee indicated that the Lodha Committee did not regard itself as being in receipt of any confidential communications, and that it did not intend to instruct Piper Alderman.

108 This was not the first time that SEBI or the Lodha Committee had become aware of the persons who would ultimately become the class action applicants and the group members, being the members of the community action group JPS. It appears that on 4 April 2016, Mr Nayak, the lawyer for JPS in India, had written to the Lodha Committee requesting that the Committee undertake a special investigation into PACL's overseas investments including that it "*enquire into the investments of PACL and PGF and their subsidiary and Sister concerns and their overseas investments particularly in Australia*". The response from SEBI was, however, negative. In a letter dated 19 April 2016, the Lodha Committee advised that the issues raised by the lawyer for JPS "*does not fall within the purview of [the] committee*" and further advised that in accordance with orders of the Supreme Court of India, the "*main function of [the Lodha] committee is to dispose of the land purchased by the Company*".



109 Against all of this background, it is hardly surprising that by June 2016, Mr Coburn had formed the view that neither SEBI nor the Lodha Committee were going to take any urgent steps in Australia directed towards recovering, for the benefit of the investors, the assets located in Australia despite the risk that those assets may be soon dissipated. On 12 June 2016, Mr Coburn attended a meeting of JPS held at Mr Nayak's office in Pune, India. It was at that meeting, it appears, that committee members of JPS considered whether legal action in Australia should be commenced, without the involvement of SEBI or the Lodha Committee. Mr Coburn gave evidence, which was not challenged in cross-examination, that in his view, the only hope of securing the Australian assets, including the Mirage, was for the class action applicants and the group members to commence proceedings and that there was "*sufficient evidence for them to commence this action urgently*". It was at this meeting that JPS resolved to instruct Shine Lawyers to take legal action.

110 The only conclusion to be drawn from the above, is that without the efforts of Mrs Kadam's lawyers in taking steps to secure the proceeds of sale of the Mirage and to prevent dealings with the Sanctuary Cove Properties, that the amount represented by these assets would most likely have been put beyond the reach of the investors. It was Mrs Kadam who succeeded, following the hearing of a contested application, in obtaining MiiResorts' agreement to temporary undertakings that neither the Mirage nor the proceeds of sale would be dissipated. Additionally, the Sanctuary Cove Properties were, and are, protected by a caveat lodged by those acting for Mrs Kadam.

111 Importantly, despite SEBI being made aware of the asset in Australia (the Mirage) and despite being told that MiiResorts was looking to sell the property, SEBI refused, until well after Mrs Kadam had obtained the protective undertakings, to take any action. This lack of endeavour seems, in the absence of explanation, to be difficult to understand. If SEBI thought that there was a deficiency in the amplitude of its powers or that of the Lodha Committee, the evidence in this proceeding demonstrates that this understanding was incorrect, and it is strange that steps were not taken to clarify the position with alacrity.

112 A problem with this inertia by SEBI was that MiiResorts did not then concede that Mrs Kadam or the group members had any interest in the Fund in question and did not concede that the undertakings should remain in place until an initial trial. It was only months later, after I began case managing the class action, that an indefinite restraint was put in place until an initial trial. In the intervening period, MiiResorts had brought applications seeking orders permitting some

of the proceeds to be used to pay MiiResorts' legal costs and some substantial creditors, and also asserted that unless security for costs was provided, then any restraints should be lifted. Additional applications were made seeking to have the class action proceeding dismissed for want of jurisdiction (an application I dismissed peremptorily: see *Kadam v MiiResorts Group 1 Pty Ltd (No 3)* [2017] FCA 1138), or that it be struck out as an abuse of process.

113 Although it was necessary for Mrs Kadam to secure the Fund and the Sanctuary Cove Properties and oppose all of these applications made by MiiResorts until the SEBI Proceeding was commenced, for reasons I will explain, the steps taken to secure the trust funds were not performed efficiently and the confusing way in which the class action claims were advanced, at least initially, is a source of legitimate criticism. Despite this, the initial actions of Mrs Kadam were necessary and in these circumstances, it is only fair and reasonable that appropriate allowance be made for those costs incurred by Mrs Kadam that were referable to getting in and securing the assets which will, in due course, be distributed.

114 Put in blunt terms, the issue to be resolved by the referee, with guidance from the Court, is to identify costs incurred in achieving this result for the benefit of the beneficiaries and distinguishing them from those other costs and expenses incurred by misdirected activity or activity solely related to advancing her individual case.

115 On the basis of the material adduced at hearing and striving to avoid the benefit of hindsight (that is, the present understanding of how straightforward the tracing process and the claim has proven to be), it seems to me that the appropriate categories of costs and expenses that were incurred by Mrs Kadam on behalf of the beneficiaries and contributed to securing the Fund and the Sanctuary Cove Properties were as follows:

- (a) Mr Coburn taking initial instructions from JPS as to the basis upon which funds were invested in India and securing access to examples of the documentation which purported to regulate the dealings between the investors and the Scheme, including the costs of one trip to India to confer with the JPS and the Indian lawyer for JPS;
- (b) communicating with solicitors in Australia to secure representation on a conditional fee basis;
- (c) the costs associated with contacting SEBI or communications concerning SEBI securing the funds in Australia including preliminary research into SEBI's entitlement to maintain a claim on behalf of investors generally; this would include the costs of

Piper Alderman in sending the communications to which I have referred (in the event those fees were paid or there was, and is, a subsisting legal obligation to pay those fees);

- (d) briefing junior and senior counsel in relation to providing initial advice as to causes of action that may be available and fees of counsel in providing such advice;
- (e) drawing and settling an originating application, any interlocutory application and accompanying affidavit evidence seeking interlocutory relief of an equitable nature in relation to preserving the proceeds of sale of the Mirage and also costs in lodging a caveat in relation to dealing with the Sanctuary Cove Properties;
- (f) arranging for service of process on MiiResorts and any dealings with MiiResorts or its legal representatives in relation to procuring undertakings or in relation to the initial interlocutory progress of the litigation;
- (g) resisting the applications made by MiiResorts to obtain access to part of the Fund, for security for costs and dismissing the class action on the basis of a want of jurisdiction (until the SEBI Proceeding was commenced);
- (h) retaining and instructing counsel to appear at the return of the originating application and case management hearings, to the extent that the costs and expenses incurred were directed to advancing an entitlement of group members to the Fund and the Sanctuary Cove Properties until SEBI's application for intervention, but not as to other extraneous matters;
- (i) the costs of the reference process of Mr Callinan QC paid on behalf of Mrs Kadam, but excluding all expert fees incurred in relation to the retention of expert evidence in India by Mrs Kadam or the costs incurred in relation to the intervention of SEBI or in relation to the SEBI Proceeding;
- (j) costs of dealing with the Commissioner and his intervention, but only as to one half of those costs after SEBI's application for intervention.

116 Paragraph 10 of the affidavit of Mr Coburn sworn on 12 February 2018, categorises the work done on behalf of Mrs Kadam and the group members into three phases being: *first*, pre-injunction work; *secondly*, post undertaking work until SEBI intervened and *thirdly*, evidence gathering for the initial trial. As to the *first* of these phases, much of the work claimed (see [15] of the affidavit) is plainly not recoverable from the Fund (such as appearing on the 7:30

Report, obtaining 15 affidavits, setting up a website or Mr Coburn's appearances as a spectator in Court). As to the *second* of these phases, the same is true (see [16] of the affidavit), and why more than one trip to India was necessary to obtain sufficient evidence to maintain the undertakings is wholly unclear to me. As to the *third* phase, subject to one matter I raise below, it is difficult to understand why any of these costs would be recoverable against the Fund, although some of the costs were no doubt properly incurred to advance individual claims.

117 There was a good deal of debate in the written submissions concerning the ability to recover costs in respect of any work undertaken by Mr Coburn's corporate vehicle. The question arose because there had been a number of changes of position by Mrs Kadam with respect to the work of Mr Coburn and/or his corporate entity and Mr Coburn's or Shine's obligations to comply with requirements of the *Legal Profession Act 2007 (QLD) (LPA)* in relation to the work performed. Although this issue may be relevant on any taxation, I do not believe it is necessary to resolve the issue as to what was required to be done in order for Shine to authorise the incurring of disbursements incurred by Mr Coburn and what costs are properly recoverable pursuant to the terms of the LPA and the retainer agreement between Mrs Kadam and Shine.

118 My present role is different, that is, to work out what amounts were incurred for the benefit of the beneficiaries generally in getting in and preserving the assets. At least on one view of the evidence, although it is not pellucid, the actual amount charged by Mr Coburn's entity is apparently \$819,060.44 and, as I understand it, it is the total of this 'disbursement' amount, together with the other costs incurred by Shine, which is sought to be deducted from the Fund prior to distribution. In the light of the admittedly incomplete evidence as to costs presently filed, the amount of costs properly recoverable out of the Fund appears to be a relatively small subset of the overall costs incurred on behalf of the class action applicants. I mention this, not to come to some definitive view relating to quantum (which I propose to leave to the referee), but because there appears to be significant disconformity between the quantum that Shine apparently seeks to have paid from the Fund and the amount that is properly payable on equitable principles, or pursuant to an appropriate order under s 33ZF of the FCAA.

119 Before passing from this general topic, I should make a further point. At Issue 8 below, I deal with issues relating to the appropriate regime that should be put in place to provide for the assets to be distributed to the investors. In relation to making submissions on this specific topic at and after the initial trial, Mrs Kadam has acted as a contradictor and, in this sense, has acted to advance the interests of all investors in ensuring that the amounts are paid in such a way as

to maximise returns. My preliminary view is that these costs are also recoverable. Again, it will be important to distinguish these 'third phase' costs from other costs incurred at or after the initial trial (including the advancement of Mrs Kadam's individual claim, or those of group members, or the repetition of the contention that the investors needed to prove 'loss' or costs incurred in resisting SEBI's 'standing').

120 Using the topics I have identified above, the metes and bounds of recoverable amounts should be set out by reference to topics in the terms of a reference order, following the parties having the opportunity of reviewing these reasons and the completion of the further hearing on the making of orders.

121 In settling upon the terms of the order for reference, it may also be useful to give some further guidance or assumptions to the referee. For example, reference was made above to an estimate of costs made on 16 May 2016 by Piper Alderman in its letter to the Lodha Committee and the Chairman of SEBI. By this stage, the solicitors considered sufficient work had been done to reach the conclusion that there was a strong, *prima facie* case. The position as to the balance of convenience was plain. Although, as noted above, some recoverable costs had been incurred to put the solicitors in the position of having a settled view of the soundness of the claim, the estimate of fees identified in that quotation seems to me a reasonable estimation of the further work necessary to obtain interlocutory relief to secure the assets.

122 Subject to refinement following any further submissions, the topics identified above appear to adequately capture those amounts that are properly recoverable and excludes those costs (which I anticipate are very significant) which were incurred either unnecessarily or have not been established to have been reasonably incurred to the benefit of the investors in getting in and preserving the Fund. In particular, it is necessary to exclude all costs incurred by the complex and prolix pleadings containing unnecessary causes of action, all costs associated with the resistance to the intervention of SEBI and incurred in opposing the relief sought by SEBI, all costs associated with seeking to establish the class action applicant and group member *individual* claims on a final basis at the initial trial, the costs associated with resisting the reference and all costs associated with the ill-conceived opinion evidence filed as to Indian law. These costs were not incurred for the benefit of the beneficiaries and many were incurred in a manner inimical to the case management imperatives in Part VB of the FCAA which require a focus on narrowing this essentially legally simple (but factually complex) case to the real issues.

123 As to the balance of the costs incurred which will not be identified in the orders for reference, they fall into different categories. Some, such as the costs of seeking properly directed equitable relief on behalf of Mrs Kadam individually, are obviously proper costs, but were not incurred for the benefit of securing and preserving the Fund generally. Others were unreasonably incurred, such as those incurred in resisting the Indian law referee. I presently express no view on what proportion of the costs not recoverable from the Fund, fall into each category, and will hear from the parties as to whether and what proportion of those costs should be the subject of a costs order made against MiiResorts or other respondents. There is clearly a distinction between costs which might be recoverable pursuant to a costs order *inter partes* (according to usual principles involving the exercise of discretion under s 43 of the FCAA and upon any taxation), and the separate analysis called for in determining what reasonable amounts have been proved to have been incurred on behalf of the beneficiaries which will be the subject of payment out of the Fund.

124 Having expressed my views in relation to the case generally, I propose at a further hearing (which I will order to take place on 23 July 2018) to hear any further submissions about the adequacy or accuracy of my description of the topics above and as to what information should be given to the referee to conduct the reference. Given the necessity to make what might be fine judgments as to those costs which were incurred on behalf of beneficiaries and those that were not, my present view, again subject to hearing from the parties, is to appoint a referee who is a barrister but who has legal costing experience.

**Issue 7: should any amount of Fund be paid to SEBI and, if so, how should it be calculated?**

125 The position in relation to SEBI is qualitatively different. From the time of intervention, the submission of SEBI was that any relief granted in relation to the Fund should be properly adapted to reflect that all the monies of investors were pooled in India, that there was a breach of trust and that proceeds could be traced to Australia. Not only has SEBI been vindicated in relation to that proposition, but it was also the party that adduced the evidence which provided the necessary evidentiary foundation for declaratory relief of that type to be granted. Along the way, SEBI was required to conduct an internecine battle with those acting for Mrs Kadam which was unnecessary, but no doubt costly.

126 In these circumstances it seems to me that, subject to any further submissions, SEBI should be entitled to recovery of the reasonable costs of its intervention in the class action and conducting

the SEBI Proceeding (save for the costs in resisting the declaratory relief sought by Mrs Kadam) and costs (if any) attributable to SEBI's initial delay in taking steps to secure the assets.

127 Again, I will hear the parties further as to whether, in the light of these reasons, they wish to be heard further in relation to this preliminary view and to whether it is better that these costs be quantified by me (in a way similar to the quantification of a lump sum costs order) or whether it is preferable to leave this separate quantum issue to the referee.

**Issue 8: after payments authorised out of the Fund, how should the residual amount be distributed to the Investors?**

128 Mr Coburn was forthright in his criticisms of SEBI, and his frustration was evident when giving evidence. This is partly understandable as without his personal efforts in putting Mrs Kadam and other claimants in touch with Australian lawyers, there is every reason to think the assets may have been lost to the investors. This has no doubt informed his evident displeasure at his actions being belatedly questioned by SEBI. Although a significant part of his efforts, like the lawyers, were misdirected to seeking proof of matters extraneous to obtaining necessary relief, this is not to deny he rendered a valuable service for the benefit of vulnerable people at a time when those charged with protecting their interests lacked the understanding or the will to act. Having said this, I reject any notion, to the extent it is maintained, that SEBI has not sought to act in good faith. Any delay seems to have been caused by confusion as to what steps could and ought to be taken.

129 Having said this, my misgivings about SEBI's initial reluctance to take steps to protect the interests of investors when put on notice of a chance to secure significant recoveries, has caused me some disquiet. Additionally, evidence was not initially adduced that provided comfort that the Funds (augmented by the sale of the Sanctuary Cove Properties) would be distributed to the investors in a way that was efficient or in a manner which maximised the return to those beneficially entitled to the balance.

130 On 16 February 2018, SEBI filed a draft order setting out the proposed form of final relief for which it contended. Those draft orders included a proposed undertaking by SEBI to deal with the assets (comprising the Fund and the net proceeds of the sale of the Sanctuary Cove Properties) in accordance with the scheme established pursuant to the orders of the Supreme Court of India made on 2 February 2016 administered by the Lodha Committee and in accordance with orders made by the Court. This was supplemented by further submissions made prior to closing addresses which included submissions on the appropriate refund scheme

to be adopted. Various points were made in response to this proposal on behalf of Mrs Kadam to which I will return briefly below.

131 During the course of closing addresses on 13 March 2018, motivated in part by my concerns to ensure the maximum return to the investors including the group members, I raised with senior counsel for SEBI whether it would be prepared to give an undertaking to the Court that if assets were paid to SEBI (which at that stage I estimated to be approximately \$63 million), \$61.5 million would be distributed to investors and not used for administration expenses and legal fees. There is no evidence as to what the quantum of these costs and expenses would be, but I raised with Counsel an estimate that it may involve expenses in the region of \$1.5 million to administer the scheme in Australia. I stress, that this was nothing more than a very rough estimate based on the experience of the Court in administering settlement schemes in Part IVA proceedings, albeit domestically. I also expressed a preliminary view that if such an undertaking was provided, then all things being equal, it may be better for SEBI to distribute the funds in India rather than the Court seeking to do so from Australia with all the perceived logistical difficulties that this may involve (on the basis of the material then before the Court).

132 In response, on 2 April 2018 SEBI, by its authorised officer, executed an undertaking that upon receipt of the sum the equivalent of \$63 million or more declared by the Court to be held in trust for all investors, SEBI would deal with them in such a way so that the expenditure incurred in the distribution would not exceed \$1.5 million.

133 Mrs Kadam's position is different. The class action applicants support the Court putting in place its own scheme and oppose the refund process proposed by SEBI and articulated for the first time in the proposed amended originating application (**Refund Process**). This is notwithstanding the undertaking that SEBI provided as to efficient distributions to investors.

134 This opposition of Mrs Kadam is maintained on several bases (although some of the matters initially raised by Mrs Kadam have been addressed by the provision of the undertaking). Having said this, it is convenient to repeat some matters initially raised by Mrs Kadam in relation to the initial scheme proposed by SEBI for the sake of completeness. In this regard, the primary submission of Mrs Kadam reflects the contention as to 'loss' to which I have already made mention and which was articulated in final submissions as follows:

First and foremost, litigants who succeed on liability and prove their loss in an action commenced in the Court should be entitled to recover. The Janlok Applicants' claims should not be diluted or defeated by an unproven assertion that there are others, not before the Court, who have suffered a similar loss. SEBI asserts that there



are in excess of 50 million investors who are owed money by PACL but has repeatedly said it does not intend to prove the number of investors or their loss. Even at this late stage it offers no admissible proof for this bald assertion...If SEBI does not prove there are other unpaid investors there is no reason in principle not to pay the Janlok members in full at the conclusion of the proceeding. That is both because they would have proved their loss after succeeding in the case and there would be no evidence of them receiving a preference. An immediate distribution to the Janlok Applicants in these circumstances would be consistent with the *obiter dictum* of Millett J (as his Lordship then was) in *El Ajou v Dollar Land Holdings plc* [1993] 2 All ER 717 (sic) at 747g.

135 This submission is the supposed legal basis for the repeated contention of Mrs Kadam that she and the group members she represents are entitled to all of the Fund, including as augmented following the sale of the Sanctuary Cove Properties. The submission, as I have already noted, is misconceived. It is appropriate I explain that conclusion in more detail.

136 The *obiter dictum* of Millett J in *El Ajou (No 1)* [1993] 3 All ER 717 to which Mrs Kadam refers, must not be decontextualised. His Lordship was dealing with a case where a plaintiff owed substantial funds and securities which were under the control of an investment manager in Switzerland who was bribed to invest the plaintiff's money without authority in a fraudulent share selling scheme operated by three Canadians through the medium of two Dutch companies. The proceeds of the schemes were channelled through Geneva, Gibraltar, Panama and back through Geneva where some was invested in a project in the United Kingdom with the defendant, a property company, which required working capital for a speculative building project. The plaintiff eventually discovered the fraud perpetrated by the Canadians and his agents brought proceedings against the defendant to recover the money received from the Canadians on the grounds that the defendant had received the money with knowledge that it represented the proceeds of the fraud.

137 For reasons that are presently irrelevant, the action by the plaintiff failed before Millet J, although his Lordship found, relevantly for this case, that the plaintiff's ability to trace his money in equity was dependent upon the power of equity to charge a mixed fund. Since the property was received in England by the defendant, the proper law for determining the defendant's obligation to restore assets to their rightful owners under equitable tracing laws was English law (at 737-738). More relevantly for present purposes, the passage to which Mrs Kadam refers is at the conclusion of his Lordship's reasons, and is as follows, at 747:

This [that is, the failure of the plaintiff's claim] makes it unnecessary to consider what the proper remedy would have been if it had succeeded, bearing in mind that the plaintiff was only one of the victims of the fraud and that he has not been appointed to represent the others. Counsel for [the defendant] submitted that he could have

recovered only a proportion of the value of the assets which [the defendant] received. I doubt that I would have accepted that submission. The court would, of course, have been concerned to protect [the defendant] from further claims by other victims, but that could have been achieved in a number of ways.

138 On the successful appeal ([1994] 2 All ER 685), the relevant issue was not dealt with, but once the matter was remitted, the judgment of Robert Walker J (as his Lordship then was) in *El Ajou v Dollar Land Holdings Plc (No 2)* [1995] 2 All ER 213 at 223-224, returned to the relevant topic raised in this case by Mrs Kadam. After reference was made to the other victims of the fraud, his Lordship noted that a trustee in bankruptcy who had the power under Dutch law to take proceedings on behalf of the defrauded creditors, had been fully informed of the proceedings and supported the plaintiff's claim. There was also evidence that the other individual victims "*more or less willingly accept or acquiesce in the trustee in bankruptcy's attitude*": at 223. Robert Walker J went on to note that the other claims were not before the Court and in these circumstances there was (at 223):

... a reason for concluding, as I do conclude, that there is nothing inequitable in permitting the plaintiff to assert his claim to charge a sum in excess of \$5m (which is, I repeat, a minimum figure) **when it appears that no other claimant is seeking to assert a charge ranking rateably with the plaintiff's charge and that there is no realistic possibility of such a claim being made in the future.**

(emphasis added)

139 His Lordship then went on to stress that there was not, "*any rigid rule to be applied as to whether a defendant can ever plead a sort of equitable jus tertii in this type of case*". Like all equitable relief, Robert Walker J noted that it must "*depend on circumstances*": see also *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch); [2005] All ER (D) 238 at [76]-[80] per Hart J.

140 Ultimately, the equitable remedy to be imposed is, as Robert Walker J noted, dependent upon all the circumstances. This is the way equity operates. As Hart J described equity's notional charge in *Campden Hill*, it is "*fertile and almost magical*" and, being adaptable, relief is fashioned according the circumstances as revealed in the evidence: at [79].

141 The present circumstances are very different to the non-representative claim advanced by the plaintiff in *El Ajou* (acquiesced in by a trustee in bankruptcy and other possible claimants). Here a claim is made by SEBI on behalf of all investors; there is no longer a dispute about the standing of SEBI to advance such a claim and Court is not presented with a defendant pleading an equitable *jus tertii*. Even without the SEBI Proceeding itself, SEBI, on behalf of all investors, since its intervention in the class action, has always agitated to ensure that the Fund

and the proceeds of the Sanctuary Cove Properties were secured for the benefit of all investors equally. In these circumstances, it would be clearly inequitable to allow a differential treatment between the class action applicants and group members on the one hand, and the other investors making a claim through SEBI on the other. A rateable distribution approach across all investors in the case of pooled funds was inevitable after it was evident that claims were being made on behalf of all investors whose investments were pooled. *Aequalitus est quasi equitas*: equity delights in equality.

142 Properly understood, there is nothing about what Millett J said by way of obiter in *El Ajou (No 1)* that lends support to some notion that all investors need to prove 'loss' (whatever that legal concept is supposed to mean in this context) to resist the applicant and group members obtaining access to assets which plainly, on the evidence, are the traceable proceeds of pooled trust funds of which, the invested funds of the group members, form a very small part.

143 A number of other issues were raised by Mrs Kadam, but out of these, given the undertaking and revision of the proposed Refund Scheme by SEBI, only three additional points appear to have continuing significance.

144 *First*, while Mrs Kadam does not suggest that the undertaking relating to the Refund Process is not offered in good faith, it is submitted that it is not an undertaking of worth. It is not given by a natural person, but by a corporate entity that is an agency of a foreign government. The undertaking, it is submitted, could not be enforced in the event of a breach. SEBI has no presence, staff, or property in Australia and there could be no imprisonment of a natural person for contempt in the event of breach. Further, the Court would have no control over the Refund Process as SEBI proposes that the Court be informed of matters relating to distribution after the fact, and not before. Hence, it is said, the Court would have no recourse to address any unsatisfactory report, a failure to report, complaints from investors or dilatoriness in distributing funds to investors.

145 *Secondly*, connected to the first point, it is submitted SEBI might find itself in the position of being unable to comply with its undertaking to the Federal Court, because it is subject to contrary orders made by an Indian court, or an authority with power over it. It is said the proposed Refund Process could be changed or abandoned by the Supreme Court or by the Government of India.

146 *Thirdly*, in response to an order made on 14 March 2018, Mrs Kadam provided by way of detailed submissions, further information in relation to the cost of an alternative scheme for distribution of assets. It was submitted that following consultation with a number of service providers, Mrs Kadam was in a position to provide details and confirm cost estimates for an Australian supervised distribution scheme which, it was submitted, would cost much less than the Refund Process proposed by SEBI, potentially saving hundreds of thousands or millions of dollars in distribution costs. In summary, it is suggested Shine Lawyers cause an online platform to be established, through which investors could submit their claims. Data would be collected to verify claims (including as to the investors' identity) and obtain bank account information. Claimants would be verified against a database of known claimants (to be based on the records held by SEBI, which SEBI would be invited to provide electronically to the Court to assist in distribution). At the conclusion of the process, it is proposed a detailed ledger of all payments made be provided to SEBI to ensure that investors are not able to make multiple claims, or otherwise receive more than that to which they are entitled.

147 It is convenient to deal with the *first* and *second* of these additional points together. Ordinarily, an undertaking would be proffered and accepted by the Court in circumstances where a sanction would be available in the event that the undertaking was breached. This is an unusual case in that the undertaking has been proffered by a body constituted under an Indian statute. The provision of the undertaking by SEBI followed an invitation made by the Court. I have no doubt it the provision was made in good faith as an indication of the intention of SEBI to ensure that if it was charged with the responsibility of distributing the assets to investors, that it would do so in what SEBI regards as the most efficient manner. An undertaking given by a body such as SEBI would no doubt have been given after a good deal of consideration and with the intention that it be the subject of compliance. Accordingly, I do not regard the fact that SEBI is a foreign entity as a sound basis for me failing to have regard to, and placing reliance upon, the undertaking. Despite this, a related point made on behalf of Mrs Kadam has some substance. It seems to me that given my protective and supervisory role in relation to group members who form part of the class of persons to whom funds are to be distributed, I should endeavour to keep a close supervisory role in relation to the conduct of the distribution even if it was to be undertaken by SEBI pursuant to the Refund Process (or some variation of that process). To this end, my preliminary view is that in the event that distribution was to occur in the way contended for by SEBI, the appropriate course would be for all the preliminary steps prior to distribution (up to the stage of identification of bank accounts and the amounts to be

distributed to investors), to take place prior to remittance of the funds currently held in the interest bearing account to India. This would ensure that the Court maintains control until the time comes for distribution of identified funds to identified investors.

148 The *third* point raised by Mrs Kadam following my order of 14 March 2018 is more problematic. This is because those submissions provide further detailed contentions on factual matters which arose following what was said to be consultation with third parties. There does not appear to be any affidavit evidence which supports those assertions filed (which is not surprising as no leave was given to file additional affidavit material and the evidence had closed). The problem is that in these circumstances, SEBI has not had the opportunity of responding to this material by way of submission. It should have such an opportunity.

149 In order to do justice to both SEBI and Mrs Kadam, the appropriate course is for me to hear further submissions as to which of the proposed schemes should be preferred and to ascertain whether any of the factual contentions made in the submissions filed by Mrs Kadam are in dispute. Ultimately, orders should be made with the aim of maximising the return to investors (including the group members) and to ensure that the process is undertaken with the minimum of cost and the maximum of efficiency. In the light of the comments that I have made, I invite the parties to confer, hopefully prior to the resumed hearing, in order to ascertain whether or not it is possible for an agreement to be reached in this regard.

**Issue 9: should there be an order that MiiResorts pay the costs of Mrs Kadam?**

150 In my answer to Issue 6, I dealt with the dispute as to the amount that should be paid out of the Fund to Mrs Kadam and its quantification. In doing so, I made the observation that it was important to draw a distinction between those costs that will be quantifiable by the referee (being the costs that were reasonably incurred to the benefit of investors and getting in and preserving the Fund), and the excluded costs which fall into two categories: being costs that are unrecoverable (as being unreasonably incurred); and those costs which were properly incurred, but are of a character that is not recoverable out of the Fund. I have already referred to the fact that MiiResorts is now in external administration and that the other respondents have played no active part in the initial hearing. The value of obtaining a costs order against these entities is presently unknown, but that does not mean that an order for costs ought not to be made if it was otherwise appropriate to make such an order.

151 It is necessary to emphasise an important point: just because legal costs are recoverable by both Mrs Kadam and SEBI out of the Fund, this does not mean that a costs order should not be made

against MiiResorts or another respondent. To the extent that those costs have been paid out of the Fund, the investors (whose recovery has been diminished by the payment out of the Fund) have a right to the Fund being replenished, in the event that either Mrs Kadam or SEBI was able to obtain recovery of those costs against a third party. Such a result does not offend the indemnity principle. As the Full Court (Bromberg, Mortimer and Lee JJ) recently explained in *Cristovao v Tan & Tan Lawyers Pty Ltd* [2018] FCAFC 41 at [40] to [44], the argument that the indemnity principle means that where a litigant is entitled to a costs indemnity from a third party (or, I would add, a fund comprising assets belonging beneficially to third parties), costs cannot be recovered against an unsuccessful litigant, has been rejected on numerous occasions.

152 As to the position of SEBI, it is presently unclear to me as to the scope of any costs sought by SEBI or whether any claims for costs that SEBI might make against MiiResorts have reached a compromise as part of the broader resolution of issues as between SEBI and MiiResorts. This can be clarified at the further hearing.

153 The same position does not apply in relation to Mrs Kadam, who did not reach any agreement with MiiResorts. Accordingly, it seems to me that I should hear further from both Mrs Kadam and MiiResorts as to the precise terms of any costs order sought in the light of these reasons. MiiResorts' initial resistance to any relief sought on behalf of Mrs Kadam has been unsuccessful, but the ultimate relief obtained was far narrower than originally pressed. I have already explained that the class action was advanced in an unnecessarily complex and in some respects misdirected way. It is evident that the range of other relief sought by Mrs Kadam for contravening conduct on behalf of MiiResorts was not practicable when there was little chance of recovery beyond the Fund and the Sanctuary Cove Properties. Having said this, I am conscious that this was a preliminary or initial hearing consistent with the usual procedure adopted in Part IVA proceedings. The additional relief sought was not doomed to fail and may have had utility in circumstances where the recovery could have been obtained over and above the assets represented by the Fund and the Sanctuary Cove Properties. In these circumstances the issues relating to costs give rise to some unusual features and I will hear orally from the parties as to what orders should be made on 23 July 2018, after they have had the opportunity of reading these reasons.

**Issue 10: what orders should be made under s 33ZB of the FCAA and in relation to the balance of the class action?**

154 Given the very significant reduction in the issues in dispute, my preliminary view is that the only orders that need to be made of a type which will bind both parties and group members who have not opted out, for the purposes of s 33ZB of the FCAA, should be the declarations made in the SEBI Proceeding and also the machinery orders which will allow for the distribution of the assets currently held in Australia to both the group members and also other investors.

**H CONCLUSION & ORDERS**

155 I have already indicated during the course of these reasons that I propose to order a further hearing to be held at 10.15 am on 23 July 2018. At this time declarations and other orders can be made reflecting these reasons and further submissions can be received in relation to the precise terms of the material and instructions that should be provided to the referee in relation to costs and as to orders to put in place to reflect my intentions concerning the scheme to allow distribution of the assets to the investors in the most cost efficient and expedient way. Additionally, it will be necessary to put in place a regime for the sale of the Sanctuary Cove Properties in the manner I have described. I will also hear the parties as to what costs orders should be made.

I certify that the preceding one hundred and fifty-five (155) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:



Dated: 20 July 2018

## **SCHEDULE OF PARTIES**

**QUD 528 of 2016**

### **Defendants**

Fourth Respondent: NIRMAL SINGH BHANGOO

Fifth Respondent: SUKHWINDER KAUR

Sixth Respondent: GURPARTAP SINGH